Submission to Aviation Safety Regulation Review

ProAviation, updated February 21, 2014

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Executive Summary

This submission concludes that a pervading “culture” exists within the Civil Aviation Safety Authority that has degraded relations between the regulator and most industry sectors to a point where it is impacting negatively on air safety in ways that we illustrate by reference to examples.

It is submitted that this culture has developed, evolved and progressively expanded and consolidated since CASA was established in July 1995 and first designated as an independent statutory authority. We believe several symptoms of the existence of this culture can be identified in the examples we cite, and that it is manifested by the interaction between CASA departments which our examples illustrate.

It is acknowledged that a number of quality employees remain employed by CASA, although their numbers are reducing and their capability to influence the way the regulator carries out its functions has been so limited that numerous key figures have voluntarily left the organisation.

A majority of the aviation stakeholders we have consulted observe that the embedded anti-reform culture still exists and thrives within the organisation. They point out that it has already survived several high-level enquiries; and that events have proven that no reform can be effective unless those influences are identified and permanently negated.

CASA has operated, and continues to operate under the notion that to be legal is to be safe. Nothing could be further from the truth, particularly when the industry is forced to operate under flawed and ambiguous legislation while separate offices; and at times different officials in the same office, make differing decisions when applied to different operators requesting identical approvals.

We consider the situations we detail demonstrate that solutions cannot be developed and recommended without significant amendment to the Civil Aviation Act and Regulations.

Introductory notes

Our submission is based on current and past research, some of which has been previously published in articles that are now part of this analysis. Those articles, whilst not always identical with the original, have only been reviewed to the extent necessary to bring them up to date, in some cases by adding a "sequel."

We note the Minister's advice that:

> [The review] *will not be reopening previous air safety investigations nor will it be a forum to resolve individual complaints or grievances. It is about the future regulatory challenges and growing our industry.*

In that context we respectfully submit that the case studies which we reference clearly typify both past and current regulatory processes, and that this can also aid in identifying changes that will be necessary to regularise the management of similar events into the future. Furthermore, the point must be made that some individuals are more frequently involved than others in both past and contempoary cases, and that a number of these still occupy positions that offer opportunity for continued misconduct.

We emphasise that matters we quote as examples represent only a fraction of the material that is stored in our files. Much of this material comprises matters which we submit would warrant completely independent external investigation.

Some of the regulatory adventures detailed in the case studies are related to the regulation of flight operations by flying operations officers and their supervisors. Some are related to airworthiness and principally involve airworthiness inspectors and their supervisors.

However, they all involve CASA lawyers in varying roles. Additionally reporting to the General Counsel and Executive Manager of the Office of Legal Services, are the office that attends to freedom of information applications, the investigations office which oversees the activities of CASA investigators, and the Senior Advisor, Enforcement Policy and Practice, whose responsibilities are detailed by CASA as "developing enforcement policy, strategies and procedures, coordinating enforcement and monitoring, on a centralised basis, all aspects of CASA's enforcement related activities."

We also draw the Panel's attention to a major "enforcement" event which is still current; and which calls for close attention as to CASA's decision making and conduct throughout the processes of investigation and subsequent enforcement activity. This is the process by which Barrier Aviation is currently being managed out of existence.

None of this analysis is intended to denigrate individuals or organisations. Instead we recount events and leave the Panel to form its own impressions. Our own opinions when expressed are labelled "Comment:" and represent the opinion of the author and/or the publisher.

Terms of reference

This submission acknowledges and conforms to the Panel's Terms of Reference for the review and under separate headings, variously addresses each item as follows:

- the structures, effectiveness and processes of all agencies involved in aviation safety;
- the relationship and interaction of those agencies with each other, as well as with the Department of Infrastructure and Regional Development (Infrastructure);
- the outcomes and direction of the regulatory reform process being undertaken by the Civil Aviation Safety Authority (CASA);
- the suitability of Australia's aviation safety related regulations when benchmarked against comparable overseas jurisdictions; and any other safety relatedd matters.

Credentials & motivation

ProAviation was established as a not-for-profit web based journal with a readership comprising people who are principally engaged in the operational areas of flight operations, aircraft maintenance, repair and overhaul, accident investigation, operational and airworthiness administration and matters related to regulatory affairs.

Publisher, Stan van de Wiel:

Involved in Commercial aviation since 1966, most of Stan's (circa) 24,000 hours having been accrued in management and the training of pilots on three continents. He believes the basics learned by starting off on Auster and DH82 aircraft, have stood him well in an incident-free career: "I can proudly say that none of my protégés has been involved in any major incidents, although regrettably two were killed over the Sudan, having been shot down in separate incidents.

"My interest in *ProAviation.com.au*, as publisher and contributor, is to foster aviation in Australia which, mainly at the hands of government and CASA, has in my opinion seen a drastic decline at a time when it could be a leader in providing pilots globally."

Stan also acknowledges that he has outstanding issues with CASA which are related to a regulatory action against him, which are detailed in the article titled Shooting the Messenger.

Editor, Paul Phelan.

Flew for over 50 years in private, charter, corporate and regional aviation, worked in senior management roles with a major regional airline, and retains a CASA license. In parallel he has been writing for Australian and international aviation journals for well over 20 years on all aspects of aviation including aircraft evaluation, flying, industry affairs, infrastructure, manufacture, navigation technologies, regulatory affairs, safety and training. Senior journalism appointments have included those of editor, *Australian Flying* magazine, and Australian Correspondent of *Flight International*.

Three articles that are reproduced in this report have won the National Aviation Press Club award for "Aviation Technical Story of the Year."[1]

Paul has also operated as a flight operations consultant, assisting operators, prospective operators and pilots in their dealings with the regulator.

Update notes

Our original submission to the Review Panel was submitted at a point where it was less complete than we would have preferred but comprised all that was possible within the time frame. As we advised at that time, we are now publishing this update of our submission and it is provided to the Panel as a courtesy in the event that it is convenient to accept the updated version. Significant alterations to the original are marked with the black sidebar on the left side, and are largely but not exclusively under the headings of **regulatory development program**, **compliance and enforcement**, and **avenues of redress**.

In the version on our website, the supporting "case studies" will be published separately for technical Internet-publishing reasons, while the re-submitted update will contain the same studies in the one file.

Other Agencies' involvements

We recommend that various matters raised in this submission might effectively be referred to the indicated agencies for specialist input:

Australian National Audit Office (ANAO) in respect of aspects including the budget performance of the RRP against its targets, management of the program, whether there is a strategy to bring the project to a credible and viable conclusion, and above all the question of why the RRP has not yet completed the enactment of a regulatory suite that is workable to industry, compliant with international obligations, and in accord with the Constitution and government guidelines.

Productivity Commission in respect of aspects including the high costs of technical staff recruitment, training and turnover, allocation of resources measured against achieved safety outcomes, the engagement of consultants and contracted former employees, the cost to the public of apparent legal adventurism in pursuit of spurious enforcement actions, the performance and costs of the expanding aviation medical department, and the cost to the public and industry of operating the "Permissions Centre" and its service delivery.

Also requiring assessment is the framing of regulations, practices and procedures in a way that has already begun to enshrine ongoing micromanagement and its associated costs to a level that is globally unprecedented and therefore threatens industry competitiveness now and in the longer term.

Attorney-General's Department in regard to compliance in the RRP process with the guidelines provided by:

[1] Whyalla Airlines, the "Birds?" analysis and "To Hell with the Rules."

- The *Australian Law Reform Commission Report 95*: *Principled Regulation*: and
- The *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*

Australian Law Reform Commission whose newly-announced Australian Law Reform Enquiry will review Commonwealth legislation to identify provisions that unreasonably encroach upon traditional rights, freedoms and privileges. We submit that several examples of such provisions are likely to be identified in recent aviation legislation and also that the commission may be an appropriate agency to review some of the matters we raise.

Australian Federal Police as to whether in some cases, criminal misconduct has occurred, and as to whether existing oversight of the regulator is adequate in that regard.

Regulatory reform program

We acknowledge that some of our comments on the current state of the program may be outdated by events because the situation is made extremely fluid at this time by the flow of legislation and amendments.

Our analysis of these issues is contained in a slightly updated version of an article titled *To Hell with the rules*, first published in October 2010 and re-published in this submission. We believe that this article presents some highly relevant but lesser-known insights and significant indicators for potential reform.

The article demonstrates that the regulatory review program has been no more than an embarrassing failure in terms of delivering on its stated goals. To support that observation, we cite just a few random examples of actual statutes that have been passed into law as amendments to existing legislation:

61.530 Aeronautical experience requirements for grant of private pilot licences—helicopter category

(1) An applicant for a private pilot licence with the helicopter category rating must have at least 35 hours of aeronautical experience that includes:

(a) at least 30 hours of flight time as pilot of a helicopter; and

(b) at least 10 hours of solo flight time in a helicopter; and

(c) at least 5 hours of solo cross-country flight time in a helicopter; and

(d) at least 2 hours of dual instrument time; and

(e) at least one hour of dual instrument flight time in a helicopter.

Comment: We are advised by helicopter industry sources that:

- Approximately 90% of all helicopter operations in Australia are conducted under the visual flight rules (VFR). Therefore the same percentage of aircraft are not equipped for instrument operations or training. Very few helicopter training schools would be equipped with the certified flight instrumentation and navigational systems necessary to provide the training
- A similar percentage of helicopters are not equipped for operations under instrument flight rules (IFR) for two reasons. Firstly the aircraft are not required to operate under the IFR, and secondly the cost of initial training and ongoing proficiency checking would make no sense in terms of business or safety.
- The industry's aversion to the fitment of unnecessary systems is largely due to the high maintenance/replacement costs caused by vibration in helicopters.
- The training would normally have to be conducted in a different helicopter (or flights training device) of the type which the student would be completely unfamiliar.
- The minimum instrument flight training prescribed under the regulation would therefore be worse than useless in terms of pilot proficiency, aircraft utility or safety.

Comment: The requirements specified for commercial helicopter pilot licence holders under regulation 395 (at least 10 hours of instrument time and at least five hours of instrument flight time in a helicopter) are objectionable to the industry for the same reasons.

61.370 Provision of photograph

(1) The holder of a flight crew licence commits an offence if:

(a) the holder exercises the privileges of the licence after the end of 10 years beginning:

(i) when the licence was granted; or

(ii) if the holder holds more than one flight crew licence—when the holder's most recent licence was granted; and

(b) the holder has not, before the exercise of the privileges, given CASA a photograph of the holder:

(i) showing the holder's full face and his or her head and shoulders; and

(ii) taken not earlier than 6 months before the end of the period mentioned in paragraph (a).

Penalty: 50 penalty units.

(2) An offence against this regulation is an offence of strict liability.

Comment: CASA doesn't provide photo identification on the pilot licences it issues, so despite the gravity implied by the specified maximum available penalty, it is unclear (a) what impact non-compliance would have had on ensuring the safety of air navigation, and (b) what on earth motivated the legislative drafters to solicit such priceless "gifts" under threat of a 50-unit (currently $5,500) fine?

To be fair, following industry ridicule this regulation was repealed shortly after it was published; however it does appear to reflect on the training, guidance and motivations of people tasked with writing the regulations, and it is only one of thousands of examples of compulsive over-regulation. It also appears to represent an unnecessary breach of privacy to store data of this kind when there is no apparent "safety of air navigation" benefit while doubtless at least the equivalent of one employee would be required for management and storage. Let's say at least $150,000 a year including oncosts.

219 Route qualifications of pilot in command of a charter aircraft

(1) A pilot is qualified to act in the capacity of pilot in command of an aircraft employed in charter operations if the pilot is qualified for the particular route to be flown in accordance with the following requirements:

a) The pilot shall have an adequate knowledge of the route to be flown, the aerodromes which are to be used and the designated alternate aerodromes, including knowledge of:

(i) the terrain;

(ii) seasonal meteorological conditions;

(iii) the meteorological, communication and air traffic facilities, services and procedures;

(iv) the search and rescue procedures; and

(v) the navigational facilities associated with the route to be flown;

(b) If the flight is to be conducted under the Instrument Flight Rules, the pilot shall have demonstrated either in flight or by simulated means that he or she is proficient in the use of instrument approach-to-land systems which he or she may utilise in operations on that route.

(2) A pilot must not act in the capacity of pilot in command of an aircraft employed in charter operations if the pilot is not qualified in accordance with subregulation (1). Penalty: 50 penalty units.

(3) An operator must not permit a pilot to act in the capacity of pilot in command of an aircraft employed in charter operations if the pilot is not qualified in accordance with subregulation (1). Penalty: 50 penalty units.

(4) An offence against subregulation (2) or (3) is an offence of strict liability.

Note For ***strict liability***, see section 6.1 of the *Criminal Code*.

Comment: the above regulation is an attempt to adapt the current *CAR 218 (Route qualifications of pilot in command of a regular transport aircraft* for the reason that *ad hoc* charter operations by their nature cannot provide a route checking system as RPT carriers do. (Otherwise operators would need to conduct a route check before each charter flight. It is a particularly ridiculous regulation because it attempts to define "an **adequate** knowledge of the route to be flown" without defining the word "adequate", and providing a list of five dot pointed areas of knowledge which are accounted for under either the qualifications and proficiencies the pilot is already deemed to hold, or in the published information required to be carried on any flight.

Finally, this summary would be incomplete without a comparison with similar legislation in other jurisdictions. An example lies in a single regulation covering the "sharp end":

Australia – 351 words

91.060 Responsibility and authority of pilot in command
(1) The operator of an aircraft must ensure that the following information is available to the pilot in command of the aircraft to enable the pilot in command to comply with subregulation (5):
(a) the aircraft flight manual instructions for the aircraft;
(b) the airworthiness conditions (if any) for the aircraft;
(c) if the operator is required by these Regulations to have an operations manual — the operations manual;
(d) if the operator is required by these Regulations to have a dangerous goods manual — the dangerous goods manual.
Penalty: 50 penalty units.

(2) The pilot in command of an aircraft is responsible for the safety of the occupants of the aircraft, and any cargo on board, from the time the aircraft's doors are closed before take-off until the time its doors are opened after landing.

(3) The pilot in command of an aircraft is responsible for the start, continuation, diversion (if any) and end of a flight by the aircraft, and for the operation and safety of the aircraft, from the moment the aircraft is ready to move until the moment it comes to rest at the end of the flight and its engine or engines are shut down.

(4) The pilot in command of an aircraft has final authority over:

(a) the aircraft while he or she is in command of it; and

(b) the maintenance of discipline by all persons on board the aircraft.

(5) The pilot in command of an aircraft must discharge his or her responsibilities under subregulations (2) and (3) in compliance with the following:

(a) the aircraft flight manual instructions for the aircraft;

(b) the airworthiness conditions (if any) for the aircraft;

(c) the operations manual (if any) as it applies to the pilot in command;

(d) the dangerous goods manual (if any) as it applies to the pilot in

USA - 94 words

91.3 Responsibility and authority of the pilot in command.

(a) The pilot in command of an aircraft is directly responsible for, and is the final authority as to, the operation of that aircraft.

(b) In an in-flight emergency requiring immediate action, the pilot in command may deviate from any rule of this part to the extent required to meet that emergency.

(c) Each pilot in command who deviates from a rule under paragraph (b) of this section shall, upon the request of the Administrator, send a written report of that deviation to the Administrator.

New Zealand - 96 words

91.203 Authority of the pilot-in-command

Each pilot-in-command of an aircraft shall give any commands necessary for the safety of the aircraft and of persons and property carried on the aircraft, including disembarking or refusing the carriage of:

(1) any person who appears to be under the influence of alcohol or any drug where, in the opinion of the pilot-in-command, their carriage is likely to endanger the aircraft or its occupants; and

(2) any person, or any part of the cargo, which, in the opinion of the pilot-in-command, is likely to endanger the aircraft or its occupants.

Author's note

The Australian version, with exactly the same heading as the FAA uses, and similar to the NZ version, doesn't even address the subject matter in the heading. It devotes the first 91 words (highlighted in blue typeface) to detailing some of the responsibilities of the *operator* – not the pilot in command. It then goes on to detail some (but not all) of the documents which CASA requires to be made available to the pilot in command during flight. These items are generally referred to as "shelfware"; a GA pilot's description of in-flight documents that have no particular usefulness in flight but whose carriage is mandatory. Their principal purposes appear to be increasing the aircraft's operating empty weight, cluttering the cockpit floor and its limited storage spaces, and obstructing escape routes in an emergency while also adding fuel to any resulting fire. Pilots are also warned that because of a common CASA practice of specifying the content and wording of operations manuals, the aircraft flight manual doesn't always agree with the operations manual, and the AFM should be considered the overriding authority where there is a discrepancy. The preferred time to debate this is not when one is flying an aircraft.

The allocation of 50 penalty points for not having this library aboard is confusing as to who is committing the crime and who is incurring the penalty, because the heading of the paragraph conflicts with the duties attributed to the operator rather than those of the pilot.

The Aussie version then goes on to detail a few (but again far from all) of the many responsibilities of a pilot in command, by referring him (or her of course) to the shelfware that has already been listed once.

From this example it is clear that far from putting the "finishing touches" on Part 91, the serious work of developing intelligible and effective legislation hasn't even started yet.

The US version says in 23 words, considerably more than CASR 91.060 says in its entirety, as well as adding a paragraph that intelligently permits pilots to deviate from the rules as necessary in an emergency, and a requirement to report the event (but only) if requested to do so.

Like the USA, the NZ regulations empower the pilot in command to make necessary decisions, the only special reference being specific

command.

Penalty: 50 penalty units.

Note These Regulations also contain other requirements and offences that apply to the pilot in command of an aircraft.

(6) An offence against subregulation (1) or (5) is an offence of strict liability.

authority to deny boarding to drunks and druggers.

In real life literally hundreds of duties and responsibilities are rightfully assigned to any pilot in command, and they are spelt out in the appropriate sections of any competently-written rule set. They are and should not be used as padding to project a false impression of regulatory diligence.

The new regulations are rich in similar examples.

Strict liability offences

It has been explained to us that offences are designated to be of "strict liability" so as to exclude intent from the elements defining the offence, and that for that reason the concept has no place in legislation on operational matters. It has also been explained to us that the reason that almost every regulation is assigned the maximum of 50 penalty points maximises the amount of the available administrative fine where that is an optional alternative to criminal prosecution.

Priorities

We also submit that of all the regulatory material that has come to our attention, the most abused and therefore the most in need of reconstruction is S9A(1) of the Civil Aviation Act 1988, Polar Aviation[2] being the best example. The next statute requiring urgent attention is the widespread abuse of the "fit and proper person" decision process.

[2] See separate article in this submission

Analysis: To Hell with the rules!

Author's Note: This is an updated version of an article that first appeared in *ProAviation* in October 2010 and is now also published in *ProAviation* in its updated form.

Reform of aviation regulation in Australia is further from becoming a reality than it has ever been since the need was first acknowledged and addressed 24 years ago. That is the collective view of senior industry figures who have been involved in the process almost since its inception.

The prime concepts driving the project that became known as the Regulatory Review Program (RRP) have always been:

- outcome-based rather than prescriptive regulation, which is the basis of aviation regulation in all other aviation-significant democracies;
- alignment with overseas regulatory structures so that Australia could achieve true bilateral agreements with the leading overseas aviation authorities;
- 'plain English' rules that are easy to understand, administer and enforce;
- the elimination of wasteful and un-necessary administration, including evaluations of cost benefit and safety relevance;
- compliance in rulemaking with Australian law, government guidelines; international (ICAO) standards; and
- two-tier regulation to replace the existing multi-layer regulation comprising the Civil Aviation Act, Regulations and Orders, policy documents, individual rulings and permissions, exemptions and other instruments.

Although endlessly repeated in political and administrative rhetoric right through the regulatory reform process, these goals have been almost completely ignored by well-placed CASA dissidents.

And worse, political pressure is now on Director John McCormick to rush the remaining legislation into Parliament regardless of its blatant non-compliance with founding principles.

This situation is no accident; it can only spring from deliberate corporate defiance of existing law, international standards, government directives and guidelines, and executive directions.

In September 2007 CASA admitted to a Senate committee that up to that time $144 million had already been spent on its Regulatory Review Program. It added that its estimate for the current year (2006-07) was $24 million, and the projected costs for 2007-08 were another $23 million. That pushed the expected total bill to a staggering $191 million in 18 years. Assuming conservatively that the following five years equalled the 2008 figure, we now seem to have run up a total bill for $306 million!

Former Program Advisory Panel (PAP) industry delegates now believe the situation will continue generating material that will eventually have to be reversed until CASA's "resistance movement" is identified and dealt with, and until the RRP process is brought into uncompromising alignment with its stated goals and into compliance with published government policy.

This increasingly costly fiasco appears to be almost solely the work of former and present CASA lawyers, supported by the resistance movement of officials in airworthiness, flight operations and administration.

The obstruction was briefly circumvented in early 1997 when CASA's Office of Legal Counsel (OLC) was bypassed. Since that time the CASA's Standards Development Branch officials have reassumed the role, although neither the AGs nor CASA will explain when queried, why and how that reversal was achieved, and the process is back where it started.

The solution to the regulatory rewrite problem is simply to repeat the exclusion of CASA lawyers from the regulatory rewrite, purge the organisation of its "resistance movement" at any cost, and re-establish respect for the rule of law within CASA.

This analysis concludes that an equally valuable side benefit will be the cessation of hostilities between CASA and the industry it is supposed to be regulating.

* * * * * * *

In October 1996 CASA and its industry-based PAP were sparring over the format and content of Civil Aviation Safety Regulation (CASR) Parts 21-35.

Mr Peter Ilyk, then head of CASA's ever-growing Office of Legal Counsel, was explaining that the draft CASR Part 21 which the Panel had favoured had been written in "American language" which wasn't suitable for "Australian conditions." He told the Panel it needed to be written in language that judges and the courts could understand.

That was too much for AIPA (Australian & International Pilot's Association) President Bill Pike to swallow, according to witnesses who recall the scene clearly: "He got no further than that when Bill at the other end of the room blew his top, leapt to his feet, livid, pointed at Ilyk, and yelled at him: "I don't want judges and bloody lawyers to understand it, I want the bloke in the cockpit to understand it!"

PAP member and highly-regarded aeronautical engineer Dafydd Llewellyn, recalls:

"That kind of intelligibility was achieved in Parts 21 – 35, and we do as a result now have something approaching a true bilateral airworthiness agreement with the FAA in the areas covered by those Parts; and we also (as a separate issue) now have a growing aeronautical component manufacture industry that is making replacement parts that are no longer available elsewhere for many aircraft types. This industry did not have a proper place prior to the introduction, in 1998, of Part 21, because the appropriate legislation for it did not exist before then. Bilateralism will make this an export industry. Further, the rules have been defined for MITCOM, (manufacture [of components] in the course of maintenance) and without both of these, aircraft maintenance in Australia would have ground to a halt. This piece of progress has NOT had any adverse effect on safety."

A guide for the future

The smooth progress of Parts 21-35 has been explained to us by another PAP participant:

"In early 1997 a meeting took place between Transport & Regional Services Minister John Sharp, the then Attorney-General (Hon Daryl Williams), officials of the Attorney-General's Department, DOTARS officials and CASA Director Leroy Keith. The issue was specifically whether the US FAA and UK CAA texts could be used. (In other words, could we harmonise?) CASA's Office of Legal Counsel (OLC, now LSD) had obtained advice from AG's that this could not be done. But this was in the days when the AG's Department was competing with the private sector to give advice to government and therefore sought to please the 'client.' When it was discovered that the 'client' as represented by Leroy Keith and the Minister actually *wanted* to harmonise, all difficulties vanished and Parts 21 -35 largely reflect this success."

This enabled lay draft regulations to bypass CASA's OLC and go straight to the Attorney-General's Office of Legal Drafting (OLD), now renamed Office of Legal Drafting & Publication (OLDP), and returned as intelligible legislation. At the same time an agreement was achieved between the Attorney-General's Department and John Sharp as Minister for Transport that "plain English," along the US style, could be used as was already the case with other Commonwealth legislation.

But if the current state of the maintenance regulations is an indication, that arrangement has since been sabotaged. We asked CASA if the arrangement had ceased, and if so when that was announced and why, and are still awaiting a reply. The AG's Department is similarly unwilling to enlighten us.

We also asked CASA on October 1 if former CASA CEO Bruce Byron's directives 16/17 were still in force, and if so why could they not be found on the CASA web site. CASA responded that: "The directives have been superseded by policies and this is why they no longer appear on CASA's web site."

The next question: "Perhaps you could direct me to the corresponding published policies?" also remains unanswered.

Several years after these events, promising "regulation with a capital R," CASA Director John McCormick told the RAAA conference in October 2009:

"I'm not saying we won't consult. I'll say it again. We must consult with industry; the Civil Aviation Act requires that we do. CASA will continue to do that. But I'm not going to consult to consensus, because it's impossible. There are various sections of the industry in Australia that hold such entrenched views that they are prepared to fight to the last man standing over something which I think in some cases is minuscule."

The author has been briefed by several senior industry identities with deep backgrounds in the now 21-year-old RRP, who insist their concerns are far from minuscule. They believe that what is now happening with the development of the maintenance regulations will simply never work; that the whole process is foundering because of embedded opposition within the regulator, that compliance with guidelines, polices and directives has been thrown out the window, and that external intervention is now becoming imperative.

The PAP did not "consult interminably" as has been implied by some, including John McCormick. In fact while (then) CASA Director Leroy Keith was a member PAP decisions were always unanimous, and veto was never exercised, says James Kimpton, former Ansett executive responsible for government relations and regulatory affairs (1983 to 1999), who later chaired the PAP: "I did say that CASA needed to explain its decisions so well that they were accepted, and generally Leroy rose to this challenge."

In September 1997 Leroy Keith left after the CASA Board passed a no-confidence motion in his management strategy. Given Mr Keith's outstanding overall performance, especially in regulatory reform, this was a highly controversial event, and Board Chairman Justice William Fischer and member Dr Clare Pollock both resigned in protest at the Board's handling of its Director.

At about the same time the New Minister for Transport and Regional Development, the Hon Mark Vaile MP, replaced Minister John Sharp, and Dick Smith was appointed Chairman, vowing at the PAP table that this time he would "get it right." Industry believes Dick may now agree however that "getting it right" remains a challenge.

On December 9, 1998, John Anderson, then Minister for Transport and Regional Services, told the House in a second reading speech:

> *In July 1996 the government announced that the Civil Aviation Safety Authority, CASA, would conduct a complete review of the civil aviation legislation in Australia, with the objectives of harmonising it with international standards of safety regulation and making it shorter, simpler and easier to use and understand. This was also an election commitment in the government's "Soaring into tomorrow" aviation policy statement. The Morris Plane safe report and the Seaview commission of inquiry both supported the need for a review of Australian regulations and standards.*
>
> *The purpose of this bill is to facilitate the findings of the review and provides for the introduction of a new set of regulations which are harmonised with civil aviation laws internationally…….The amendments proposed in this bill will facilitate the long awaited introduction of a regulatory regime for the Australian aviation industry which is not only harmonised with international practice but clear, concise and outcome focused. The government's commitment to deliver this objective has been realised.*

Well, not quite. In October 2005 CASA's (then) CEO Bruce Byron commissioned a comprehensive study of the agency's regulatory structure by an "industry/CASA EASA (European Aviation Safety Agency) team."

In the following year Byron, having briefly toured Europe and engaged with some of its EASA rule-makers, returned with the firm intention of enforcing the Government policy for outcome based-regulation justified by risk and cost benefits analyses. This would be done by replacing regulation that was currently under development, with a rule set based on EASA in what industry stakeholders described as "an ambitious but entirely achievable timetable."

The new EASA approach, which Byron said already fitted Australian Government policy, was to develop new maintenance, repair & overhaul (MRO) rules that were closely harmonised with ICAO, EASA, FAA, and particularly Canada and New Zealand. This would replace CASA's "Engineering Suite" which industry sources say comprised "some 9600 pages of complex and absolutely prescriptive maintenance laws, the breaching of any one of which would be a criminal offence."

Because EASA did not yet have a full suite of general aviation MRO rules, Australia would draw on rules developed by a former consultative panel, abandoned in 2000, and on Canadian, US and New Zealand outcome-based rule sets with "acceptable means of compliance" customised for the Australian risk equation.

One stated outcome of the changes was to be that criminal offences would be limited to high-level genuinely criminal acts, as in other major aviation countries. All "unique" Australian rules were to go, and Australian aviation businesses of all sizes expected relief from what they described as a "regulatory straightjacket."

Byron announced in a notice of proposed rulemaking (NPRM 0604MS) in October 2006 that CASA now planned to adopt a completely new regulatory format for the "maintenance suite" of regulations – CASR Parts 42, 66, 145 and 147. The NPRM explained in part:

> *Because of the availability of a new regulatory style pioneered by the European Aviation Safety Agency (EASA), CASA decided to amend the package of proposed regulations and commence a further period of consultation. CASA considers that it is necessary to seek comment on the changes made to the regulations as a result of areas of policy change and the new style of regulation writing. Some of these regulatory changes have, however, previously been consulted on.*

One of the main drivers for Mr Byron to shift to the EASA style programme was that it could be delivered quickly and would purge the proposed Manuals Of Standards (MOS) of all the "hooks and barbs" that could be hidden in them. It was known that while CASA diligently consulted and produced some "vanilla flavoured" regulations, much of the MOS's were not consulted on at all, and so became potentially a hidden "third tier of regulation" which industry believed would not be "disallowable documents," and therefore not subject to Parliamentary scrutiny. At the time Byron stated that getting the maintenance regulations harmonised first would allow large Australian MROs to operate more effectively in the international market.

The NPRM commented at length on the out datedness and complexity of the existing maintenance regulations, their lack of conformity and harmony with international regulatory practice, and their lack of clarity and conciseness. The decision however virtually meant binning the newly developed rules which had been almost ready to be sent for drafting, and starting again in a format that blended with that of EASA. It also created the problem that EASA rules had no coverage of general aviation, as well as giving those CASA officials who were opposed to most of the guiding principles anyway, an opportunity to launch a campaign which would turn the maintenance regulations into the mess they now represent.

The airlines were satisfied with the EASA style Regulations as they were. As EASA had no general aviation regulations, CASA believed that Australia could provide a body of ready-made material that could easily be uplifted into the EASA format.

Work on that aspect has yet to begin.

The EASA decision was unpopular within CASA and with many in industry because it negated much of the regulatory development work already completed.

On Monday October 26, 2004, Bruce Byron held a meeting of all his executive managers in Melbourne. He announced major intended changes in CASA direction, including a requirement to move CASA out of the administration of private general aviation, to focus primarily on the oversight of passenger-carrying operations, including support sectors such as large MROs and airports, and detailed a new approach to regulatory reform, supported by specific directives, that would to return it to conformity with its by now often-stated goals.

Palace revolution

On Friday of the same week in Canberra at a meeting of some, but not all CASA executive managers, the mood was one of outright revolt, with complete rejection of Byron's announcements. Byron was not present and it is understood no minutes were kept.

Three separate sources say that 'the feeling of the meeting,' rich in expletives, was expressed in terms of "We are the safety experts, we'll tell the bastards what the rules are, and what the policy is, and if they don't like it, we'll run them out of the industry."

The meeting "agreed" that all the reform program changes put in place in 1996/1999 were a grave mistake, and they would put that right because the Government had "got it wrong".

Obviously interesting times still lay ahead. In fact the meeting also "decided" that in the face of concerted opposition, Byron would back down and they would have a free run; that the DOTARS and the Minister would not stand in their way, so there would be no more "pandering to the industry" in terms of consultation.

One attendee at the meeting declared that all the changes the PAP had put in place were 'not Government policy,' notwithstanding that the PAP briefed the Minister monthly.

Only a few days after the meeting, Byron called in three of the executives without involving his Deputy and Chief Operating Officer Bruce Gemmell. The three, who left CASA almost immediately, included Bill McIntyre, CASA's (then) Executive Manager of Standards who had overseen the controversial rule rewrite.

A month after the meeting, on 24 November 2004, Byron issued two directives to Gemmell, with immediate effect. They were clear and uncompromising, and again spelt out the goals of the program using now-familiar phrases.

Directive 16/2004 – Development of Regulations and the Regulatory Framework - set out to establish guiding principles for the development of the regulatory framework and to provide clear guidance for the development of proposed aviation safety regulations.

The regulations were to be developed on the basis of addressing known or likely safety risks, with each proposed regulation to be assessed against the contribution it would make to aviation safety.

Wherever possible, the CASRs were to be drafted to specify the safety outcome required, unless, in the interests of safety and to address known or likely aviation safety risks, detailed requirements were to be presented.

This is exactly what EASA rules deliver, and is why the EASA committee recommended to Byron that adopting EASA maintenance rules would achieve another of his objective which was:

> *"Wherever possible, aviation safety regulations are to be developed within a two tier regulatory framework comprising the Civil Aviation Act and the Civil Aviation Safety Regulations (CASRs), supported by advisory material that details acceptable means of compliance with the CASRs, together with appropriate guidance material."*

Manuals of Standards (MOSs) were to be developed only where there was a clear requirement, on the basis of safety, to mandate standards that for the purpose of clarity should not be contained in the Regulations.

Notably, the CASA lawyers had emphasised that a MOS would have to be referred to in the regulations, and would therefore become a third tier of legislation – highly undesirable and work-intensive when a MOS will contain material that needs regular updating in practice.

The content of proposed MOSs must also be assessed against the contribution made to aviation safety, and a MOS must only contain such standards as are clearly authorised by a particular regulation and must not be used as a vehicle for promulgating advisory material and other information.

And all proposed CASA Parts and MOSs were to be assessed against the guiding principles.

Directive 17/2004 – Regulatory Advisory Panels – required Regulatory Advisory Panels to be established in relation to each CASR Part under development, and the work of the panels to be separate from and additional to the existing consultative arrangements through the Standards Consultative Committee.

The RAPs were to advise the CEO on the proposed content of each CASR Part and, where applicable, the associated MOS, prior to publication of a Discussion Paper, NPRM or submission to the Minister, in relation to that Part.

The Advisory Panels would comprise:

- Chair of the Standards Consultative Committee
- Project Manager for the relevant Part.
- Manager from the relevant Standards branch (nominated by EM Standards)
- Member of the SCC (Nominated by the SCC)
- Member of the ASF (Nominated by the ASF)
- Inspector / Manager from the relevant area of Compliance (Nominated by EM Compliance)
- Independent member of the aviation industry (nominated by the CEO)
- Member of the Office of Legal Counsel (nominated by General Counsel)
- Representative of the Department of Transport and Regional Services
- Adviser from the Office of the CEO (Nominated by the CEO)

The Regulatory Advisory Panels, created after the Senate's disallowance of Part 47, did useful work. James Kimpton chaired the only two that were convened, which sorted out difficulties with the very light aircraft amendments to Part 21 and Part 137 dealing with Aerial Agriculture. The third dealt with Part 99 (drug and alcohol testing.)

The directives, which were fully in line with (then) Minister Anderson's comprehensive charter letter to Mr Byron on his appointment in November 2003, came shortly after the departure of the three executives. It sent a strong message to other officials still pushing for the mountain of regulation that had been under preparation since CASA set aside the industry consultation input of the PAP in the late 1990s. The directives represented a 180-degree turn away from "prescriptive" regulations whose development over the past six years had ploughed ahead in the face of vigorous industry opposition.

Among the remaining symptoms of substantial internal resistance to CASA reform, had been embedded contempt for the reform process, continued antipathy to the concept of industry consultation, the determination of CASA to walk away from modern regulatory frameworks and guidelines, a growing

confrontational mentality that has further damaged industry relations, and an apparent absence of acknowledgement of, and compliance with, international obligations.

Tidying up

Byron continued taking a vigorous stance against the activities of staff who had since 2000 successfully delayed the implementation of government aviation regulatory reform policy. He removed the regulatory reform program from the general body of the Authority, and control of the program from the Legal Services Branch, to a new Planning & Governance Office reporting to the Office of the CEO. Major changes in the staffing of the Legal Services Branch occurred. He also set about 'market testing' all Canberra based support functions resulting in significant job cuts and cost savings, and commenced a process of moving operational activities out of Canberra.

Byron and a small team also got on with the job of internal reorganisation and restoring industry relations despite resistance at almost every step. They achieved some notable reforms including the removal of several employees and the sidelining of others to positions where they were less able to obstruct reform.

But now, [2010], harmonisation with international regulation along with the long-sought simplicity, 'plain English presentation,' brevity, clarity and outcome-based format are now further away than ever, complain critics of the process who were experienced in regulatory development, and they believe they understand the reasons, pointing to the "Maintenance suite" of regulations as an example, and a possible key to the ongoing problem.

"Shorter" regulations in particular remain a fantasy. We are told for example that the USA's equivalent Part 91 is about 33 pages when reduced to standard legislative A5; that New Zealand's equivalent is about 39 pages; but that Australia's Part 91 is about 250 A4 pages, which will probably increase to something like 350 pages when in A5 format.

Why so much more paper? The reason for this has been a stated insistence within CASA's legal staff that "the government requires" that Australian aviation regulations must be framed in a criminal law format, along with penalties.

Nobody understands where this claimed "requirement" originates, least of all when they read statements like this one from the *Australian Law Reform Commission* (ALARC) *Report 95: Principled Regulation*:

Statement of Principle

> *The distinction between criminal and non-criminal (civil) penalty law and procedure is significant and adds to the subtlety of regulatory law. This distinction should be maintained and, where necessary, reinforced. Parliament should exercise caution about extending the criminal law into regulatory areas unless the conduct being proscribed clearly merits the moral and social censure and stigma that attaches to conduct regarded as criminal.*

The ALARC Report also explains, for those who find that simple prescription hard to understand:

> *The main purposes of criminal law are traditionally considered to be deterrence and punishment. Central to the concept of criminality are the notion of individual culpability and the criminal intention for one's action.*

Another government publication goes into more detail. The *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, published under the auspices of the Minister for Home Affairs and Justice and supported by the Criminal Justice Division of the Attorney-General's Department, which has a role in advising on the framing of offences and other enforcement powers. The purpose of the guide is to assist agencies to frame these types of provisions.

That document further explains the concept of criminality in this context:

> *……..A key characteristic of a crime, as opposed to other forms of prohibited behaviour, is the repugnance attached to the act, which invokes social censure and shame.*
>
> *Certain conduct should be almost invariably classified as criminal due to the degree of malfeasance or the nature of the wrongdoing involved. Examples include conduct that results in physical or psychological harm to other people (murder, rape, terrorist acts) or conduct involving dishonest or fraudulent conduct (false and misleading statements, bribery, forgery). In addition, criminal offences should be used where the relevant conduct involves considerable harm to society, the environment or Australia's national interests, including security interests.*

Since murder, rape, terrorist acts, false and misleading statements, bribery, forgery and similar offences are relatively rare events in maintenance hangars, critics of the proposed aircraft maintenance regulations are at a loss to understand why, despite all the published instructions to the contrary, the regulations should be thus framed, or for that matter who authorised these deviations from recommended practice, and why.

For any drafter who still doesn't understand their obligations, the Guide offers further assistance to the decision-making process:

In many cases it will be difficult to determine when a given provision should be criminal or civil in character. Factors that should be considered in this context include the following.

- What is the nature of the conduct sought to be deterred? What are the circumstances surrounding the proposed provision?
- Where does the proposed provision fit in the overall legislative scheme?
- Does the conduct seriously harm other people?
- Does the conduct in some way so seriously contravene our fundamental values as to be harmful to society?
- Is it appropriate to use criminal enforcement powers in investigating the conduct?
- Is the criminal law appropriate for dealing with the undesirable conduct in question?
- How is similar conduct regulated in the proposed legislative scheme and other Commonwealth legislation?
- If the conduct has been regulated for some time, how effective have existing provisions been in deterring the undesired behaviour?
- What level and type of penalties will provide appropriate deterrence?

Yet the whole process has been beset by the "criminal code" mind-set for almost as long as anybody can remember, with repeated attempts to return the rules to the disastrous state that made reform necessary in the first place, and all along the way it has been resistance from Canberra and the varying policies and practices of successive CEOs – not the requirement to consult with industry – that has been at the heart of the endless delays.

We asked the Attorney-General's Department what systems are in place to ensure compliance if differences have not been proposed and approved. The A-G Department will only say:

> *The Minister for Home Affairs and Justice, supported by the Criminal Justice Division of the Attorney-General's Department, has a role in advising on the framing of offences and certain other enforcement powers. To assist agencies to frame these types of provisions the Department, with the authority of the Minister, publishes the Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers.*
>
> *The Guide consolidates a range of principles and precedents relevant to the framing of offences and enforcement provisions to assist agencies to draft provisions.*
>
> *Departures from the principles contained in the Guide may be necessary or justified in the context of a particular legislative framework.*
>
> *The Senate Standing Committee for the Scrutiny of Bills and the Senate Standing Committee on Regulations and Ordinances regularly refer to the principles contained in the Guide when considering proposed legislation, and may draw Senators' attention to provisions that depart from those principles.*

This appears to say that regardless of all the guidelines, parliamentary explanatory memoranda, charter letters, ministerial and CASA executive directions, political statements about the program's aims and something like 20 years of nonstop industry protest, The Attorney-General's Department has handed back legal drafting to CASA officials who are acting in apparently reckless defiance of all of those definitions and prescriptions, and that the industry has no other apparent redress than to complain to a Senate committee after the damage is done.

One stated outcome of Byron's changes was to be that criminal offences would be limited to high-level genuinely criminal acts, as in other major aviation countries. All "unique" Australian rules were to go, and Australian aviation businesses of all sizes expected relief from what they described as a "regulatory straightjacket."

The in-house hostility to Byron and his reforms continued, and part of the process was a campaign to discredit him and members of his team. In the case of some team members, this took the form of formal complaints alleging a range of criminal misconducts. Each of these was duly investigated by external agencies, and found to be without merit. As he had foreshadowed since his appointment in 2003, Byron left CASA following completion of his five year term, although he stayed on for some months while the Government sought a replacement. The campaign against other executives however became so widespread and vindictive that several finally decided that enough was enough; that they could not hope to achieve what needed to be achieved in that working environment, and left the organisation.

Another new director

Byron's replacement, John McCormick, joined CASA in March 2009. At least three involved aviation identities have since written personally to Mr McCormick expressing their continued concern over regulatory development, but say there has been no response.[3]

Meanwhile the "legal drafting" process has turned Byron's whole EASA based maintenance suite on its head, making it literally unworkable, according to individuals who are (or were) close to the process. But it appears that Director John McCormick, now under political pressure to end the 21 year old farce, is pushing ahead regardless.

Former AOPA President Bill Hamilton and Ken Cannane (who was CASA's Acting General Manager of the Regulatory Framework Office, later its Head of Maintenance & Personnel Standards, and is now Executive Director of the Aircraft Maintenance, Repair & Overhaul Business Association) report that at the last SCC meeting, John McCormick virtually acknowledged that the resulting rules would not work, by announcing that in the future legislative instruments (in the form of variations, concessions and exemptions) would be used where the rules "don't work".

Some of Bruce Byron's energies had been directed towards halting the widespread use of such variations, concessions and exemptions, as they were proof of the inadequacy of the existing rules – the whole reason for the reform program in 1996.

CASA advises that it is now its Standards Development Branch, not its Legal Services office, which provides OLDP with drafting instructions. We've now asked CASA: "What I am interested in, is the process by which the lay draft is converted by the Standards Development Branch into legalese and allocated penalty points, especially if lawyers are not involved?" Any response will be edited into this article with an explanatory note.

"There are mountains of important work still to do," says Bill Hamilton. "We have no Part 91 [general operating and flight rules,] we have no Part 135 which is what we now call charter, no Part 121 [High Capacity Transport] and no maintenance rules, so we have none of the really important elements yet."

Whoever is responsible, says Ken Cannane: "instead of harmonisation we have wound up with a draft set of maintenance rules that is unlike anything anywhere else in the world, and a stream of legislation still to be developed, examined, approved and published."

An example is (our highlighting):

> ***145.065 Provision of maintenance services***
>
> *(1) If a Part 145 organisation provides maintenance services, it must provide the services only in accordance with:*
>
> *(a) its exposition; and*
>
> *(b) the approval rating for each class of aircraft or aeronautical product for which the organisation is approved to provide maintenance services; and*
>
> *(c) the approval rating for each specialist service that the organisation is approved to provide; and*
>
> *(d) any limitations applying to an approval rating mentioned in paragraph (b) or (c); and*
>
> *(e) the privileges that apply to the approval rating under the Part 145 Manual of Standards.*
>
> *Penalty: 50 penalty units.*

[3] Comment dated October 2010

(2) An offence against subregulation (1) is an offence of strict liability.

Ken Cannane comments:

"That a subjective interpretation of completion of a maintenance task could constitute a 50 point strict liability offence is absolutely unacceptable, and appears to be a complete breach of the Office of Home Affairs guidelines for establishing criminal offences — but nobody in CASA seems to care.

"The very concept of being able to write an exposition (maintenance procedures manual) that covers each and every process, in detail, for each and every aircraft, is lunacy of a high order. The idea that each and every company's 'Operations Manual' or 'Maintenance Manual' is to be subject to Parliamentary disallowance —- words fail me !!!!"

"The Guide is quite clear in how you apply 'strict liability'. An Exposition or MoS are not legislation, so local interpretations will apply. How can you be held accountable to documents that are not in legislation? Expositions are not subject to Parliamentary scrutiny and 'privileges that apply to the approval' is subjective.

"It looks like our next step will be writing to the Scrutiny of Bills Committee listing our concerns once it enters Parliament. This rule, like so many others in this package, is a fiasco."

They also believe that a solution lies in revival of development work already done and later abandoned, through the establishment of a small, focused and properly directed independent group which could finalise the whole project in about 12 months. The adoption of the New Zealand rules is now being seriously proposed by some observers as an alternative.

Micro-managing airworthiness

To put micromanagement in perspective, in just one of hundreds of examples, the Panel will find it informative to review a tome titled *CASR Maintenance Regulations, Part 145, Assessor Handbook V4*, a copy of which *ProAviation* has provided to the Panel.

This 312-page volume is published as a guideline for CASA officials assigned to assessing applications for approved maintenance organisation (AMO) approval under Part 145. For anybody who understands micromanagement, it makes a particularly alarming read.

Assuming version 4.0, June 2012, is CASA's fourth attempt to get it right, the English and the grammar in versions 1 to 3 must have been very disappointing. Apart from that, the recurrent use of subjective adjectives such as "acceptable", "adequate", "appropriate", "necessary", "satisfactory" and "sufficient", guarantee ample scope for subjective assessments of the kind that have created an industry within an industry, in the endless process of reviewing and demanding changes to manuals, expositions and other such documents which require CASA "approval" without published objective guidelines. The frequency with which individual inspectors agree on the content of manuals is unknown but experience shows that it is miniscule.

The document, and the employment-creating philosophies it supports, paint a clear picture of the ongoing micromanagement of the MRO sector that can be expected, not only to contaminate the AMO approval process but also to form a basis for yet another layer of regulation, not subject to parliamentary scrutiny, and foreshadowing intolerable levels of intervention in day to day business by inadequately trained or supervised individuals who have never operated or managed a successful business in their lives.

Have the Panel members ever seen a document that so blatantly points the way to replacement of the "rule of law" with a system of "rule by regulator"?

One wonders where the language of a document like this originates, so as an experiment, we selected one single dot point item of about 30 from page 178, which poses the titillating question: *How is the AMO internal reporting process structured to ensure a close-loop feedback communication system which will involves* [sic] *consultation between the necessary departments as the investigation report identifies?*

How much deep and cogent navel gazing went into developing that engrossing query?

Well, not all that much it seems. It took our plagiarism detection system (Google) just 0.67 seconds to identify "about 16,600" erudite dissertations which had helped themselves to very large chunks of those 30 words, all of which adorn the gripping works of the global business management system industry.

Notably, each topic (of perhaps a couple of hundred) has a section titled *Things for consideration*, which warns:

> *The following information may be of value in assisting the Assessor to determine if the AMO has provided sufficient evidence of compliance with the requirements for the* [particular topic] *commensurate with the size of the organisation and its scope of work.*
>
> *Note: these things for consideration may not necessarily be requirements for legislative compliance.*

We are told that this represents an encouragement for assessors to impose their own requirements while acknowledging that there may be no enabling regulation.

We would be confident that AMROBA's submission to the Panel will amply cover the detail of industry concerns over the even more serious issues the document raises.

Micro-managing flight operations

Commercial air operators and their senior pilots are concerned over whether CASA is committed to conformity with ICAO standards and recommended practices (SARPs) and its own legislative requirements, and they quote credible examples that support their concerns.

A large number of flight training accidents throughout have been directly attributed to deviations from SARPs. Several of these have been fatal and the situation has resulted in questions over the regulator's performance in its intervention and oversight of flight operations, training and checking.

A Sydney-based charter operator is one example of the risk associated with apparently uninformed intervention in flight operations. The company, which holds a charter and aerial work AOC, sought to upgrade the quality and safety of its services by adding a six-seat Cessna 510 Mustang twinjet aircraft to its fleet.

The C 510 is Cessna's latest and smallest twinjet Citation. Like most other Citations, it is specifically designed and certified to be flown by a single pilot (i.e. without a co-pilot.) With first-jet customers in mind, Cessna went to unusual lengths to see that new owners flying their first jet would find the transition easy, enjoyable and safe. Having flown a Mustang on a pilot evaluation, *ProAviation* can confirm that for a pilot who is familiar with the advanced avionics and is IFR qualified, the aeroplane is at least as simple to fly as a Cessna 172.

The Mustang is certified to the US FAA's FAR (Federal Air Regulation) 23, which prescribes airworthiness standards for the issue of type certificates, and changes to those certificates, for aeroplanes in the normal, utility, acrobatic, and commuter categories. The category is limited to aircraft with seating for nine or fewer passengers and a maximum certificated takeoff weight of 5700 kg (12,500 lb) or less. Maximum takeoff weight of a Mustang is 3930 kg (8664 lb.)

Small jets in charter operations normally fly between 300 and 400 hours per annum because the work usually involves a lot of waiting time as well as time between charters. The workload is well within the capabilities of a single pilot, and common practice would be to train and engage a part-time pilot to cover for days off and holidays. Commonly, operators manage the maintenance of pilot proficiency through periodic checking by a CASA-approved ATO who is qualified on the aircraft type.

But one of the first requirements CASA imposed on this operation, was to issue an "instrument of direction" requiring the company to establish a CAR 217 training and checking organisation by a specified date. That requirement is normally limited to regular public transport services or to other operators of heavy aircraft with a maximum takeoff weight above 5700 kg, however the regulation adds: "and any other operator that CASA specifies."

Although the reason for the direction was not stated, CASA verbally explained it by asserting that the aircraft was a "complex type." In comparison with numerous turboprop and piston engined aircraft, from a pilot viewpoint the Cessna 510 is in fact a much simpler aircraft to operate, with circuit speeds similar to or lower than many comparable turboprop types.

However the unilateral decision means that the company must employ a qualified and CASA-approved pilot to conduct pilot check and training on the Mustang. That in turn requires two pilots to be approved and employed as training and checking pilots so each can check the other! Since none of these arrangements would increase the amount of revenue flying, it would have the effect that the two pilots would share the 300 to 400 hours of annual revenue flying, thus heavily limiting their accrual of total type experience and arguably eroding the operation's safety margins.

The next requirement related to aircraft flight manuals (AFM). Like any new US certified aircraft, the Mustang is delivered as certified by the FAA, with an AFM and separately what is known as a quick-reference handbook (QRH), an abbreviated flight checklist for carriage in the aircraft for in-flight use. The QRH is developed from the AFM, and both documents are part of the aircraft's FAA certified equipment, which means that the FAA has certified that the QRH accurately reflects the AFM but in an abbreviated form. But CAR 138 (1988) requires that the pilot in command of the aircraft must comply with a "requirement, instruction, procedure or limitation" in the AFM. So if the content of the operations manual does not precisely match the content of the AFM, and if an insurance claim is incurred, it is certain to be contested because whichever manual you are using at the time contradicts the other document.

Also despite that certification, CASA apparently found it necessary to spend a great deal of a flying operations inspector's time (at $160 per hour) cross checking the two FAA documents to ensure that they conform with one another, raising questions over whether CASA accepts FAA certification without question.

Next, CASA generates a “requirement” that a second expanded checklist be developed with directed modifications and inserted in the company operations manual, compliance with which is mandated by CAR 215. This requirement is supported by CAR 215(3) which authorises CASA to require the operator to include particular information, procedures and instructions in the manual, and to vary that information at any time. This means that the aircraft now has three separate sets of checklists: the expanded information in the AFM, the abbreviated information in the QRH, and whatever version of those two documents CASA requires to be published in the appropriate section of the company operations manual.

An industry analyst who works in these areas observes: "In effect, CASA is claiming that regulation 215 authorises them to direct a certificate holder to violate the design certification standard of the aeroplane, and the conditions under which its certificate of airworthiness is issued. I think they would be well advised to seek a qualified legal opinion on their own liability if they plan to follow that path. Like it or not, you no longer have the legal right in Australia to demand changes to manufacturers’ procedures for operating the aircraft as laid down in the AFM."

While all this is still being thrashed out, the Mustang is dispatched to Bathurst to pick up a medivac passenger for transportation to Sydney. On arrival, the HF aerial is seen to have been broken, possibly by a bird strike. Its removal is necessary before further flight, and would normally be carried out in about one minute by any available LAME with a 3/8th inch spanner. However CASA has deemed that this aircraft may only be maintained by a LAME from a Part 145 maintenance organisation, meaning that somebody has to be flown from Bankstown to Bathurst to carry out that simple task. The charter client organisation is forced to hire another aircraft to move the patient so that any revenue from the operation is forfeit, and two other things have to happen before the aircraft can be returned to Bankstown. First, an engineering order will have to be generated to allow the removal of the antenna, ($590) and second, a permissible unserviceability certificate will have to be issued at a cost of $320 to permit the aircraft to fly from Bathurst to Bankstown, a short flight over a route on which HF communications will not be necessary.

Shortly afterwards, the Mustang is dispatched to Karratha, WA, where it is contracted as a standby Medivac aircraft by a consortium of resource companies, to substitute for their normal contract aircraft which is absent for maintenance. Although the Mustang is a single pilot aircraft, the contract requires a safety pilot in addition to the pilot in command, as well as 24 hour crew standby availability. Four pilots, all with command endorsements and instrument ratings, standing by in rotation, can meet these requirements.

After two weeks, the company is then asked to extend the contract for a further period of two weeks, during which time the instrument rating of one of the safety pilots will expire in the absence of a check flight. The chief pilot requests CASA approval for a suitably qualified and available ATO from Perth to carry out the rating renewal check. CASA refuses that request, because that particular ATO, although fully C510 qualified, is not listed as having CASA approval to carry out checking and training under the company’s CAR 217 approved training and checking system. The only available option is to fly the pilot from Karratha to Sunshine Coast airport and back, and conduct his rating check in a C510 simulator located there.

The options of either approving a two-week extension of the pilot’s 35-year-old command instrument rating, for consulting with CASA's Perth office to approve the available ATO to append his to the company's list of approved check pilot based on his experience, do not appear to have been considered by CASA.

Pilots flying the Mustang regularly believe that it, or something like it, represents the basic trainer of the future. Yet through a series of administrative decisions that are arguably outside CASA’s own guidelines, many of them made by one individual, the aircraft type could become all but unsaleable in a market that is searching for modern aircraft that are safer, more economical and more environmentally friendly than anything in the existing fleet.

Where have all the experts gone?

Processes like these have convinced many in the general aviation industry that the sector is now being systematically deprived of some of its most respected practitioners and mentors, and that recent events seem to support that concern.

An apparent campaign to reduce the number of approved senior testing officers (ATOs) has resulted in a worrying reduction in the pool of available and experienced flying school instructors, and of training and checking pilots for charter operators around Bankstown and similar airports. CASA's system for the ongoing oversight of flight-testing provides ample opportunity to cancel the approvals of industry ATOs, who assess pilots for licences and upgrades, and also those of line pilots’ instrument ratings and other proficiencies.

CASA "approvals" of chief pilots, chief flying instructors and ATOs rely on periodic reassessments as well as random checks conducted by observing flight tests in progress. However in the recent past, a number of Bankstown's most highly qualified and experienced instructors and ATOs have experienced "aggressive" flight-testing by CASA flying operations inspectors (FOI). Some have been stripped of their qualifications because of vigorously disputed CASA assessments. Injured parties link most, but not all of these adverse decisions with the arrival in the area of recently appointed individuals who command absolutely no industry respect that *ProAviation* has been able to identify.

Although a CASA "approval" as a company-appointed chief pilot had always been a valued qualification for pilots in their career advancement, operators are now complaining that nobody wants the chief pilot job any longer, saying they "can't afford the aggro" that is generated by some of these individuals.

One contentious issue is the actual approval process for CASA 'acceptance' as a chief pilot. There are no published rules for deciding how the assessment is to be made in terms of what may be examined, to what level or to what degree. For example, a chief pilot holding a commercial pilot license can be asked questions pertinent to airline transport pilot license qualification, such as complex fuel or runway performance calculations. There is no regulatory backing for this subjective type of approach, and there are numerous examples of its abuse. The chief pilot position is essentially an administrative appointment, and we're told that under the regulatory regimes of some other countries, even a pilot who is permanently unable to fly for medical reasons may be appointed in this role.

A secondary issue is the option to flight test applicants for chief pilot approvals. Although CAO 82 states that a flight test 'may' be conducted; there are no published parameters for this test; it is purely subject to the whim of the FOI. There are recorded cases where an aspirant chief pilot has been deprived of all ratings and reduced to student pilot status following a flight test, despite having recently passed or renewed several of the ratings.

> CAO 82.0 appendix 1; Approval of Chief Pilot by CASA
>
> 1.3 The appointment may be approved only if the person has:
>
> (a) In the opinion of CASA, maintained a satisfactory record in the conduct or management of flying operations; and……..

For these reasons pilots now perceive the process as flawed, subjective, intimidating, and carrying the threat of losing a pilot license or other important career qualification. They are highly suspicious of the motivations for these actions. Former CASA CEO Mick Toller was once asked how many members of a particular pilot union had "failed" a chief pilot interview as compared with non-members of the union. No response was ever provided, and the panel may find it informative to review that question as to whether conflict of interest exists.

Also worrying are the rapidly escalating costs of "regulatory services" that almost any interaction with CASA now incurs. There is a widespread belief that individuals within CASA are now deliberately limiting the number of ATO's working in industry, replacing them with CASA employees, and creating new profit centres by diverting more and more flight-testing activity to its FOIs at around $160 an hour plus travelling time.

Does all this represent good value and safety enhancement? Not necessarily, insist industry ATOs, CFIs and chief pilots. They believe that some checking and training practices suggest deficient knowledge and experience levels on the part of CASA staff that adopt or promote them. Some of the events below appear to support their concerns.

Increasing the risk

Fairchild-Swearingen Metro III turboprop commuter aircraft are fitted with an automated stability augmentation system (SAS), which because the aircraft has "undesirable stalling characteristics," is a mandated item for all flying. Yet a highly experienced ATO, who has undergone no fewer than 50 instrument rating renewals and literally dozens of assorted check rides throughout his career, was asked to demonstrate a stall and recovery in a Metro III with the SAS disabled. The procedure in any aircraft is to reduce power and raise the nose as necessary until the symptoms of an approaching stall are identified, and then to apply power, lowering the nose if required, and flying the aircraft out of the incipient stall condition. In a Metro with the SAS disabled this is contrary to manufacturers' instructions and almost suicidal.

Part of the role of the SAS (also known as the stall avoidance system) is to operate a "stick shaker" which provides a tactile and noisy warning to the pilot that the aircraft is approaching an aerodynamic stall. This

prompts the pilot to initiate the recovery action we have described if he or she hopes to survive to fly another day.

In effect, the SAS does exactly what it was designed to do - avoid a stall - unless you defy all the warnings and the dictates of commonsense. And to be quite clear, Metro and Merlin aircraft have been involved in fatal training accidents when prescribed procedures were ignored, including a crash in a Merlin in Norway on July 20, 2008 during a training flight. (A Metro is a stretched variant of a Merlin iii with no other significant differences.) The accident related to an "approach to stall" procedure with the aircraft in landing configuration. The aircraft's altitude increased by 300 ft during which speed decreased and control was lost, followed by a 30-second dive from 6300 ft to the sea surface. Horizontal speed at impact was minimal, which is symptomatic of an unrecovered spin. Pilots familiar with the type say that the event could not have occurred if the SAS had been operative.

Against that background it is difficult to understand why this experienced ATO was publicly vilified for refusing to accept a FOIs ruling that 'stalls' were a mandatory requirement for co-pilot endorsement and that the SAS must be disabled to achieve this goal. He pointed out that stalls were only required for command training, and that they were only to be conducted according to the manufacturers instructions. The aircraft's pilot operating handbook emphasises that the aircraft must not be stalled, and simulated failure of the SAS is therefore not discussed. There is an AFM procedure for a "failed" SAS unit, but the aircraft flight manual states categorically that the aircraft must not be operated with the SAS disabled under any circumstances. Such operations are also not permitted under a minimum equipment list (MEL).

It took a strongly worded letter from the aircraft manufacturer to produce a grudging acknowledgement from CASA, who despite that, resurrected the same argument later in the Administrative Appeals Tribunal in support of claims that the pilot was a 'danger to air safety'.

This same ATO was later “failed” in a simulator check ride to qualify a 'simulator pilot' under CASA supervision. Despite his having already demonstrated twelve previous stall recoveries, one of the fail items was “loss of height (200') during a simulated stall.” As a result the ATO had both his aircraft type and instrument ratings suspended as a 'risk to flight safety.’ CASA has administratively imposed impossible conditions for the return of those ratings. That dispute is ongoing, with simple commonsense apparently excluded from the debate.

Notably, in the now-famous crash of Air France flight 447, an Airbus A330 descended through 35,000 feet at about 10,000 feet/minute with the nose held at a high angle of attack and N1 thrust values of between 48% and 100% right up to the point of impact. *ProAviation* has spoken to numerous flying instructors, training and line pilots, all of whom confirm that setting an arbitrary maximum acceptable height loss during a stall recovery is a nonsense. This is because of variables such as the exact point in the stall manoeuvre where stall and recovery are initiated, the individual aircraft type’s control responsiveness and interaction, engine power, centre of gravity, density altitude, and even turbulence.

What appals observers of this ongoing drama is the fact that a single FOI can apparently wave aside not only the manufacturer’s recommendations, but CASA's own guidelines. The following prescription from CASA’s *Approved Testing Officers’ Handbook* should be clear enough, and certainly calls for an explanation of why the FOI was unaware of these limitations:

GEN 1	*Only emergency and abnormal systems failures listed in the test aircraft Pilot Operating Handbook are to be simulated by a prescribed ATO during the flight component.*
GEN 2	*A prescribed ATO or a prescribed person must not introduce simultaneous multiple unrelated simulated emergency or abnormal situations during the flight.*

An ignorance-based requirement

….with apologies to those familiar with these issues if we explain something you already know:

A takeoff in a multi-engine airline aircraft certified for operations under the USA's FAR Part 25, calls for three separate speeds to be calculated, which are defined as V_1, V_R and V_2, and are normally called by the co-pilot as they are reached during the takeoff run.

At V_1 the crew is committed to continue the takeoff even if one engine fails, that speed being calculated as one from which they will be able to accelerate despite the partial loss of thrust, and is based on ambient values like temperature, atmospheric density and aircraft weight.

V_R is the recommended indicated airspeed at which the crew should initiate rotation of the aircraft into a nose up attitude – usually about 10° depending on type and configuration – for takeoff, and….

V_2, the recommended speed for initial climb, is based on a number of elements including stall speed with a factored percentage added, demonstrated minimum engine-out control speed, aircraft weight, landing gear and flap configuration changes, and obstacle clearance along the flight path. In general terms an aircraft that is rotated at the rate recommended in its flight manual, will have accelerated to V_2 plus 10 to 25 knots (depending on aircraft type) as it lifts off. If it suffers an engine failure at or close to rotation, it should be at or close to V_2 when it reaches the initial climb attitude.

A couple of generations ago, it was generally accepted that climbing at V_2 would optimise climb angle, and this has now been interpreted by some FOIs as a "requirement" that should an engine failure occur during a normal climb, the pilot should bring the speed back to V_2 to continue to climb. In one example, CASA's type specialist is promoting this view. With that apparent exception, aircraft manufacturers and the flight departments of major airlines have long ago set the doctrine aside, especially since the fatal crash of a McDonnell Douglas DC 10 at Chicago in July 1989.

In that event, the NTSB found that damaged hydraulics had caused the left-hand leading edge slats to retract, increasing the stall speed of that wing whilst the right-hand slats remained extended with the wing not stalled, and the crew failed to recognise the resulting roll as a stall symptom.

American Airlines subsequently issued an Operations Bulletin (DC-10-73) which amended the procedure and states, in part:

> *The following climb speeds will be utilised to obstacle clearance altitude when an engine failure occurs after V_1 on takeoff:*
>
> - *If engine failure occurs after V_1 but not above V_2, maintain V_2 to obstacle clearance altitude.*
> - *If engine failure occurs after V_2, maintain speed attained at time of failure but not above V_2 + 10 (knots) to obstacle clearance altitude.*
> - *If engine failure occurs at a speed higher than* V_2 + 10, reduce speed to and maintain V_2 + 10 to obstacle clearance altitude.

In the relevant section of its further analysis, the NTSB said:

> *"The pilot's adherence to the airspeed schedules contained in the company's engine-out emergency procedure resulted in the aircraft's entering the stall speed regime of flight. Had the pilot maintained excess airspeed, or even V_2 +10, the accident may not have occurred. Since the airspeed schedules contained in American Airlines' emergency procedures at the time of the accident were identical to those currently contained in the emergency procedures of other air carriers, the Safety Board believes that speed schedules for engine-out climb profiles should be examined to insure that they afford the maximum possible protection.*
>
> *"In summary, the loss of control of the aircraft was caused by the combination of three events: the retraction of the left wing's outboard leading edge slats; the loss of the slat disagreement warning system; and the loss of the stall warning system -- all resulting from the separation of the engine pylon assembly. Each by itself would not have caused a qualified flight crew to lose control of its aircraft, but together during a critical portion of flight, they created a situation which afforded the flight crew an inadequate opportunity to recognise and prevent the ensuing stall of the aircraft."*

And a senior Airbus A330 C&T captain confirms that similar practices are established in Airbus fleets: "The A330 engine failure at V_1 has you initially raising the nose to 12.5° to guarantee unstick, but at high weights (eg 233 tonnes) the SRS (speed reference system) will immediately command close to 10° nose up to avoid speed decay. Single engine acceleration altitude in a jet is normally 1500 feet, so if we have an engine failure any time below that altitude, we select V_2 to V_2+10 to meet certification climb gradient on one engine."

Independent research by Boeing confirmed the findings of both the NTSB and the airlines, and Boeing promulgated similar recommended procedures. There is consensus among airline experts we have spoken to, that the same principles would apply at least equally to light jets, whose thrust/weight ratios are equal to or better than those of large commercial airliners.

Given the possibility that any engine failure can cause unknown airframe damage and resulting increase in minimum control speed, and also given that operators of all shapes and sizes around the world have now embraced these philosophies, airline training experts cannot understand why any CASA official would continue to advocate the safety-negative practice its FOI is suggesting. In short, maintain whatever speed

you have, and determine the state of the aircraft, before you change anything. Reducing speed to V2, “for the sake of compliance”, could kill you.

But there’s more.

A dangerous approach

Most light twin engined aeroplanes are certified with no guarantees of specific single-engine climb performance figures, except for the expectation that they must have a demonstrated ability to climb at 1% gradient at 5,000’ with the critical engine inoperative on a "standard day," and that only for IFR certification. To help pilots manage an engine-out situation, each such aircraft type has an optimum calculated airspeed to maximise rate of climb, and a blue line on the airspeed indicator indicates this speed, although the value may vary slightly according to gross weight and ambient conditions. Even then, climb performance at blue line speed may be disappointing to say the least in this category of aircraft. In most cases the best option in the event of a low level (gear down below manufacturers minimum safe single engine speed) engine failure before, at, or shortly after liftoff in that aircraft category, may usually be to put the aeroplane on the ground and do your best to stop while there is still some available runway ahead.

Now, consider a pilot approaching for a normal landing. The accumulated wisdom of hundreds of airlines around the world is that the best and safest landings are achieved if they follow a stabilised approach, meaning one with only minimal changes such as undercarriage and flap deployment, and power/attitude adjustments to achieve a constant glide slope of (usually) 3°. In most light aircraft, pilots use a "reference speed" (V_{ref}) that is typically equivalent to 1.3 times the aircraft's stall speed (V_S) in the landing configuration. And remember that the required runway length you've calculated is based on that airspeed or a similar one, so that any other approach speed you adopt will invalidate the calculation and could result in a runway overrun. CASA also “requires” demonstration of a stable approach.

So it was surprising during a pilot evaluation flight in a light twin at Essendon, when the demo pilot warned that our approach speed was too low, saying we should be approaching at "blue line” best one-engine-inoperative speed of 92 knots, which is 30 knots above this particular aircraft's stall speed. We didn't argue that point because there was plenty of runway at Essendon, and a good thing too, because the aircraft "floated" for a couple of hundred metres until it decelerated to a safer touchdown speed. It was later explained that most CASA FOIs were requiring pilots to conduct the whole approach at the "blue line" speed, which is considerably higher than the V_{ref} that is recommended in the pilots operating handbook.

It was also explained that the reason for this "requirement" was provision for two separate and statistically improbable events to occur simultaneously. The first was an instruction from the tower to "go around" (i.e. abort the landing approach and carry out a missed approach) and the second was that while you are responding to that, the critical engine would fail and you'd need to carry out a single engined missed approach. This sort of unintelligent risk management has killed a large number of instructors and students over many years. The more mature instructors understand that if an average light twin is already in landing configuration and if both those events occur, you are in most cases already irreversibly committed to a landing. And if there's another aircraft on the runway you do whatever is necessary to avoid a collision with it, either landing on the unoccupied section of the runway, a taxiway, or on the adjacent grass flight strip, whichever makes the most sense in the circumstances.

This issue has been discussed with senior CASA official by a retired Qantas check captain who should know: “What is being taught is that the overriding consideration of every approach is a possible engine failure and a go-around, which is almost a statistical impossibility. What these inspectors are requiring, is that pilots should hazard every approach they make, to provide for that probability. That's not intelligent risk management. CASA denies it all, just as they deny that inspectors are requiring instructors to fail engines at low level. That's why I was so disturbed by that last Twin Comanche crash at Camden, which incidentally, the ATSB declined to investigate thoroughly.”

And a dangerous departure

For the same reasons, the training scenario of a simulated engine failure after takeoff needs to be managed with a degree of intelligent caution, which it doesn't always receive, say experienced instructors and ATOs. In the light twin aircraft category (below 5700 kg MTOW) no certification data is available to establish values for V_1, V_R and V_2. Most manufacturers limit their advisory material to suggesting that after liftoff, the aircraft be accelerated to well above single-engined minimum control speed (V_{MCA}), to the manufacturers recommended

safe single engine speed (SSE) for reasons such as improved performance, terrain clearance, pilot visibility and engine cooling.

All this, however, doesn't dampen the enthusiasm of (some) FOIs for demonstrably dangerous practices such as simulating an engine failure before the aircraft has reached a safe height and speed with gear and flaps retracted and a steady climb established. This removes the pilot's options to 'safely stop or safely go', a tenet that has been around since the first Cessna 310 appeared 60 years ago.

There is, of course, nothing to prevent an instructor simulating an engine failure after takeoff at a safe height with the aircraft in takeoff configuration, but a very large number of people over many years, have ignored that option with a fatal outcome. Despite this, it now seems that various FOIs and ATOs are interpreting the syllabus as requiring a flight testing procedure that carries an unacceptably high risk.

What seems to be missing from CASA's *Approved Testing Officer's Handbook* is some very firm guidance regarding unnecessarily high-risk procedures, especially in aircraft types with which the ATO is often unfamiliar. But the lack of consensus on these issues offers little promise that this will happen any time soon.

And as we're about to see, the need for some straight talking and intelligent action on flight standards is not limited to fixed wing operations.

Purchasing an outcome

While Australia has a large number of high quality organisations training pilots for both fixed wing and helicopter licences, there has always been dissatisfaction in the industry at the regulator's failure to identify those schools whose output is unsatisfactory, and to take corrective action. Because the demand for helicopter pilots is currently stronger, the situation is more serious in that industry but exists also in fixed winged flying. In some cases, it is clear that licence candidates are selectively seeking low-cost schools, which all but guarantee an outcome for a quoted price.

The chain of events recounted here has been provided to CASA by other sources, along with considerable detail. They relate to the adventures of a pilot we will call "Mr Smith"

A helicopter operator warned the (then) General Manager of the (then) Civil Aviation Authority that another operator at the same airport had been under-recording aircraft flight times. This malpractice, known to be common in some sectors of the helicopter industry, has grave implications for safety because it causes critical components such as rotors and gear trains to overrun their maximum safe service lives.

The regional manager was asked to investigate, and found that there were various anomalies that were confirmed as far as the operator was concerned, but which also drew attention to the way the operator was being regulated. He called in the CAA's locally-based helicopter experts, who confirmed his concern that the responsible FOI, Mr Smith, was "too close" to the operator and also that his qualifications were somewhat suspect. In fact, he had been 'moonlighting' as a pilot for the operator.

This gave rise to an investigation of Mr Smith's qualifications, which found that he had joined the Authority without an instructor rating. The CAA had paid for his Grade 3 training and rating, which was issued following a flight test by a helicopter-rated FOI.

Mr Smith's Grade 2 rating had later been signed off by another FOI, and later reviewed again by a third, although both the latter FOIs were fixed wing pilots. It was also upgraded to a Grade 1 instructor rating at a later date, by the same FOI who had signed the Grade 2 upgrade.

One of the minimum experience levels required for a Grade 1 rating is that of having completed 400 hours of *ab initio* flight instruction.

The question was flagged to the regional manager - how did Mr Smith, a helicopter FOI, accumulate 400 hours of "elementary instruction" as a CAA employee following the issue of his Grade 2 rating? And that question became the subject of the investigation.

As a result of that investigation the (then) regional manager instructed an investigator to explore Mr Smith's records, and as a result of the findings he issued a show cause notice as to why Mr Smith's instructor rating should not be withdrawn. The rating was subsequently withdrawn.

The Australian Federation of Air Pilots then wrote to the regional manager asking why he was taking this action, saying that the action could not be substantiated legally. There was then a delay on the further investigation because there was a review of the (then) CAA by an ex-Qantas pilot consultant, because "there was some concern as to how the CAA was being run. "

During the delay another letter from an AFAP official said the matter had come under that organisation's scrutiny and enquired how the manager could pursue this course. The manager responded that he had taken the action, and that that was the end of the matter.

CAA's lawyers then became involved, and the whole exercise was reduced to the question of the definition of "elementary instruction," and of how fixed wing FOIs could conduct helicopter instructor flight tests – in aircraft on which they had no qualifications.

The lawyers said that the regional manager really didn't know what was "elementary instruction," that he had no backing for use of the phrase because there was no legal definition of it in the regulations.

Below are the current regulatory prescriptions. It is not known whether those definitions applied at that time, although the information would (theoretically) be available from CASA archives.

CAO 40.3.7

4.3 An applicant for the issue of a flight instructor (helicopter) rating grade 1 must:

(c) have at least 1,200 hours of flight time as a pilot in a helicopter, being flight time that includes at least 400 hours during which the applicant gave elementary helicopter flying training.

And in both definitions:

> ***Elementary helicopter flying training*** *means flying training in the sequences set out in the helicopter syllabus that are required before a person attempts the general flying progress flight test for helicopters.* (From CAO 40.7.3)

However, the CAA lawyers in Canberra said there had been no definition of the qualifications of an FOI in the legislation or the rules either. The CAOs only said that an FOI, inspector (or whatever designation was in use in those days) may conduct tests but did not state the qualifications required of an FOI, although there were industrial agreements that referred to the designation. In effect, that meant a Boeing 747 qualified FOI could conduct a flight test on a helicopter pilot because there was no reference to qualifications for FOIs.

Mr Smith's ratings were restored, but only based on advice from CAA lawyers that they lacked the authority to cancel them. Later he was told that Mr Smith would be "briefed on the difference between elementary or *ab initio* training" - definitions of which most Grade 1 instructors would already be aware.

"In effect," says our source, "the outcome of all that was that CAA had acquired (at its own or at public expense), a flying operations inspector whose signed-off qualifications have never related to his entitlements or to his demonstrated abilities. And please be reminded, that the outcome of all this is that you have an individual who is now feeding other incompetent instructors into the training system; a situation that results in continuing degradation of the product quality of a large section of the helicopter pilot training industry."

Having later left CAA/CASA with all those qualifications intact including his ATO designation, Mr Smith had been operating in that role ever since, and had become well known as the ATO of choice for many pilots with proficiency problems.

One of these, another pilot whom we'll call Mr Jones, approached Smith seeking a renewal flight test for a Grade 1 helicopter pilot instructor rating. Mr Jones had recently undergone two separate rating renewal tests. The first was with the proprietor and CFI of an Archerfield flying school. A CASA FOI oversaw the flight test at the request of the instructor, because the CFI was aware that Mr Jones was a pilot of doubtful proficiency. He failed that test and the FOI confirmed the decision.

The proprietor and CFI of a Sunshine Coast flying school, also overseen by CASA FOI, conducted the second test but with an identical outcome, Mr Jones was not seen for some time after that, because he had gone to New South Wales and contacted Mr Smith, who passed him on his Grade 1 instructor flight test.

On his next appearance in the area Mr Jones was flying a Bell Jet Ranger with its new owner aboard when he decided to demonstrate a simulated engine failure and auto-rotational landing. An extremely heavy landing seriously distorted the tail boom, but a court has been told that regardless of that Mr Jones flew to the opposite side of the airfield, and the helicopter was transported to another airport before details of the accident were notified. Related matters are still before the courts.

The above events have been detailed to us by reliable and informed individuals who are at a loss to identify any positive safety outcomes from these matters.

* * * * * *

The operators of reputable flying training organisations remain concerned that "rogue" ATOs acting both as individuals and in some cases CFIs, are continuing to put commercial pressures before their professional obligations. They also believe that the demand for well-qualified helicopter pilots is forcing CASA to engage underqualified FOIs.

CASA Director John McCormick recently admitted to a Senate committee: “It [staff recruitment] is always a struggle, particularly finding helicopter pilots. We compete with the industry for pilots with heavy helicopter experience. As I am sure you are aware, apart from the military, we do not find many people who have multi-engine helicopter experience and we certainly cannot pay the rates that the industry pays.”

In fact, the training industry observes that CASA has become a significant training ground for the heavy end of the helicopter industry. *ProAviation* is aware of instances of pilots with low to middle level experience being recruited, then undergoing enormously expensive advanced training in Australia and overseas at taxpayer expense, and then disappearing into multi-engined IFR jobs in the resource industry. This may suggest a management problem that could be solved in various ways including the engagement of contractors who are prepared to sign return-of-service agreements so that the Australian taxpayer won’t be saddled with the costs of their expensive career development.

The longer-established flying schools believe the heavy helicopter industry is well equipped to assess, check and where necessary train its pilots before or after induction. They believe that the more critical problem continues to be that of identifying and retaining FOIs with the necessary practical and credible training experience to take a proactive part in overseeing and enhancing the quality of basic commercial helicopter pilot training.

Is reform still possible?

There are of course, flying operations inspectors who relate to and have strong professional respect for their industry counterparts. In fact some of them have been known to share their industry concerns and views with *ProAviation*. They also share the disappointment of industry professionals, in the way they say CASA's “personal development program” for CFIs and ATOs is being managed as a platform to talk down to instructors rather than as an opportunity for mutual improvement through professional dialogue. “Death by PowerPoint” is one of their descriptions.

One situation wholly evident in our dialogue with certificate holders, is that a significant number of CASA inspectors, both in airworthiness and flying operations, now exhibit an aggressive "do it my way" approach that sets aside industry’s valid expectations and their own duty definitions. Some reported incidents leave us convinced that there exist matters that merit independent investigation, because they believe CASA would be unlikely to conduct such an investigation in a transparent way. We are also convinced that in at least some cases, “networking” between officials has impeded (and continues to impede) the employment elsewhere of victims of these individuals in a way that should be investigated as to whether conspiracy has occurred. Credible accounts of specific incidents strongly suggest that there are flight operations and airworthiness inspectors who are not psychologically or ethically equipped to interface with industry.

Matters that have come to our attention range from untested but credible allegations that warrant investigation, to suggested lines of enquiry, to amply-documented fact. *ProAviation* is willing to share this information with any properly constituted and transparent investigation.

CASA chief John McCormick told a Senate hearing: “What I found when I got to CASA, as I think we have discussed before, is that there was a significant lack of direction, and perhaps some of the things that we see and we are here discussing may be direct outcomes of some of that lack of direction and focus.”

There were hopes that the next director would not be heard expressing similar frustrations.

Regulatory oversight

Relevantly to this topic, the fates of two recent enquiries which had remained largely ignored at the time of writing, would provide helpful guidelines for any new review:

- The Aviation Regulation Review Taskforce‘s *Report on Activities and Findings*, delivered in December 2007, included comprehensive recommendations on the regulatory review program (RRP) including full implementation by 2011 (That’s now three years ago) of the "priority regulatory parts," options to speed up the process and enhance consultation arrangements, and ongoing

monitoring of the RRP. It also sought continued adherence to regulatory development principles first established by Bruce Byron and since reversed.

- The fate of the 27 recommendations of the other recent report, that of the Senate Rural and Regional Affairs and Transport Committee's unflattering review of aviation accident investigations, was at the time of writing, awaiting the attention of Transport and Infrastructure Minister Warren Truss, whose pre-election comments on these issues had give some cause for hope (now diminishing) that they would now soon be addressed.

If it's good for the industry…….

A significant issue which has been raised many times over many years, is the fact that although CASA personnel are engaged in a large number of relatively complex flying operations, there is no apparent attempt to develop a system that oversees standards and recommended practices (SARPs) within sectors of the organisation that engage in flight operations.

This is despite the fact that CASA flying operations inspectors are encouraged to maintain their flying skills through funding for a specified annual number of flying hours per annum.

It has been suggested frequently, that this funding should be directed to structured flying training and assessment in order to best achieve its stated goals, and that CASA should have at least two chief pilots (fixed wing and helicopter) to focus on standardisation in instructional and flying standards, flight testing and other licensing and compliance issues. It has also been suggested that the Standards Division should hold an Air Operator Certificate and establish flight operations manuals, checking and training system, training manuals and an auditable safety management system, and should be subject to routine auditing as are other AOC holders.

Obviously CASA's Airworthiness and Engineering Standards Branch would benefit from a parallel restructure.

Because both Flying Operations and Airworthiness/Engineering have close associations with relevant trade unions, those relationships should be reviewed to ensure that conflicts of interest do not exist.

Structures, effectiveness and processes

We refer to the following two TORs in the context of relations between CASA and ATSB:

- the structures, effectiveness and processes of all agencies involved in aviation safety;
- the relationship and interaction of those agencies with each other, as well as with the Department of Infrastructure and Regional Development (Infrastructure);

While the major air carriers are able to protect their own interests in ATSB proceedings, this is not the case for general aviation operators or pilots. Although the department's response to the Senate committee's recommendations regarding the Norfolk Island ditching is still awaited, the Panel should be aware that the processes identified in relation to that enquiry are all too familiar in general aviation. As examples, we cite the following three events:

1. Twin Comanche crash at Camden

In this accident ATSB investigators related the separate accounts of the two pilots and appears to adopt the instructor's version which invites the reader to accept that the aircraft enmtered a spin at a height at "about 400 feet" and that the instructor's actions achieved a spin recovery and levelling of the wings before the aircraft impacted the ground. The wingtip tanks were full.

Comment

While it is an excellent training or personal aeroplane when well handled and understood, nobody who is familiar with the PA 30 believes a spin recovery could be effected in less than 5000 feet, especially with full wingtip tanks, while most believed 10,000 feet to be a more realistic figure. Most believe that the recovery at any height with the full tip tanks would be highly unlikely.

While the ATSB recorded some training policies the operator had introduced, it made no recommendations regarding the dangerous practice of asymmetric flight training at low levels, and its recommendations did not include any advice to the regulator on such matters. The ATSB's advice below appears to condone the practice by not censuring it.

This accident highlights the critical importance of conducting the appropriate response actions following both an actual or simulated engine failure in a multi-engine aircraft; and the inherent risks of using the mixture control to simulate a failure at low altitude.

2. DC3 ditching in Botany Bay

Comment

The ATSB/CAA (pre-CASA) interaction in this investigation is, in our opinion, a total disgrace. Correspondence obtained under Freedom of Information and made available to us has convinced us that it will be valuable to future generations to publish a full analysis of this matter which we will be doing in due course. Capt Rod Lovell ditched the DC three into Botany Bay in 1994, after an engine failure on take-off and inability to feather the failed propeller due to maintenance. All 25 crew and passengers on board survived without serious physical injury.

In this event, the interactions between government agencies extend beyond the ATSB to the involved Commonwealth Ombudsman. Here is an example in the form of an email from a CAA lawyer to a CAA district manager which reveals that CAA was invited to "approve" the Commonwealth Ombudsman's eight page formal response to a complaint from Capt Lovell:

> MEMO Canberra Office
>
> TO: XXXXX XXXXXXX
>
> FROM: XXX XXXXXXXX
>
> SUBJECT: LOVELL - OMBUDSMAN
>
> XXXXX,
>
> You will be pleased with the attached draft letter which I have approved to be sent out by the Ombudsman to Mr Lovell. I do not believe that we should necessarily alter any of the contents of this letter as it is reasonable to us and won't necessarily get us any further even if he may not necessarily of [sic] answered absolutely everything.
>
> Another victory!
>
> Regards,
>
> XXX XXXXXXXX
>
> Legal Counsel
>
> [Date]

We believe this correspondence also reflects a cynical and irresponsible mindset that is quite unacceptable in organisations exercising their respective responsibilities in matters of this kind.

3. Whyalla Airlines accident and Whyalla supplementary report

The original report is dealt with in our article, *How wrong can it get*? The supplementary report deals largely with issues other than those our article identified.

Case study: Shooting the messenger

A chain of events that competent, responsive and honest management could clearly have prevented, ended in the grounding of about 65% of Australia's general aviation fleet in December 1999; most of them for almost four months. In-house Civil Aviation Safety Authority documents show that CASA ignored important industry input and supporting evidence, blanketed the whole event through denial, deferred positive action until it was too late, and sought to blame industry.

It was Stan van de Wiel's misfortune to be at the geographic epicentre of these events. With the exception of one other operator, the Royal Victorian Aero Club, his aeroplanes were closest to the Mobil fuel facility, and were therefore among the first to be refuelled from the tanker every morning, and resultingly the most seriously affected.

Mobil's misuse of a chemical cleaning substance in aviation gasoline (avgas) manufacture was eventually identified and admitted to be the contaminant that grounded about 7,000 general aviation aircraft on Christmas Eve, but that wasn't until long after two separate engine failure incidents in one day prompted two responsible Moorabbin operators to ground their respective fleets voluntarily.

Documents obtained by Mr van de Wiel under freedom of information and other sources show that CASA ignored or overlooked numerous indicators that the fuel crisis was developing, and that his persistent questioning of the way the regulator managed the situation led to a CASA campaign to damage his business beyond repair.

Also revealed is the way CASA officials subsequently engaged in extensive plotting of tactics that were clearly designed to disable Mr van de Wiel's business by avoiding due legal process in favour of administrative decisions and actions which are not transparent and therefore do not enjoy the assurance of due process. CASA's actions were taken despite internal legal advice that cast doubt on the validity of the procedures that were proposed, and ignored the observations of the Commonwealth Department of Public Prosecutions and those of one of its own investigators.

Stan van de Wiel believes the FOI documents show that the regulator's attitudes and actions amounted to orchestrated targeting of him as a "whistleblower" for his persistent questioning of the way the regulator managed the fuel quality crisis.

Most of the events recounted here occurred during the tenure of Mr Mick Toller as CASA's CEO, and have not been resolved because there has been no observable and transparent examination of CASA's actions against Mr van de Wiel.

CASA's present Director John McCormick has declined to examine the matter further in the absence of "specific, new, credible and factual evidence." However when presented with that evidence in the form of documents obtained under FOI, Mr McCormick referred the matter to Industry Complaints Commissioner Elizabeth Hampton, who has since indicated that CASA considers the matter closed and suggested the option of legal action. It therefore appears that CASA does not consider the documents obtained under FOI to contain "specific, new, credible and factual evidence."

The "messenger"

Stan had completed his initial pilot training with Schutts in 1968, and by 1971 held the position of chief pilot and chief flying instructor of PilotMakers flying school in Victoria. In those days the processing of his air operator certificate (AOC) took just one week including a site visit from the (then) Department of Civil Aviation (DCA.).

When his wife was diagnosed with a terminal illness in 1980 Stan took his young family back to The Netherlands to be near her family. He immediately had his licenses converted to the Dutch equivalent at the (then) Dutch Government flying school (R.L.S) for his practical tests. On completion he was duly offered a position.

The Dutch were impressed by Stan's practical approach, which he attributes to the (then) prevailing Australian system: "Looking back, I believe the whole approach by respective Australian regulatory authorities has been totally reversed, with CASA now legislating on absolutely everything regardless of safety relevance," he says.

Returning to Australia In 1996, Stan purchased Schutt Aviation. Founded in 1946 by Arthur Schutt, the company had been a major GA business, but events surrounding the JetCorp fiasco had caused it to be

downgraded to a smaller charter, flying school and surveillance operator with its own maintenance facility. The operation was losing $500,000 per year, and Stan set himself the goal of getting it back on its feet. In the first year of operation under his ownership Schutt was breaking even, and had it not been for the fuel contamination disaster, would have shown a healthy profit. Based on that prognosis Stan continued investing funds through the acquisition of several aviation businesses at Moorabbin.

His first involvement in RPT operations began in Oct 1999, as handling and booking agent for Par Avion, of Hobart, which operated from his newly acquired Aus Air terminal. In early 2000, CASA grounded Par Avion for carrying a single passenger from Moorabbin to Flinders Island in a Class 2 maintained aircraft. The passenger had arrived late and had missed his flight but the baggage aircraft had a seat available so the pilot offered it. In fact the passenger was carried in the only non-contaminated Class 2 aircraft operated by Par Avion, whose fleet had also been grounded.

Dec 1999 – fuel contamination.

Because there has never been an open and transparent enquiry, it cannot be established to what degree CASA contributed to the disaster by shutting its eyes to the indicators, or whether it was simply the lack of leadership and professionalism often evident within regulatory bureaucracies. CASA's refusal over the following decade to carry out any follow-up investigation, and the ATSB's March 2001 *Systemic Investigation into Fuel Contamination* report suggests there are highly significant facts the regulators and the investigators still did not want exposed.

The ATSB didn't go out of its way to interview industry, and appeared to accept Prof Trimm's findings at face value. The report does go on to recommend the reinstallation of an oversight process as pre-1992 but CASA ignored this and took five years, finally to respond in the negative.

There had been ample warning.

The first serious contaminated fuel incident on record was a successful forced landing of a light aircraft after an engine failure on Dec 31 1997 at Shepparton, Vic.

Because "sabotage" was suspected the police became involved. Three years later CASA used a Victoria Police photograph of this aircraft's carburettor taken at Shepparton at that time, to demonstrate to the public [on a television newscast] the nature of the contaminant; but all the time denying knowledge of any previous incidents. The owner involved identified his photograph from TV footage. (Name withheld for obvious reasons.)

Then in mid 1998, there were six major fuel system component failures on AusAir Piper Chieftains. Each incident was duly reported to CASA, a logical requirement under then-existing legislation, especially for an RPT operator. The stranding of aircraft and passengers was a financial drain for the airline and a direct cause of its demise in mid 1999. Having purchased AusAir in that year, Stan had since sighted duplicate copies of the incident reports, but didn't identify their relevance until 2000. When he requested copies under FOI in 2005-2007, the request was unsuccessful and no reason was given.

Note: Throughout the rest of this narrative, dates will be highlighted to help the reader follow the sequence of events.

On 22 April 1999, Mobil quarantined Avgas outlets at a number of aerodromes in NSW, Vic, SA and Qld, and carried out tests on fuel from a wide variety of locations. The tests indicated that the fuel at the quarantined sites met the Mobil specification for Avgas, and the quarantine was lifted. Yet in Jan 2000, local operator Bob Hussey retrieved two sealed fuel containers from his hangar at Bairnsdale, VIC, with samples dating back to April. Independent laboratories tested both to determine the EDA content positively. CASA took control of one sample; Mobil took the other, which was never seen again. This event was apparently overlooked in the ATSB's lukewarm final report which focused on systemic failures without identifying specific incidents and accidents in its commentary.

In October 1999 a Schutt Piper Chieftain Charter flight experienced engine surging on takeoff from Oakey Qld. The company submitted an incident report but again no record appeared on the ATSB report or (apparently) in CASA records.

The engines were bulk stripped by a Toowoomba workshop, but a vital clue was overlooked when the fuel injectors were removed and replaced. Months later as part of the "avgas contamination clean-up," The owner discovered that the fuel injectors were blocked with the very contaminant which ultimately caused all the

problems. In this instance however a local CASA AWI had attributed the incident to “pilot error”. Direct costs for this incident exceeded $100,000. Again, the event is not referred to in the ATSB report.

Then in late November 99 during the Schutt Christmas breakup, staff witnessed a helicopter crash at Moorabbin airport while the control tower was not operating. Emergency services attended and the pilot was taken to hospital by ambulance. These events, not detailed in any ATSB report, became classic examples of how proactive intervention by CASA might have averted further incidents. In Early December 99 the problem worsened, with frequent incidents of poorly starting engines and engines failing to idle. This culminated in the detection on Dec 12 1999, of large globules of a foreign substance during routine pre-flight fuel inspections.

The Moorabbin Mobil fuel agent took up the matter in response to Stan’s direct complaint and a refinery chemist attended the next day taking samples. Two days later, Stan’s son experienced an engine failure while flying a company aircraft, but managed a successful landing back on the aerodrome. Minutes later a Royal Victorian Aero Club aircraft, piloted by a student pilot, experienced a similar failure within seconds of lift-off. Fortunately that pilot had enough runway remaining to land short of the surrounding factories.

Dec 16, 1999. At that point Mobil took immediate action through its local agent by advising all clients of the possible contamination of its product. Avgas sales were terminated.

In consultation with the RVAC, Schutts decided to ground all company aircraft until further investigation. In Stan’s case that involved 16 aircraft, a decision not taken lightly considering the essential cash flow generated by these assets. The RVAC followed suit. As required by the Civil Aviation Act, the matters were duly reported to the local CASA, again with the now familiar and almost reflexive dismissal.

Stan and the President of RVAC visited CASA and told AWI Jim Hammond of their findings. Hammond had previously been told by the then Schutt Deputy CFI (Peter Baldwin) in early 1998 about the problem. They were shown the door with gratuitous comments of “old poorly cared for aircraft.” Mr Baldwin described that meeting on TV in Dec 1999.

This time, Stan took the matter directly to the (then) CASA Director of Aviation Safety, Mick Toller, on Friday, December 17. Mr Toller’s reaction was he would “look into the matter.” No evident further action occurred at that time.

However the grounding was enough to attract the media’s attention, and because of the reputation of Schutts, Stan began to receive numerous calls, initially from pilots who had reported incidents of dirty fuel and poorly running engines since late1997. When he later contacted the ATSB about reports missing from its data base, ATSB replied that these “were not regarded as significant,” explaining that “ATSB has insufficient funds to investigate more than a dozen incidents per year.”

On the same day Stan received a call (prompted by media coverage) from a former refinery employee who identified the actual contaminant as Ethyl Diamine, a neutralising agent used to protect refinery plumbing from corrosion, but obviously to be removed from the product line before dispatch. Apparently, the refinery’s dispensing and cleaning equipment broke down regularly as evidenced by the sporadic aviation incidents from 1997 on, as was witnessed by the end users.

“Mind your own business”

On Monday December 20 Stan reported the nature of the contaminant as EDA, again directly to Mr Toller, advising him of Schutt Aviation’s actions and their consequences. Stan’s diary notes record that Mr Toller: “rebuked me and told me I should mind my own business if I knew what was good for me.

“I make no apologies for my very direct way of speaking when I’m dealing with unresponsive bureaucrats who have secure jobs and guaranteed cash flows, and I’m very aware that CASA has a history of selecting its targets from among people who disagree with it, making a decision to act against an individual or company, and then sweeping aside all its obligations by invoking the magic word “safety” in an attempt to justify anything they do.”

Because our 24/7 safety watchdog CASA was winding down for the Christmas breakup it took some time to activate any appropriate safety-relevant reaction, but eventually in an airworthiness directive dated December 23, all light aircraft in S.E. Australia, were grounded on Christmas Eve. Mobil advised all its agents in Victoria, NSW and southern Queensland of the problem, and suspended avgas sales.

“However,” says Stan, ” Mobil couldn’t (or wouldn’t) identify the problem and in late January CASA appointed UNSW Professor David Trim, to analyse the product and provide a solution for clean-up of aircraft systems.” Stan had identified the contaminant to Mr Toller three weeks earlier.

By Boxing Day industry licensed aircraft maintenance engineers had experimented with clean-up methods using an aviation approved additive, only to be threatened in no uncertain terms that CASA would prosecute anyone who carried out their own (non-CASA-approved) method of clean-up. The logic, as well as the legal liability aspects of forbidding qualified specialists to rectify identified problems using approved materials, was never explained.

During this period Mr Skip Fulton, an I.T. specialist in Stan's employ, had identified a similar problem that had occurred in the USA during late 1998 (12 months before) where Exxon Mobil, had experienced similar problems. The article featured on the American FAA web site and that of the oil industry, but back in Australia nobody seemed any the wiser.

Despite the losses due the grounding of the fleet, all Stan's financial commitments were fully met and progress continued. At its peak in 2001 the group employed some 23 full and part time staff including engineering, ground, administrative and flying. Annual group turnover was approaching $4m. By this time Stan had committed the company to a $2.5m investment program, so his interest in a solution was compelling. Later in Jan 2000, during regular fuel contamination "get-togethers" at Moorabbin, a small group visited the Professional Helicopters hangar and saw the contaminant, but at that time there was still no evidence of any positive CASA or ATSB action on the fuel contamination issue.

In the third quarter of 1999 Australian Air Charter Pty Ltd (Aus-Air) went into receivership, a direct result of extensive avgas contamination earlier that year. This had presented an opportunity tor purchase the business and its substantial property/buildings at Moorabbin Airport. Turbo Aero Maintenance was also purchased.

Despite the warning to "mind his own business," Stan continued actively seeking a meaningful response from the regulator in communications with CASA, ACCC, AOPA and fellow-operators. On January 7 he faxed Mr Toller, reminding the director that he (Stan) had his own responsibilities as an AOC holder adding:

"As there are still several thousand aircraft out there flying with possible contaminated fuel systems, it is assumed that it is your responsibility as the CEO of the supposed 'safety' authority to take immediate action to safeguard the flying public. Should such action not be taken immediately, I and the Australian public will hold yourself personally responsible for any accident or fatalities."

At the same time he sent a fax to Transport Minister Anderson, outlining the situation and concluding:

"As you should be aware this is not the only matter of contention with a dysfunctional government institution, and I feel it is high time a parliamentary enquiry into this authority be called. Or do we again have to wait for the body bags to be filled?"

The following day (January 8) Stan sent another email to Mr Toller thanking him for his response in issuing the revised airworthiness directive (AD 78), but also pointing out that;

"Contamination is taking place beyond the filter system. Your field officers are fully aware that in most reported cases the system has appeared clean, only to find after engine failure(s) that it is the carburettor, fuel pump or injection system which has been contaminated."

He also pointed out that the inspection recommended by the AD was therefore "not adequate:

"The reported engine failures in the Piper Chieftain in New South Wales confirm this matter. My concern is that those pilots/owners who have had their aircraft systems correctly cleaned out as per AD/GEN/77 some days ago, as we have, will have met the letter of the law but will be especially vulnerable to failure.

All aircraft that could have been exposed to the contaminated fuel were then grounded on 10 January 2000 by airworthiness directive AD/GEN/79.

4. CASA kept ACCC out of the Mobil case

An approach by several operators to the Australian Competition and Consumer Commission (ACCC) met with a negative response as the ACCC could only act when [the] lead agency CASA requested such assistance. CASA inaction thus obstructed vital legal assistance under the *Trade Practices Act* 1974.

By April 2000, most aircraft were now back in the air, although the total clean-up took a further year to complete.

At this point, although Mobil had appointed an intermediary to handle claims, few were being met and at the behest of AOPA (Aircraft Owners and Pilots Association) Stan reluctantly agreed that Schutt was ideal, representing every facet of GA, to become the lead party in a class action. After months of deliberation as to the legality of such action in the Victorian Court, Stan was approached by the Mobil Insurer and settled to opt

out of the action for $920,000. (an amount established by the insurer's forensic accountant as Schutt's actual losses). Months later he was presented with a $550.000 legal bill in respect of the class action.

In June 2000 the administrator of Island Airlines of Tasmania approached Schutt to manage its RPT flights, and duly obtained the necessary approval from CASA. In October 2000, the Island Airlines management agreement was terminated and the AOC was surrendered. Interestingly the former manager of Island Airlines was issued with a new RPT AOC only two months after applying. At this time Small World Travel agency (SWT), a tenant at the new Schutt building, approached Stan (Schutts) about conducting charter flights for the now stranded passengers to Flinders Island and Launceston.

Again approval was sought from CASA as the nature of the flights could be seen (depending on interpretation) as contravening the *Civil Aviation Act* 1988 (Regulation 206.) CASA advised that as long as flights were conducted as "charter" and through an agent, there were no objections. (In 2009 CASA changed the "policy" to disallow such a "charter substitution arrangement" officially, unless it has given written approval for the arrangement.

This issue is central to events surrounding Schutts. At least two CASA directors, Mick Toller and John McCormick, have publicly acknowledged that R 206 is a "bad regulation", but notwithstanding that it has been variously misused over many years as a regulatory blunt instrument, having been inconsistently and unpredictably applied by various CASA regimes in various regions. The basis of all controversies relating to the question of what does, and what does not, comprise a regular public transport operations.

At one point Mr Clinton McKenzie, CASA's (then) General Manager of General Aviation Operations published and circulated a mini-thesis in the form of a policy document which introduced the concept of an "interposed third party." The policy put forward was that if an entity that was "unrelated" to the operator chartered the entire aircraft and then sold seats to separate travellers or groups, this would in some unexplained way be legal (safe), provided there were no personal or corporate connections between the carrier and the chartering entity. This has been described as an "arms length" relationship; however the expression is not defined anywhere in the Act or regulations, and has given rise to considerable dispute because to this day it is still being randomly and inconsistently applied, apparently at the whim of individual officials. The CDPP later raised this as an objection in one of its letters to CASA relating to CASA investigator Geoff McLaws' report (see later.)

This concept has provided lush grazing for amateur lawyers and professionals alike, and in several instances an operator has been shut down for alleged non-compliance, only to be replaced by another who appeared to be doing exactly the same thing.

Simply put, Regulation 206 seeks to define the differences between a charter flight and an RPT flight by specifying that it is an RPT flight if it is conducted "between fixed terminals", "to a fixed schedule," and is "available to persons generally." (These definitions are derived from the now defunct "Two Airline Policy" and provided freedom from competition to the duopoly. The issue has no discernable safety implications.)

On Sep 20 2000 Stan met with CASA team leader Matthew Anderson and area manager John Botham to outline the arrangements Schutt had agreed with Small World Travel Pty.Ltd. On the same date he received a letter re-stating CASA's position that a flight was considered to be not a charter but an RPT operation, if it carries "persons generally", and operates at fixed times from fixed terminals, where the operator determines the times and the terminal. The letter ended by stating:

"*If what you are doing satisfies all these triggers, you would need to stop your operation until you have an authority on AOC authorising RPT operations*."

The arrangement as outlined at the meeting met with the charter requirements as the client was an independent travel agency, an element which then validated the legitimacy, (read safety) of the flights. Such flights had been conducted since September 2000 and CASA had no problem in renewing the Schutt AOC in March 2001.

In November 2000, Stan negotiated purchase rights to acquire RPT AOC holder Uzu Air (in liquidation). Stan and his co-directors of RegionAir Express (the entity for the proposed airline) met with CASA representatives Botham & Anderson, requesting acceptance for its use on Bass Strait/Tasmanian Routes. The CASA officials categorically stated that they wouldn't consider that, even with proposed changes, but Mr Botham declined to affirm that decision in writing. CASA however offered to process a new RPT AOC application within six to eight weeks. It was later established that CASA has no head of power to refuse the Uzu Air application and that these were again purely personal interpretations by CASA, which frequently quotes "policy" in addition to

what is substitution for references to regulations. The word “policy” is not to be found anywhere in the *Civil Aviation Act* 1988. Such “commercial” determination also deprived Uzu Air creditors of a substantial amount.

It is against that background that issues raised by CASA in relation to Stan’s activities need to be considered. In 1998 in the second reading speech of his amendment Bill, Minister John Anderson expressed the need to remove any reference to “Commercial” from the legislation as CASA was only charged with a “Safety” role as regulator. Under the *Acts Interpretation Act 1901* this then also became law. In 2013, CASA has still not recognised or acknowledged this.

At this time, another point of contention between Stan and Moorabbin-based CASA officials began to emerge. From 1998 onwards, Stan had reported various safety matters to CASA as he observed them as chief pilot and CFI of Schutts, as mandated by safety considerations and plain airmanship. He records that such reports, some of them mandatory and confidential, were either dismissed or not acted upon, and he had a strong impression that these interventions were unwelcome.

An early example was the case of a foreign student who had gained an Australian CPL at another school and had registered with Schutts to train for an instructor rating. A fellow-student reported an incident involving the trainee on a night flight where he was completely “unaware of his location” (lost over Bass Strait):

“When this was reported I decided to test the trainee with a simple navigation exercise, which he failed in virtually all respects. I wrote to the Moorabbin CASA manager Bob Greenwood about this and about six months later on the eve of that manager’s retirement he visited me in regard to that report. I wanted to know how ‘safety’ could be guaranteed for such a licence holder other than my refusing to rent him an aircraft. This individual’s (Indian) parents had scraped together the monies to support him, yet his document was a licence to kill himself and possibly others.

“As far as I know my report was never acted upon.”

Not discouraged, Stan continued to act appropriately and within his area of responsibility, in terms of moral and legal obligations, a “safety culture,” or simply “duty of care.” Those commitments have since been enshrined in regulation 5.4 of the *Transport Safety Investigation Regulations* 2003. Although getting lost over Bass Strait at night isn’t specifically listed in the regulations as a reportable matter, they do define at least two reportable matters that could result from getting into that situation, for example if “flight into terrain is narrowly avoided” or “the supply of useable fuel becomes so low that the safety of the aircraft is compromised.” Clearly, if the pilot had been alone as was permitted by his licence, the flight would certainly have resulted in a fatality, and Stan makes absolutely no apologies for reporting the incident as was his duty. In this case the safety experts offered no solution and took no apparent action.

“A slippery operator”

February 12, 2001 Correspondence finally obtained under freedom of information provisions shows that from the time the (RPT AOC) application were raised, various involved officials energetically opposed the application to a degree that was inconsistent with their undertaking to process it within six to eight weeks. A flurry of e-mails between nine CASA officials was triggered when FOI Tim Baker warned his colleagues on February 9:

Gents, be careful. Stan van de Wiel is a very slippery operator and he will do anything to get his hands on a LCRPT [low capacity regular public transport] *AOC, which will include playing both the airline office off against the GA office (sic.)*

DON’T LET THIS OPERATOR PLAY OFFICE POLITICS WITH US” (emphasis added with 29 exclamation marks.)

The reference to a “LET 420″ relates to discussions Stan had already had with CASA officials regarding the introduction of a 19-passenger LET 420, a “commuter” type Czech Republic aircraft certified by the FAA. Stan accompanied the Czech company pilot to fly the newly acquired LET down to Moorabbin and it was parked there for almost six months whilst the LET Engineer In Chief visited CASA Canberra – a useless exercise! The LET engineer with all his experience dealing with third world countries said he had never experienced such lack of interest!

It is unclear exactly where in his life experience Mr Baker acquired a talent for identifying “slippery operators” and forecasting their business strategies, unless of course it was during his CASA legal training induction course. These remarks were circulated at the time of considering the renewal of the AOC, which despite the various comments ultimately went ahead.

Mr Botham proposed a somewhat less direct approach that also displayed a better understanding of freedom of information access procedures:

I am perfectly happy with the situation. Tim’s dramatic comments are quite unnecessary as we will take each application by Schutts as it comes and take any action as required. If they gain an RPT AOC with small aircraft and then ask to have the LET 420 added, we will simply hand over to you or your inspectors to assess the application as appropriate.

In March 2001 RegionAir Express Pty Ltd filed an application with CASA for an RPT AOC, which was finally issued as a “charter only” AOC in January 2003 – considerably more than the “6 to 8 weeks” that had been the undertaking and only after Stan was forced to resign as Director, and not have anything to do with the company. The applicant who took over the company under contract was later threatened with criminal charges, for allegedly having made a false statement as to Stan’s ongoing role as then sole shareholder. (The company had been sold subject to approval and only a deposit paid, hence Stan held the shares as collateral.)

In the meantime the ‘Charter’ operations had been ongoing since September of the previous year, this with CASA approval, but FOI Baker didn’t agree and decided to impose certain conditions of his own. These included changes such as designated “escape routes” and nominating a radio operator at base. All were adopted as part of the Company’s procedures, albeit Schutt being the only charter operator in Australia to be required to do so. Also further notices were placed in the terminals identifying charter flights with Schutts, these arrangements were all negotiated with the CASA field officers, who were reluctantly persuaded by those actions to recognise the interim arrangement as a charter operation. However the operations continued to be referred to by them as ‘RPC.’ (Regular public charter), a designation raised by the FOIs on one of their visits.

In April 2001 a “routine” CASA operational audit was carried out for the stated purpose of renewing the company’s AOC. FOI T. Baker, carrying out the audit, was negative in his report to his supervisors, who censured his comments and renewed the company‘s AOC without reservation. Stan had been alleged to be using “loopholes”. CASA’s internal response was: “if there are loopholes, we should close them.” This “loophole” has more recently (May 2010) been closed by amendment of Civil Aviation Order 82.0 – 3C Conditions relating to charter substitutions. Up to this time several N.T. based ATSIC communities operated flights on the same basis, albeit without the additional safety precautions, nor CASA action.

May 01, 2001: From this time onward, CASA employees Baker and Rushbrook began almost daily surveillance of the company’s operations in the form of “ramp checks” – the pilots and regular passengers began to complain as they saw this as an intrusion if not downright harassment and intimidation.

May 02, 2001: The company purchased an additional Piper Chieftain, a Class 1 (Airline standard) maintained unit. CASA however “required” it now be maintained in Class 2 maintenance, an allegedly inferior standard applicable to charter category. Stan protested but was forced to downgrade the aircraft to comply – being thus compelled to operate at a theoretically reduced level of safety, for unexplained reasons.

Around mid 2001, detailed personal information only known to certain CASA personnel began to appear on the “Professional Pilots Rumour Network” (PPRuNe) blog site. The sources of this information were identified as two CASA Flight Operations Inspectors who were deeply involved in matters related to Schutt. CASA was duly advised of this, but no perceptible action was taken.

A nocturnal near miss – August 2001

Schutts regularly carried out scenic flights at night for local businesses, over the city of Melbourne. On one such occasion returning to land, the Chieftain with ten occupants was on short final to 17L when Stan (as check pilot) remarked that he was losing sight of the runway lights. The Pilot flying had no problems but before he could answer Stan took control and veered the aircraft off to avoid an unlit Piper Warrior only meters ahead of them:

“The passengers who caught sight of the Warrior now lit up by our lights were impressed. Little did they know how close to a mid air we had come? The incident was reported with the purpose that it should be a lesson to all. I made the recommendation that when the tower was closed as on this occasion, pilots allocate

themselves a sequence number turning “base” according to their perceived position. Such number is generally allocated by ATC during tower operating hours. The next day I spoke with my by now regular CASA contacts, Anderson and Botham who appeared incredulous at such a suggestion. 11 months later a young pilot died when she landed her Cessna on top of another Cessna on short final, Inclusion of my recommendation could have saved that life; at least her flying school has now adopted my recommendation. Since neither CASA nor Air Services Australia appears to have bothered, it’s likely they haven’t quite identified the safety implications.

“It was never my aim to have penalties handed out as a result of my reports, but rather I sought for everyone to learn from another’s experience. The “unlit” Piper Warrior was possibly being flown by a student simulating an electrical failure! Yes, some solo students appear to practice this as taught by their instructor during a dual training flight. In the Warrior it is easy to extinguish the navigation lights by rotating the dimmer switch too far! Did anyone learn? Surely not, judging by the reaction from the two senior CASA officials. Did the ATSB feel this was worthy of a report if not a study? Apparently not. In 2004 Stan submitted a related article to the CASA Flight Safety magazine but it was rejected. The implications for CASA due its inaction were again too great.

Aug/Sep, 2001

There was a considerable internal exchange of letters between Moorabbin and Canberra relating to halting the processing of the RPT application, based on the position that Stan was not considered suitable as a director whilst the cancellation action (September 2001) was in progress. Stan was developing the impression that CASA was becoming less and less committed to processing his RPT AOC application inside the eight weeks as had been promised; and more committed to trashing it.

2001 Sep 15

In view of the events of 9/11 and the demise of Ansett Airlines five days later, RegionAir Travel decided to cease taking bookings for the Bass Strait flights. Existing bookings were honoured up to November 2001. Fear of flying had set in, especially with foreign tourists.

On Sept 1 AviaTour Pty Ltd (t/a RegionAir Travel) took over as travel agent from Small World Travel. Despite previous consent, it was now claimed (by Botham) that this arrangement was no longer at “arms length” as Stan was also a director, and that therefore it did not align with the CASA consent provided earlier. At CASA’s (Botham’s) suggestion Stan resigned his directorship although CASA (according to its own directives) has no authority to dictate company structures or affairs. The term “at arms length” is not defined in a legal context, nor does it appear in any CASA publication available to the public – the CDPP pointed this anomaly out to CASA but the advice was disregarded entirely. Stan again consulted his company’s legal advisors, who dismissed the CASA claim, stating that this was another of CASA’s own interpretations of the Act.

Comparing & plotting strategies

As shown later in emails (finally) obtained through FOI it was clearly becoming the corporate view that “an example has to be made of this operator.” Here now was the chance under the guise of “no longer at arms length.” John Botham drafted a letter to Stan which said in relevant part:

We have received legal advice that your operation is in fact an RPT operation. As Schutt Flying Academy (Australia) Proprietary Limited does not have RPT listed as a permitted operation of its AOC, I would ask you to cease the operations immediately, otherwise we will be forced to take further action.

INSERT FOI BOTHAM PRECEDENT (2)11 (Probably a drafting instruction – Ed .)

Stan never received that letter, presumably because it was a draft sent to another CASA office as a suggested letter.

In its place, he received a letter dated September 26 2001 signed by John Botham, the letter having been “vetted” by CASA’s (then) Office of Legal Council, containing a statement from the OLC which was obviously not intended to be included in the final document. The letter said in part:

We have received legal advice based on the information presently available to us that your operation is in fact an RPT operation.

Following that statement, the person who had drafted the letter had inserted the obviously in-house comment:

[Not sure that we can be so definite but if we're not the rest of the letter is weakened.]

The inadvertent bracketed comment confirmed that CASA's legal office was questioning whether it had any legal basis at all for demanding the cessation of flights, and that its contents were therefore purely threatening. (A copy of CASA Board minutes quoting this letter and advising staff not to repeat any such oversight was obtained under FOI in 2005-07.) The letter then reverted to the earlier draft, stating that legal advice to CASA was that it was an RPT operation, and asking that it be ceased immediately to avoid "further action."

Interestingly, the Board letter could be construed in either of two ways; either criticising the incompetence of leaving such a remark in the document, or indicating that the Board concurred with the action being implemented, irrespective of its accuracy or legality.

"Clearly there were those in CASA who wanted an example made of me," says Stan. The information released under FOI where CDPP had recommended against action is reason to call the subsequent action vexatious. Also the ultimate sign-off by Mr Ian Ogilvy contrary to the provisions of CASA's Compliance & Enforcement Manual seems to have provided Mr Toller an escape route. In an earlier letter to MP Warren Entsch, Toller explains that a cancellation is taken seriously and as such is "a decision taken at the top."

2001 Nov 01

CASA investigator Geoff McLaws requested all flight operations records, same to be returned once copied. As part of the FOI application, a document was reluctantly disclosed four years later relating to the CDPP's refusal to allow a "search warrant" for any of the company's documents. There was nothing to hide; all documents having been reasonably available for the asking. There was absolutely no challenge as to the flights having taken place! Reports released under FOI confirm that at all times during 1999 – 2002; the company complied with all CASA requests and directions in regard to flight operations.

2001 Nov 26

Stan received two notices from CASA on Nov 26 2001; one demanding that he show cause why his approval as chief pilot, and the other why his company's AOC should not be cancelled. On these issues, the CASA website detailed the action taken against Stan and the company, available for public notice. Stan immediately engaged legal counsel and a written statement was prepared. At the same time the first request was made for the removal of the details from the Website, but no action was taken and the details remained displayed for the subsequent 15 months. Even when ordered by the AAT (April/May 2002) on several occasions to amend the details CASA simply ignored the matter. CASA has since ceased the practice, and now limits itself to stating the details of an actual suspension or cancellation. In 1998 in respect of the Commonwealth's liability the Attorney General's Department had warned all departments against this practice, the Commonwealth being liable for any defamation action.

Nov 27 2001

A "show cause meeting" was scheduled and held on January 15 2002. John Maitland represented Schutt, and its area legal counsel Trevor Killmier, local manager John Botham; flight operations team leader Matthew Anderson; and an airworthiness inspector represented CASA. It is standard procedure at such meetings that guilt is presumed over innocence and the apparent purpose of such meetings is to determine the strength of the respondent's case and identify any weaknesses in CASA's position. As usual all questions were fielded by CASA and no decision was forthcoming at the meeting. A final decision was left to CASA Delegate Ian Ogilvy, whom sources say never attends such meetings, inviting the inference that he relies on the views of those attending, who are normally the original initiators of the action.

In March 2002 CASA Chairman Ted Anson invited Moorabbin-based industry representatives to attend an "Open Forum" at Moorabbin Airport Victoria on April 17. In response Stan wrote to the Chairman and individually to each CASA Board member seeking answers to a series of (outstanding) questions relating to industry matters such as prosecution of Mobil and compensation to Industry in general and for CASA's role in the Avgas contamination "cover-up." This was clearly intended to avoid embarrassment should such questions need to be asked during the forum, and also to allow answers to be given as part of the CASA presentation. Note: at this stage CASA was still to respond to the ATSB finding, and finally did so a further two years later.

Certificates cancelled

April 16, 2002: No answers to Stan's questions to the Board were forthcoming with the exception of "Notices of Cancellation" of Stan's chief pilot approval and the company's A.O.C. These notices arrived by facsimile late on the eve of the "Open Forum."

A quote from an internal CASA Legal (in confidence) document written on the same day details the issues of policy and tactics which appear to have replaced considerations of due process and natural justice:

OLC believes that this is a borderline case and were it to appear before the AAT, that the results of a review could not be guaranteed. However, both OLC and the Area Office argue that it is an important policy position to take action against Schutt, in order to dissuade other companies from attempting to circumvent legislation in this way.

It has never been explained, exactly what specific piece of "legislation" Schutt was attempting to circumvent, nor has the sudden shift from an arrangement reached in consultation with CASA, the treatment of the whole matter as a regulatory breach. (Copies of the notice of cancellation of the AOC and chief pilot approvals were attached.)

At this stage it had taken five months to "ground" an allegedly unsafe operator which had already ceased all disputed operations. After the September letter from Botham, the intimidation of pilots by Baker and Rushbrook, licence checks and other forms of harassment, along with the effect of the tourist downturn, it was decided to cease accepting all Tasmania charters.

Schutts had been conducting "regular" charter flights from Moorabbin to Launceston via Flinders island which were now all discontinued. RegionAir travel employed six staff in connection with bookings, flight handling at Launceston and Flinders Island and business promotion. These were all dismissed. As for Schutt, it lost several hundred hours of aircraft utilisation from Moorabbin and several pilots sought alternative positions. Stan had recently invested some $600,000 in the refurbishment of one Piper Chieftain, with a rebuild from the ground up. This aircraft sat idle for several months.

The loss of the AOC and Stan's chief pilot approval meant that the company could not operate any commercial flights or training, and this led to the demise of the whole company. The adverse publicity initiated by the CASA was enough to drain the student and private pilot base even when an alternate CP was employed.

It was later noted that Ian Ogilvy, a manager/delegate at CASA, but a person specifically not authorised to sign such notices of cancellation, had signed the notice. CASA in its "*Enforcement Manual 2001*" sets out a strict detailed "schedule of authorised persons" in the manner of a "flow chart." Under FOI request 2005-07 no copy was made available. At the 2002 AAT hearing, at Stan's request, CASA provided a "back-dated", copy of Mr Ogilvy's delegation which still didn't comply with its *Enforcement Manual 2001*.

At the "open forum" accompanied by several others, Stan approached Mr. Anson and asked him to explain the "notice of cancellation". Anson acknowledged that he knew about the issue but told Stan to approach CEO Mick Toller about a meeting. Stan immediately approached Toller, who denied all knowledge when challenged. Anson knew of this immediately and opened the Forum with a statement that: "if there is any trouble here or insinuations against CASA, I will close the meeting immediately."

It is not made clear how a Chairman of the Board should be acquainted with such operational matters while CEO was not. Censored board minutes later released under FOI indicated that Mr Toller had been equally well informed.

At a Senate Estimates Hearing in 2002 Mr Toller stated when questioned by Senator O'Brien, that he had "met with [Mr van de Wiel] in early 2001 at Moorabbin Airport, and had had extensive discussions with Mr van de Wiel, regarding the Fuel Contamination issues and these were resolved." While Mr Toller did visit Moorabbin and address a group of industry representatives, he did not meet with Stan at any time, despite a meeting having been requested. The matters were never resolved. Stan remained in his office all day awaiting Toller's arrival and had alerted staff to call him immediately. He did not appear. Toller's diary details for the day were not made available under FOI.

Stan's (then) legal counsel applied to the AAT for a "stay" which was granted, initially with him as chief pilot for one month. Thereafter a new chief pilot had to be engaged. CASA fought vehemently against the granting of the stay, producing demonstrably concocted evidence against his person and stressing the seriousness of

the “safety” aspects of the situation. Resultantly, as of November 2001, the company had voluntarily ceased the disputed charter operations.

The CASA *Enforcement Manual* specifically required all evidence to be available *before* the issue of a show cause notice. As revealed later under FOI (2005-08) no tangible evidence supporting the decision had been available at that time, which also explains the CDPP’s refusal to act, as there was no case to answer. CASA’s in-house legal advice was that: “this is a difficult case.”

Stacking the cards

Internal CASA correspondence finally obtained under FOI reveals the mission-oriented in-house deliberations that can be applied in a hostile action against a certificate holder. The inescapable impression that the dialogue provides, is that a decision has been taken to take action that will result in Stan van de Wiel leaving the industry, and that nothing that does not support that outcome is worth considering.

In an e-mail to FOI Julian Smibert and Moorabbin manager Matthew Anderson, CASA lawyer Trevor Killmier laments:

> *There is no specific “fit and proper” test which AOC applicant must pass which is a pity.*

But all is not lost, as he hastens to ensure his colleagues, discussing the options that remain available through administrative decisions, without resorting to legal processes which are unreliable because they are subject to all sorts of inconvenient prescriptions:

> *There are other tests though under section 28 CAA [Civil Aviation Act] which achieve much the same.*
>
> *Firstly, we must be satisfied the RegionAir is capable of complying with legislation that relates to safety.*
>
> *A company can only act through its officers and employees. Given the facts and circumstances of the action we are principally taking against Schutt and Van de Wiel personally, with him and Grant in control of RegionAir, I do not think we can be so satisfied. After all, we are alleging that Schutt is running unauthorised RPT and those operations are run at a lower standard than they should be. That’s a safety issue arising through a breach of the legislation.*
>
> *Of course, if RegionAir did get its AOC, we might expect the people involved would lift their game to meet the appropriate standards, but the flagrant disregard of the law by them at present would cause me to doubt their resolve to comply.*

Having made that assertion, one might have expected Mr Killmier to march Stan and/or his company into the courts charged with “flagrant disregard of the law,” however he declines to identify the disregarded law, and no such option has been discussed in any of the material we’ve seen. This Instead, Mr Killmier offers his colleagues some guidance on various administrative processes that may help scuttle RegionAir Express’s application for a low capacity RPT AOC:

> *Secondly, for much same reasons, how can we be satisfied that the organisation is suitable to ensure the operations can be carried out safely? These people are vital components of the organisation.*
>
> *7.19 of the AOC manual deals with how we become “satisfied” and you might want to have a look at that too.*
>
> *At this point, we have 3 choices. Delay, request more information or refuse the AOC application.*

The tactical analysis that followed almost defies belief as it represents a dialogue on three possible ways to abuse the administrative decisions process in order to achieve a defined goal.

> *Refusal is probably justified for the reasons above but that decision would be reviewable in the AAT.*

How inconvenient! Surely there’s a non-reviewable way?

> *Tactically, it would be better to see what Schutt and Van de Wiel have to say in the show cause process and make up our minds after that. If we take no action against Schutt, e.g., the Regionair application is likely to proceed successfully and we do not have the complication of a review running with a show cause process. If we cancel or take other action on the Schutt/Van de Wiel, we are in a better position to deal with a review of that decision and any that results from the probable refusal of the AOC.*

Hmmmm – let’s bookmark that option for the moment. What else can we get up to? Well,…….

> *Delay is also an option. We could delay processing the AOC application until the show cause is resolved. This also seems the fairest thing to do by Van de Wiel too. A refusal now is no help to him.*

Perhaps this could be explained to him if he starts pushing for a result. I think it is reasonable to say to him that on the information available to us at present, we could not grant or recommend the grant of AOC. The disadvantage of this approach though is that he has not [been] given an opportunity to convince us to progress with the application. In theory he could take proceedings to compel us to make a decision. In a practical sense, this prospect might be discounted but he could make some mileage of the situation – we are holding up an important authority and his new airline on the basis of the alleged problem with a separate operation. It might look as though we've made up our minds too.

Well now, that would never do would it?

The third alternative is to put the problem back to him. Under 27AC we can require Regionair to give us further information that is reasonably required for us to consider the application. I am not sure exactly what the notice might say but I expect along the lines that we have concerns as above and matters which we need to be satisfied about under the legislation.

This appears to be an open proposal to abuse process by prevarication.

Please convince us that the Regionair operation will be safe given the apparent attitude taken by Van de Wiel (and Grant?) in the Schutt operation. It would probably look a bit like the show cause further at least in part. It would be difficult for him to respond and my guess is that his legal advice will be not to until the show cause matter is sorted out. This gives us a legitimate reason to delay under 27AF.

Whatever we do is likely to be untidy. Our recommendation is to give Regionair a 27AC notice and see what happens from there. If nothing else, we gain some time and Van de Wiel has the opportunity to have his say in the process. I'm happy to help with the drafting.

2002 Apr 16

In a letter dated April 16, signed by Mr Ogilvy, Stan's chief pilot approval was cancelled on the grounds that as chief pilot he had failed to ensure that Schutt's operations were "conducted in compliance with the Act, the Regulations and the Civil Aviation Orders." Note: at this stage all Tasmanian Charters had been cancelled since Dec 2001 – four months earlier.

The rationale for that decision was Mr Ogilvy's assessment that "Regionair Travel appears to function solely for the benefit of the company and not as an independent travel agency." Aviatour t/a RegionAir travel was duly licensed as a travel agency and carried the required insurances, Aviatour also held its own AOC for charter, used extensively for its outback tours. This AOC could not be used for Tasmanian routes as then it would have been RPT – this was the loophole. But Schutts, an independent AOC holder and recognised as a separate company (legal entity) by CASA, could operate such flights, hence the need to introduce the "transposed entity" document in 2009 by John McCormick. It was not explained why, if the legislation used against Stan was adequate, there was any need for change; nor why it should have taken nine years to remedy such an "unsafe" situation?

Unbeknown to Stan, nor submitted to the AAT (September 2002), in October 2001 CASA's Manager, Enforcement and Investigations, Mr Rob Plaice, had assigned investigator Geoff McLaws to investigate whether Schutts was conducting RPT services whilst only holding an AOC permitting charter operations. Mr McLaws' report which was returned on June 17, 2002, made *inter alia* the following points:

1. Until September 2001, Schutt's were operating this service (with Regionair livery) under an arrangement that satisfied CASA's policy on the classification of charter and RPT operations; i.e. that an 'interposed entity' (Small World Travel) existed which stood at arms length from Schutt's and that entity arranged travel on Schutt's behalf.

2. On September 1 Small World Travel withdrew from the relationship and was replaced by Aviatour P/L, of which Stan van de Wiel was also a director.

3. Although there was no travel agent activity at the premises to support the contention that a similar arrangement existed and was operating in the same way as the arrangements with Small World Travel,

4. On December 21 McLaws had recommended against further action 15 but also recommended that CASA should at least consider action to refer a brief of evidence to the Commonwealth DPP for consideration of prosecution.

5. He had received approval to proceed with the investigation with a view to preparing such a brief, and the Australian Federal Police submitted an affidavit to the DPP for

approval to go before a magistrate to seek a search warrant to access documents viewed as essential to freezing the money link between Stan van de Wiel's companies and the existing and previous travel agencies.

6. After asking and receiving further information, the DPP wrote: 'Having perused the supporting documentary evidence, we have serious concerns with this application. More particularly we don't believe that the material contained within the present draft affidavit would provide sufficient justification for a valid search warrant and we urge you to consider meeting with us to discuss this application further before proceeding.'

7. When the issue of dual directorships was raised, Stan van de Wiel had voluntarily removed himself as a director of AviaTour, and: "At every stage that CASA took issue with the arrangements that apparently existed, Schutt's or van de Wiel answered CASA's concerns and this included removing himself as a director even though he had sought independent legal advice that he need not do so."

8. "The central issue that the DPP have difficulty with, in proving that an offence has been committed, is that at law, companies are legal entities having separate identities. As such they would be treated independently by a magistrate who would in all likelihood, based on the CASA policy, not issue a search warrant. In fact the magistrate was likely to view the exercise as a "fishing expedition" It was added that should their office receive a brief of evidence on the matter, a similar view would be likely to be taken and it was unlikely that they would initiate any prosecution action based on this view and on the prosecution policy of the Commonwealth.

9. For the reasons outlined above, the DPP's view is that a prosecution could not be implemented or proceeded with by them because it was not in the public interest and it was highly unlikely that it would succeed. I herewith request approval to cease the investigation of this matter forthwith and approval not to submit a brief of evidence to the DPP."

This crucial document was finally obtained from CASA in 2006 under FOI.

The immediate outcome of the chief pilot approval decision was that the company was compelled to cease all flying operations until an initial stay was granted allowing Stan to continue as chief pilot for one month only. However the continued publication of the cancellation was abused by competitors who approached clients directly with a print-out!

CASA refused to approve several candidates successively nominated for the chief pilot position despite having verbally reassured Stan that they would not require an instructor rating as Stan's Chief Flying Instructor approval was not challenged.

Due to the continued publication on the CASA website, the company lost the majority of its clientele to competitors. The company continued to employ its staff during this period despite the lack of revenue flying.

In **August 2002**, (two weeks prior the commencement of the AAT Hearing) CASA again carried out what it described as a routine audit; this one of a company working at 5% of its normal capacity. In the ensuing AAT Hearing, CASA used information gathered during this audit in another attempt to discredit Stan personally. The CASA Airworthiness Inspector duly failed to attend the compulsory closing conference. In fact the audit "closing conference" was not held because of his absence and the embarrassment as a result of his actions of removing a placard from one Cessna.

The AWI consulted directly with the chief engineer of Turbo Aero Maintenance (a Schutt Company) who attended to matters raised on the spot. The (postage stamp sized) fuel calibration card which was located on the floor directly below its panel was represented as a serious maintenance deficiency in the later AAT hearing, CASA attempted to use evidence gathered in this manner to its advantage.

The full hearing commenced in September 2002 and lasted for four days. Senior Counsel Harvey, in-house solicitor Adam Anastasi and assistant represented CASA. Stan represented himself and Schutts, supported by Alan Baskett, a former CASA victim.

During the hearing CASA introduced new evidence purportedly against Stan's character. This evidence had been obtained with the specific undertaking (to the providers) that it would not be used in public. The AAT disregarded the evidence but regardless it is now in the public domain (a privacy matter) and despite the material being inadmissible the AAT permitted cross examination. (This account is relevant to later matters

because as we'll see, there were subsequent attempts by individuals within CASA to infer that Stan had been untruthful about his employment in Holland.)

An obvious attempt at character assassination

In explanation of this matter, the Dutch system at that time did not allow for perpetual licenses as in Australia. For that reason there was no record of Stan's Dutch ATPL because in order to renew, one has to fly a minimum number of hours on "heavy" aircraft during the preceding 6 months, in addition, complete a flight test on type at the pilot's own expense. He didn't comply, so there was no licence on their records.

Had CASA staff asked the question "has he ever held…" They would likely have been better informed. As to employment with KLM he had used the term "KLM Academy" but when he was involved with their training programs (1980 – 1989) it was under the management of the Dutch government. The Academy was later sold for a nominal sum to KLM.

In **November 2002**, an AAT decision reversing the cancellations was handed down. However, due to "not being able to turn back the clock" a "suspension" was substituted in its stead [sic]. This suspension was lifted effectively on the date of the decision. CASA was later to attempt to argue in its appeal that the AAT had no authority to substitute such an order. CASA implied that the AAT had applied a penalty, leaving the incorrect inference that Stan was guilty of something. It was open to the AAT to reverse the cancellations altogether; being "not able to turn back the clock" is a lame excuse.

Significantly Mr Adam Anastasi of the CASA Office of Legal Counsel contacted Stan 26 days after the AAT decision asking whether he intended to appeal the decision. Stan replied that he was contemplating taking legal action against various individual CASA employees on the grounds of their vexatious conduct. Anastasi said he would have to speak to his (then) supervisor Peter Illyk about this. Anastasi contacted Stan the following day and advised that because of his "threat," CASA would be filing an appeal in the Federal Court.

CASA commenced its appeal but at the first "mention hearing" was told to submit an acceptable case because the judge was not prepared to accept such an ill-prepared document. CASA failed to meet the time requirements for its amended case. However, the appeal did not proceed, due the forced liquidation of Schutt Flying Academy in April 2002. Stan's chief pilot approval was linked to the company, so if there was no company, there could be no chief pilot. In the interim there had been uncertainty at CASA as to how to reinstate his chief pilot approval. CASA claimed it had been cancelled, whilst the AAT had changed that to a suspension. CASA disputed the AAT's right to make such a decision. No conclusive answer was ever received but Stan (acting on the AAT decision,) resumed his position until the company's demise. All these actions have been in direct conflict with the Attorney General's Model Litigant Directions, yet a complaint to the Court, the Attorney General and the Minister, met with no response.

During all these months CASA had failed to remove the cancellation or alter its Website to reflect the true situation, and even though it was ordered by the AAT on two occasions, failed to obey. The Website was finally altered by removing the whole message in March of 2003, co-incidentally effective with the liquidation of the company. ASIC rules require a company to remain "solvent" to trade.

CASA's actions, again contrary to Model Litigant Directions, had succeeded in taking the company over the edge, a goal which aviation lawyers believe was intended all along. CASA had fulfilled the "need to set an example," expressed in the FOI document.

Information in relation the CASA website protocol was requested under FOI 2005-07 as were copies of instructions to the webmaster but again were not forthcoming. Since the orchestrated failure of the Schutt Group, Stan attempted on numerous occasions to communicate with CASA. Bruce Byron, the new CEO, initially gave the appearance of wanting to resolve the impasse, but apart from the initial meeting and the resurrection of the action against Qantas nothing happened. It is apparent from Hansard that Byron met with considerable and effective internal opposition in trying to root out systemic problems. To Byron however, Stan's issues were among the least of these.

In 2005, after persistent attempts to obtain Alternative Dispute Resolution (ADR), Stan commenced an FOI application, only to be frustrated at every step, dealing with (now) OLC head Adam Anastasi. Once documents were released, albeit reluctantly, it became clear why Anastasi had refused access. It also became very clear why CASA had withheld many documents from the 2002 AAT hearing. The CDPP reference document to "there is no case" should have been enough to raise questions over CASA's Model Litigant credibility. The "Obligation to Assist the AAT" requires all relevant documents to be provided to the tribunal, yet the most relevant documents were held back as revealed by the FOI disclosures. This illustrates

the lengths to which CASA will go to defend its position. Continuing requests for alternative dispute resolution (ADR) as dictated by legislation were also ignored. Such requests have been repeatedly made in correspondence with current CEO John McCormick, again with total disregard.

In relation to freedom of information requests, at a telephone directions hearing (2006) with Dept President Forgie of the AAT, Anastasi advised that it was impossible to access any records for release. At the next hearing some four months later, Ms. Forgie offered the mildly scathing suggestion that CASA could perhaps conduct a dedicated word search. Two months later at the next telephone conference CASA advised that they had been able to access all of approximately 13,000 related folios. CASA would require several months to scrutinise these for release. Some 2200 documents (many triplicated) were finally received late 2006. Several of these have been referred to in this document.

July 2007: Stan attended a formal AAT hearing before Member E. Fyce seeking the release of privileged documents. A. Anastasi (S.M. Fyce made a point to stress that Mr Anastasi was under oath) stated that "CASA does not hold personal files on (pilots)". When questioned later he admitted [CASA] does hold medical files on individual pilots. As it obviously also does at least in respect of licences, approvals, other ratings, and correspondence with the certificate holder. Mr Anastasi's denial that "CASA does not hold personal files on pilots" has never been researched, even when reported to the A.G. Dept.

In his AAT application Stan referred to the "Brazil Directions of Prime Minister and Cabinet"

'BRAZIL DIRECTION': CLAIMS OF LEGAL PROFESSIONAL PRIVILEGE

ATTORNEY-GENERAL'S DEPARTMENT

Claims of Legal Professional Privilege Exemption under the Freedom of Information Act Section 14 provides that nothing in the Act is intended to prevent or discourage agencies from giving access to exempt documents where they can properly do so.

Where a client agency wishes to assert a claim of legal professional privilege in respect of a document which has no apparent sensitivity, the attention of the client agency should be drawn to the Cabinet decision mentioned above. The client should be advised that legal professional privilege should be waived unless some real harm would result from release of the documents.

P. BRAZIL 2 March 1986

Despite the "Real Harm" having already been identified, it was not explained what such exempt documents could hold.

In 2007 Stan presented the new information he had just received to various politicians and wrote to the then Deputy Prime Minister, Hon. Mark Vaile requesting assistance with these issues. His response was to request Bruce Byron (CEO of CASA) "to provide [Stan] with a detailed response so that these long standing issues may be resolved." In 2013 there had still been no response or resolution.

In Stan's ten year quest to regain his chief pilot approval, he was confronted with Civil Aviation Order 82.0 – Appendix 1. Subsection 5 – 1. Approval of Chief Pilot by CASA

> *1.3 The appointment may be approved only if the person has: (a) in the opinion of CASA, maintained a satisfactory record in the conduct or management of flying operations;*

According to all information available to Stan, he would be found unable to comply. Yet CASA was not prepared to substantiate its opinion either way on whether Stan's conduct had been satisfactory. If CASA now concedes that "He maintained a satisfactory record" CASA actions in 2001 are further proven to have been vexatious, vindictive and deliberate. Their suggestion in writing was for Stan to apply for a chief pilot position and "see what happens." The poor delegate of CASA conducting the interview would have no option but to refuse such a delegation. That's why Stan asked the CEO for the exemption, he explains: "It is a chess game!"

At this point CASA's Deputy CEO Shane Carmody put only Stan's question regarding chief pilot approval to the ICC, knowing full well that such (exemption) was an executive decision and the ICC had no jurisdiction.

The more important questions relating to the Avgas contamination cover-up were ignored as were those relating to the tactics in persecuting the company in relation to its alleged contravention of R.206 and of "policy". In his subsequent communications with Michael Hart, Stan on several occasions requested a simple yes or no answer to this question. "However as this is an executive decision it is out of his jurisdiction," he reports. It only took 18 months to not get an answer. The CASA response to the Minister's request was

quoted in Hansard as having been “satisfactorily completed.” Apparently this was an internal decision by CASA and was not shared with the victim.

Michael Hart resigned as the Industry Complaints Commissioner with CASA after only 15 months in office. All approaches to the current Minister have met with a referral to CASA to investigate.

This report is riddled with examples of the processes by which CASA navigates within available “administrative decisions” options to avoid due legal process. It also reveals how CASA treads a fine line between teamwork and conspiracy in developing tactics which exploit the availability of those administrative decisions and the proposition that “CASA must be satisfied.”

It’s easy to trace the change in the culture of CASA from Stan’s initial dealings with the regulator to the present organisation, where it appears that individuals within it interpret regulations to suit their own personal agendas but with the full backing of most of their colleagues. The organisation as presently structured and overseen provides ample opportunity for corrupt misconduct. It seems statistically unlikely that such opportunity is not being embraced.

The regulator should be compelled to state objectively how “the safety of air navigation” has benefited from the processes we have described.

Case study - Birds? What birds?

An Administrative Appeals Tribunal (AAT) decision delivered on October 13 2011 had a large number of people in aviation – particularly helicopter pilots and operators – carefully studying its implications and the lessons to be learned and stored.

A North Queensland helicopter pilot was in effect fired from his job following a brief meeting with a CASA official and another pilot from his company who was awaiting CASA approval as his employer's new chief pilot.

The pilot concerned was told CASA had seen a video on You Tube that had been recorded on one of his scenic flights, and was then accused of various acts of flying misconduct but was provided with no supporting detail. He denied the allegations, not believing he had ever conducted a flight in the manner he was accused of which varied considerably from anything in his memory suggested. He was then excluded from the meeting, after which his company suspended him from duty. Because his only income was an hourly rate while flying, that meant that he was in effect unemployed.

The events that followed will be a useful guideline to what anybody can expect if CASA decides that they have breached the regulations – and also what they cannot expect. The conduct recounted here will have a familiar ring to many who have already experienced similar treatment. This especially applies to pilots and operators who do not belong to a large organisation with a capable and well funded legal department.

Grounded indefinitely:

It is now nearly three years since CASA's senior FOI at Cairns, Dennis Allwood, arranged the meeting that in effect resulted in North Queensland commercial helicopter pilot John Quadrio being summarily kicked out of the industry. That outcome was achieved without the production of any valid evidence and without any formal regulatory action at all. The action, which required the cooperation of the CASA certificate holder who employed him, was taken on the basis of untested allegations against Mr Quadrio that had come from an unusually dodgy source.

John & Sophie Quadrio and their first investment in aviation

Mr Quadrio – we'll just call in John from here on – is a mature-age pilot from a farming background who enjoyed a reputation as a conscientious and safety-minded helicopter pilot. He was employed by Cairns-based commercial helicopter operator Heli Charters, much whose operations are scenic flights from helipads on the Great Barrier Reef near Cairns, flying small groups of tourists whose day cruise craft visits the pontoon.

Their operating environment is outside but close to controlled airspace, and pilots have to manage each flight with continuous care because of pretty high traffic levels, with hundreds of tourists visiting Cairns wanting to see the reef from the air, and a number of helicopter and fixed wing operators are there to serve that market.

The other hazard is bird encounters which are a daily occurrence, and on some days it's a continuous problem that can only be managed by a constant and alert lookout. Frequent avoidance manoeuvring is so routine for any pilot operating these flights that it's all in a day's work and is not remarkable.

John says that had Mr Allwood accepted the offer of a visit to Hastings Reef he would have been far better informed on this issue, including the frequency and variety of bird life and the ample evidence of it that has to be cleaned off the helipad and other assets there quite regularly.

At the time of these events John had 735 total flying hours of which most were in Heli Charters aircraft over the previous two years. Corporate and government clients often requested his services because they appreciated his safety-first approach to flying.

John recalls the first time he became aware there was any issue at all: “CASA first raised it in early November 2008 with Noel Stubbs, the Chief Pilot at the time of the alleged incident. A passenger on a scenic flight had used a mobile phone to take a series of video clips that had been edited, compiled and posted on ‘You Tube’ under the title: *Aerobatics in a Robinson R44 over the reef off Cairns*,” he says:

“When Noel Stubbs viewed the footage he told Allwood it wasn’t a ‘steep turn,’ it was ‘a wingover,’ a manoeuvre that’s taught in the CASA helicopter training syllabus, and he was happy to take him out and demonstrate that, but Allwood wasn’t interested. Noel also told Allwood that he didn’t have any problems with the flying but had advised all his pilots to ‘tame it down a bit.’ He did show all the Heli Charters pilots the video footage but at the time I thought it was a different pilot. I didn’t recognise it as my flying but I saw nothing wrong with the manoeuvring.”

For the unfamiliar a ‘wingover’ is a turning manoeuvre that is similar whether you’re flying a helicopter or an aeroplane. It’s specifically taught in the CASA-approved helicopter pilot training syllabus because it’s a far less aggressive alternative to a steep turn; it accomplishes a change of direction at relatively low airspeed within a small turning radius but without any sudden changes in pitch attitude, or “G” force. It needs only moderate engine power, and causes no increased stress on the aircraft, pilot or passengers. A steep turn is usually defined as a sustained turn using an angle of bank of 60° or more, which applies “G force” in proportion to speed, turn radius and bank angle, and in some definitions is classified as an ‘aerobatic’ manoeuvre.

“First my employer was pressured by CASA to suspend me before they had conducted a proper investigation.”

“Allwood apparently saw the opportunity to have another go when Noel Stubbs left,” says John. “The first time I knew it was me they were looking for, was on the day Casey McKenzie, the new nominee for the chief pilot position, took me to a meeting with Mr Allwood at CASA’s Cairns office on December 18, 2008.”

At that time Mr McKenzie was awaiting approval from Mr Allwood’s office of his proposed appointment as chief pilot of Heli Charters. CASA issues chief pilot approvals, which can be a very helpful boost to a pilot’s career prospects, but the regulator can just as easily decline to approve them or withdraw them, without the decision being appealable in the AAT because it is supposed to be based on an objective assessment through a personal interview. The exposure of the approval to non-appealable withdrawal is well known to limit disagreement on operational matters between chief pilots and the officials who approve their appointments.

“I told them I didn’t recall the flight, and that I don’t fly in the manner in which they were alleging,” says John. “Casey then asked me to leave the room, and he had a private conversation with them during which, he later informed me, he was asked by CASA to ‘take disciplinary action against the pilot.’ He told me he asked CASA ‘What do you suggest – I stand him down?’ to which, I was told, Dennis Allwood replied ‘That’s exactly what we are suggesting.’ Since then Casey McKenzie will neither confirm nor deny the particulars of that conversation however.”

Mr Allwood’s version of this event, as conveyed in his record of interview, claims that Mr Mackenzie volunteered that he would suspend John from duty “until the results of the investigation were known.”

On the same day Heli Charters wrote to John saying that a flight he allegedly conducted on 28th September 2008: “*appears to be in violation of several CASA rules as well as the Heli Charters Operations Manual. I have therefore been left no choice but to suspend you from all flying duties until further notice*.” A copy of that letter was also sent to CASA.

John had thus been consigned to unemployment without any transparent investigation, without any detailed discussion about the allegations or their validity, and obviously without seriously reviewing the range of options published in CASA’s own *Compliance* and *Enforcement Manual* (since renamed *Enforcement Manual*):

One immediate outcome was to force John and his wife Sophie to suspend plans for building a new house on their property on the Atherton Tablelands, because they didn’t believe the banks would be willing to provide a loan while John was without a steady income.

On February 3 2009, John received a call from Mr John Moore, an investigator from CASA’s Canberra office: “I told him I think it stinks that I have been suspended when I haven’t even been charged, let alone proven guilty. I said I thought in this country you were meant to be ‘innocent until proven guilty’. He told me that as far

as he was concerned my licence was not suspended. He suggested I might like to get legal representation and then gave me his phone number to give to my lawyer."

Later that day John phoned Steve Spinaze – his boss at Heli Charters – to advise he was available to fly for the company, but Spinaze said he wasn't prepared to reinstate him without a letter from CASA confirming he was not suspended. No such letter was forthcoming.

Mr Moore, based on first observations of the YouTube video by CASA FOI Yvette Lutze, also recommended to his supervisors that John be prosecuted pursuant to the regulations quoted below along with our summary of their content:

1. Section 20A of the *Civil Aviation Act*: Reckless operation of an aircraft;

Under this section it is an offence to operate an aircraft being reckless as to whether the manner of operation could endanger the life or property of another person.

2. Civil Aviation Regulation 157: Low flying

The relevant part of CAR 157 says the pilot in command of a helicopter must not fly it over any area at a height lower than 500 feet above the highest point of the terrain, and any object on it, within a radius of 300 metres from a point on the terrain vertically below the aircraft. Obviously this cannot include takeoff and landing, or departure and approach flight paths.

3. Civil Aviation Regulation 155(1) for conducting an aerobatic flight.

"Acrobatic" flight [not *aerobatic*] means manoeuvres intentionally performed by an aircraft involving an abrupt change in its attitude, an abnormal attitude, or an abnormal variation in speed.

At this point however John didn't know of Moore's recommendation to charge him with these alleged offences. In early March 2009 he engaged Tamworth-based aviation lawyer John Glynn of McMahon Broadhurst Glynn, as his legal representation; to act for him in matters related to his AAT application. Mr Glynn advised him not to speak with CASA and undertook to contact CASA advising that John would not partake in any interview, nor have any discussions with CASA officers about the alleged incident. Most experienced aviation lawyers give the same advice, simply because of a deep mistrust based on past experiences of the purposes and conduct of "show cause" processes.

"Then I was issued with a "Show Cause Notice" without sufficient details to enable a response."

On March 26 2009 John received a "Notice of Show Cause" signed by CASA's Northern Regional Manager of General Aviation Operations, Gerard Campbell, which referred to a 'DVD' which had been posted on 'You Tube'. He wasn't provided with a copy of the images and the item on the You Tube website had already been deleted. Furthermore the notice didn't identify 'the flight' by date, time, place, point of departure or destination, nor did it identify the passengers who were on 'the flight', or the pilot. For those reasons Mr Glynn didn't consider this notice complied with the rules of procedural fairness because neither John nor his lawyer had been given sufficient details to enable a response.

This was the beginning of a lengthy series of events that raises questions over the quality of CASA's investigation and of the degree of diligence with which its evidence was assessed. Many of CASA's misstatements were only corrected from information provided by Messrs. Quadrio and Glynn. The corrections included the time of commencement of the flight, the location, the identity of the operator, and some assertions made by the witness who took the video clips.

"I responded and some more details followed but not enough."

Two weeks later Mr Glynn responded to the Show Cause Notice. He asserted that the video did not depict the events alleged in the Notice, denied that the footage identified John, disagreed that the images showed the helicopter was performing "acrobatic and abrupt flight manoeuvres," and specifically disputed that the helicopter was shown to have flown in the following manoeuvres [as accused]:

- Descending sharply so that negative gravity forces were felt by the passengers;
- Very steep turns in excess of 60º angle of bank at altitudes of 100 feet or less;
- Buzzing" of a motor vessel moored at Norman Reef on more than one occasion at a height between 20 and 100 feet above the sea."

"I responded again advising that my log book has me at a different place and time on that date so they amended their notice to match my details."

CASA simply switched the scene of the alleged misconduct to Hastings Reef, altered the time of the events, and "gave us 10 days if we wished to make some further response to the ***amended*** Show Cause Notice."

However, Mr Glynn continued having difficulty extracting material CASA had relied upon, and which it was obliged to provide, including the particular video segments which they claimed confirmed many of their allegations.

"CASA cancelled all my licences".

Instead, on June 30 2009 CASA sent John a *Notice of Cancellation of your commercial Pilot (Helicopter) Licence.* Signed by CASA Group General Manager Of General Aviation Operations Group, Greg Hood, the letter repeated the earlier three allegations, but with the addition of:

iv. "Acrobatic and abrupt flight manoeuvres" [which if substantiated would have constituted aerobatic flight.]

John was now earning a trickle of income from farm labouring on the Atherton tablelands.

"My lawyer had to attend numerous hearings at the AAT because CASA was withholding evidence and we could not adequately respond."

Because an application for review had been filed with the AAT, CASA was now compelled to supply to John and to the Tribunal within 28 days, all documentation upon which it relied, to make the decision which was now being appealed. (The "T documents")

There followed a paper war of attrition as Mr Glynn strove to obtain the documents and video footage, stating at one point: "We are seriously concerned that you have deliberately made available to us a video that appears to have been manipulated, or is incomplete."

By this time John Glynn had been provided with various statements from CASA witnesses, including those of the passenger who took the videos, Benjamin Coglan, and his companion on that day, Michael Jentsch, who observed the flight from the surface.

On July 31, 2009, John Quadrio provided further corrected details, including his response to an allegation by Coglan that John had deputised him to make a pre-departure radio call. This was later acknowledged to be another fabrication.

CASA's Evidence at this point comprised statements from seven witnesses:

- **Michael Jentsch**, the maintenance engineer who allegedly observed the flight (Jentsch was not an aircraft maintenance engineer; he was employed in the hospitality industry). His statement got it seriously wrong. He had located the alleged incident on the wrong reef, saying that when he witnessed these events from the surface he was at Norman Reef, which is six nautical miles north of Hastings Reef. To add to the confusion he even described the two pontoons there. There's only one pontoon at Hastings Reef. There's also considerable helicopter activity in the area, but on the day in question John's aircraft flew only from Cairns to Hastings Reef, conducted one scenic flight, and returned to Cairns. It seems highly likely that in reporting on some events, one or both of these two witnesses observed the operations of other helicopters at another location and confused them with VH-HTE.
- **Benjamin Coglan**, an associate of Jentsch, was the passenger who took the video: Some of Coglan's evidence also seemed to suggest that the pair may have confused John's aircraft (which had only conducted one flight on that day) with other helicopters operating in the area. Coglan also said John had asked him to conduct radio communications with Airservices, which (besides being highly improbable) would also have been physically impossible because he (Coglan) would have had no access from the passenger seat to a working microphone. It's not known how CASA carefully assessed this witnesses credibility. In fact, under cross-examination in the AAT he later conceded he had untruthfully represented himself as a "Qantas first officer" and elsewhere that he had "10 to 12" hours flying experience but he eventually admitted he had never held any pilot licence including a student licence at any time. When asked, he explained that his reason for describing himself as a Qantas pilot was "because the girls like it."
- **Dennis Allwood**, FOI and designated expert witness – the FOI who had spoken to John and who had also viewed the videos. Allwood made demonstrably incorrect assertions about the operation of inflatable emergency floats on R44 helicopters and inaccurately interpreted the specifications of the Pilot's Operating Handbook in respect of the arming of the floats. He also appears to confuse 'arming' the floats (priming them for deployment) with 'deploying' them. His evidence did not support that of his

colleague Ms. Lutze, and his statement also contained assertions that the video footage showed the helicopter conducting "aerobatic manoeuvres."

- **Yvette Lutze**, FOI and designated expert witness, who had also viewed the videos and who appears to have had eventual reservations about the accuracy of her assessments. CASA later advised John and Mr Glynn that Ms Lutze was no longer able to give evidence because she was required to care for her mother full-time, following a serious accident. However John later heard from a reliable source that Ms Lutze had already left CASA and was attending a night vision goggle training course in Tasmania. Ms Lutze's statement also repeats some of Mr Allwood's statements regarding float operation and deployment, and "aerobatic" manoeuvres.

Her statement continued: "….. The helicopter appears to have large angles of bank. Based on the footage, these appear to be in excess of 70°. This observation is drawn from where the horizon crosses the windscreen."

- **Malcolm Walker**, FOI, whose evidence varied little from that of Allwood and Lutze. His statement contained similar interpretations from the video of low-flying, steep turns, and "large angles of bank, possibly in excess of 60° based on where the horizon intersects with the windscreen." It also contained the now-familiar warnings cut and pasted from the R 44 flight manual stating that "abrupt control inputs produce high fatigue stresses and could lead to a premature and catastrophic failure of a critical component." There was considerable emphasis on steep turns, and a dissertation on associated risk including possible loss of height reference, unintentional loss of altitude, and retreating blade stall, which he described as "a phenomenon associated with high speed, high gross weight and high rotor disc loading such as at present in a steep turn. Instances of retreating blade stall in helicopters such as the R 44 quite often result in mast separation." The relevance of those observations was not explained in subsequent deliberations.
- **David Ringrose**, designated expert witness – an examiner of forensic imaging – provided an opinion by reference to still images/photographs. This disregards the actual operation of a moving helicopter, possibly because that would be outside his professional experience. His expert evidence also created significant doubt about Lutze's interpretation of the video. Mr Ringrose also alleged that the helicopter had been flown at or near a 70° angle of bank.
- **John Beasy**, FOI and expert witness, took a countervailing view to that of Ms Lutze and Mr Allwood, which appears eventually to have convinced the DPP to withdraw criminal charges against John.

"Nine adjournments followed as it slowly dawned on the Department of Public Prosecutions (DPP) that the case was flawed. They had lost most of their witnesses."

To provide time for all that material to be evaluated, the matter was adjourned to August 6, 2009. This was the first of a string of adjournments that continued for about a year while CASA and the DPP strove to put a case together. Most of these were attributed to the need to gather and assemble more evidence, which appears to differ from normal policing practice, in which evidence is carefully gathered and assessed before a decision is made to lay charges. *AviationAdvertiser* has several well-documented examples which illustrate this syndrome.

Although it didn't emerge until much later, CASA Senior Airworthiness Inspector Peter Larard had sought and obtained comment on the video footage from the aircraft manufacturer, Robinson Helicopters. He informed Moore as early as May 21, 2009, well before the DPP became involved, that he had made enquiries with Robinson in relation to the airworthiness of the helicopter after the manner it was flown. Larard E-mailed Moore, saying: "in short, Robinson said there were no maintenance issues as far as they were concerned." This information does not appear to have been shared with other CASA decision-makers, to the defence as required by law, or to the DPP.

CASA's eight CDs were eventually delivered by courier to Mr Glynn's office in Tamworth but too late to post them to John for viewing before the hearing, and very significantly too late for any detailed analysis at all. They were too big to email so Mr Glynn was forced to request a further adjournment to allow time for them to be reviewed.

On October 12 2009 Mr Glynn filed a second application to the AAT seeking a stay, based on the assertion that it was unfair and prejudicial to John, to be forced to conduct proceedings in the AAT whilst there were threatened criminal prosecutions.'

He also noted: “Another concern that we have is that the Brief of Evidence was forwarded to the DPP on 1 July 2009 and at this stage, no charges have been laid. It would appear to us that there may be significant deficiencies in CASA’s case and that they may be awaiting your evidence at the AAT hearing, to then prepare a criminal case.”

However, because it had effectively achieved John’s grounding in a single meeting from which he was excluded, CASA certainly appeared to be in no hurry to meet the challenges it still faced.

Eventually AAT Deputy President Hack SC gave his Judgment on the application for a stay, concluding that not granting it would cause John significant hardship, given that there were most likely criminal proceedings to be commenced, and the AAT matter could not proceed while they were afoot.

But he also directed that John notify CASA of any employment that he obtained as a commercial helicopter pilot, and also: “*Within 14 days of the end of each quarter, commencing on 31 December 2009, he deliver to the Cairns office of CASA his Pilot’s Log Book for inspection and/or copying*.”

That left John Quadrio back where he started:

“I am innocent and I refused to accept a punishment for something I didn’t do, so I would not go back to work if I had to present my log book to CASA every three months like a criminal on parole. Also I hadn’t flown for almost a year now, and with no guarantees I was not prepared to pay for expensive refresher training, biannual flight review tests, pilot medicals and other attendant costs.”

On November 13 2009 Mr Glynn was formally issued with a Summons served by the Commonwealth DPP, charging his client with three criminal offences and requiring him to appear at the Magistrates Court in Cairns on December 10 2009 – which was later deferred.

The AAT Hearing was now on hold until the criminal matters had been dealt with, and CASA’s attentions were turned to reshaping the evidence it had prepared for the AAT, to meet the more rigorous standards of a criminal court.

On the following day John was bailed to then “appear and surrender into the custody of the Magistrates Court at Cairns on 4/02/2010.” The notice listed seven “undefined offences”

Just prior to the mention the CDPP advised Mr Glynn that the prosecution: “intend relying upon FOI Allwood and FOI Lutze as experts in the case;” and: “are considering calling some engineering evidence as to the effect of the aerobatic manoeuvres on the airframe.” As we’ll see the DPP had already been denied important information on that issue that might otherwise have caused an earlier discontinuance of proceedings.

On May 12 2010 the CDPP advised Mr Glynn he did not at this stage intend calling any evidence from an expert engineer and would be relying upon the evidence of Dennis Allwood and Yvette Lutze.”

Two days later CASA advised that its prime witness Mr Coglan had been located, but inconveniently he was in prison and not due to be released until July 1. This news may have been the reason the prosecution had indicated it wanted the matter to run entirely on the videos without the necessity of calling any of the ‘civilian’ witnesses (Jentsch and Coglan.)

Comment: One might expect that the DPP, its fingers having been similarly burned in the course of numerous other CASA legal adventures, might by now have begun to have reservations as to the quality of the legal preparation it had to work with. Up to this point there doesn’t appear to have been *any* competent analysis at all as to how a Robinson R44 helicopter pilot might have sustained a 70° banked turn without destroying or seriously damaging the helicopter, pulling something in excess of 3g (if Lutze’s assertions were correct), losing more height than remained available beneath the aircraft, and killing all its occupants. Various CASA witnesses had now estimated the bank angle successively at 60º (twice) 70º, 85º and 70º again. They had described flying conduct that was physically impossible, demonstrated their inability to examine and report accurately on technical issues, and also to read and understand a flight manual and other technical data correctly.

Attitude or altitude?

Two recurring themes in the analysis of the available data were the estimates of bank angle, and the presence or otherwise of “G” forces, neither of which seemed to be fully understood either by some of the technical witnesses or (later) by CASA’s lawyers. Much of the dialogue suggests a lack of awareness of the

distinction between positive and negative G, and also of the fact that one G is the normal state of things. G levels between zero and 1G are sometimes mistakenly referred to as "negative G." Zero G is what a child experiences at the top of a swing because centripetal acceleration from the swing (the motion having ceased) is absent. In an aircraft it will cause objects and unsecured people to be weightless like astronauts in a space shuttle. A negative G condition will cause the same objects and people to accelerate in a straight line towards the roof of the aircraft.

Ms Lutze's lengthy discourse regarding bank angles and G forces asserted:

> *"For example the load factor at 45° angle of bank is 1.4. At 60° angle of bank the load factor is 2.0, and 75° angle of bank load factor is 4.0. Load factor is the ratio of the lift on aircraft to the weight of the aircraft. Load factor is expressed in multiples of G where one G represents conditions in straight and level flight. To avoid descent due to increased load factor of high angles of bank, the collective must be significantly increased during a sustained steep turn. The power demand to overcome the increased drag from the increased collective blade pitch angle must be matched by the power from the engine. There is a limited amount of power that engine can produce. Once this is exceeded and the engine can no longer produce enough power to drive the rotor system, the rotor RPM will decay and rate of descent will develop. To further attempt to reduce rate of descent and avoid collision with obstacles, the pilot is likely to instinctively apply aft cyclic control to decelerate in attempt to trade speed for height. In conducting turns with large angles of bank at low level (in this case under 100 feet AMSL) risk is significantly increased due insufficient height to recover in the event of a descent."*

This, when rationally analysed, actually suggests that the passengers would have been subjected to a load factor in the order of 4G. Had anything like that been the case, the dire outcomes she went on to describe would certainly have occurred, and neither the passengers nor John Quadrio and the aircraft, would be likely to have survived. Exposure to forces of between 1.5 G, and 3G, would be an experience that any passenger, and most pilots, would find memorably upsetting and possibly disabling.

Author's note: For the remainder of this article, the bracketed numbers in the commentary for example **(para 25)** refer the reader to the relevant numbered paragraph in the AAT decision.

On the subject of bank angle there were several references in the witness statements to "the angle between the windscreen and the horizon" and varying other estimates of the actual bank angle **(Paras 25, 31, 54[b], 62)**.

Unfortunately Mr Baddams had accepted that he should defer to the expertise of Mr Ringrose on the issue of observable angle of bank, and even more unfortunately Mr Ringrose's estimate of "67° to 70°" went unchallenged, **(Para 25)** leaving it as the definitive statement even though it was totally inaccurate. It is possible that it was left unchallenged because John and/or Mr Glynn believed the Tribunal would see it as a nonsense.

Assessment factors

Given that the videos were shot by a passenger sitting in the left front seat, the only airframe components which might aid in the measuring of the aircraft's attitude in relation to the horizon are the divider between the left and right panels of the windscreen itself, and very occasionally parts of the instrument panel pedestal. To make any of these estimates credible, other matters need to be taken into account. These are the actual shapes of those aircraft components, the focal length of the lens, which considerably distorts the perspectives because it varies as the lens is zoomed, the alignment of the camera with the yaw, roll and pitch axes of the aircraft, the actual motion of the camera, its positioning in relation to the visible aircraft reference structures, its lateral and vertical movement around the cabin, and the motion of the aircraft.

In the main, the lack of understanding of those elements which is revealed in the various expert witness statements is dismal. That is unsurprising because the training and testing that leads to the tenure of a pilot licence does not include developing the talent to derive technical assessments from video footage.

Let's take a look at "Exhibit E," the clip that received the most attention. While you're watching, keep in mind the considerations in the paragraph headed "assessment factors" above.

Click here for exhibit E

Reckless flying

Technical witnesses who provided statements also made various assessments of the height and the vertical speed (rate of climb/descent in feet per minute) of the helicopter during the flight, but did not always provide references as to how they assessed the height at any given time.

For example, Mr Allwood made one height estimate on the basis of the visible shadow of the helicopter on the surface, stating: "The helicopter's shadow on the reef can be seen, confirming the low altitude." However, it confirms nothing of the sort if photographed through a zoom lens. The use of a zoom lens at various times during this adventure is clearly evident in some of the video shots, and the single glimpse of a helicopter shadow in one of the clips is totally inadequate to make any assumptions on height.

The attitude of the aircraft, and changes in attitude, also received a good going-over from most of the technical witnesses, but these were limited to phrases such as: "intentional and involved abrupt change in the helicopter's attitude," (Mr Allwood), and "low level, steep turns, with abrupt changes in attitude and rate of descent (Ms Lutze.) Not one of these statements about abruptness was quantified in terms of rate of roll, pitch, or change of heading. It became obvious that the reasons for referring to "abrupt changes" is that they are quoted as one of the elements of "aerobatic flight", and also form part of the legal definition of the alleged offences.

And of course, all these assertions were peppered with summaries and warnings from the flight manual of the dire consequences of illegal aerobatic flight, ignoring the response from Robinson Helicopters, which had apparently not been provided to these experts.

By now, a series of qualified CASA pilots appear to have shied away from further involvement, and eventually CASA heeded advice from somebody who effectively confirmed that had been the smart thing to do. That was (then) CASA FOI John Beasey, who had advised CASA in an e-mail that CASA would be unlikely to prove any of the charges "with the possible exception of low-flying."

The prosecution must have agreed with that because the court was advised of the CDPP's decision to discontinue the proceedings and was adjourned to 16/11/2010 for the purposes of John's Cost Application.

John recalls: "On 16/11/2010 the [AAT] judge asked the CDPP why they went through with it and what made them pull out. The CDPP said Lutze had pulled out and that led them to get their own expert witness [Mr Beasy] who told them that there was no case to answer, and that is why they were pulling out now."

By now John Quadrio hadn't flown for 2½ years and his licence cancellation remained. But the administrative decision that dumped him in that position had not been reversed.

In March 2011 Mr Barry Dick, a highly experienced commercial helicopter pilot, instructor and operator, having studied the statements of Lutze, Jentsch, Allwood, Coglan and imaging specialist Ringrose, provided an affidavit which included a highly detailed and critical analysis on the previous statements of the CASA witnesses.

A similar statement provided at that time by Mr David Baddams, another amply qualified military and civil pilot, provided strongly supporting input with logical and definitive analysis of the kind which had been lacking in the statements of most of the CASA officials.

Back in the AAT

The AAT reconvened in Cairns on June 14, 15, and 16, and Sophie Quadrio's mother Helen Irvine provides an impression from the "members' stand:"

"Talk about David and Goliath! CASA had a barrister, Shields, from Sydney as part of their team of nine "heavies" most in black shoes, black suits, shaved heads and sunglasses. Many of them had flown up from Sydney or Canberra. They were intimidating and looked smug and I couldn't understand at first why such a trivial case from CASA's point of view? I mean it wasn't like a plane crashed or anyone got hurt so why would they need such a huge team to decide if John should get his licence back AFTER they had dropped all criminal charges without going to court just before Christmas?"

Piecing together the observations of various witnesses, it became apparent that CASA's case was not looking good, a view which one of its officials ruefully confided to one of our observers, possibly mistaking him for a colleague in the crowd.

One thing *every* CASA inspector was unanimous about was that John had been low flying illegally, and the regulation regarding height above terrain was smugly read out.

Of course, as the DPP had already been aware, a submerged coral reef does not meet the dictionary definition of “terrain,” and the nearest geographical feature to Hastings Reef that meets that definition, would be Cape Grafton, some 23 nautical miles to the south.

“You could almost hear the sound of jaws dropping,” recalls one of our court room observers.

Next issue was “illegal G forces.” Mr David Baddams is a former Royal Navy Sea Harrier fighter pilot and therefore an expert on G forces. When a CASA lawyer apparently sought to discredit him by suggesting that he knew nothing about hovering or landing on objects like pontoons, Mr Baddams was pleased to be able to put him straight. Frame by frame through the video at the point where CASA claimed significant G-force had existed, he showed that Coglan raised his camera to photograph upwards and the girls in the back raised their hands. Baddams pointed out that no upward passenger movement would have been possible if John had been inducing any significant G forces at all.

Baddams also identified that the manoeuvring is: “not abrupt or abnormal, particularly if the aircraft is inspecting the landing area to ensure it is clear, prior to conducting an approach.” He stated: “The conclusion I draw from this video is that no significant G forces were present above 1G.”

And noting that both FOIs Lutze and Walker relied entirely on one of the exhibit videos, and that FOI Lutze on her observation of “*appears to be in excess of 70°” and elsewhere…. ‘Possibly in excess of 60°’* he commented: “I consider this assertion to be incorrect and not supported by the evidence in the video.”

FOI Walker had not established any basis for his allegations regarding the angle of bank that was shown in the video, but ultimately admitted, while still giving evidence, words to the effect that: *The truth is none of us can tell anything from the videos, because there are not enough reference points. We are all only making assumptions*. The observers saw this as another damning admission, and there were more to come. (NOTE: we do not have access to the transcript of this part of the hearing; however the above quote is from the collective memories of three separate people who were in attendance.)

When FOI Allwood was cross-examined on the question of steep turns, he said he could manage to read the manifold pressure gauge on the instrument panel from the videos, and the needle was pointing straight up; therefore the pilot was using 25” manifold pressure, which represents close to full throttle power as would be required in a steep turn.

John says he was encouraged to experience one serious steep turn at a 60° bank angle in the course of his low flying approval training, and that was enough to give him a lifelong aversion to high G steep turns.

Under cross-examination, FOI Allwood repeated his assertion that the application of 25 inches manifold pressure would be normal and necessary in a steep turn, but confirmed it would *not* be used in a wingover.

At that point John Glynn produced a clear close-up photograph of a Robinson instrument panel, which shows that when the manifold pressure needle is pointing straight upwards, it is actually indicating 20-21” mp, comfortably below normal cruise power, which is perfectly consistent with the execution of a wing-over manoeuvre.

This, according to some who were present, proved to be something of a showstopper, with various members of the CASA team exhibiting symptoms of severe embarrassment and/or distress.

Before adjourning in Cairns, the tribunal required both sides to provide their final submissions, ordering CASA to surrender all the previously withheld evidence, including one video clip that had been omitted from the set, and to provide contact details for Mr John Beasy – the CASA FOI who had finally recommended dropping all the criminal charges.

The hearing was adjourned on June 16, 2011. The AAT normally expects to deliver its findings within two months. The AAT decision was delivered on October 12, 2011 – almost four months after the adjournment and can be viewed HERE:

The situation at that point:

The AAT decision centred on four factors – low flying **(para 38-49)** aerobatic flight contrary to the flight manual **(para 50-53)**, reckless operation of the aircraft **(para 54)**, and unsafe operation (**para 65)**.

1. Low flying

The tribunal's finding was that quite a lot of the depicted flying was below 500 feet, "at heights and speeds that were contrary to the manufacturer's recommendations." It rejected the argument regarding the legal definition of "terrain", saying it was "absurd" to think the rule was intended to exclude minimum altitudes over water **(para 46, 47)**. It also rejected John's explanation that the wingover manoeuvre may have been due to traffic or bird avoidance, and repeatedly described these assertions and the statement that he could not recall the particular flight as "simply not believable" and "risible." **(para 72)**

2. Aerobatic flight contrary to the flight manual

The finding was that this complaint was "not made good." The Tribunal noted that the manufacturer had viewed the footage and it and remained unconcerned, providing the inference that the Robinson representative didn't regard the depicted moves to be contrary to the flight manual.

3. Reckless operation of the aircraft

This issue had four elements. The tribunal didn't accept the allegation of negative G forces, and also rejected allegations of "buzzing" the tourist boat. **(Para 55 & 58)**

However the allegations of bank angles in the order of 70° were accepted **(para 62)**, as was the claim that the flying involved "abrupt changes in the *altitude*" of the helicopter. This finding is not understood, because it is "abrupt changes in *attitude*", not "altitude", which (present other factors) can be an identifier of "aerobatic flight." We have to assume that the acceptance of both the bank angle and attitude/altitude (whichever was meant) assertions relied on Mr Ringrose. It seems unfortunate that somebody didn't explain to the tribunal to the difference between altitude and attitude. It is also unfortunate that assertions of "abrupt changes of attitude" were not required to be quantified in terms of the rate of roll or rate of pitch change in terms of degrees per second, which are common values used in contexts of this kind.

"Negative G forces" were finally knocked on the head as well **(Para 55)**, possibly because it was realised that this had been a fanciful description all along.

4. Unsafe operation

Repeating its rejection of John's "reconstructed excuse for this manoeuvre," the Tribunal re-asserted that the video/audio revealed no sign of possible threats such as conflicting aircraft or bird life. That, and the voice of Mr Coglan on the video saying "that's awesome" was interpreted by the Tribunal as evidence that there were no birds or other aircraft in the area. **(Para 60).** This appears to be consistent with the tribunal's advice **(para 36)** that "the Tribunal is not bound by the rules of evidence," which is an important point to remember if you are ever in a similar situation..

Our expert witnesses

We have been in contact with three experienced civil helicopter pilots with an average of something over 15,000 helicopter hours each and strong backgrounds in all areas of helicopter operations and pilot training. We will not identify any of them because all hold current Australian licences and other regulatory permissions, but the three have viewed a draft of this report and the AAT decision. Separately we have discussed this with Mr Barry Dick who has advised us on these issues. All are unanimous in believing that a grave injustice has been done, and extremely blunt about CASA's conduct in certain of the matters we have discussed here.

Grounding of the pilot

"This all started at the meeting between Allwood, Quadrio and the about-to-be chief pilot. That's where it should have stopped until it had been properly investigated. I believe it should now be investigated as to whether the company was coerced – obviously illegally if it did happen – into firing him. Allwood could have sought authority to suspend his licence through official process and didn't. I think your analysis of this farce explains why. They never had supporting evidence and they still don't, but when one of their officials makes a blunder like that they don't investigate it or reverse it, they close ranks behind this official and do whatever it takes to cover it up, including destroying people's lives.

"In my view CASA should be investigating the exact circumstances in which the pilot was grounded."

Comment: If John Quadrio's version of these events is correct, it would appear that at least one CASA official has improperly exceeded his authority, causing this pilot considerable financial harm and damage to his reputation. It is obviously open to CASA to investigate whether this is the case. If the CASA official did not use coercion such as the threat of "adverse audits" or the non-endorsement of the chief pilot approval

application, and if Mr Mackenzie's decision was voluntary, it would seem that John would have a strong case against the company for unfair dismissal.

Dramatisation of flight manual material

"Some of those CASA witnesses talked absolute [cattle mustering expression meaning 'nonsense'] about retreating blade stall and rotor mast separation, which as far as I know has NEVER happened in a Robinson or any other aircraft except in test flying, and possibly not even then. Basically it's a theory and applies only in high speed and overloaded operations, so it's not relevant to this case and seems to be something thrown in to dramatise the alleged risk."

"I can't put it better than this info from this web-based commercial helicopter forum: *"One thing to keep in mind as you look at these HV curves is that they are not limitations placed on the pilot. If they were intended as limitations, they would be placed in the limitations section of the flight manual. Instead, they are placed in the performance section as a guide to the pilot, so he can make intelligent choices about what combinations of airspeed and altitude to use for a particular mission. Some missions require you to fly the helicopter in the shaded area of the HV curve. While doing so, good pilots are spring loaded to react immediately to any clues that something may be wrong with the aircraft, and they will attempt to get out of the shaded area immediately. Operating in the shaded area of the HV curve involves risk to the aircraft and its occupants, and the risk must be managed wisely.*

"That didn't stop CASA from convincing the Tribunal that Quadrio flew in an unsafe way. If you look at the R44 HV curve for the takeoff flight path it is unusually flat, because it's a modern helicopter with a much lighter composite main rotor which means it has low inertia and is more quickly decelerated by aerodynamic forces. In fact one of Mal Walker's accounts [on Exhibit B] details a low-level acceleration that fits almost perfectly into the R44 HV curve.

"The manual doesn't say you can't, the advice is to avoid it. It says that if you're below 500' and the engine stops you *may not* be able to do a safe autorotation, depending on circumstances. I can do a hovering autorotation from 200' and yet the graph says I can't do one from 500. It's a matter of experience and judgement and intelligent risk management. It doesn't mean you're taking a lot more risk unless you're worried about going from one in 100 million versus one in 99.9 million. If you slow down to show them a turtle it's hardly suicidal I think, because a couple of seconds at reduced speed represents a statistically negligible increase in risk exposure -far less than attends most approaches and departures.

Some quotes from the decision with editorial comment:

The Authority submits that Mr Quadrio ought be regarded as being unreliable. It points to variations in his account of events and to variations between Mr Quadrio's account and that of Mr Coglan. And, it submits, the discs show no evidence that would support the notion that Mr Quadrio flew in the manner depicted to avoid a hazard.

Comment: Well, CASA would submit that, wouldn't it? From various matters revealed in the course of the hearing, one might have thought that the more difference there was between John's and Mr Coglan's account of events, the more reliable the Quadrio version was likely to be, than that of somebody who has professed to be a Qantas first officer with 12 hours flying experience.

Mr Coglan can be heard in disk E saying "that's awesome" and "that's unreal" in response to the figure .(the You Tube footage is no longer available.) Sophie's superimposed voice describing the flight as "awesome" and "unreal," inserted from the comfort of their home, can be clearly heard. ***Update comment December 9 2001:*** *Please note that at CASA's request we emphasise that this footage was taken on a separate flight and there is no intention to depict it as being part of the original footage.*

"…… *That conclusion* (that Mr Quadrio was not a fit and proper person) *is fortified by Mr Quadrio's subsequent actions…."*

And

"We are more concerned that Mr Quadrio, from the outset and during the hearing, professed no recollection of the flight and advanced a patently risable [sic] story to account for his flying on that day."

Comment: "Risible" is misspelt twice in the text. It means "causing or capable of causing laughter" and the comment ran the unfortunate risk of being interpreted as arguably a gratuitous insult from an institution whose published values include "integrity, professionalism, efficiency, accessibility and independence."

There is no record to suggest that John ***ever*** at any time denied being "the pilot in charge"; he simply stated at all times before and after his identification was confirmed, that he did not recall this particular flight. Any pilot doing repetitive flying of this kind would confirm, as this 14,000 hour pilot/aviation writer can, that unless something very unusual happens during such a flight it's very unlikely to stick in one's memory. Having conducted something over 1,400 round-trip flights between Rockhampton and Great Keppel Island (as one example), I would estimate that on something like two thirds of those flights, a departure from optimum flight paths would have occurred because of weather, ATC requirements, conflicting traffic outside controlled airspace, people/vehicles/animals/aircraft on the runway, and even inconveniently placed yacht masts on short final. You manage one issue at a time and move on to the next. In fact the only flight of which my memory retained any detail at all was the one when I passed within three metres of a Beech Baron which was traversing the area and enjoying the scenery in radio silence.

In fact at Safeskies 2011 Dr Kathy Abbott, Chief Scientific & Technical Advisor on Human Factors for the FAA, said of a recent FAA study: "Only ten per cent of all flights proceed according to plan."

That point is made because of the way in which CASA and its team of expert witnesses, all but one of whom was on the CASA payroll, was able to convince the Tribunal that it was ridiculous for John to claim that he couldn't remember the details of a particular flight. Expert witnesses will be discussed in more detail later.

Mr Quadrio's inability or unwillingness to acknowledge his demonstrated shortcomings only reinforces our view that he is not a fit and proper person to have the responsibilities and to exercise and perform the functions and duties of a commercial pilot.

The second aspect concerns Mr Quadrio's suggested explanation for the manoeuvres shown in the film. As we have said we regard those explanations as risable.

Comment: There's "risable" again. Well, most of us have a little list of risible courtroom comments off the Internet, so here's one we can add to your collection, delivered by CASA lawyer Mr Shields when cross-examining Barry Dick:

Mr Shields: "So the aircraft's going to pick up some height as it goes up?"

Mr Dick: (straight faced) — "*Yes*."

Comment – expert witnesses: On less risible issues, some observers were also critical of what they believed was a tendency for the Tribunal to elevate the experience levels of CASA's expert witnesses Allwood and Walker in comparison with their characterisations of the applicants' expert witnesses Dick and Baddams:

- *"Mr Allwood is an experienced pilot with over 10,000 hours experience on fixed winged aircraft and appropriately 500 hours on helicopters including the Robinson R44."* Yes, that sounds like a respectable amount of experience.
- *"Mr Malcolm Walker is a flying operations inspector employed by the Authority with vast experience in military and civilian flying and in excess of 10,000 hours in helicopters."* Yes, that too sounds like a respectable amount of experience. But……
- *"Mr Dick, a helicopter pilot of considerable experience"* omits to mention that Mr Dick's flying experience amounts to 17,500 hours flying, of which 14,500 have been in helicopters and over 6,000 instructing in both ab initio and advanced training in every facet of advanced helicopter operations including international operations, and has written serious articles and books on the subject.
- *"Mr David Baddams is a very experienced military fixed wing pilot albeit with some little experience as a helicopter pilot."* CASA's lawyer actually suggested Mr Baddams might not know much about hovering or landing on objects like pontoons. He overlooked the relevance of Mr Baddams' experience in vertical takeoff and landings in Sea Harrier jet fighters on aircraft carrier decks in all weather and light conditions. (The lawyer is now better informed.)
- *Ms Lutze's helicopter experience amounted to 716.9 hours.* (which is almost equal to John's experience at that time.)
- *Mr Walker's helicopter experience totalled 12,000 hours, some 10,000 of which are helicopter hours, and his background suggests that if bird life was evident in the footage that he should have detected it in his detailed examination.*

Nor was the tribunal finished with Mr Dick, who inadvertently transposed north and south when sketching a flight path diagram. The Tribunal concluded: "*We do not think that we are able to place any great weight on the opinions expressed by Mr Dick."*

As cartography doesn't appear on the commercial pilot licence syllabus the casual observer may see this observation as a little harsh, so let's see what's said about Mr Allwood's apparent inability to read an everyday aircraft instrument like a manifold pressure gauge correctly; and let's not forget that was one factor that led directly to John's grounding: *"When he spoke of the observed engine manifold pressure supporting his characterisation of the figure of eight manoeuvre not being a wingover ….. he was demonstrated to be in error. But we are, nonetheless, satisfied that we can act upon the factual components of Mr Allwood's evidence."*

For the moment, enough said on that issue.

The Tribunal had made it abundantly clear that it didn't accept John Quadrio may have turned the aircraft suddenly to avoid bird life, and must have been so convinced by CASA's input that the AAT repeatedly poured scorn on that scenario.

Research

Exploring the bank angle issue, we deploy the full resources of our mini-aeronautical research laboratory/garage to the question of bank angle. We began by building a scale model of the left side of the R 44 cabin to provide a clue to anomalies detailed by CASA's witnesses, had they chosen to check their facts. The metal eyelet in these diagrams represents the notional position of the camera, so that looking through it provides a camera view.

Appointing myself (Paul Phelan) as our expert witness, I will just summarise as expert witnesses do, my relevant credentials:

- over 14,000 hours total flying experience in general aviation, corporate and regional airline operations; no significant helicopter experience.
- low-level survey flying between 35 and 40 years ago, for researchers from various scientific and environmental agencies over the outer and inner Great Barrier Reef to observe, count and catalogue and photograph migratory birds from Heron island and the Swain reefs in the south to Princess Charlotte Bay in the north.

Overleaf is a summary of our findings. The metal eyelet represents the viewer's eye or the camera view.

Images 1 to 3 should be compared with Figure 4 below. It is images of this kind that were obviously the basis of assertions about 67° and 70° angles of bank; however any such assumptions would obviously be invalid because those who made them had no way of knowing the relativity of the windscreen divider to the vertical, the spatial location of the camera, and whether it was rotated any particular direction, let alone any considerations of perspective. In fact, the best estimate from this image would be the angle between the small visible longitudinal section of instrument panel glare shield and the horizon which suggests a bank angle of approximately 34°, and even that estimate is unreliable because of perspective considerations and the obvious twisting of the camera to the right around the longitudinal axis of the aircraft.

Calculating bank angle from perceived intersection of horizon and windscreen divider: So much for expert witnesses!

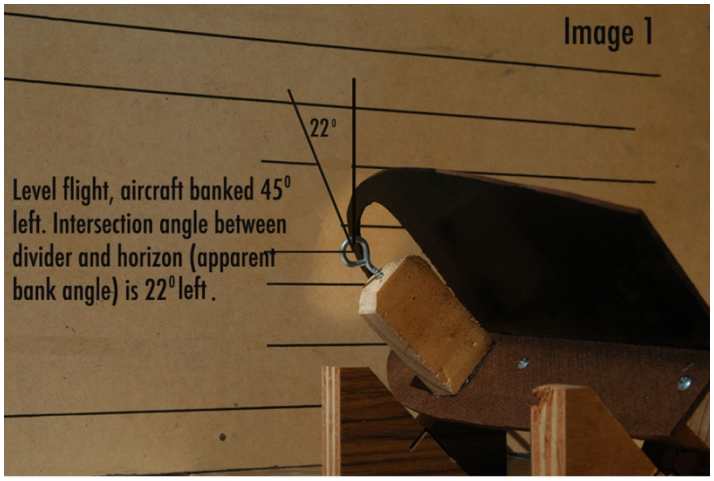


Image 1

The helicopter is in level flight but banked 45° to the left. The perceived angle of bank however is only 22° at the point where the observer sees the windscreen divider intersecting the horizon

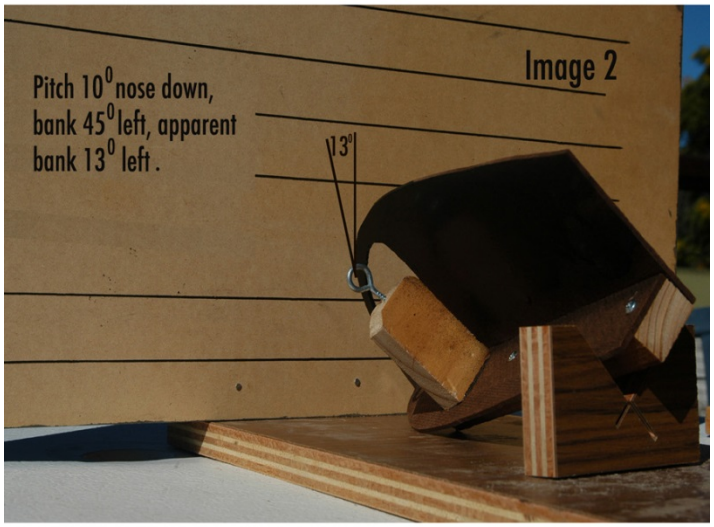


Image 2

45° angle of bank to the left, with the nose pitched down 10°. This has moved the intersection point on the windshield divider upwards, altering the perceived angle f bank of 45° back to 13°. The above two images therefore illustrate the difference in bank angle perception which occurs when the nose is raised or lowered.

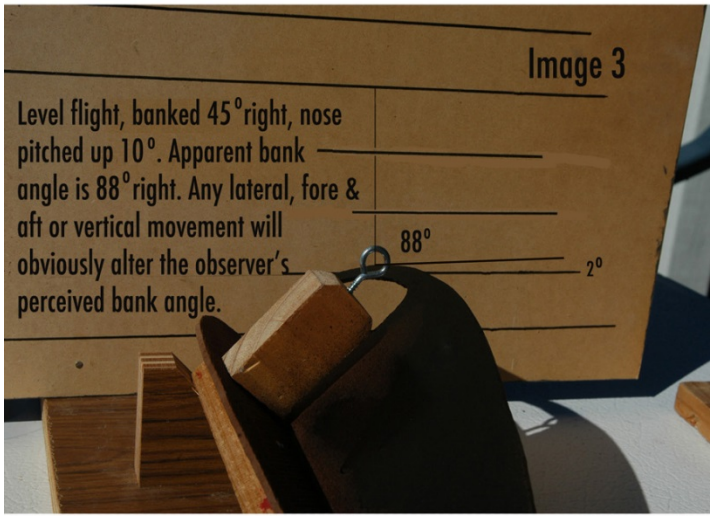


Image 3

Although the model is in level flight and banked 45° to the right, the perceived angle is 88° because that part of the divider apparently intersects the horizon at that angle.

Here's another angle to explain Mr Allwood's "vertical pillars." Look at the horizon from a Robbo seat and you'll see what we mean.

Figure 4

The white arrows point to the windscreen "dividers/pillars" that the witness asserts "are vertical when the aircraft is straight and level." That was the case with Model T fords but not much since. Now picture yourself sitting in the left front seat of one of these helicopters and looking at the point where the windscreen divider crosses the horizon. Remember you're not looking at it from directly behind, and you'll find that depending on how tall you are the divider will cross the horizon at about a 40° angle, so if you want it to be parallel to the horizon you'll only need to rotate the helicopter about 50°, not 90° (See Figure 3).

If somebody had taken a good look at the images……

This image was taken at or within a fraction of a second of the **exact** point Mr Allwood was referring to when he gave evidence, i.e. at the 32-second point in the video Exhibit 8. Compare it with image 3 above and with the witness's evidence below:

Mr Shields: Okay, are you able to express a view as to the angle of bank that was carried through that turn ?

Mr Allwood: It was certainly in excess of 60 degrees for a large part of it, and I know a lot or people talk about distortion their windscreen, but that vertical line in the middle of the windscreen - which has a vertical hole in it or beam [an apparent typographical error because it is meaningless] – when the aircraft is straight and level, that is absolutely vertical, and there are a number of instances in that video clip you can see that that is even almost parallel to the horizon.

Mr Shields: Okay.

Mr Allwood: Allowing for even a small amount of distortion**,** that still gives you a very steep angle of bank.

Mr Shields: Can we identify where that beam, in the first turn, is parallel to the horizon?

Mr Allwood: Almost.

Mr Shields: Almost parallel to the horizon. Okay, you stopped the video at 32 seconds. Can you just indicate, firstly, where's the beam that you're talking about?

Mr Allwood: That's the centre pillar there. You can see that that's the bottom of the screen and there is a slight amount of distortion there, but this top part or perhaps this centre part, is virtually parallel to your eyes.

Comment:

This bit of (apparent) smoke-and-mirrors nonsense probably may explain why CASA deliberately delayed handing over the videos until it was too late for a proper evaluation of this vital evidence. First, there is no confusion in that dialogue; Mr Allwood clearly stated that the windscreen divider is "vertical when the aircraft is straight and level" and also identified it by its other name – the "centre pillar." That assertion would clearly have been picked up had there been time to assess the video properly.

They didn't see the birds!

Investigating these issues, we became distrustful of a great deal of the input from CASA witnesses which had clearly persuaded the tribunal that Mr Quadrio was untruthful in stating that he could not recollect the particular flight. This was reflected in a succession of withering remarks from the bench such as:

Mr Quadrio professes no particular recollection of the flight. He says, in terms, that it was one of many flights that he had made and there is no particular reason to recall this flight. And, while professing no recall of the flight, he surmises that he would only have engaged in the low flying and the figure of eight manoeuvre to avoid other traffic or birdlife. He did not suggest that he could recall that happening, only that such events might explain the flying …….

(CASA) submits, the discs show no evidence that would support the notion that Mr Quadrio flew in the manner depicted to avoid a hazard. (Para 18)….. "We do consider Mr Quadrio's exclamation fanciful when regarded as had to what is visible in, and audible on the disks. There is no visible evidence of other aircraft or bird life……..

Except for – had they been looking more attentively, the large flock of birds that was appearing almost straight ahead of the aircraft in a typical migratory bird formation in two straggling lines behind their leaders.

"……but beyond that, a figure of eight manoeuvre is an improbable response to the perceived hazard because its effect is to put the

helicopter in a similar position without any real opportunity to observe any perceived hazard." (Para 20

"thus we reject Mr Quadrio's proffered explanation and, more importantly, consider that it is an explanation conjured up to avoid him having to explain the reality of his flying on that day."

"We entirely reject Mr Quadrio's reconstructed excuse for this manoeuvre. As we have said the audible and visual evidence from the film shows no sign of the emergence of any sudden threat.…… The absence of any hint on the film that Mr Quadrio regarded the terms as a necessity for safety and our own viewing of the film lead us to be well satisfied that Mr Quadrio flew in that manner for the purpose of entertaining his passengers. It was unsafe to do so" (Paras 60 and 61).…..

"the conduct of 28 September 2 008, we think, demonstrates that Mr Quadrio was prepared to disregard the requirements of safety to satisfy a need to entertain the passengers.…… We need not recite the findings that we have already made. They satisfy us that Mr Quadrio was not a fit and proper person." (Para 70)

"we are more concerned that Mr Quadrio, from the outset and during the hearing, professed no recollection of the flight and advanced a patently risible story to account for his flying on that day.…… We find it impossible to accept that Mr Quadrio is truthful when he asserts that he had no recollection of the flight in the details of it were drawn to his attention, and he viewed the film of part of the flight, less than two months after the flight. That assertion is simply not believable." (Para 72) "the second aspect concerns Mr Quadrio's suggested explanation for the manoeuvres shown in the film. As we have said we regard those explanations as risible. They had been conjured up to avoid Mr Quadrio confronting the reality that his flying on 28 September 2008 fell well below the standard expected of a commercial pilot. But Mr Quadrio's inability or unwillingness to acknowledge his demonstrated shortcomings only reinforces our view that he is not a fit and proper person to have the responsibilities and to exercise and perform the functions and duties of a commercial pilot." (Para 73

,,,,,,,"it is undoubtedly the case that pilots will from time to time, fall into error. In our view a pilot who does so and who has a proper appreciation of the importance of air safety will acknowledge the error and reflect upon it in order to prevent a recurrence. Mr Quadrio has done none of that. On the contrary he sees himself the persecuted victim of an 'overly protected bureaucracy'" (Para 74)

"we acknowledge that the decision and its affirmation and in those great cost and hardship on Mr Quadrio and his family. And he has been put to expense, no doubt considerable expense, in resisting the criminal proceeding. These matters cannot transcend the overarching obligation to have regard to the safety of air navigation. They cannot overcome our conclusion that Mr Quadrio is not a fit and proper person." (Para 76)

See the birds disappearing at frame 32:00?

As we are about to see, the Tribunal made its decision on the basis of a flawed assumption – that CASA's expert witnesses had done the job they're paid to do.

It's interesting that while Mr Quadrio was "committing" his alleged infraction and Mr Coglan was inadvertently collecting evidence purportedly of steep turns and abrupt flight manoeuvres, that these experts were actually witnessing a bird avoidance manoeuvre – in other words a pilot doing what pilots are paid to do: Minimising the risk to their passengers!

It is especially poignant that the more John Quadrio protested his innocence, the more the Tribunal belaboured him with gratuitous insults and hardened its attitude. One of the members was even seen to roll his eyes and shake his head when he persisted.

(Continued overleaf)

Return of the birds

Following their unexplained disappearance, the birds now begin to reappear from behind the windscreen pillar and compass – just one in frame 32:01, four more in the following frame, and a continued increase over the next ½ second to frame 32:15 when the birds once more mysteriously disappear (on the next page.)

CASA has dismissed these images as "video graphic distortions. “Pilots who have spent many hours over the Great Barrier Reef (as has this one) flying marine biologists, national parks and other researchers while dodging birds, will be impressed by the way these "video graphic distortions" impersonate flocks of migratory birds so accurately by flying in ever-changing formations in trailing line astern and flapping their wings. In fact, a contact at the Great Barrier Reef Marine Park Authority apologised for not being able to identify the actual bird species because the image quality wasn't quite up to it.


TCR 00:00:32:08


TCR 00:00:32:09


TCR 00:00:32:10


TCR 00:00:32:11


TCR 00:00:32:12

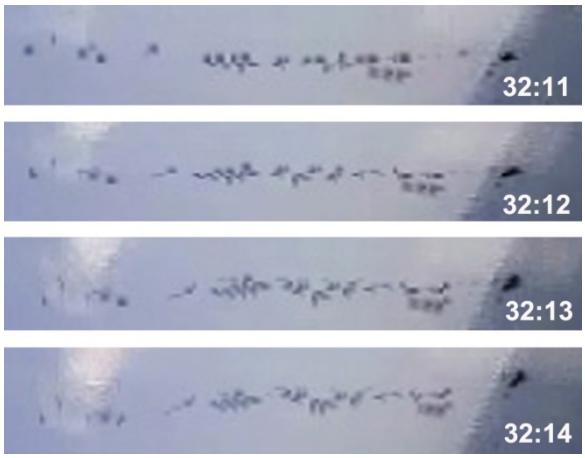

TCR 00:00:32:13


TCR 00:00:32:14


TCR 00:00:32:15

A technical note:

The image sets on our files vary in quality, but those above and at right provide the best definition available. However, the image quality also depends on the software and hardware you are using to analyse it. These four images are the last four before the birds disappeared. They have not been enhanced in any way. The large blob on the right-hand side in fact represents a cluster of birds aligned roughly one behind the other when viewed from the camera. Despite the fact that the images are only 1/30th of a second apart, two aspects remained clearly discernible. They are the flapping of the birds' wings, and the constant changes in their positions relative to others in the flock – unlike the Roulettes – however the bird experts tell us it's done "to confuse predators."



That appears to have been very effective in John Quadrio's case.

Sequel

On December 21, 2011, CASA Director John McCormick wrote to John supporting the AAT's affirmation of CASA's decision to cancel his license, denying that the video evidence depicted a flock of birds, and asserting that:

> *"You are free, of course, to re--apply for a commercial pilot (helicopter) licence at any time. If and when you may decide to do so, however, you will need to demonstrate to CASA that you are a fit and proper person to hold such a licence."*

Having been grounded now for well over three years, faced a failed criminal prosecution and spent over $50,000 on legal processes, John couldn't really see how the CASA officials who had made the grave decisions affecting his future would suddenly change their minds.

His response to Mr McCormick:

> *I acknowledge your advice that I am free to re-apply, but advise that while retaining that right I do not intend at this time to do so.*
>
> *One reason for this decision is your assertion that I would need to demonstrate to CASA that I am "a fit and proper person to hold such a licence."*
>
> *Considering the levels of unfitness and impropriety which various of your officials have displayed at almost every stage of the process, I see no value in facing, once again, the task of trying to convince those same officials that they should change the perception they have spent so much time and public money promoting.*
>
> *I need hardly remind you that CASA was successful in persuading the Administrative Appeals Tribunal to adopt the view that my failure to admit guilt showed that I was not a fit and proper person. I remain not prepared to admit guilt falsely at this or any other time.*
>
> *The fact your officials have been able to operate in the way that they do without any apparent meaningful intervention in or investigation of their misconduct also leaves me and many others with no confidence that there is any management impetus to pursue a return to honourable practice, the rule of law, the principles outlined in CASA's code of conduct, its enforcement procedures manual, and other published guidance material.*
>
> *Yours sincerely*

Nine months later:

"John Received a call from Mr Adam Anastasi who admitted 'there had been some mistakes made,' and "said he just wanted me to meet with their regional officer, Owen Richards. I said I don't think there's really much point in meeting him, but Owen Richards called me and said would you like to have a meeting with me. I asked what he wanted to discuss at this meeting: 'Well, I just want to find out whether you learnt anything from it.' I said 'of course I've learnt something from it; I've learnt that CASA are a mob of ******* crooks.'"

An email from John Quadrio's wife Sophie to friends: Sep 20, 2012

"Well, we've worked out what it was CASA wanted when they tried to get John into their Cairns office for an interview today. My gut told me it was a case of the spider and the fly. I don't think they were expecting John to extract it out of them over the phone in the way that he did.

"They must have thought that when John applied for his licence reprint that he wanted to get back into the air. Getting the reprint was a fact-finding exercise. We didn't apply for it to get him back in the air which is what CASA apparently thought he was up to.

"So we now believe the plan was to get John to admit guilt in some way in return for them reducing the requirements for him to get back into the air. (CASA: 'So what have you learned from all of this, John?') I am sure they would have been planning to record the interview so if they managed to extract some sort of confession they could use it to justify what they did to him if ever questioned it in the future. What they didn't expect, was John's strong response that: 'What I have learned is that CASA are incompetent and malicious and will stop at nothing, even if they have to break the law to do it! Don't you get it? I am INNOCENT!!!'

Furthermore Owen Richards [North Queensland Regional Manager] was surprised when John told him that an extensive brief had been given to the Queensland police.

"So, no – we will not be attending CASA's office for an interview today."

John Quadrio puts it a little more bluntly: "The way I feel about it is quite simple; I do not wish to have any dealings with CASA because I do not trust them 100 per cent. They have completely destroyed my career and my confidence, and at this stage getting back in the air is no longer an option for me because the damage they have done to me is irreversible and I simply don't want to be in the same room as them."

Comment

Apart from any police investigation, which would obviously be limited to specific allegations, CASA's management of the whole Quadrio matter presents an all-to-frequent opportunity for a searching independent examination of CASA's processes and pattern of behaviour in cases like this.

The Quadrio case encapsulates numerous behaviour patterns that are a recurring factor in many similar matters we have analysed. Among the questions that need to become terms of reference for an enquiry would include, but should certainly not be limited to:

- The facts surrounding the initial meeting between Mr Allwood, John Quadrio and his employer, whether the meeting was recorded, and if so by whom? (CASA has responded to an earlier query, saying that "CASA did not record the meeting." We note that this is not the same response as saying "the meeting was not recorded.")
- The process by which CASA adopted the technical opinions of relatively junior pilots on its staff, while ignoring the advice of more knowledgeable, senior and experienced helicopter pilots that it was unlikely to prove any of the charges, "with the possible exception of low-flying."
- The reasons why the CASA investigator and the local officials did not visit the scene of the alleged offences, interview informed witnesses, and assess environmental factors including bird life;
- Whether CASA deliberately manipulated the legal system to drain the Quadrios' available funds by charging Quadrio with criminal offences in the middle of an AAT hearing which had the effect of shelving that hearing for 12 months (while still keeping it alive) while CASA tried its luck with the criminal legal system where all the charges were eventually dropped;
- Whether unlawful coercion to withdraw John Quadrio's AAT application was attempted in a late night telephone call from a CASA investigator on February 3 2009. (Archival telephone records could easily resolve this issue if they haven't been tampered with.)
- The provenance of all the evidence, especially the videos, used to support CASA's allegations and the quality of its evaluation and interpretation;
- The quality of or otherwise of the legal and technical input into these processes, including the sudden decision to refer the case to the DPP, and the quality of the assessment of technical evidence provided by various witnesses.
- CASA's apparent policy of refusing to acknowledge or investigate possible misconduct on the part of its own officials, and of closing ranks behind them in the time-honoured concept of military loyalty.

- "Jurisdiction-shopping" between the AAT, administrative decisions, and criminal court processes.
- The reason why, although Mr McCormick had written to Quadrio in a letter headed: **Cancellation of pilot licence – ARN no 585016**, he was told when he telephoned the licensing branch that it had never actually been cancelled.
- A study that examines all the costs to the taxpayer of this misadventure, including executive, lawyer and drone time, travel, accommodation and allowances, and balances them against what the study identifies as the net safety benefit, using contemporary risk analysis tools.
- Comparison with other well-known cases to identify repeated misconduct.
- Staff turnover at CASA per occupation per annum since Mick Toller ascended to the throne.
- Amount spent annually on aircraft type ratings for flying operations inspectors, and measures/policies to protect the investment in public money from the exporting of these qualifications without due return of service provisions.
- The qualifications and training of the FOI who initiated the action against JQ.

The case raises too many issues to reiterate them all here, but for any agency seeking to initiate an enquiry, ample guidance is available from articles appearing in *ProAviation* and other published analysis, as well is from the Quadrios.

John's decision not to meet with CASA is worthy of respect. Now at age 50, he hasn't flown for four years, the process has cost him between $50,000 and $60,000, not to mention four years of lost income and the destruction of the Quadrio's business plan. At the time when he was stood down by his employer he was forced to cancel his order for a brand-new Robinson R 66 helicopter from Heliflight, and along with it an expected annual turnover of between $300,000 and $400,000 with substantial contracts already negotiated. A four-year hiatus has now deferred that plan to the point of impracticality and destroyed those aspirations.

And if anybody in CASA gives a damn about all that, they're making a pretty good job of keeping their heads down.

Case study: Persecution in the Pilbara

The rot set in back in May 2004 when Clark Butson, of WA AOC holder Polar Aviation, found himself in a verbal stoush with CASA officials over two operational issues during a routine "operational audit."

A previous audit in July 2003 had gone fairly normally, although CASA had noted some minor clerical and technical items which "required attention." Butson was described by CASA as having "adequate control and knowledge of day-to-day operations" in his capacity as CP and CFI; and the AOC had been renewed at that time. In January 2004 polar embarked on a number of innovations including using the Company website as an operational hub for all operational activity. The then Operations Manager Kyle Hargraves was engaged to aid in the alignment of its flying school syllabus with the recently introduced competency-based training [CBT] requirements and to incorporate CBT into the company's operations manual.

Butson had been the Director of Polar Aviation since 1983. The company had held a charter and aerial work AOC continuously for the entire 24 years of its operation, and enjoyed a long and excellent aviation safety record with no accidents and only two incidents. During the relevant period, Polar operated eight aircraft and employed six pilots, a licensed aircraft maintenance engineer and a third year aeroplane maintenance apprentice.

The May 2004 audit was in response to Polar's application to renew its AOC which was due to expire in July 2004. Polar said the adverse actions began after a heated technical argument during that audit, between Butson and CASA FOI Terry Robinson, over operational issues including CASA requirements as to asymmetric flying training procedures, and whether there was a requirement to carry lifejackets on the route between Port Hedland and Broome.

Polar claimed: "it is an unfortunate that the argument occurred, which became very personal; and it is believed that the personal hostility of the officers from CASA was reflected in their report. The CASA report of the May 2004 audit opens with the observation that "the facilities at Polar Aviation are generally adequate", however CASA did not acknowledge the many improvements and positive changes made by Polar, the details of which had occupied almost the entire "entry interview" for the May 2004 audit. It was acknowledged that several items remained "works in progress," but also that the fundamental structure for implementing changes was firmly in place."

However CASA's report from the May 2004 audit carried a very different tone. CASA did not acknowledge any of the changes, upgrades and innovations which had occurred and which were occurring, and which had occupied almost the entire entry interview. In particular, Polar had been found to be well advanced in implementing "competency-based training" (CBT), which was in its infancy at that time.

Following the May 2004 audit CASA issued a number of requests for corrective action ['RCA'], audit observations ['AO'] and aircraft survey reports ['ASR']. Polar responded to all these reports by email, but says that "CASA subjectively objected to the responses to the RCA's. Butson subsequently contacted (then) Area Manager Terry Farquharson in Perth, complaining that CASA was being unreasonable. Farquharson responded in a way which effectively said that CASA intended to close Polar's flying school on the grounds that it was "not CBT compliant," despite the information provided at the entry interview in May. In response, Butson made some enquiries regarding the number of CBT compliant schools, and found that only one of the flying school in Western Australia (the Royal Aero Club WA Inc) was CBT compliant, as were only 5% of flying schools Australia wide. During a seminar convened by CASA in Perth in early September 2004, the CASA presenter announced that "only 5% of flying schools were compliant."

Following complaints from Butson to CASA about its conduct in proposing to impose the threatened administrative sanctions against the Polar Flying School, CASA then withdrew its intention to close the school but issued a number of “show cause” notices against Butson and Polar Aviation.

On 16 July 2004, CASA issued three notices to Polar Aviation and to Butson `of proposed action to cancel or suspend and to refuse to re-issue Polar Aviation's AOC and to revoke Butson's Chief Pilot and Chief Flying Instructor Approvals subject to them showing cause why the proposed administrative action should not be taken. The basis of the first “show cause” notices was grounded primarily on an assertion that the RCAs issued by CASA after the May 2004 audit had not been responded to the satisfaction of CASA.

On 20 July 2004 CASA told Polar that it would “allow the company to continue to operate…” while the “show cause” process continued. Farquharson, however, refused to grant an extension of time for Polar and Butson to further respond to the 14 RCAs which were issued by CASA following the May 2004 audit.

Butson engaged aviation lawyers Grundy Maitland & Co (now Maitland Lawyers), to deal with CASA. On 30 July 2004 CASA extended the Polar AOC for a “further period of 2 months, expiring on 30 September 2004”.

On 13 August 2004 CASA agreed to an extension of the time by which Butson and Polar Aviation should respond to the first “show cause” Notices to 31 August 2004.. On 30 August 2004, Polar and Butson comprehensively responded to the three “show cause” Notices through their legal advisers..

A letter to CASA dated 30 August 2004 included a comprehensive response to the RCAs in the format preferred by CASA, who subsequently agreed that the minor matters raised by way of RCAs had been adequately addressed.

On 7 Sep 2004 CASA advised that it had “cleared” all but three of the RCAs, one of which related to the assertion by CASA that the Polar had not yet become compliant with the recently introduced CBT program. That issue, which also formed a major “ground” of CASA’s show cause notices, was raised at a time when only some 5% of flying schools in Australia had become CBT compliant; and when CASA was still conducting educational programs for flying schools on how to format a CBT program.

By 2 December 2004, only one RCA remained outstanding with CASA, being the RCA which related to the CBT program. The CBT program was submitted by Polar Aviation to CASA for assessment and approval, however, it remained unassessed by CASA, for almost two years!

On 30 September 2004 CASA extended Polar’s AOC to 30 November 2004, and enclosed “a new AOC recording this extended term”. At about that time, Butson sought to settle all differences between himself and his company and CASA. At the invitation of CASA, Butson and Hargraves attended a meeting with seven CASA officers at the Perth offices of CASA. During this meeting, some of the CASA attendees expressed ‘surprise’ at the innovations and upgraded operational procedures introduced by Polar Aviation. The Chair of the meeting made very favourable comments and invited Polar to continue to inform CASA of subsequent innovations”. At that point no items remained outstanding save for the matter of developing training materials for the CBT.

However on 9 November 2004, a number of CASA officers attended the premises of Polar to conduct an “audit”. The purpose of this “audit” was stated to Mr Butson by CASA “…to determine the progress of the implementation of operational procedures and changes to the Polar Operations Manual.” However, he said, The *real* purpose of this so-called “audit” by CASA was to try and find further faults in the operation and administration of Polar Aviation. Far from the conciliatory attitude displayed by CASA officers during the 18 October 2004 meeting, the audit team during the November 2004 “audit” was demonstrably hostile towards Butson and all of the Polar Aviation employees.

Hostile attitude displayed by CASA

On the night before the commencement of the “audit”, and on the lawn of the pilots’ house at Newman (W.A.), CASA audit team member and FOI, Gary Presneill, took it upon himself to advise two pilots (who had been employed with Polar Aviation for only about one week) to “get some rest because you are in for a roasting from CASA”. That statement confirmed to Butson that CASA had already formed a view adverse to Polar Aviation before the so-called ‘audit’ commenced:

“The CASA team stayed here five days and ‘trawled’ through all documents in a transparent attempt to ‘find anything’ which could be used adversely against Polar. An audit team member told Hargraves that ‘Clark Butson is an impediment to progress in the company’. Despite this unfortunate comment, I ensured that our employees extended the CASA ‘audit’ officers with every professional courtesy and assistance.

"However CASA issued supplementary show cause notices to Polar Aviation and myself raising a number of minor points they said were from the Nov 2004 audit. And then on 29 November they issued a further AOC which extended the term of the AOC from 29 November 2004 to 31 January 2005. By that time, only one RCA was still outstanding, being the one relating to the CBT. We then comprehensively responded to the second "show cause" notices through our legal advisers."

Cancellation of the AOC, Chief Pilot and CFI Approvals

"Then on 14 Jan 2005, *two weeks before the AOC was to expire*, CASA cancelled it, along with my Chief Pilot and Chief Flying Instructor approvals. They advised the cancellations by letter dated 18 January 2005, a copy of which was handed to our lawyer at the AAT in Perth where he was appearing in another, unrelated matter"

CASA said that the Decisions relating to Butson's CP and CFI Approvals were not automatically stayed, and took effect immediately upon receipt of the Notices, which meant that Butson's business was immediately shut down with no right of automatic stay, upon receipt of the CASA Notices.

CASA acknowledged that the alleged facts and circumstances in the cancellation notices largely repeated the facts and circumstances alleged in the first and second "show cause" Notices of July and November 2004. This was despite the fact that by 2 December 2004 only one RCA remained outstanding, being the RCA concerning the CBT program. An examination of the grounds for the decision confirmed that.

The remaining RCA, which related to the CBT program in the flying school, was being finalised. (The finalised CBT material was forwarded to CASA on 2 March 2005 and languished thereafter in CASA's offices for a considerable time, awaiting an assessment by the relevant CASA FOI.).

The cancellations forced Polar Aviation's immediate shutdown and Butson's life's work in developing a successful general aviation business was unnecessarily destroyed on 14 January 2005, however their financial obligations continued.

First Application to the AAT: January 2005

On 18 January 2005 Butson and Polar Aviation applied to the AAT in Perth seeking a review of the decisions. Through their lawyer John Maitland, they also sought an agreement from CASA to allow the Polar operation to continue pending the Review by the AAT, and an assurance that CASA would re-issue the Polar Aviation AOC upon its expiry on 31 January 2005.

Farquharson said that CASA would not consent to Butson continuing as CP and/or CFI pending the Review, and that before the aviation business could be restarted under the AOC, Polar would have to seek CASA approval of an alternative Chief Pilot before any flight operations resumed.

CASA said that it would not negotiate any deal to restart the Polar aviation business if Butson occupied the position of Chief Pilot or any managerial role in his own company. CASA had timed the Notices of Cancellation to take effect so close to the expiry of the Polar AOC, that Butson was left with no real option but to accede to the CASA demands if Polar Aviation was to be given any chance of having its AOC renewed by CASA by the expiry date of 31 January 2005.

In an effort to preserve his business, Butson began an immediate search for an appropriately qualified person to submit to CASA for approval. This was difficult because of the location and nature of the business and the lack of suitably qualified pilots willing and able to work in the outback of the Pilbara, at such short notice.

CASA said it would consider re-issuing an AOC to Polar if Butson "stepped back" from his business and appointed an alternative CP to occupy his position. CASA also indicated that an FOI would be made available at short notice to assess any proposed alternative CP. Butson arranged for pilot Matt Coram to be assessed by CASA and appointed as CP.

Conditional offer by CASA to renew the AOC

On 31 Jan 2005, *the day of the expiry of the AOC*, Farquharson advised Butson and Polar Aviation (by letter addressed to his lawyers) that following the acceptance by CASA of Coram as CP, he would be prepared to recommend to the Delegate that CASA issue an AOC for 3 years from 31 January 2005, **if**:

> (a) Polar Aviation entered into an enforceable "voluntary" undertaking ['EVU'] with CASA pursuant to section 30DK of the *Civil Aviation Act* on terms as were dictated by CASA, and
>
> (b) On the additional condition that both Polar Aviation and Butson agreed to waive their rights to appeal to the AAT for a Review of the CASA Decision made on 14 January 2005 to cancel the AOC and the CP and CFI Approvals.

It was CASA practice at the time to post the details of any company subject to an EVU on the CASA web-site under the title of "*Hot Topics*", whereby CASA would editorialise the justification for the EVU in quite disparaging terms. The editorialised comments posted by CASA would obviously put only one side of the story, and would not publish any countervailing factors. Butson feared that if Polar entered into the EVU as proposed by CASA that it would be unnecessarily vilified to the detriment of his business.

Butson and Polar Aviation also wanted to continue to exercise their rights to seek a Review before the AAT, because the conditions dictated by CASA for Polar Aviation to enter into the EVU were intolerable, and therefore declined to enter into the EVU. However, as a compromise, Polar Aviation proposed a set of practical and realistic undertakings in lieu of the terms proposed by CASA. CASA refused.

Butson was outraged at CASA's conduct, and was not prepared to be bullied into surrendering his rights or those of his company to make the appropriate application to the AAT for a Review of CASA Decisions.

On 4 Feb 2005, CASA issued a "Notice of Proposed Refusal to Issue an AOC" which alleged a number of things about Butson personally which he considered were both offensive and untrue as 'grounds' for the issue of the notice.

The "Notice of Proposed Refusal to Issue an AOC" flew in the face of the negotiations and agreements reached with CASA, and the offer of the 3 year AOC which had been made by CASA to Polar Aviation only three days earlier. The "Notice of Proposed Refusal to issue an AOC" was of itself a 'nonsense' for the reason that CASA had already refused to renew the AOC at its expiry on 31 Jan 2005. Butson formed a reasonable belief that CASA refused to re-issue the AOC not out of any genuine concern regarding its flight operations, but for the vindictive purpose of 'penalising' Butson and Polar to 'teach them a lesson'.

Second Application to the AAT: February 2005

Polar Aviation made a second Application to the AAT for review based upon a claim that as at 31 January 2005 it had a reasonable expectation that CASA would renew the AOC but that CASA had made a decision to refuse to reissue the AOC.

The AAT issued different case numbers to reflect an application relating to each decision under review.

CASA initially denied to the AAT that it had actually refused to re-issue the Polar AOC. It was believed that the denial by CASA was made to frustrate the second application to the Tribunal on the basis that there was no 'real decision' to refuse the re-issue the AOC. CASA eventually conceded that it had in fact made a decision to refuse to re-issue the certificate.

In order to mitigate losses and to preserve, as much as possible, Polar's business and goodwill; on 4 February 2005 Butson obtained approval from the West Area of CASA to enter into a short term commercial agreement with another Pilbara Operator, King Leopold Air Pty Ltd [KLA], whereby KLA conducted some commercial flights sourced by Polar.

Also to avoid, as much as possible the hardship and inconvenience to Polar customers who depend upon air services to travel in the outback of the Pilbara region, Butson also carried some of his former customers as private flights for no remuneration.

Stay Application 11 February 2005

The Application for a stay was heard by the AAT in Perth through a telephone hearing. CASA vigorously opposed the application. Butson was outraged to hear CASA make unsubstantiated and untrue allegations that he had conducted a charter flight illegally while the Polar AOC had been cancelled. He was further outraged to hear CASA seek to support this untrue and scurrilous allegation with an affidavit sworn by a CASA legal officer, Mr. Adam Anastasi, in which Butson said he had misrepresented the facts concerning one particular flight. Despite being made aware of the true facts surrounding the alleged flight, Anastasi refused to withdraw the untrue allegations contained in his affidavit.

Anastasi deposed in paragraph 10 of his Affidavit sworn on 9 February 2005 and filed with the, that:

> "*The respondent has received a report that the applicant conducted a charter flight on 4 February 2005 for the Shire of East Pilbara Council. At this time the applicant did not hold an AOC. Annexed and marked with the letter "D" is a copy of a file note of a conversation with Alan Cochrane, the President of the Shire of East Pilbara on 7 February 2005 and an email from Alan Cochrane to Mr Farquharson of the respondent dated 8 February 2005."*

The conduct of CASA in cancelling the Polar Aviation AOC just prior to its expiry by effluxion of time, and CASA's subsequent refusal to renew the AOC on the date of expiry was clearly designed to deprive Polar Aviation of the benefit of the stay afforded by section 31A of the *Civil Aviation Act 1988*.

However on 11 Feb 2005 the AAT ordered that the decision to cancel the Polar Aviation AOC be stayed and that the AOC be extended until the Tribunal's decision on the ultimate hearing of the Application for Review. In his reasons, Deputy President Hotop said that he had "no doubt that on the merits of the matter" the Tribunal should make such an order. The Tribunal found that there were "no overriding public safety considerations in this case". The Tribunal further determined that:

> *"Unless an order is made, the effect of which will be to continue the applicant's AOC in operation, the applicant will suffer commercial hardship –indeed it may even amount to the destruction of its business…"*

Butson says: "CASA was very unhappy with the decision of the Tribunal that preserved the AOC and which allowed us to continue our business. They were determined to shut down the Polar Aviation business, despite Farquharson earlier saying that CASA was prepared to grant a three year AOC on the onerous conditions they propose (which were unrelated to flight or safety issues) only some 11 days earlier."

Federal Court proceeding [2005] FCA 1023

On 4 April 2005 CASA made application to the Federal court in Perth seeking a judicial review of the decision by the Deputy President of the AAT staying CASA's decision to cancel the Polar AOC. CASA argued that there was no jurisdiction for the AAT to make an order extending the term of the Polar Aviation AOC, which had expired on 31 January 2005 and which had not been renewed by CASA.

The Federal Court rejected the CASA submissions and dismissed the CASA application with costs. His Honour also noted the that in the unsuccessful negotiations which subsequently took place, CASA offered Polar Aviation an AOC for 3 years, and that the amount of costs actually paid by CASA fell way short of the actual costs incurred by Polar Aviation in defending its rights.

AAT hearing 5 August 2005: Perth

On 5 August 2005 the AAT in Perth heard the Applications for Review.

In the course of the hearing, CASA raised various 'conceptual models' relating to safety management and alleged that Butson and Polar Aviation were deficient in respect of their management and operational procedures when compared to the conceptual models adopted by CASA.

During cross examination in the AAT hearing, and after having earlier asserted that CASA applied the conceptual models relating to safety management to identify operators who were, in effect, "dangerous to the industry", CASA area manager, West Area (Farquharson) was asked to explain the principles underlying the 'conceptual models relating to safety management adopted by CASA.' Farquharson could not do so despite his severe criticism of Butson and Polar Aviation, and was unable to identify to the Tribunal even one principle of the conceptual model relating to safety management which was relied upon by CASA in imposing the crippling administrative sanctions on Butson and Polar Aviation.

On 8 August 2005, and *before* all of the evidence in relation to the issue of the cancellation of Butson's Chief Pilot approval had been heard, Senior Member Allen, whilst critical of CASA's attitude and approach, sought to have the matter expeditiously disposed of by way of agreement between the parties. (The Tribunal had already indicated to both the Applicants and to CASA that the AOC was not going to be cancelled, and the tribunal also noted that Polar had in place a new Chief Pilot (Matt Coram) approved by CASA, to replace Butson.)

The AAT then determined that the AOC of Polar and the Chief Flying Instructor approval of Butson should not be cancelled, and directed that CASA issue an AOC with flying school approval by 2 September 2005. The Tribunal did not direct that Butson's CP approval should not be cancelled.

CASA had agreed that there would be no "unusual" features or conditions imposed on the, and the Tribunal directed that CASA "*…will, in good faith, do all things necessary…*" in causing an AOC to be issued to Polar Aviation which covered charter and aerial work operations including flying training.

Issue of AOC with conditions: 2 September 2005

But on 2 September 2005 CASA issued an AOC to Polar for the duration of only one year. The AOC also contained numerous onerous conditions which had not been agreed to by the applicants or their Counsel

during the negotiations with CASA at the AAT hearing in August 2005. These conditions went against the spirit and intent of the agreement discussed at the Tribunal, and, despite the Order the Tribunal made on 8 August 2005, did not allow Polar Aviation to conduct any flying training at all despite Butson retaining his CFI Approval.

The conditions imposed by CASA on the AOC included, among other things, strict reporting conditions to CASA concerning all flight and duty operations and a condition that Butson was not to occupy the position of Chief Pilot or any management position in his own company, Polar Aviation.

Rather than use its "best endeavours" in the spirit and intent of the agreement discussed at the Tribunal, CASA went out of its way to impose conditions which would prevent the Polar Flying School from operating, and which would increase the burden on Butson and Polar Aviation

Conduct of CASA post the issue of the AOC on 2 September 2005

Butson and Polar Aviation objected to the conditions imposed by CASA and sent a letter of complaint requesting it remove the prohibition concerning flying training and other oppressive conditions.

CASA refused to remove any of the conditions placed on the AOC.

To prevent, as much as possible, any allegation from CASA that he might be meddling in the affairs of his company in breach of the terms imposed by CASA on the AOC, Butson moved away from Port Hedland and relocated to Perth to allow the company to operate under the directions of the new Chief Pilot and of Hargraves, the operations manager.

However he kept in direct communications with both, but in keeping with the onerous conditions imposed on the Polar AOC, he did not attempt to have any input into the company operations contrary to the conditions imposed on the AOC.

Open hostility displayed by CASA towards Applicants

Despite Butson's departure and moving to Perth, CASA continued with a campaign of overbearing and officious targeting of the staff of Polar Aviation.

CASA adopted a pedantic and overly officious approach to Polar's compliance with the onerous reporting conditions, despite the problems involved resulting from the logistics of providing all of the detail to CASA within the times demanded, when much of such information had to come from pilots who were far out on flights in the outback of the Pilbara and unable to return to base within time.

On 7 October, CASA FOI Presneill sent an email to the CP of Polar Aviation alleging that the reports required were "overlooking a number of details required". The "details required" were Pressneill's own view of what details he suggested should be included in the Reports. These "details" did not appear in the Conditions imposed on the AOC. Pressneill further imposed very short times by which responses to further RCAs issued by CASA should be made by Polar Aviation.

Continuing the harassment, on 14 October CASA wrote to CP Brad Manning alleging that "Polar has not complied with the reporting conditions on Polar's Air Operation [sic] Certificate (AOC), and has not responded adequately to various RCAs". Pressneill claimed that Polar was not observing his conditions: "This means where a reporting condition is not complied with, until it is, any flight conducted by Polar will not be authorised by the AOC, and therefore is not lawful."

Pressneill's letter acknowledged the telephone discussion with Butson about the unreasonableness of CASA's onerous demands on reporting conditions and the short times imposed for responses to RCAs; however, Butson says he was "arrogant and dismissive of the administrative burdens imposed in attempting to comply with his unreasonable demands, stating words to the effect that a 'lack of available personnel to complete the task required was no excuse'. Pressneill told the CP:

"Therefore, if you find yourself unable to avoid flying duties – at times when your priorities should be directed to your Chief Pilot responsibilities – then you may have to raise the issue of "adequate staff numbers" with the AOC Holder."

Butson says he was constantly advised by the Chief Pilot and Hargraves that all of the employees feared for their licences as a result of CASA's attitude:

"Indeed, on 1 March 2006 the Polar Aviation Chief Pilot, Pilot Brad Manning had finally had enough of the bullying from CASA, and he sent a letter of resignation to Polar Aviation in which he stated, *among other things,* that:

…over the past 5 months I have feared for my licence and career on a daily basis due to what I felt was unnecessary pressure from CASA, from almost day 1."

Butson was distressed at CASA's letter claiming that Polar's operations under the AOC were illegal if the reporting conditions imposed by CASA were not strictly adhered to. CASA had subjectively imposed pedantic and bureaucratic sub-conditions onto the reporting conditions imposed on the AOC, and then subsequently asserted that Polar had not complied with these conditions and that all flights conducted by Polar Aviation were unlawful and would remain so until the reporting condition was complied with.

On 25 October 2005 Polar Centre CASA an objection to the unnecessary and unduly onerous conditions on the AOC. The letter explained the logistical difficulties in Polar Aviation complying with the conditions within the unreasonably short times demanded by CASA. The letter also raised concerns that CASA's officers had behaved unreasonably and with an apparent bias towards the company, which was evident from the open hostility and aggression displayed by FOI Pressneill towards Polar. Butson's lawyer suggested to CASA that due to the unacceptable degree of animosity displayed by the West Area office of CASA, that there should be a change of location of the office of CASA assigned to the surveillance of Polar Aviation to the adjacent Kimberley and Northern District of CASA.

CASA refused to remove the onerous conditions on the AOC, or to change the identity of the CASA inspectors' or field office concerned with Polar's surveillance, and denied that it was engaging in a petty and bureaucratic bullying campaign against Polar. In the same facsimile, however, the office of legal counsel for CASA asserted that:

> *"If a reporting condition imposed on an AOC under section 28BB is not complied with, the clear and unmistakable effect of this will be that the AOC no longer authorises any flight or operation while the breach continues.*

On 4 Nov, CASA manager Farquharson wrote to CP Manning alleging, among other things that:

- the reports made by Polar Aviation "were inadequate"
- Polar Aviation was in breach of its AOC conditions as a result
- "It is no excuse to assert that there are logistical difficulties in providing the information and documents to CASA"
- CASA's legal counsel had advised that: "if a reporting condition imposed on an AOC under section 28BA(2A) is not complied with, the clear and unmistakable effect of this will be that the AOC no longer authorises any flight while the breach continues That the reports sent in to CASA by Polar Aviation did not comply precisely with the exacting and pedantic requirements demanded by CASA to the satisfaction of Farquharson that Polar Aviation was placed "on notice that, while these breaches continue, any flight purported to be conducted under the company's AOC will be unlawful, as the AOC does not now authorise any such flights."
- "If Polar Aviation Pty Ltd conducts further flights before full compliance with the AOC conditions, CASA will take action against the AOC and/or your Chief Pilot approval and will also refer these matters to the Commonwealth Director of Public Prosecutions."

This letter was copied to a number of senior persons in CASA.

(m). The serious errors contained in the letters from CASA which were not sustainable at law were pointed out to CASA by Grundy Maitland & Co by letter dated 10 November 2005, however, no explanation of any sort has been proffered by any person, nor has any apology or a retraction been forthcoming in relation to these letters.

Third Application to the AAT: November 2005

On 7 November 2005, and as a result of the conduct of CASA, Butson and Polar Aviation made an application to the AAT for the matter to be brought back before the Tribunal constituted by the same Senior Member which constituted the AAT on 5 August 2005.

The application was brought before Senior Member Allen in Sydney on 9 December 2005. After considering the facts and circumstances of the matter, the Tribunal ordered that CASA and Polar attend a Conciliation Conference on 16 December 2005 in Melbourne before Member Fyce.

Oppressive RCA relating to maintenance

116 On 7 December 2004, Polar Aviation received an extraordinary RCA (No. 309455) issued by CASA requiring Polar Aviation to ensure to the CASA's satisfaction that each and every airworthiness directive [AD] and each and every aircraft manufacturer's Service Bulletin has been applied to each and every aircraft in the whole fleet of eight aircraft operated by Polar Aviation from the date of manufacture of these aircraft, and notwithstanding:

- any previous ownership of the aircraft prior to Polar Aviation, or
- when Polar Aviation may have purchased these aircraft, or
- any maintenance releases which have been issued in respect of each of these aircraft by licensed aircraft maintenance engineers ['LAME'] over the many years since the aircraft were first registered in Australia, and notwithstanding that none of these LAMEs are or were known to Polar Aviation.

To Butson's knowledge and after conducting reasonable enquiries, an RCA of this type and extent had never been issued to any other general aviation operator: "I believe it was issued by CASA under the cloak of safety compliance, and was intended to cost Polar Aviation many tens of thousands of dollars."

AAT Conciliation Conference 16 December 2005: Melbourne

At the Conference in Melbourne on 16 Dec 2005, CASA officers including Farquharson, refused to speak with Butson directly. Butson and Polar Aviation made a realistic offer to CASA in a *bona fide* attempt to settle the impasse, however, CASA remained recalcitrant and refused to move from its position with respect to the onerous and unwarranted conditions imposed on the AOC, and the matter did not settle.

Member Fyce set the application down for a hearing in Sydney before a Tribunal constituted by the same Senior Member which constituted the AAT on 5 August 2005.

February 2006 audit

On 20 February 2006, CASA conducted yet another "audit" of Polar Aviation. CASA told Polar that "the purpose of this 'audit' was for the renewal of the Polar Aviation AOC", which was due to expire on 30 September 2006. In reality, the "audit" was seen as an information-gathering exercise for CASA's use at the forthcoming further AAT hearing.

Polar had told CASA prior that date that the Chief Pilot had taken leave from 6 February 2006 and would not be back at the Port Hedland office until after 20 Feb 2006. CASA refused Polar Aviation's request to adjourn the 'audit' to a date when the Chief Pilot had returned from leave.

At the conclusion of the audit, and during the "exit" interview with the CASA FOIs, Hargraves asked the CASA audit team to what purpose the accrued information gathered by CASA during the 'audit' might be put. The response by the CASA audit team was to the effect: *"We (CASA) are mainly looking at how you (Polar) have corrected the processes which caused RCAs to be issued at the last audit, and we have also checked your reports (as conditions on the AOC) against actual data; and we have found the reports that you have sent to be accurate."*

CASA audit team didn't disclose any matters adverse to Polar during the "exit" interview other than minor clerical matters.

The 'audit' conducted on 20-21 February 2006 was the fifth intensive audit conducted on Polar since July 2003. The true and substantive intent of the February CASA 'audit' was revealed during the AAT hearing in March 2006, when CASA produced and used the material gleaned from that 'audit' by the CASA audit team, who had 'trawled' through the operational records of Polar Aviation, seeking to find as many faults as possible, no matter how minor, which could be used adversely as evidence against Butson and Polar Aviation in the March 2006 hearing in the AAT.

AAT hearing 9 March 2006: Sydney

The Application was heard by Senior Member Allen on 9 March 2006. CASA sought to adduce material which had been obtained during the so- called “audit" conducted on 20 – 21 February 2006 in an adverse manner against Butson and Polar Aviation. CASA again raised what Butson describes as “spurious further allegations.”

On 24 March 2006 the Tribunal determined in favour of Butson and Polar Aviation and directed that the conditions on the AOC be relaxed and amended, ironically, to reflect the same conditions as had been proposed by at the AAT Conciliation Conference on 16 December 2005. CASA again proved to be most difficult in relation to these orders:

- On 30 March 2006, and in order to give efficacy to the Tribunal’s 24 March Orders, CASA was requested to exercise its discretion pursuant to paragraph 4.3 of CAO 82.0 to allow the flying school at Polar Aviation to operate with Butson as CFI.
- Notwithstanding the directions of the AAT that CASA was to allow the resumption of the flying school of Polar Aviation, CASA did not comply with the request. Instead, on 4 April 2006 CASA advised that Butson should "*make a submission*" to Farquharson by 14 April 2006, and that CASA would make a decision thereafter.

The third “show cause” Notice

In what Butson sees as “a clear display of dissatisfaction with the AAT processes,” on 20 March 2006, CASA issued a further Notice of Proposed Action to vary, suspend or cancel his AOC. A Notice of Proposed Action to suspend or cancel approval of the appointment of Brad Manning as Chief Pilot was also issued by CASA on 20 March 2006, the details of which were in virtually identical terms as were set out in the Third “show cause” notice issued against Polar Aviation’s AOC. The Notices attempted to dress up the “findings” of the February 2006 'audit' as new matters and as matters of ‘consequence and seriousness’ such as warranted the closure of operations of Polar Aviation, when such characterisation was not supportable on any reasonable and informed view. The grounds were essentially the same as those relied upon in the AOC cancellation of January 2005.

The fourth “show cause” Notice

On 6 April 2006, CASA issued a further supplementary “show cause” notice signed by Farquharson which further attempted to dress up findings against the Applicants, and which stated, among other things*:*

“So serious is my concern now in relation to Polar Aviation's safety performance that, in respect of this and the 20 March 2006 Notice, I am allowing you until the close of business on 13 April 2006 to provide me in writing reasons why, on the basis of facts and circumstances set out above and in the 20 March 2006 Show Cause Notice, why I should not recommend to a delegate of CASA that he or she cancel, suspend or vary the Air Operator's Certificate".

The Notice contained allegations against Polar Aviation which Butson says “were replete with hyperbole and bias, untrue statements and a pedantic reliance by CASA upon minor clerical errors and other minutiae to support the issue of the notice. Polar said CASA “totally disregarded the performance of Polar Aviation and its officers in the total context of their operations.”

“The grounds for the threatened cancellation of the AOC relied upon by CASA in the third and fourth "show cause" notices were not supportable on any reasonable and informed view. Also, a further supplementary “show cause” notice was also issued against the Chief Pilot approval of Brad Manning in virtually identical terms.

Strong rebuttal of CASA’s conduct

Butson and Polar Aviation’s response to the third and fourth "show cause" notices through their lawyers was forceful but fair and accurate, and pressed home to CASA a number of points, which included:

- There is no proper basis to shut down Polar Aviation
- The AAT has recently decided that Polar Aviation should continue to operate
- Criminal contempt of the AAT by CASA in its actions
- The conduct of CASA amounted to an abuse of process
- The consequences of CASA’s abuse of process

- A demand that CASA stop its nonsense
- Formal response to the Third and Fourth “show cause” Notices

The fifth Notice issued by CASA

Undaunted, on 13 June 2006, CASA issued a fifth Notice of Proposed Action to Polar and Butson, which was 15 pages long and which generally went over what was by now very well ploughed ground, and avoided accepting the matters raised in the applicants’ response to CASA dated 11 April 2006.

In an extraordinary reaction to the response to the third and fourth “show cause” notices, CASA gave a further Notice of proposed administrative action in the form of what it termed a “*Deferred Decision*”.

"Not only do the conditions noted in the Show Cause Notices prevail, but due to its lack of safety culture and systems, Polar Aviation has so far been unable to rectify these problems and as a result, at least until early 2006, continued to conduct operations that are not compliant with the Civil Aviation Act, the Regulations and the Orders....

DEFERRED DECISION

I consider that up until the time the company appointed its current chief pilot there are grounds to cancel Polar Aviation's AOC..... As a result of (the appointment of a new Chief Pilot, Dafydd Skeen) I intend to defer making a decision on the show cause notices until Polar Aviation has had time to demonstrate whether under its new operational management it is able to correct the deficiencies that have been noted".

August 2006 audit

On 1 August 2006 a further audit, classified by CASA as a "special audit" was conducted over two days by CASA officers other than from the West Area office. As you’ll recall, a proposal for the involvement of an office other than the West Area office had been put forward by Polar and its legal representatives at least 12 months prior. The results of the audit were satisfactory to CASA, albeit some RCAs were issued in respect of some minor matters as a result of the audit. The RCAs were responded to on 12 September 2006.

It is significant that the attitude displayed by CASA and the approach displayed by its officers during this last audit was significantly more positive and constructive than the previous dealings experienced with the West Area office of CASA.

Issue of 3 year AOC: No special conditions September 2006

The threatened administrative sanctions by CASA did not occur. On 14 September 2006 CASA Service Centre Officer Andrew Cole advised Butson and Polar Aviation that:

"The AOC has been recommended for the 3 year period and without the conditions regarding the reporting requirements and Chief Pilot condition. The only condition that will remain on the AOC in Schedule 4 are standard conditions relating to Special Design Features (appears on every AOC that is issued) and Flying Training (appears on Flying Training AOCs only)."

On 14 September 2006 CASA issued an AOC to Polar for a 3 year period and without any specific conditions attached other than those identified by Cole.

Return of Chief Pilot Approval to Clark Butson

At the expiration of 12 months from the date of the August 2005 AAT hearing, Butson attended a short CASA seminar regarding Chief Pilots, and applied to CASA for the return of his CP Approval. On 5 October 2006 CASA advised Butson that he had successfully completed the Chief Pilot assessment process. CASA did not conduct a flight test on Butson in the course of making the CP assessment.

Flight testing approvals ['ATO']

Butson's own flight testing (Authorised Test Officer [‘ATO’] approvals), which he had held without incident for over 20 years, were not renewed until much later by CASA, which had determined unilaterally that Butson did not need them, despite the remoteness of the location of his Port Hedland business. Contrary to the subjective opinion of CASA, the remote location of Port Hedland is such that Butson *does* need ATO approvals, because without the ability to conduct flight testing, Polar Aviation training customers simply go elsewhere. There is no ATO based in Western Australia anywhere north of Perth.

On 11 May 2006 Butson requested CASA review the decision to refuse to renew his ATO approvals. The letter also requested CASA provide a full and detailed statement setting out the questions of fact relied upon by CASA in making the decision. No response to this correspondence was ever received from CASA.

The conduct of CASA had by this time destroyed Polar Aviation's flying school, and CASA's refusal to renew Butson's ATO approvals exacerbated that problem.

The sixth CASA Notice

On 5 October CASA issued a Decision Notice regarding the Polar Aviation AOC ['the sixth Notice'] which stated that this Notice…..

"will conclude the administrative action commenced on 20 March 2006". The author asserted that: *"...Mr Skeen appears to have put in place suitable systems and has apparently supervised the company's flying operations to an acceptable standard. "*

In fact, although Mr Skeen is a competent Chief Pilot, nothing had been implemented that was not in place or planned to be in place when either Butson, Matt Coram or Brad Manning were Chief Pilots of Polar. The improvements to the operation of Polar were made clear to CASA during the audit of May 2004 and reiterated during the formal meeting between Butson and CASA on 18 October 2004.

The conduct of CASA

The conduct of CASA since May 2004 has caused Butson to believe that:

(a). CASA formed an adverse view against Butson and Polar Aviation arising from the incident which occurred during the May 2004 audit,

(b). In an escalation of commitment, CASA expanded the hostilities against the applicants and imposed unwarranted further administrative sanctions and burdens,

(c). In January 2005, CASA wrongfully and maliciously cancelled the AOC held by Polar Aviation and the CP and CFI approvals held by Butson for the purpose of shutting the Polar Aviation business down and in the knowledge that the cancellation of the AOC and the CP and CFI approvals would cause Butson and Polar Aviation substantial and irreparable financial harm,

(d). Shortly after the AOC was cancelled on 14 January 2005, Farquharson was prepared to approve an AOC for the normal 3 year period, on the conditions that an enforceable voluntary undertaking ['EVU'] be provided and other AAT proceedings against CASA be withdrawn,

(e). In a further attempt to destroy Polar Aviations' business, CASA timed the cancellation notices to prevent Polar and Butson from obtaining the benefit of the stay provisions of section 31A of the Civil Aviation Act, and vigorously opposed the Applicants' stay application with the support of an affidavit which contained allegations which CASA knew were false,

(f). In a further attempt to keep the Polar Aviation business closed CASA made Application to the Federal Court of Australia seeking orders that the stay granted by the AAT be set aside, on grounds which were spurious and which sought to substantially undermine the Tribunal's capacity to provide effective relief in a case where the operation of the impugned decision would result in the applicant for review having to cease carrying on an existing business pending the hearing of an application for review;

(g). CASA has misused its power and its position to conduct a vendetta against Polar Aviation and Butson through unwarranted and overbearing administrative action and sanctions:

"CASA refused to accept the findings of the Tribunal, and misused its power to issue further notices of proposed administrative action in respect of both matters which had already been considered and determined by the Tribunal, and upon other alleged matters which were both erroneous and put out of context, with a view to causing Butson and Polar Aviation harm; and

"When seriously challenged over its conduct, CASA did not carry out its threatened administrative action, but returned the AOC and CP approvals to Polar Aviation and Butson without further argument, and in the case of Butson's own CP approval, without even a flight test.

"Since January 2005 the operations of Polar have continued to improve, and there has not been a single occurrence much less a combination of occurrences in the company's operations since that time of the nature which would justify the threat of suspension or cancellation of the AOC, much less than the actual taking of any such step. The systems to improve Polar were implemented by Butson from early 2004.

"The AAT decided in August 2005 that the Polar Aviation's AOC should not be cancelled but be reissued prior to it expiring by effluxion of time in early September 2005.

“The threat by CASA in its "show cause" notice of 20 March 2006 (and the subsequent supplement to it dated 6 April 2006) to vary, suspend or cancel the AOC held by Polar Aviation on the grounds therein which were essentially the same as the grounds relied upon in respect of the decision to cancel the AOC in January 2005 which was the subject of review by the AAT arguably constituted a contempt of the AAT pursuant to section 63(d) of the AAT Act, punishable by fine or imprisonment.

“CASA’s threat in its ‘show cause’ notices dated 20 March 2006 and 6 April 2006 caused us to respond in the strongest of terms on 12 April 2006. Although CASA avoided accepting the matters we raised in power response, it did not carry out its threat to cancel the Polar AOC; however, the unwarranted actions of CASA in carrying on what can reasonably be described as a Machiavellian campaign to harm both Polar Aviation and Butson has caused them immense and irreparable harm and economic loss.”

“CASA remained silent in relation to its threats set out in the “show cause” Notices of 20 March and 6 April 2006 for 8 weeks after the strong response. 160. In the Notice to Polar dated 13 June 2006, and in a continuation of the “nonsense” identified in Polar’s response dated 12 April 2006, CASA attempted to characterise its clear incontrovertible decision to permit Polar to continue operating, as something other than a Decision, and called it a “deferred decision”, purportedly to be made at some later date.”

“CASA’s attempts to dress up ‘findings’ as matters of consequence and seriousness such as warrant the closure of our operations, when such characterisation is not supportable on any reasonable and informed view, CASA's pedantic reliance on minutiae, with a total failure to consider the performance of Polar Aviation and its officers in the total context of its operations to ‘bully’ Butson and Polar and impose administrative sanctions upon them, and the failure and refusal of CASA to allow Butson and Polar to operate and develop their business; have had a cumulative effect which supports the claim that CASA has embarked on a Machiavellian style vendetta against myself and my company.”

Polar Aviation has made two formal complaints to CASA in relation to the conduct of some of its officers quite apart from the issues raised before the AAT and the Federal Court. To this day, some years later, these complaints remain unaddressed by CASA.

Butson also raised his and his company’s grievances with his local Federal Member of Parliament, and a number of his complaints were put to the senior management of CASA by the Senate Committee hearing for Rural and Regional Affairs and Transport on 23 May 2006. He describes the responses put forward by CASA to the questions raised by the Senate Committee on 23 May 2006 as “most unsatisfactory. CASA should be brought to account for its conduct.”

Case study: Dudding the Delegate

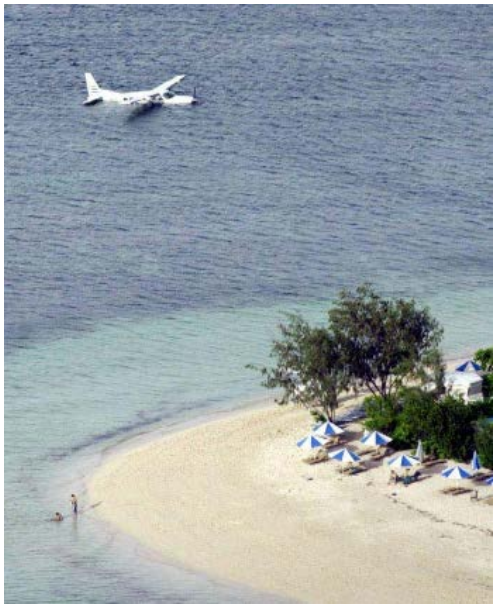
Paul Phelan, March 18, 2012

Some CASA staff had developed ways to distort published technical information and related law into selective disinformation, and to use it to deceive a colleague into making decisions that do immense damage to individuals and organisations without exposure to competent and critical review.

Until now. Like other events that occurred during the outbreak of morality, competency and professional integrity under Bruce Byron's leadership, a series of wrongs against an individual were largely reversed and justice was seen to be at least partly done, following the circulation by email of an earlier version of this case study, and further investigations by CASA including one by an external consultant.

On 8 Feb 2004, Cairns pilot Max Davy was conducting conversion training for the purpose of endorsing another pilot on a Cessna Caravan, VH-CYC. Max held a Grade 3 instructor rating and was a CASA approved person to conduct conversion training.

In the course of this training, near Green Island, Max simulated engine failure by retarding the power lever to flight idle. The three purposes of this exercise were to have the pilot under training conduct a simulated glide approach, to demonstrate the advantage of extending the glide by carrying out the forced landing approach with the propeller feathered, and to demonstrate the use of the emergency power lever. This action is in accordance with the purpose and intent of Civil Aviation Order 40.1.0.



Note: For the unfamiliar, the propeller can be feathered and unfeathered in this aircraft type with the engine running, and is immediately unfeathered simply by operating the propeller condition lever. An appropriate comparison would be that of taking a car out of gear but leaving the engine running while coasting down a hill.

Practice glide approaches are conducted to train pilots flying in typical operations, to respond to a sudden engine failure by selecting a suitable forced landing site and making a simulated forced landing approach. Before applying normal climb power and discontinuing the approach, the training pilot normally allows the approach to be conducted down to a level from which the training pilot can assess whether the aircraft has been adequately aligned so that a successful forced landing would have resulted.

Mr. Davy's account of the incident to ATSB, presumably conveyed also to CASA, was:

"A flameout occurred approaching the cleared limit of the practice glide approach. At the time the aircraft was operating with the primary power lever set to "flight idle" and the propeller fully feathered. Power was to be restored using the EPL (Emergency power lever)". When the EPL was advanced out of its detent there was no corresponding increase in torque, and both ITT and Ng were observed to be below normal during the approach. The primary power lever had been retarded to the flight idle position with the intention of restoring power using the EPL lever. However when the emergency power lever was moved out of its detent, no corresponding increase in torque occurred, and the inter-turbine temperature ITT) and Ng were below normal indications and decreasing. Ignition and

Start were selected on and a strong fuel smell was noted. A relight did not occur, fuel purging was then initiated followed by a starter assisted air start. Ng indications were such that the second attempt was discontinued, the propeller was reselected to feather and best glide performance established, a Mayday was broadcast with intentions and the aircraft manoeuvred for a beach landing. This was revised to a ditching after observing people at the far end of the beach landing area. After a successful ditching a call was made to the approach controller advising no injuries and assistance in attendance.

Note: Only one change has been made to the above text from Max's report, for the purpose of removing an ambiguity which is capable of two interpretations, one of them incorrect. The power lever had already been retarded in accordance with the manufacturer's operating advices.

Because of the skill with which the forced landing was carried out, the aircraft was undamaged by the landing and came to rest on the coral without even blowing a tyre; but was later damaged by salt water as the tide rose.

Nine months later (Sep 17 2004), Max received a "Show Cause Notice" inviting him to show cause why:

1. his appointment as a CASA approved person to conduct conversion training should not be revoked and
2. his Grade 3 instructor rating should not be suspended, cancelled, or varied.

The subsequent decision letter alleged (among other things) that :

On December 28, 2003, Max violated restricted area R766, an environmental bird protection zone around Michaelmas Cay; and stated as the three factors in support of the cancellation decision that Max had demonstrated:

a) a lack of due care in the planning and conduct of flying training;

b) an unwillingness to comply with the requirements of Civil Aviation Regulations 1988, in particular CAR 100(2) and CAR 138(1);

c) an unwillingness to communicate fully and effectively with CASA in the course of his functions and duties;

"And that hence you are not a fit and proper person to hold (the approvals.)"

Following the usual undisputed "facts and circumstances" regarding aircraft ownership, pilot qualifications etc, the delegate made various allegations and assertions in support of these decisions, the more significant of which are summarised below. (Note that CASA refers to "controlled airspace" when in fact the area is a "bird sanctuary restricted area", which is not a flight safety issue):

The **[show cause]** notice alleged as follows:

ESIR 2003 03931 – Violation of Controlled Airspace

On the 28th day of December 2003 at 11.55 (UTC) the company operated aircraft VH-CYX via Green Island and the reefs to the east of Cairns;

CASA received advice from Airservices Australia that VH-CYX was observed on radar inside restricted area R766

Flights below 3,000 feet in the area are prohibited without an ATC clearance. VH-CYX did not have a clearance and the company's flight with Max Davy in command was in breach of CAR 1988 100(2).

You, Max Davy in a written response to this ESIR denied any penetration of the restricted area despite being cautioned by the air traffic controller at the time, and afterwards being observed as penetrating the area on radar.

The response asserts that you were familiar with restricted zone R766 (Michaelmas Cay) and that you visually maintained clearance in excess of 1 nautical mile from the perimeter of R766.

The response asserts that CASA has not proved by radar, tapes of ATC transmissions, witness statements or other evidence that you penetrated R766.

I am satisfied that the evidence obtained from Airservices Australia shows conclusively that VH-CYX flown by you penetrated R766.

The notice alleges conduct by you concerning an accident near Green Island as follows:

"ESIR 2004 00433 VH-CYC Accident near Green Island

(i) (undisputed detail)

(ii) VH-CYC was on a glide decent [sic] when you, Max Davy made a mayday call: "flameout" on your radio. You reported that there were 2 persons on board.

(iii) VH-CYC was then tracked by radar until it was observed to have ditched in the sea at a point in the northern side of Green Island.

(iv) At 16.10 VH-CYC was reported in the water floating towards shore with nil injuries to person on board.

(v) In the company's written response to this incident you, Max Davy as pilot in command made reference to the emergency power level [sic] (EPL) as the means to restore power following a practice glide approach. You stated:

[See Max's account above: "*A flameout occurred.....*"]

(vi) Page 7-37 of the Cessna 208 Pilot Operating Handbook contains the following caution concerning the emergency power lever:

CAUTION

The emergency power lever and its associated manual override system is considered to be an emergency system, and should be used in the event of a fuel control unit malfunction. When attempting a normal start, the pilot must ensure that the emergency power lever is in the NORMAL (full aft) position; otherwise an over-temperature condition may result.

(vii) The Cessna 208 Flight Manual pilot's checklist in the event of an engine flameout in flight requires the emergency power lever to be in the NORMAL position during a starter assist air start;

(viii) Your use of the emergency power lever to restore engine power was contrary to the manufacturer's instructions in the aircraft's flight manual and in breach of CAR 1988 138(1)

(ix) *In the company's written response concerning this incident you, Max Davy stated:*

"Ignition and start were selected on and a strong fuel smell was noted. A relight did not occur, fuel purging was then initiated followed by a starter assisted air start."

(x) *As the emergency power lever had been operated contrary to the manufacturer's instructions it is likely that an over-fuel resulted with fuel surges to the fuel nozzles.*

(xi) *When CASA Flying Operations Inspector Jason Clark wrote to the company's Chief Executive Officer Arthur Williams on 24 February seeking advice from the company about how the "fuel purging sequence was undertaken he received advice in writing dated 27 February that you Max Davy declined to answer further questions about your actions and that all further questions about your actions be referred to Mr Laurie Cox and his industrial organisation the Australian Federation of Air Pilots (AFAP)*

(vi *In its response to the ESIR and CASA's enquiries concerning this accident the company advised that the pilot in command Max Davy was engaged in a "private" training flight.*

(vii *CAR 1988 258(1) states:*

258 Flights over water

The pilot in command of the aircraft must not fly over water at a distance from land greater than the distance from which the aircraft could reach land if the engine, or, in the case of a multi-engined aircraft, the critical engine (being the engine the non-operation of which when the other engines are in operation gives the highest minimum speed at which the aircraft can be controlled) were inoperative.

(viii) *On the available evidence I am inclined to the view, that by conducting a training fight with a student pilot who had never flown a Cessna Caravan aircraft before, including a simulated engine failure with the single engine of VH-CYC shut down, with the propeller feathered, at an altitude of approximately 2,000 feet, and using the emergency power lever to restart the aircraft's engine contrary to the manufacturer's instructions, and carrying out a flight at a distance from land greater than that which enabled the aircraft to glide and reach land safely you, Max Davy breached CAR 1988 258(1) and conducted a reckless operation of an aircraft contrary to Section 20A of the Civil Aviation Act.*

Later in the same document the following additional assertions relating to the engine handling issue were made:

(a) *Despite the disclosures made in* [Mr Davy's voluntary] *statements, you have not in these statements, or in the response, addressed the issues that gave rise to CASA's safety concerns, namely:*

(i) *Why did you conduct an emergency simulated engine failure procedure in the particular circumstances of the student pilot Matthew Radzyner who had not flown in that type of aircraft before, after only a few hours of ground training and*

(ii) *In that process, using the emergency power level [sic] to restore power to the aircraft's engine contrary to the manufacturer's instructions contained in the aircraft's flight manual, and in breach of CAR 1988 138(1); and*

(iii) *Why was such a procedure undertaken over water and not within gliding distance of a suitable landing area?*

(b) *The response states that* "The exercise was conducted entirely within the provisions of the Regulations", *and that* "CAR 258(1) only requires that the aircraft be able to glide and 'reach land.' I met that requirement. The choice to ditch was made on the basis of that being the most suitable landing at that time."

(c) *I find that errors were made by you, not in the handling of the ditching, but in the planning of the flight, and in how the simulated engine failure procedure was conducted. The emergency power lever and its associated manual override system is an emergency system under which the Cessna 208's flight manual was required to be used only in the event of a fuel control unit malfunction. You also made an error of judgement in your choice of conducting this emergency procedure over sea, rather than land, and within gliding distance of an airfield.*

GROUNDS FOR REVOCATION OF YOUR INSTRUMENT OF APPOINTMENT AND CANCELLATION OF YOUR INSTRUCTOR RATING GRADE 3

(d) *Pursuant to Section 33 (3) of the Acts Interpretation Act 1901 CASA may in its discretion revoke any instrument of approval to give aeroplane conversion training under CAR 1988 5.21.*

(e) Pursuant to 269(1)(d) of CAR 1988 CASA may cancel a license including a flight instructor (aeroplane) Grade 3 rating issued under CAR 1988 5.14 where the holder is not a fit and proper person to have the responsibilities and exercise and perform the functions and duties of that rating.

(f) I am satisfied that your conduct as set out above has demonstrated:

- *a lack of due care in the planning and conduct of flying training;*
- *an unwillingness to comply with the requirements of Civil Aviation Regulations 1988, in particular CAR 100(2) and CAR 138(1);*
- *an unwillingness to communicate fully and effectively with CASA in the course of his functions and duties;*

And hence you are not a fit and proper person to hold (the approvals.)

Discussion

1. At all material times relating to the decision, the delegate was John Flannery, [then] Acting General manager, General Aviation Operations. In CASA's current policy at that time, this appointment came with the position, regardless of the appointee's background, specialist technical or legal qualifications, or training.
2. The CASA component of the above material is drawn from the "decision letter" sent to Max, which was signed by Mr Flannery. It is not known whether Mr Flannery has any background in flight operations, nor is it immediately apparent from his correspondence, which gives the impression that he is making decisions based on advice from another party with some aviation background but with limited skills relevant to the competent assessment of these technical issues.
3. Decisions made by delegates without an aviation background are necessarily based on direct technical input from field staff, directly or through their area managers. This raises the question of whether CASA has sufficient safeguards in place to ensure that its employment, training and ongoing performance monitoring of key field and management employees are adequate to ensure the integrity, competence, and motivation necessary to achieve CASA's published goals while observing its commitments to compliance enforcement and to procedural fairness and natural justice.
4. Facts surrounding the issue dealt with in this study, raise serious doubts in that regard and invite the conclusion that CASA has made grave errors in reaching the conclusions he has drawn on to cancel Max's approvals. These are dealt with in the summary at the end of this document.

Allegation that the operation was in breach of Regulation 138(1) of CAR 1988

138 Pilot to comply with requirements, etc of aircraft's flight manual, etc

(1) If a flight manual has been issued for an Australian aircraft, the pilot in command of the aircraft must comply with a requirement, instruction, procedure or limitation concerning the operation of the aircraft that is set out in the manual.

Penalty: 50 penalty units.

(2) If a flight manual has not been issued for an Australian aircraft and, under the relevant airworthiness standards for the aircraft, the information and instructions that would otherwise be contained in an aircraft's flight manual are to be displayed either wholly on a placard, or partly on a placard and partly in another document, the pilot in command of the aircraft must comply with a requirement, instruction, procedure or limitation concerning the operation of the aircraft that is set out:

(a) on the placard; or

(b) on the placard or in the other document.

(a) The decision letter negligently quotes a "Caution" from Page 7-37 of the Cessna 208 Pilot Operating Handbook regarding the use of the emergency power lever. The page references used by CASA are inaccurate and appear to be derived from a later model Cessna 208B Grand Caravan manual. The model has a different fuselage, different flaps, different engine, different weights, and a different type certificate.

(b) The correct reference for VH-CYC's Aircraft Flight Manual is P/N D1307-13, revision level 32, 7th Sept 2001.

(c) The delegate or his advisor/s selectively used only sections of a document to support an agenda, either deliberately or negligently misleading the delegate and deliberately creating a mind-set in the reader of a non-compliant and reckless person.

(d) Mr Flannery's comment: *"On the available evidence I am inclined to the view that Max Davy breached CAR 1988 258(1) and conducted a reckless operation of an aircraft contrary to Section 20A of the Civil Aviation Act….."* invites the reader to consider whether he actually reviewed *all* the available evidence or whether he reviewed only the "evidence" that would support his incorrect assessment of the allegations. Mr Flannery, it's very hard to find good staff these days, but it may have been worth the extra effort.

(e) Are you sure you weren't pontificating just a little bit, Mr Flannery? Even experienced judges rarely use the expression: "I am inclined to the view," in part because it suggests a less than total confidence in the conclusion. The last time I heard it was from a senior judge who'd spent several days examining sworn documents, listening to sworn evidence, cross-examination and competent legal argument, and assessing the whole lot from the background of a highly qualified jurist. Even then however, he did not draw on it to support his decision.

(f) As any pilot knows, a CAUTION in a manual such as this is simply that – a caution, not a prohibition. CASA had refused to listen to this argument; and worse, CASA fiddled around with the meaning of the word. CASA deliberately made no reference to the next full paragraph at page 7-35 immediately following the CAUTION, which would have absolutely supported the argument that "Caution" does not mean "Prohibited"; and that Max Davy complied with the Pilot Operating Handbook (CAR 138 aircraft flight manual). The omitted paragraph explains how engine response may be more rapid than with the primary power lever, and that additional care is needed.

(g) Mr Flannery states that the EPL is "considered" to be an emergency system. The purpose of the "caution" is designed to prevent pilots continuing flight operations relying on the EPL, rather than landing as soon as possible and rectifying the FCU

(h) The next full paragraph in the POH on the same page (7-35) states: *Use of the emergency power lever with the primary power lever out of flight idle is prohibited.* That is a very clear instruction – do not use the EPL while the primary power lever is out of the flight idle position and the engine is running. Cessna thus clearly distinguishes between "caution" and "prohibited."

6 Max Davy was never prosecuted in a court for breaching Regulation 138(1). At least CASA has the wit in this particular case not to waste public money fighting cases based on incompetent investigation.

7 Allegations of a lack of due care in the planning and conduct of flying training

Para 7 (xiv) of the decision letter contains several errors:

"…… *including a simulated engine failure with the single engine of VH-CYC shut down, with the propeller feathered, at an altitude of approximately 2,000 feet, and using the emergency power lever to restart the aircraft's engine contrary to the manufacturer's instructions, and carrying out a flight at a distance from land greater than that which enabled the aircraft to glide and reach land safely you, Max Davy breached CAR 1988 258(1) and conducted a reckless operation of an aircraft contrary to Section 20A of the Civil Aviation Act."*

(a) It is incorrect and incompetent to state that the engine was "shut down." The power was reduced to flight idle and the propeller was feathered, which is a bit like putting your car out of gear and coasting down a hill with the engine still running. You can put it back in gear any time, just as Max Davy could (and did) unfeather the prop. In fact in some twin-engine types with similar engine/propeller combinations it's reasonably common practice to feather one propeller while taxying even at idle, to reduce thrust and save brake wear, and in some types to avoid excessive heating of plexiglass windows by hot exhaust flow spiralling around the nacelle. The engine continues to operate normally during this process.

(b) The reason for the engine "roll-back" hasn't yet been explained by anybody – especially anyone from CASA, although ATSB says turbine blade erosion *may* have contributed. See http://www.atsb.gov.au/aviation/occurs/occurs_detail.cfm?ID=605

(c) To state that the emergency power lever was used to restart the engine contrary to the manufacturer's instructions is incorrect. The EPL was not used to restart the engine, and the statement reflects that the person making the assertion is not technically competent to assess the available information.

(d) It is also incompetent and negligent to state that the flight was carried out at a distance from land greater than that which enabled the aircraft to glide and reach land safely. At no time during the flight was the aircraft in a position where it would have been unable to reach land in a glide. Even at 2,000 ft, a Cessna Caravan can glide for four nautical miles, and the distance between Cape Grafton and Green Island is only 7 miles. The option to ditch on the reef was considered preferable to running over a couple of busloads of tourists.

(e) But it gets worse, if you examine only *part* of the relevant regulatory material. The way it works, is that first, the regulator comes up with a regulation that make something quite clearly illegal such as:

> The pilot in command of the aircraft must not fly over water at a distance from land greater than the distance from which the aircraft could reach land if the engine ……. were inoperative.

(f) Mr Flannery's sources of technical information failed to make him aware of the other relevant regulatory material. CASA and its predecessors have been doing this sort of thing since World War Two. First, you make something absolutely illegal, then put together a process for permitting it under defined conditions…….

CAR 258

(3) It is a defence to a prosecution under subregulation (1) if the flight was:

(a) in accordance with directions issued by CASA

Mr Flannery's advisors, who were licensed pilots, knew about the ENR section of the Aeronautical Information Publication (AIP) which provides exemptions from CAR 258(1) as follows (I've underlined the really relevant bits) :

ENR 1.1 -98 27 Nov 03

76. FLIGHTS OVER WATER

76.1 Aircraft engaged in PVT, AWK, or CHTR [private, aerial work or charter] operations, and which are normally prohibited by CAR 258 from over-water flights because of their inability to reach land in the event of engine failure, may fly over water subject to compliance with the conditions in this section. These conditions are additional to the requirements for flight over land.

76.2 In the case of passenger-carrying CHTR operations, the distance from land areas suitable for an emergency landing must not exceed 25NM. In the case of helicopters, a fixed platform or a vessel suitable for an emergency landing, or for seaplanes an area of water suitable for an emergency landing and located adjacent to land may be considered acceptable for this requirement.

76.3 There is no limitation for PVT, AWK or freight-only CHTR operations.

76.4 Each occupant of the aircraft must wear a lifejacket during the flight over water unless exempted from doing so under the terms of CAO 20.11

76.5 A meteorological forecast must be obtained.

76.6 VFR flights are required to submit a SARTIME flight notification to ATS or leave a Flight Note with a responsible person.

So where, in CASA's apparently inadequately informed opinion, did Max bust CAR 258(1)? Even though it wasn't required, you'll find the flight conducted by Max was in full compliance with all of the relevant conditions set by ENR 1.1-98, and seems it would negligent and defamatory for his advisors (or himself) to suggest otherwise.

8. Max hadn't been prosecuted in a court for a breach of CAR 258(1). Under the circumstances, charging him would have been a pretty dumb thing to do. [redacted]

9. Irrelevant and incompetent allegations

(a) [redacted]

(b) The allegations include: *The particular circumstances of the student pilot Matthew Radzyner who had not flown in that type of aircraft before, after only a few hours of ground training;*

(c) Oh really? Perhaps there are two different Matthew Radzyners? Did CASA's expert advisor/s perchance convey a wrong impression in their haste? The Matthew Radzyner we know had a commercial pilot license, and is a qualified flying instructor and a former Cape York Air pilot who had already undergone "co-pilot" familiarisation in the same aircraft – VH-CYC - when previously employed. His relevant qualifications at or about the time of the event were:

- BA (Hons) Applied Mathematics, University of Sydney
- Commercial Pilot's Licences (Australian and OECS)
- Command Multi-engine Instrument Rating
- Class 1 medical
- Frozen Australian Airline Transport Pilot License .
- Instructor Rating Grade III (Australian).
- Night VFR Rating
- SAR Training completed.
- Flight crew dangerous goods course valid.
- Cockpit resource management course completed.
- Endorsements on Aero Commander 500 (50hrs), Britten-Norman Islander (800hrs), Beech 55/58 Baron, Partenavia P68 (85hrs), Piper PA34 Seneca, and Beech 76 Duchess (27hrs)

EXPERIENCE

- 2100 hrs Total flight time
- 900 hrs multi-engine command
- 1900 hrs command (total).
- 400 hrs planned IFR (multi-engine command)
- 300 hrs instructing
- 78 hrs instrument flight
- 68 hrs night flying

Additionally, three years charter and RPT command experience including international, VIP and remote operations and four tropical wet seasons. Regions flown included Australia (remote and metropolitan), Papua New Guinea, and the Eastern Caribbean.

(d) Absolutely nothing in the training syllabus suggested that the procedure was inappropriate at that particular stage of a conversion training program. A simulated forced landing is an event that is often repeated at various stages of a pilot's accrual of experience; and should come as no surprise; nor would it present any difficulty for any competent licensed pilot.

(e) It is understood that neither of the two CASA officials principally involved in these events, FOI Jason Clark and Townsville Team Leader Flying Operations Leon Kippin, was endorsed on the Cessna Caravan with its unique PWC PT6 engine. It is unique in that instead of the normal two exhaust ducts, it has a single duct with its attendant back pressure/gas flow characteristics, a design feature that may be a factor in the unexplained high incidence of compressor rollback. Research indicates that this undocumented feature, compressor rollback, is most likely to occur at low Ng settings, say 65% or less, as in a

Honduras landing approach incident, as well as a Fedex event, both of which occurred soon after Max's incident.)

(f) There's also an undertone in the documents that inaccurately suggests it is irresponsible to carry out practice glide approaches anywhere but over terrain where a landing could be made if necessary. That's such utter rot, and so irrelevant to intelligent risk management in the GA training environment, (or to supporting regulation) that it really doesn't deserve a response. However you should be aware that single-engine pilots in all walks of GA from crop spraying to power line patrols to tourism island-hopping to long distance charter, wisely spend quite a lot of their time contemplating what they'd do if their engine quit. So most of them explore the possibility in intelligent ways, by simulating engine failures and glide approaches when they can sensibly do so, usually without passengers.

Do we really want to make intelligent risk management practices an offence too?

(g) The language of the letter which (apparently deliberately) portrayed this pilot as a student with low experience appears to have been reckless and irresponsible, and aimed at deceitfully promoting the view that Max Davy was reckless and irresponsible because of the alleged inexperience of this pilot.

20A Reckless operation of aircraft

(1) A person must not operate an aircraft being reckless as to whether the manner of operation could endanger the life of another person.

(2) A person must not operate an aircraft being reckless as to whether the manner of operation could endanger the person or property of another person.

9. Max hadn't been prosecuted in a court for reckless operation of an aircraft in breach of Section 20A of the Civil Aviation Act, and it's not hard to see why. Somebody at CASA must have been bright enough to see that any such action would have been tossed out of any competent court. But why bother anyway, when you can belt out a few allegations, dish them up to someone who doesn't know anything about flying, and achieve your goal of getting him to make an uninformed decision that damages someone's career and reputation? And best of all, for some unexplained reason it isn't a reviewable decision that can be taken to the AAT, so you save a bucketful on lawyers.

10. Allegations of Max's "unwillingness to comply with CAR 100(2)

100; Compliance with air traffic control clearances and air traffic control instructions

(2) The pilot in command of an aircraft must not allow the aircraft to:

(a) enter, operate in, or leave a control area;

(b) operate outside a control area as a result of a diversion out of that control area in accordance with air traffic control instructions; or

(c) enter, operate in, or leave a control zone or operate at a controlled aerodrome; if the movement or operation is not in accordance with an air traffic control clearance in respect of the aircraft.

(2A) Subregulation (2) does not apply if the movement or operation:

(a) is authorised by:

(i) air traffic control; or

(ii) a notification in Aeronautical Information Publications or

(iii) NOTAMS; or

(b) is made in an emergency in accordance with subregulation (3).

(3) If an emergency arises that, in the interests of safety, necessitates a deviation from the requirements of an air traffic control clearance or Air Traffic Control instructions, the pilot in command may make such deviation as is necessary but shall forthwith inform air traffic control of the deviation.

(a) Mr Flannery's "decision letter" didn't even explain what Max was supposed to have done that supports the allegation that he was "unwilling to 'comply with CAR 100(2)." But it seems he's been dudded again.

First, the alleged penetration wrongly refers to "Controlled Airspace" and therefore appears to be a deceptive and deliberate embellishment. R766 is neither within a control area, nor is it within a control zone. The delegate really must have been having trouble finding competent advisors, as they claimed that Max's alleged violation of the restricted area (had it occurred,) would have constituted a breach of CAR 100(2). Any advice to the contrary must be incompetent advice.

(b) But it gets worse. Assuming Mr Flannery was referring to the alleged infringement of the restricted area R766, he might have needed to note that:

(i) These allegations were never adequately or publicly investigated.

(ii) Max's response to the allegations, which asserted that he was familiar with R766 and that he visually maintained clearance in excess if 1 nautical mile from the perimeter of R766, was rejected without any comment in support of the rejection.

(iii) It is understood that Airservices Australia provided CASA with a printout of radar-derived data relating to the alleged incident. This was not made available to Max for examination, nor were the qualifications of the official who examined them defined or challenged. Max was therefore never presented with an opportunity to sight or respond to the "evidence" on which the allegation is based.

(iv) The alleged "penetration" was a tangential approach towards the arc of a circle of one nautical mile radius, incorrectly depicted (Max states) on the graphical overlay on the ATC radar. That equipment wasn't designed to protect seagulls in the lowest 10 metres of the atmosphere, it isn't calibrated to the degree that would be needed to provide the information which is the purported basis of the allegations, and the scale on the air traffic control radar screen isn't anything like sufficiently accurate to provide acceptable evidence in a court of law. Max's response to the ESIR appears to have satisfied investigators who ultimately reviewed the case.

(v) The monitoring of aircraft movements outside controlled airspace is not a function of air traffic controllers, and Airservices Australia provides no specific training for it in terms of standards, tolerances, and procedures.

(i) It's also a matter of record that over-zealous CASA officials have in the past sought to launch immediate punitive action against pilots alleged by ESIRs to have violated controlled airspace, but have been restrained from doing so until ATC radar and voice tapes have been examined. These examinations confirmed that the ESIR was erroneous and no further action was taken.

(ii) The allegation is thus both technically and legally inaccurate, and therefore the result of an incompetent assessment of the available evidence.

10. Max wasn't prosecuted in a court for a breach of CAR 100(2). That lonely flash of realism shines out from a wilderness of blunders.

11. Allegations of "an unwillingness to communicate fully and effectively with CASA in the course of your functions and duties."

(a) Absolutely no regulatory requirements exist in relation to communications between individuals and CASA, especially when in this kind of situation the regulator has no other purpose than to gather evidence to support punitive regulatory action.

(b) The Australian Transportation Safety Board is the body with responsibility for the investigation of air safety accidents or incidents, the reporting of which is the regulated responsibility of individuals and organisations who are aware of events and are in a position to do so. Notably the ATSB and other air safety investigation bodies conduct their affairs around the concept of "no-blame reporting" in order to protect the air safety reporting and investigation process in such a way that air safety can benefit from lessons learned.

(c) In stark contrast, the involvement of CASA in post-accident/incident enquiries has been shown to be one of searching assiduously for any breach of the Act or Regulations, with a view to possible criminal prosecution or punitive administrative action. In the events dealt with in this case study, and in other previous matters relating to Cape York Air, CASA has been particularly aggressive in seeking evidence to support various punitive actions. It has

also demonstrated a high degree of determination to "manage" information in order to portray individuals and the organisation as non-compliant, irresponsible and reckless. Cape York Air and individuals associated with it would therefore have been extremely unwise to communicate unnecessarily with CASA employees whom they have come to distrust, and whose motivations and integrity they no longer have any reason to respect.

(d) For a considerable time, lawyers have been advising pilots not to discuss air safety incidents or accidents with enforcement officials. There is absolutely no reason why pilots should not adopt that advice, there is no justification for penalising pilots who follow it, and CASA has no authority to attach a penalty of any kind to that policy. In fact, we understand it is the same advice given to pilots by the Australian Federation of Air Pilots, of which almost all FOIs including (we understand) Mr Kippin, were paid-up members

Summary:

1. Numerous grave errors appeared to have been made by Mr Flannery as the delegate, and by CASA staff who were his sources of technical aeronautical input. If Mr Flannery was duly qualified to make the decisions he has made, both he and his employer were responsible for the material errors which damaged the career, reputation, and financial circumstances of Max Davy.
2. The "decision letter" contains several allegations of serious breaches of the Civil Aviation Act and Regulations. If the regulatory authority really believed such breaches have occurred it clearly had a duty to prosecute the alleged offender. The fact that no such prosecutions were launched, clearly indicates the lack of legal credibility that CASA ascribed to the allegations, and the poor quality of its sources of information.
3. In the recent past, especially following Minister John Anderson's initiatives to restore a measure of procedural fairness and natural justice to CASA enforcement processes, CASA had increasingly adopted a practice that is designed to circumvent those measures and remove individuals from the industry. A favourite tactic had become the practice of withdrawing "approvals," which CASA claims isn't subject to automatic stay, or to review by the Administrative Appeals Tribunal.
4. Another tactic is simply *not to renew* certificates or approvals, and then to claim that there's no reviewable decision because CASA didn't actually do anything. This practice has resulted in the termination of air operator certificates, and of individual pilot approvals. Sorry, Ministers, they've dudded you too!
5. [redacted]
6. By its actions as we've discussed, CASA either deliberately and maliciously, or negligently and incompetently, made and implemented decisions based on:
   a. Deliberately inaccurate statements; and/or
   b. Inaccurate and therefore incompetent analysis of technical material; and/or
   c. Selective and incomplete applications of parts of the Act and Regulations; and/or
   d. The subjective opinions of the delegate or other employees based on one or all of the above

CASA should therefore have been obliged to:

   e. immediately restore the approvals which it had illegally removed; and
   f. compensate Max for loss of income and reputation;
   g. review its processes for the appointment, training and tasking of delegates, ensuring that they have adequate technical and regulatory backgrounds and/or reliable and correctly motivated supporting staff, to help them make competent decisions in their areas of responsibility;
   h. establish a process of review under which any decision with far-reaching impact on the business or reputation of individuals or certificate holders will not be implemented without that review by responsible individuals;

i. [redacted]

Sequel

Following publication of an only slightly different earlier version of the above updated analysis, the writer was contacted by a senior CASA official seeking assurance that it was factual. I was later told that "This is the third investigation we've conducted." and assured that it in the light of the new information it raised it would be a very thorough investigation.

Subsequently an external investigator, Canberra-based James Venn and Associates, was commissioned to investigate the issue further. The findings and recommendations of the Venn investigation have never been disclosed.

However following the completion of the Venn investigation Max Davy received an undertaking from CASA's [then] Deputy CEO, Bruce Gemmell, saying that he had initiated two independent reviews of the facts and circumstances surrounding the original decision to take administrative action against Max in respect of:

- not renewing your CASA approved testing officer appointment; and
- cancellation of your flight instructor rating.

"Both reviews have concluded that the CASA decision maker may not have had all the facts before him at the time of making the decision."

"In the circumstances it would seem appropriate to restore your ATO delegation and instructor ratings upon successful completion of a flight test. It is CASA's intention that this occur should you so wish to avail in yourself of the flight test."

CASA subsequently met all the costs of recency training, flight testing, and issuance of all the missing approvals and ratings. Loss of income was not compensated for.

This acknowledgement of errors made in decision-making, and the preparedness to admit mistakes and provide at least partial recompense at the cost of the authority, was widely hailed as a possible change of direction. However as far as we know, (and with the exclusion of any agreements under confidentiality clauses) it has yet to be repeated. Two CASA officials, whose influence was partly responsible for the review, have since left the organisation of their own free will, believing they could not be effective in the current working environment. The honeymoon is over and we're receiving daily complaints of unconscionable conduct on the part of individual officials and groups.

An apology? Well, maybe next time.

Acknowledgement:

Invaluable input from Mr Peter Rundle, former CASA District Flying Operations Manager in Townsville, especially in analysing the procedural, regulatory interpretation and legal aspects of the issues discussed here, is gratefully acknowledged. Peter's deep understanding of general aviation and his objective analysis of complex compliance issues made him a well-respected regulatory employee of the kind that has been diminishing in number since the Australian government ceased appointing sufficient numbers of competent senior executives to the regulatory authority.

Case Study - Publish and be damned

This example is a complex one that details more than one apparent abuse. The most serious of these was the decision to ground a commercial charter operator based on ten unsubstantiated (at that point) allegations. The next was to publish the still-uninvestigated allegations on the CASA website.

Before any meaningful investigation had taken place, Cairns-based seaplane operator Aquaflight Airways, was shut down by the Civil Aviation Safety Authority's suspension of its Air Operator Certificate on 17 August 2000 for 28 days **"pending investigation of alleged breaches of the Act, regulations and Orders."**

The action was stated to have been taken under Section 28BA(3) of the Civil Aviation Act 1988, and the suspension was renewed for two further consecutive 28-day terms. It was finally lifted when the owner was forced by the financial outcomes of the closure, to sell his business.

The following analysis was prepared with the assistance of a former CASA flying operations inspector and Team Leader Flying Operations. Extracts from CASA documentation are highlighted in blue typeface.

Analysis of the Civil Aviation Safety Authority's actions.

The allegations were based on information provided by three pilots who were all known to one another, working in unison, after one of them had been dismissed for unsatisfactory performance.

This analysis of the ten allegations against the operator demonstrates that the suspension of the AOC was not necessary "in the immediate interests of safety" without examining whether the unsubstantiated allegations had merit. In other words, had CASA been motivated to assure the operator was a compliant operator rather than a discredited operator, initiatives were available to its officials to achieve that assurance without exercising sanctions which had the inevitable outcome of closing down a commercial aviation operation at the peak of a business season. The allegations and an analysis of their validity and Civil Aviation Safety Authority responses are detailed below.

The relevant section of the Act as invoked by CASA was:

Subdivision E—Conditions of AOC

28BA General conditions

(3) If a condition of an AOC is breached, CASA may, by written notice given to its holder, suspend or cancel:

(a) the AOC.

Note: At that time a "show cause" notice was not required but in February 2004 the Act was amended to correct that.

The announcement of the Aquaflight suspension was a clear admission that the allegations, because they were still under investigation, remained unsubstantiated at the time the decision was announced. The following is the text of the entry published on CASA's web site. The underlining is added for our emphasis:

Web site announcement

Regulatory action

Where CASA has reasonable grounds to believe there has been a serious breach of the Civil Aviation Act or the Civil Aviation Regulations by an aviation organisation, CASA is required to take appropriate regulatory action.

For regular public transport, charter and aerial work aviation operators this may involve varying, suspending or cancelling their Air Operator's Certificate.

For aviation maintenance organisations this may involve varying, suspending or cancelling their Certificate of Approval.

Before taking action to vary, suspend or cancel a certificate, CASA provides operators and organisations with written details of the facts and circumstances that CASA believes warrant the proposed action and, except in a case involving an immediate safety threat, provides them with a reasonable opportunity to show cause why the action should not be taken.

CASA's decisions to vary, suspend or cancel a certificate are reviewable by the Administrative Appeals Tribunal. CASA advises all operators and organisations of their right to have CASA's decision reviewed.

Action has been taken against the following organisations:

Aquaflight Airways Pty Ltd Cairns Queensland: Suspension of Air Operators Certificate for 28 days from 17.8.00, pending investigation of alleged breaches of the Act, regulations and Orders.

The announcement on the CASA web site went on to detail the actual allegations:

Regulatory Action

Aquaflight Airways Pty Ltd Cairns Queensland

Suspension of Air Operators Certificate for 28 days pending investigation of alleged breaches of the Act, regulations and Orders.

Authority: Subsection 28BA (3) of the *Civil Aviation Act 1988*.

Date of effect: Thursday 17 August 2000

Air Operators Certificate: No N40151816 authorising charter and aerial work

Grounds for suspension

Breach of condition imposed on the AOC by paragraph 28BA (1) (a) of the *Civil Aviation Act 1988*, which requires that the holder of the AOC comply with all requirements of the Act, regulations and Orders applicable to the holder.

Provisions of the Act, regulations and Orders allegedly breached

- Subsection 20AB (2) of the Civil Aviation Act (carrying out maintenance without an appropriate licence)
- Subsection 23 (2) of the Civil Aviation Act (carriage of dangerous goods other than in accordance with the regulations)
- Civil Aviation Regulation 43B (failure to record total time-in-service of aircraft on maintenance release)
- Civil Aviation Regulation 47 (1) (failure to record major defects in aircraft in maintenance release)
- Civil Aviation Regulation 5.55 (breach of directions in relation to flight time limits by pilots as set out in Civil Aviation Order 48.1)
- Civil Aviation Regulation 120 (using meteorological forecasts and reports made without authority of Bureau of Meteorology or CASA)
- Civil Aviation Regulation 133 (1) (d) (commencing flight without all required maintenance on the aircraft having been carried out)
- Civil Aviation Regulation 172 (1) (flight under the visual flight rules below 2000ft when unable to navigate by reference to the ground or water)
- Civil Aviation regulation 233 (1) (b) (commencing a flight where aircraft exceeds gross weight limitations)
- Civil Aviation Regulation 283 (making false statements on documents furnished in accordance with the regulations)

Notes:

When the above material was published on the web site, CASA did ***not*** provide the operator with written details of the "facts and circumstances" that it believed warranted the proposed action. Instead it provided Aquaflight only with the allegations which it had listed on its web site. Being deprived of the detail of the allegations, Aquaflight was thus placed in a position from which it could not prepare a proper response.

The implication from this action must therefore be that CASA believed this was “a case involving an immediate safety threat.”

At that point therefore, CASA failed to provide the certificate holder with a reasonable opportunity to show cause why the action should not be taken.

There is no apparent mechanism which provides a certificate holder with the opportunity to put to legal test the assessment that 'an immediate safety threat exists.' In fact, CASA does not even identify the individual officer who makes the assessment. This places operators and other certificate holders in a position from which **there is no defence against arbitrary suspension**.

At 5 pm on the last day of the 28-day suspension, Aquaflight received a faxed letter from CASA's Area Manager North Queensland, George Ivory, again detailing the alleged facts and circumstances and offering the company:

(a) a further 28 days in which to show cause "why I should not recommend to a delegate that the AOC issued to Aquaflight be cancelled on the basis of the facts and circumstances set out above." and

(b) "an informal conference to discuss the facts and circumstances raised in this notice."

By separate letter from the delegate, Laurie Foley, almost immediately afterwards, the operator was advised of the further suspension for a second 28-day period "to enable the conclusion of the investigation."

Comment:

The tactic of advising the additional 28-day suspension for the stated reasons can only be described as that of a storm trooper mentality. As CASA well knows, a business which has been left without cash flow for 28 days, and has been given no indication of the direction CASA intends to take at the expiry of the 28 day period, cannot plan, recruit, borrow funds or engage in marketing activity unless its future is clear. The penalties inflicted by two successive suspensions are therefore several magnitudes more severe than those ever able to be obtained as a result of adherence to due legal process; and they are inflicted by an individual without legal training or validated and documented evidence.

Additionally, CASA Director Mick Toller had said:

> *"The decision to suspend Aquaflight's AOC was made on the basis of evidence in CASA's possession that strongly suggests that Aquaflight poses a serious air safety risk."*

Mr. Toller offered no evidence or analysis to support that assertion; and there was no evidence that the decision maker was technically and legally qualified to make that assessment or to provide data to support it.

On the contrary, Aquaflight Airways had been operating for many years without an air safety incident of any sort; and the allegations still remained uninvestigated.

Also the majority of "incidents" referred to in the letter of suspension were matters that were pilot responsibility rather than operator responsibility.

Section 28BA of the Civil Aviation Act makes no reference to "immediate safety threat." Those words are the words of the Civil Aviation Safety Authority in the attached document, and no doubt they were drawn from the Civil Aviation Safety Authority "Enforcement Manual", which was at that time unavailable to the public pending a review of its enforcement practices. CAR 268 uses similar words when it considers suspending a pilot licence. The words are reasonable only if "an immediate safety threat" is shown to exist.

While it is not contested that CASA should be able to take positive action, if the regulator was concerned over public perceptions of procedural fairness, a fairer application of justice would be apparent if any such action was taken under a Court Order.

The questionable issue is how, and by whom, the genuine issue of what constitutes a "serious safety threat" can be evaluated objectively with due regard to public safety, natural justice, the rules of procedural fairness, and impartiality.

In this context there is also a huge question mark over the emotive misuse of the word "safety", which is further evaluated in this section.

The operator is effectively out of business at this point. There is no cash flow to sustain property rental, staff wages, aircraft lease or other financial payments, let alone to mount a legal defence. Yet this operator has not injured any person or had an accident, and has had no charges brought against it, and none of the charges has been fully investigated, let alone proven beyond reasonable doubt.

Subsection 20AB (2) of the Civil Aviation Act (carrying out maintenance without an appropriate licence) *"a person must not carry out maintenance unless licensed:" Imprisonment 2 years*

> If CASA believed an unlicensed person carried out maintenance on an aircraft, the Authority could have grounded that aircraft immediately by use of a Code 'A' Aircraft Survey Report (ASR).

It was also open to CASA to institute a prosecution against the alleged offender.

Comment: Had these options been exercised there would have then been no immediate safety threat and therefore no valid reason for suspending the certificate. If CASA was convinced of the accuracy of the allegation and did not ground that aircraft or institute a prosecution, someone in CASA should have been suspended. No maintenance was carried out by the operator in other than approved and supervised conditions.

1. **Subsection 23 (2) of the Civil Aviation Act:** (carriage of dangerous goods other than in accordance with the regulations) *"a person must not carry out maintenance unless licensed." Imprisonment 2 years.*

   If the operator did carry the alleged dangerous goods, then there can be no reason not to prosecute. While under the threat of prosecution, it is very unlikely the operator would continue to carry more dangerous goods..

   Comment: Had these options been exercised there would have then been no immediate safety threat and therefore no valid reason for suspending the certificate. If CASA did not ground that aircraft, someone in CASA should be suspended

2. **Civil Aviation Regulation 43B** (failure to record total time-in-service of aircraft on maintenance release) *"At the end of the days flying the time in service must be recorded on the maintenance release"* Penalty 25 units ($2500). The operator is accused by unidentified individuals as having breached that requirement.

   If CASA believed that time in service has not been recorded CASA should issue a Code 'A' ASR grounding the aircraft until the time in service has been corrected and if required any maintenance then due would have to be done before the aircraft could fly.

   Comment: Had that option been exercised, there would have then been no immediate safety threat and therefore no valid reason for suspending the certificate. If CASA was convinced of the accuracy of the allegation and did not ground that aircraft or institute a prosecution, someone in CASA should have been suspended. Safety would not be an issue if there were only a few flight hours not recorded as we all know the aircraft will not fall out of the sky for the sake of a few flight hours. There is now no immediate safety threat and the suspension of the certificate is not warranted in the interests of "immediate safety concerns." The failure of pilots to comply with requirements to note should not be used to the detriment of the operator.

3. **Civil Aviation Regulation 47 (1)** (failure to record major defects in aircraft in maintenance release): **"***If the holder of the CoR, operator or pilot becomes aware of a major defect (and other things) an entry must be made on the maintenance release"*

   If CASA became aware of a "major defect" not being entered on a MR then CASA should have issued a Code 'A' ASR grounding the aircraft immediately. If CASA did not do that then CASA is at fault and the responsible staff member should be suspended.

   If CASA did issue a Code 'A' ASR grounding the aircraft until the "major defect" (if it was in fact a major defect) then that defect would have been rectified before the aircraft flew.

   Comment: There would then have been no immediate safety threat. Safety would no longer be an issue and there would be no warrantable grounds for the suspension of the certificate.

4. **Civil Aviation Regulation 5.55** (breach of directions in relation to flight time limits by pilots as set out in Civil Aviation Order 48.1)

   CAR 5.55 is the head of power for flight and duty limitations. This CAR would probably be the most breached CAR of all the regulations. Experience shows when an operator is caught out breaching this regulation the operator will desist immediately, in some cases minor re-offences will occur after a period of time. It is extremely difficult to imagine this regulation standing alone being a "serious threat to safety"

   Comment: Had these matters been acknowledged and appropriately addressed, there would then have been no immediate safety threat. Safety would no longer be an issue and there could be no warrantable grounds for the suspension of the certificate on the grounds of 'immediate safety concerns.'.

5. Civil Aviation Regulation Civil Aviation Regulation 120 (using meteorological forecasts and reports made without authority of Bureau of Meteorology or CASA)

Neither the author nor the former FOI who has researched this has ever heard of any person or operator being charged under this CAR dealing with the "authority" of a weather forecast. A pilot has a weather forecast which indicates areas of rain, showers and low cloud. The overseas or long-distance domestic customer has pre-paid to visit the "world renowned" Great Barrier Reef. Using normal intelligence, the pilot or company telephones or radios people at the destination seeking their "opinion" of the local weather (how bad it is, what is the visibility like, is the weather set-in or passing and so on). Armed with this "local knowledge" and the forecast the pilot or operator makes a decision to "go and have a look".

In the background of this process is the commercial awareness that it is a counter-productive process to fly international tourists to a location they will not enjoy because of bad weather. However, Obtaining that "local knowledge weather information" and acting on it is held to be illegal under CAR 120.

Note: in the case of a seaplane operation with tourists out of Cairns, the distances being flown are usually within 30 nautical miles, and the destination is quite commonly visible shortly after takeoff.

Comment: There is no immediate safety threat arising from the alleged practice. In fact, it could be expected to enhance the pilot's situational awareness. If the pilot operates the aircraft with additional and extra information than that which is required by the law it hardly makes the action of the operator unsafe.

6. Civil Aviation Regulation 133 (1) (d) (commencing flight without all required maintenance on the aircraft having been carried out)

If CASA found the operator "commencing a flight without required maintenance being carried out," it should have issued a Code 'A' ASR on the aircraft concerned grounding that aircraft until the required maintenance is carried out.

If CASA believes the operator has a "habit" of commencing flights without required maintenance being carried out the operator should be prosecuted.

Comment: However if the aircraft has been grounded, the perceived risk no longer exists and there is now no immediate safety threat.

7. Civil Aviation Regulation 172 (1) (flight under the visual flight rules below 2000 ft when unable to navigate by reference to the ground or water)

Two significant points are relevant.

First, this is an area of the regulations where it is almost impossible to prosecute due the inability to prove actual heights of cloud and visibility, and even then there would need to be a qualified witness next to the pilot. This is why CASA endeavours to take administrative action rather than attempting to prosecute.

Secondly, like most other items in this paper, once the "rules" have been highlighted to the operator the operator will invariably desist.

Comment: In either case, there is no immediate safety threat and the responsibility of such operations rests with the pilot, not the operator.

8. Civil Aviation regulation 233 (1) (b) (commencing a flight where aircraft exceeds gross weight limitations)

Two significant points are relevant:

CAR 233(1)

- If CASA was aware this was about to occur it should have stopped the flight at that point.
- If it is not about to occur then there is not an immediate problem.

Once again this is an area of the regulations where is very difficult to prove in a court unless there was major overload as the record of actual passenger weights is not readily available, carry on baggage likewise, and the specific gravity of the fuel on board at the time would also need to be established.

Comment: If CASA knows an overweight operation took place, then it is derelict in its duty if it has not prosecuted the operator. If it is acting on the basis of a suspicion as advised by an unchecked source, it is falling seriously short of its claimed commitments to natural justice.

9. **Civil Aviation Regulation 283** (making false statements on documents furnished in accordance with the regulations)

   In a court, an accused individual or entity has to prove a defence beyond a reasonable doubt. However in an Administrative Appeals Tribunal hearing, the accuser simply uses the word "safety" with sufficient frequency and emphasis to circumvent due process. Administrative action is thus a far easier instrument for CASA to be seen to enforcing the regulations without its actions being exposed to public and political scrutiny.

Comment: If an accident is not about to occur there is no risk. There is therefore no immediate safety threat.

At the expiry of the 28 day period, CASA simply announced to the operator that it was suspending the AOC for a further 28 days to complete its investigation; and placed the same advice on its web site.

Defamation aspects

The publication by of accusations against operators had taken several forms before these events. These included:

- Media briefings in which details are provided of the number and substance of past non-compliance notices issued against the operator and in some cases other verbal allegations, as in the cases of Ord Air Charter, Uzu Air and Whyalla Airlines. This information is also commonly conveyed to parliamentarians in support of administrative decisions;
- Publication on CASA's web site of
  a) A decision to suspend an operator's AOC; and
  b) Unsubstantiated allegations under investigation in relation to a suspension.

The CASA public affairs office at the time advised that the action of publishing the allegations in support of its decision to suspend Aquaflight Airways AOC was endorsed by its Office of Legal Counsel, who had indicated that it was acceptable "on the basis that other regulators like the ACCC [Australian Consumer Protection Commission] do exactly the same thing."

That advice was completely inaccurate.

In response to a formal request for media information the ACCC indicated as follows:

> *"We would normally not comment on an investigation until such time as it has been instituted in the courts, because we have to go through the courts. There is no parallel with CASA because they are responsible for issuing licences etc.*
>
> *"We will occasionally comment on something that has been in the media, but rarely would we institute any publicity about an investigation on our own.*
>
> *"From time to time some people will say they are being investigated by the ACCC or people will announce that they have reported somebody to the ACCC, then it's in the public domain. We will sometimes confirm or deny that."*

Similar responses were elicited from the Australian Customs Service and the Australian Federal Police, the tenor of which was that the publication of unsubstantiated allegations against a person or corporation under investigation of those allegations was not to be contemplated before of the defamation laws and those agencies commitment to natural justice, due process, and procedural fairness.

Other regulatory systems:

Enquiries were also made of the Civil Aviation Authority of New Zealand and Transport Canada.

Transport Canada had recently revised its policy on the publication of the names of corporations violating its Aeronautics Act and the Canadian Aviation Regulations. However Transport Canada, which does not name individuals, says corporate offenders would only have their names published on its website along with a summary of the offence and resulting sanctions, in circumstances it sets out as:

- after the company has paid a monetary penalty; **or**
- has accepted the suspension of a document [such as an air operator certificate; **or**
- following a final decision of the Civil Aviation Tribunal or a court; **and**
- only after all appeals have been exhausted.

New Zealand's Civil Aviation Authority said it had the authority to suspend certificates but that it would only publicise regulatory action against companies if its investigations were well advanced: "We would have to have justification that would have to stand up in court, and we know that. There are safeguards in New Zealand law that if we were to suspend or revoke a certificate and we don't have the evidence, we will be in trouble in the courts; and if we are found to have made a mistake, we will be liable for substantial damages. That puts a certain discipline on us and we're quite happy with that."

Both Canada and New Zealand said they would not publish unproven allegations.

In the past, the former Civil Aviation Authority placed public notices at aerodromes inviting intending passengers to seek confirmation that an operator held a current AOC. More recently however, CASA had declined to answer inquiries as to whether an individual operator held a current AOC, on the basis of "commercial confidentiality," and its current policy appeared to represent yet another policy switch, made without any explanation of changed circumstances.

These discrepancies were put to CASA's General Counsel, Mr Peter Ilyk. Without commenting on the comparison between CASA and other Australian enforcement agencies, Mr. Ilyk replied that the US Federal Aviation Administration also published allegations against entities. A call to the FAA elicited the following points of insight into the FAA's processes:

Phone call to Paul Takamoto, FAA public affairs, 22-Sep-00

- An investigation will take place if is an incident is referred to an FAA inspector, or an inspector may have discovered it by themselves.
- There is then a lengthy and carefully defined process that closely follows rules of due process, whereby evidence is gathered.
- The inspector will make an initial recommendation for a fine if he feels that is warranted, and there are strict parameters by which the amounts of the proposed fines are set according to the nature and seriousness of the violations.
- Then our legal people will weigh the evidence in terms of how strong the case is, and they may also readjust the initial proposed fine accordingly. It's a lengthy process, but it's only at the point where the agency determines the proposed fine, that it becomes public. The investigation is never announced publicly until the proposed fine is determined. The processes before that are internal.
- The enforcement actions we take against organisations are then posted on our web site, where we publish proposed fines. The proposed fine is not published until the investigation has been concluded.
- We do not have a situation where a certificate is suspended to allow an investigation to proceed.
- Sometimes half of a fine is forgiven, as long as that party commits no further violations for a period of (say) a year.
- The entity can appeal, generally before an administrative law judge. There are different avenues of appeal depending on the situation, but there is an appeal process and there may be hearings if that is warranted. Frequently there are appeals before an administrative law judge at the National Transportation Safety Board, which is a separate entity.
- The purpose of publishing the proposed fine gives them their chance of due process, which has also already been observed during the investigation. The publication of the proposed fine gives the entity the opportunity to provide a formal response.
- At that stage the evidence has been gathered and the investigation is complete.
- We do not publish allegations which are still under investigation.
- We will ground an operator if they are not conducting their operations safely. We did that with an airline called Pro-air. However there has to be strong evidence of systemic failure to comply with

rules, and that evidence has to be assessed by our legal people as to whether it would stand up in a court of law.

- We would not take steps like that on the basis of "reason to believe," we would require absolute proof.

Conclusion

If CASA became aware of any safety-related allegations against operators, scrutinised and evaluated them as to whether they would be sustainable in a court of law, and did not ground the aircraft concerned until the alleged errors were rectified; or did not have the matters rectified immediately, then CASA must itself be guilty of negligence.

The question of whether the publication of unsubstantiated allegations constitutes defamation never came before a court.

However the owner was charged in the Cairns District Court with the 10 alleged offences. He was found guilty on the dangerous goods charge and fined $600 for that offence, which is a minor technical one. Like most seaplane operators he made a practice of carrying a jerrican of two-stroke motor fuel in a locker in one of the aircraft's floats in case a boat tending the aircraft ran short of fuel. The actual offence was carrying the fuel without having a supplement in its Operations Manual to describe the dangerous goods precautions taken. The other nine charges were dismissed.

Case study: Dad's Army Revisited

If you ever wondered what kind of value Australian taxpayers are getting for their aviation safety regulatory dollar, you may well find guidance in the saga of Mareeba photographer and pilot Richard Rudd.

This is not about whether a court's findings were fair and reasonable, nor whether a sentence was a just one. It invites the reader however, to ponder on the motivations of the regulator, or at least of some of its employees, in applying huge resources to pursue a small operator to the brink of bankruptcy; about CASA's priorities in the deployment of resources which it often claims are under pressure; about its apparent confusion over its own published policies; about uniformity, consistency and fairness, and about the methods its officers are willing to employ to achieve a punitive outcome.

Richard's adventures, earlier reported in an Internet article titled Dad's Army rides again, wound up with a small crop of bruised egos on the part of three airworthiness inspectors but with no visible action to remind supposedly accountable CASA supervisors of their responsibilities. Richard was left with a bill for $5,788 in legal fees, the reimbursement of which doesn't seem to be a CASA priority, notwithstanding the philosophies, commitments and motherhood statements scattered around the About Us section of its website.

To recap briefly from previous reports, Richard "fell foul of the law" when he was accused in a signed and witnessed statement by a CASA airworthiness inspector of doing illegal maintenance on his Wilga aeroplane at Mareeba Airport on July 11 2007. The allegations were supported by signed and witnessed statements from two other AWIs who with him.

The three AWIs weren't there on a scheduled inspection or surveillance, they just happened to be visiting on other business as their statements confirmed. But one of them spotted Richard near his aeroplane and decided that what he was doing amounted to maintenance. And because Richard wasn't a LAME he was therefore committing a crime. There are varying versions of the conversations that followed, but they seem to have ended when Richard used admittedly intemperate language to suggest the manner of the AWI's departure. "Take off" might have been more appropriate.

It's a long (but entertaining) story so have a browse through it and then return here for the aftermath.

* * * * * *

At this point Richard Rudd had been accused of committing a physically impossible offence, as was admitted in the investigator's report, part of which was obtained under freedom of information rules:

> *The key issue pointed out was a major discrepancy in the evidence of the airworthiness inspector Peter Larard. This consisted of evidence being provided by the defence in which the description of what was observed could not have existed under any circumstances. Peter Larard's description was blatantly inaccurate. There were also serious doubts raised as to the accuracy of the conversation that is alleged to have taken place at the time between Rudd and Larard."*

Rudd's problem was solved except that he'd been left with a legal bill for something like $5,700 in legal fees, the reimbursement of which didn't appear to be a CASA priority. He hadn't been required to attend the court, having been told the matter had been "struck out." A brief letter from the DPP told him: "Prosecution was discontinued on the basis that it was considered that there was insufficient evidence to proceed. Prior to the discontinuation of the matter it was agreed by your solicitors not to request a costs order against this office (such costs are awarded against the Commonwealth director of public prosecutions, not CASA."

But it wasn't CASA's decision to make: "Her phraseology was in fact incorrect; she should have said 'if you don't claim against the office of the CDPP, the CDDP will terminate the case.' I had to agree to that because CASA's decision to prosecute had put me under financial duress, but nobody suggested that would nullify any claim I might have against CASA."

At this point it must have been quite evident to CASA that it faced a serious egg-on-face situation, having undertaken major and quite expensive legal proceedings on the basis of appallingly flawed evidence. However, it doesn't seem to have been one of CASA's imperatives to review ways of redressing the financial harm to Richard Rudd. Instead, and unknown to Richard at the time (but later revealed under the freedom of information procedures), a wrap-up case review meeting of CASA officials, was held in Townsville on August 28 2008. This would have been an opportunity for CASA as an organisation to identify any serious errors it had made and to build defences against their repetition. The expenditure of executive time, travel allowances, fares and accommodation, may be a measure of how seriously CASA was taking this matter.

Or it may not.

The meeting's stated purpose, also obtained under the freedom of information, was "to discuss the reasons for the discrepancies in the statement made by Peter Larard."

Attending the meeting were

- John Bromley - Manager of Safety Oversight;
- Narelle Tredrea - (then) Manager, Enforcement Policy & Practice and (currently) Senior Adviser Enforcement Policy & Practice in the same office;
- Peter Larard – the AWI who originated the allegations against Mr Rudd; and
- Kent Spencer. – Team Leader Administration, Northern Region.

Discrepancies in the statements of the other two officials weren't discussed, nor were the pair listed in the meeting notes as being present. Apparently their act in providing corroborative false evidence wasn't considered worthy of discussion.

The "history" of the case as minuted at the meeting begins by observing: *"Offences by Rudd had been identified by CASA officer – Peter Larard."*

That was an inaccurate observation because there were in fact no offences. It might have more accurately referred to: "falsely alleged offences."

The gathering was told that the matter had been referred to Ms Tredrea's Enforcement Policy and Practice Branch for the issue of an infringement notice which Mr Rudd declined to pay, and:

> *"Steve Cremerius (part IIIA investigator) was assigned to investigate the matter fully. As part of that investigation Steve took a statement from Larard in relation to what he had seen, heard and said on 11 July, 08 – (the date of the alleged offence).*

There is no mention here of whether the investigator prepared the statement for Mr Larard's signature, or whether the details were recorded in the AWI's original statement.

> *The brief was referred to the CDPP as a result of the investigation. A summons was issued for a breach of CAR 42ZC(2).* [Probably meaning 42ZC(1)]. *The matter was to come on for a hearing on 04 August 2008 in the Mareeba Magistrates Court. Prior to that date – on 2 July 2008 (and prior to the mention be set down for 04 July 2008) – Rudd's lawyers provided a response to the prosecution case contesting the facts and submitting, in relation to an aspect of maintenance on the elevator, the defence that the action claimed in a statement of Peter Larard was in fact a "legal impossibility" given the type of aircraft.*

In fact, it was a physical impossibility, not only a legal one.

> *This was a major discrepancy in the evidence and was patently inaccurate. The DPP considered that on the basis of the evidence of Larard that they could not realistically maintain the prosecution and withdrew the charge.*
>
> *Peter admitted that when he read the statement, he was looking for the aspects he considered important and didn't notice the specific errors. He mentioned that as most aircraft had two elevators (not one – as in this case) he had put in his contemporary and contemporaneous notes "elevators" reflecting this colloquial usage, instead of being specific.*

Hold it! Isn't there an aroma here, of glossing over the facts of the case? Larard's statement specifically said that one elevator was attached to the aircraft, and the other was lying on the ground nearby, and that was the error that set the scene for the false allegations. It's unclear whether this reference is to Larard's own statement, or one prepared for his signature by Mr Cremerius.

How did the inaccuracy creep into the statement? Well, it's no less confusing *after* you've read the meeting notes:

> *Steve Cremerius has picked up on this "plural" in those notes and had not realised that the term was used inadvertently. This error was then transcribed into the statement and not corrected by Peter. In relation to the toolbox placement: the design of the aircraft has a large sliding door so that*

statements such as "at the rear" or "in the cabin" – in relation to this aircraft could mean the same thing. Peter has been made aware of how important it is to clarify such statements for an investigator.

Incredible! Let's remind ourselves exactly what Mr Larard's "witness statement" said:

"Whilst speaking with Rudd I observed that he was holding a spanner in each hand. I further observed that he was tightening nuts and bolts **on the right hand elevator hinge, which attached the elevator to the tailplane. I also observed the left hand elevator to be sitting on the ground on the other side of the airplane**. (our emphasis)

And later: "**I observed the left hand elevator which was earlier lying on the ground was no longer there and in fact Rudd was attaching it to the tailplane of VH-AQX**."

As the illustration clearly shows, the Wilga aircraft has only one elevator, which is 3.3 m long, and not divisible into left and right elevators.

The meeting however completely brushed over those apparently negligent misstatements, and went on to say:

As a result of this meeting and what has been explained to him, Peter has learned that he will need to be very careful in the way he reads and checks statements before he signs and ensures that he has made sure that the investigator knows exactly what he means.

Peter was forthright and there was absolutely nothing in what he said or in his demeanour that suggested that they had been anything beyond carelessness and misunderstanding in what he had done in signing the statement.

Well, there's certainly a lesson there: Don't sign anything an investigator asks you to sign without bouncing it off a lawyer; and not an in-house lawyer at that!

He now has a better understanding of why each word in a statement is important and that if in doubt always do that bit extra to ensure that the other person knows what is meant.

Coincidentally, age pensioner Richard Rudd also has a better understanding of that, the difference being that his enlightenment cost him around $6000 and a lot of wasted time.

The use of cameras was discussed and Peter explained that he normally carries one but in the circumstances of this unplanned visit he did not have one on the day. John advised that he would review the file but that he expected, in the absence of anything to the contrary that he might find on the file, that Peter would probably be given counselling letter reminding him of his responsibilities. The action will also be taken to train others (sic) *inspectors so that they are all aware of the importance of reviewing their statements before signing.*

Protocol for this may be reassessed within GAOG. [General Aviation Operations Group]

So what's been learned from this grotesque misadventure? Perhaps a "stable door" solution:

EPP [enforcement policy & practice] *branch will also explain to the investigators the importance of going through statements step-by-step with a witness and ensuring that they obtained verification of where and what is being looked at in relation to any aircraft (e.g. where there is* [sic] *no photos – getting a picture of the aircraft off the net and getting the witness to pinpoint where they were what area of the aircraft was being worked on* [original punctuation] *or get them to do a drawing etc.) This will be covered in more detail in the evidence gathering course run by the EPP branch.*

The meeting certainly didn't put on record any conclusions on the accountability of CASA employees and their supervisors or their exposure to legal action against them personally, and at no stage was there any mention of the harm that this kind of negligence can cause to victims or their bank accounts - or to the regulator's credibility and reputation. If there was any dialogue on whether Ms Tredrea's team had failed in its duty of care, it also doesn't appear in the minutes.

Also the record suggests that neither Mr Larard's attention nor that of the delegate who made the decision to refer the matter to the DPP was drawn to the relevant area in CASA's own *Compliance Manual* which at that time stated:

2.11 - Civil Liability for Damages Resulting from Defective Decision-Making

This is not the place to discuss the law relating to negligence or the circumstances under which the Authority (and in some cases, an individual officer or delegate) may be found liable for damages as a result of a failure to observe the rules and principles of administrative law.

It is important to keep in mind, however, that when it can be shown that, in the process of exercising decision-making powers under our legislation, an officer or delegate has acted negligently, the Authority may be held liable to pay the costs associated with any harm or injury a person may have suffered as a direct and proximate result of that action (or, as the case may be, a failure to act).

This relaxed approach is in strong contrast with the fervour with which CASA pursues pretty well anybody who's accused of any breach of the rules it enforces – quite often implementing regulatory action before completing (and sometimes even before beginning) a meaningful investigation. Several amply documented examples are in our files.

Richard was convinced that CASA's successive decisions to slug him with an administrative fine and then later to lay charges against him, all flowed from inaccurate statements by the three FOIs, a carelessly inadequate pre-acceptance investigation of Mr Larard's allegations, and what he saw as an obsessive corporate determination to nail his hide to the barn door.

Getting the runaround.

The events that followed reveal the amount of time, effort and public expense that people in several government agencies are willing to expend, to avoid admitting to a dumb mistake. One CASA employee, apparently believing he was talking to a colleague, remarked to a non-CASA observer: "That ****ing Rudd……we've done over $300,000 on him, for no result!"

Was the lower-cost alternative of sending Rudd a cheque for $6,000 considered? Apparently not.

At this point CASA's actions against Richard had set him back $5,788 in legal fees, which he believed had been incurred as a result of negligence on the part of CASA. He therefore filed complaints against the various officials with CASA's (then) Industry Complaints Commissioner Michael Hart, alleging criminality in some of the CASA officials' actions.

Mr Hart responded on **19 December 2008** that he had reported on the matter to CEO Bruce Byron, recommending that the matters be referred to the AFP. Also that the matter had in fact been handed over to the AFP; and because of that it would not be proper for him to consider the matter further.

While still unaware of those outcomes, Richard advised Mr Byron that: "I have lodged documents with the Australian Federal Police with a view to criminal charges being laid against CASA employees, for perjury, conspiring to pervert the course of justice and misfeasance in public office. And they were certainly negligent and failed in their duty of care towards me as CASA client."

On the same day – 19 December – the AFP wrote back explaining (as it often does) that the matters referred to them often exceed their capacity to investigate. The letter added that it had referred the matter back to CASA who advised that they would not accept the matter for further investigation, and that the AFP's Cairns office operations committee had also "decided that this matter would not be accepted for further investigation."

November 1, 2008, he wrote to the Cairns office of the AFP providing a "brief of documents" which he claimed were evidence that perjury, conspiracy to pervert the course of justice and misfeasance in public office had occurred.

November 07, 2008 He also wrote to CEO Bruce Byron and General Manager, General Aviation, Greg Vaughan, complaining of the conduct of investigator Cremerius, lawyer Narelle Tredrea, the three AWIs, and their conduct to date.

November 19, **2008** Industry Complaints Commissioner Hart wrote to say he'd reviewed Richard's complaint and other material, provided a report to Mr Byron, recommended that the matters be referred to the AFP, and that the CEO had accepted the recommendation. "As the matter is now one for the AFP to consider, this office's involvement with the matters is now complete and as such my office can have no further involvement or take the any action with respect to the matters.

But on the same day the AFP wrote to explain to Richard that they were very busy people, and far too under-resourced to investigate every complaint or allegation, "even when there is sufficient information to suggest that there is a breach of Commonwealth Law." Apart from the opening and closing paragraphs, any student of the bureaucratese language would identify the rest of the text as form-letter prose of the kind that is stored in computer hard drives for use in times like these.

Richard Rudd's quest for redress may be doomed to go on forever. It's possible that CASA's tenacity may explain (without excusing) CASA's tenacity in giving him a hard time.

Why were they doing this?

Rudd, a commercial photographer, learned to fly in Adelaide but couldn't obtain a commercial licence medical certificate because of a hearing defect which however didn't prevent him from holding a PPL. He accumulated about 3,000 flying hours and about 10,000 hours flying as a flight line navigator/photographer, as well as qualifying as an assistant glider instructor and obtaining endorsements and approvals as a glider tug pilot.

In 1982, having worked as a photographer with several companies in Australia and around the Pacific, Rudd took over the company he'd been working for - Mapmakers, forming Beechtree Pty Ltd and trading as Northair Surveys. His intention was to carry on business as a commercial aerial photographer. He acquired a turbocharged Piper Cherokee Lance, has an aerial camera fitted to it, and held in an AOC from 1982 to 1996. He didn't set himself up as a full scale aerial survey and mapping operation; he didn't sell photographic interpretation services; he limited his activity to exposing film, having it processed into print or transparency images, and selling the finished product to clients.

In 1992, relevantly (as the story unfolds), Dick Smith who was later to become CASA chairman, published a high-quality, informative and stimulating book called *Solo Around the World*, documenting his remarkable long-range helicopter flying and navigational exploits. The book, sold in 1993 for $40.00 by Dick's Australian Geographic Pty Ltd, contained over 450 wonderful photographic images, and all aerial pictures were obviously acquired by Mr. Smith personally, while he was flying his helicopter.

The themes of fatigue and other demands on the personal abilities of the solo photographic pilot are repeated throughout the book. At this time, six hours airborne would have been an unusually long day for Dick's fellow commercial photographer, Richard Rudd, who was flying 'in his own back yard,' obviously in VFR conditions, and totally free of the peripheral but worrying concerns detailed in Dick's book.

Note: It's not the intent of this article to infer that Dick was engaging in illegal activity, but only to illustrate an apparent CASA approach that might well be interpreted as selective harassment and victimisation of an individual.

In February 1996 Beechtree designated a chief pilot who was approved by CASA, but who resigned three months later. On May 21 Rudd conducted a photographic flight to acquire images for a sugar mill. This was later presented in evidence against him.

On June 28 CASA issued Rudd's company with a new AOC superseding the previous certificate and valid until September 30. This AOC was issued without a new chief pilot being nominated.

At about the same time, under pressure from (then) Minister Mark Vaile, CASA established a Program Advisory Panel (PAP) to provide advice and guidance to CASA review programs which were revising the regulatory framework and conducting a review of CASA's regulatory role. One of the guidelines was that: "Safety of people is more important than safety of property," and Dick Smith's rhetoric as CASA chairman, and that of the organisation, increasingly indicates CASA was adopting a philosophy under which aviation activities of an aerial work nature wouldn't even require an AOC. An example was the sustained resistance to requiring large commercial parachuting operators to hold an AOC, or even to employ commercial pilots. Smith and CASA vocally supported this philosophy, despite considerable unease within the industry over what it sees as a potential degradation of operational standards.

Beechtree's AOC expired on Sep 30 1996. Encouraged by CASA policy statements current at that time, Rudd formed the view that under current CASA policy wasn't required to hold an AOC or to nominate a chief pilot, to conduct his photography business.

Rudd however came under investigation by CASA over the question of whether his activities were in breach of the regulations and the Act. The investigating officers visited various associates of Rudd including a Western Australian aerial survey firm and obtain evidence from that firm that it had purchased photographs from Rudd. During a telephone conversation with one of the investigating officers, according to evidence the client later gave in court, the investigator asked the client if he would fly "in an aeroplane that had been dragged off the [rubbish] tip" The client said he had "felt intimidated" by suggestions that he might be implicated in an offence unless he cooperated with the investigators. He said he derived from these remarks that the officers were seeking to insinuate that Rudd's activity was "some kind of shoddy operation."

The witness also gave evidence that he raised with investigating officers the question of Dick Smith's aerial photography for commercial purposes: "Because they were quizzing me about aerial photography and being paid for aerial photography, I said 'well, doesn't Dick Smith do the same sort of thing in essence? Does he or

does he not take photographs?' It was all a matter of trying to understand why they should be there, querying me about my business and aerial photography. So they then said, 'Well he's our boss. That's not the point, it's Northair Surveys [we're interested in].'"

Under pressure to provide information which the CASA officers could use as evidence, the witness says he sought the advice of a lawyer before providing the information and that following that advice he eventually provided invoices from Rudd and cheque butts which confirmed he had paid for the pictures. Rudd says: "And they bizarrely stated to this client that 'this is not about safety, this is about commerce…..but don't say that in court.' The complaint to CASA about my WA operations had been made to CASA by a competitor who brooked no competition in WA."

(On April 15, 1997, CASA's Review Programs Office had published an unsigned document titled Classification of Operations, which began: "This document sets out CASA policy on the classification of aircraft operations both as a matter of public policy and for the purpose of providing a framework for establishing aviation safety regulations under the Civil Aviation Act."

The Review Programs Office was therefore publishing **CASA Policy.**

Like many such documents, its primary goal was clearly not to satisfy the reader's appetite for quality literature; however it's interesting to compare subsequent CASA practice with its stated policy.

The paper explained that because CASA didn't have limited resources, it would have to meet its responsibilities in such a way as to minimise the risk of harm, injury or damage to persons or property to the greatest extent practicable. It aimed to achieve this by adopting a risk management approach which took into account any inherent riskiness in the operation; and the consequences of an accident related to it.

The document went on to explain that as CASA's mandate was limited to *safety* regulation, the question of whether an operator was making money from the operation had not been considered as a determinant of an operation's classification: "What (the policy) does mean is that not all operations which have a commercial character need necessarily attract the same safety standard. *The payment of monies to an aircraft pilot, owner or operator, either to reimburse him for his expenses or to allow him to make a profit is possible in all classes of operations*. (our italics)"

Under the policy, three classes of operation would be established:

Passenger transport, a new category, amalgamated charter and regular public transport (RPT) and attracted a common level of safety standards and regulation.

Aerial work encompassed a wide variety of operations. Its definition was: "Broadly means operations by persons in the business of operating aircraft (on a non-recreational basis) in which only persons essential to the flight are carried." It ranged from agricultural chemical application to air cargo operations, both scheduled and unscheduled.

General Aviation covered all aspects of aviation which had historically been considered as recreational, sport and other kinds of private flying, assuming that the participants were aware of any risk involved and accepted it, and applying the lowest level of regulation.

Despite some confusing aspects of the guidelines published with this policy, an operator who was not in the passenger transportation business, and could be described as "a pilot with a toolbox or a corporate aircraft," was among those who would come under the "General Aviation" category. As such, CASA said its role would be primarily to protect passengers and people on the ground, and to exercise surveillance over, and audit operators.

The policy was adopted by the CASA Board and the Minister in 1997. Rudd later circulated a letter to each Board member, inquiring why the policy which had been adopted by the Board and the Minister had not been followed by CASA and its employees in the field. He never received an answer. He was eventually informed by the Board secretary that CASA was "formulating a response which would be vetted Mr. Laurie Foley." He never received the response.

In May 1999 Rudd appeared in the Mareeba magistrate's court on a number of charges, some against himself and some against his company, all but one of which related to allegations that he had conducted "aerial photography and surveying."

Unfortunately, CASA policy doesn't automatically become law even if the regulator behaves as though it did. Rudd was fined $10,000 including costs, about $4000 for court costs, $2,500 for the company, and another $500 for conducting similar operations in PNG. An appeal against the sentence failed.

Because Rudd had continued to operate prior to initial court hearing, CASA then prosecuted him a second time, but this time the magistrate protested: “This is at the lowest point on the safety scale” and the fine was a more modest $3500, says Rudd: “CASA persons in court were not amused, I had been advised by my lawyer that they were looking for $65,000 or 2 years, either or both of which would have destroyed Northair immediately.”

CASA spokesperson Rob Elder said in response to a media query: It is CASA’s function to pursue breaches of current regulations, not breaches which may or may not be about to stop being breaches because of an intended change of the rules. It’s not a question of whether the rule’s right or wrong; the rule’s on the books.”

As well, the CASA spokesman trotted out a proposition with which the media was becoming more and more familiar. When confronted with evidence of apparent selective victimisation, discrimination and deliberate persecution apparently by CASA officers with an axe to grind, it now appeared to be standard CASA practice to say words to the effect of: “We know a lot about this operator that we can’t tell you. If you knew what we know, you wouldn’t be defending him.” As a supplement to this argument, the emotive possibility of an aircraft “falling on a school” was frequently invoked, even when the operator was flying over the Western Australian desert as Rudd was.

Rudd observes that while CASA investigators and FOIs were sleuthing around the WA wilderness trying to nail him: “In North Queensland alone there were SEVEN light charter accidents and TWENTY-ONE fatalities. It’s also interesting to note that the final round-robin email within CASA [from FOI David Farquharson, obtained under Freedom of Information] advising of the successful ‘kill’ and fines involved, was titled ‘for your amusement,’ which is a very sobering reflection on the disgusting mindset of certain CASA persons. So you can see where CASA’s priorities lie when they have a mission at the behest of a competitor company.”

Back to the present

On **21 Sep 2009** Richard wrote to the Commonwealth Ombudsman to complain about what he alleged to be CASA misconduct.

On **27 Oct** the Ombudsman's office replied that it had decided to investigate his complaint, had already made enquiries of CASA, and expected a response within 28 days.

Meanwhile the office of the Australian Government Solicitor entered the fray on **5 January 2010**, acting for CASA, with a cheery letter from Mr Andrew Berger, General Counsel, Litigation. The AGS letter referred to "the following defamatory imputations.” It quoted them, denied them, and warned that

> "*Such allegations could give rise to an action for defamation against you by the officers referred to in your letter. Such an action could claim damages for damage to reputation of these officers as well is the legal costs they incur in bringing such an action.*
>
> *"Publishing such comments also has the potential to undermine public confidence in CASA and therefore prejudice the important work they do in seeking to ensure the safety of civil aviation.*
>
> *"We therefore require that you desist from publishing such comments in the future."*

Rudd then sent a statement of account to CASA, seeking payment of $5,788 for legal expenses incurred "in dealing with the veracity of statements made by CASA AWIs, namely Larard, Retzki and Clark.”

On a less aggressive note, the Commonwealth Ombudsman’s office analysed the situation in great detail in a four-page letter which walked Rudd through the convoluted dealings between government agencies as well as the contribution of CASA Industry Complaints Commissioner Michael Hart.

Some notes from that letter:

> *The ICC* [Mr Hart] *concluded that what was alleged to have been seen by CASA officers was not possible to have been seen, but was unable to reach a conclusion as to why there was such a significant and material variance between the versions of events given by the CASA officers and other witnesses.*

The ICC letter contained four recommendations:

> 1. *That the chief executive officer (CEO) through the head of legal services contact the AFP and seek their advice as to whether they have a current investigation into the allegations made by Mr Rudd.*

2. *That the CEO provide advice to the Commissioner of the AFP of the allegations made by Mr Rudd and the outcome of preliminary investigation by the ICC and such other persons as he feels necessary and warranted.*
3. *That if the AFP is not seeking to investigate the matter, that services of an independent person or investigator, preferably an experienced criminal lawyer, be pertained to conduct an investigation of the matters alleged with a view to recommending whether or not the matter should be referred to the AFP for formal investigation of breaches of the Crimes Act.*
4. *That the CEO take whatever are appropriate steps with respect to the ongoing employment of the officers involved.*

The ICC's recommendations related only to Mr Larard, Mr Retzki, and Mr Clarke, the ICC did not recommend that any action be taken in regard to Mr Cremerius or Ms Tredrea.

On **2 Feb 2010** CASA lawyer Adam Anastasi (unsure of his title at that time) responded to Rudd's invoice:

> *"CASA denies it owes you any liability to you to pay your account and accordingly declines to pay it. If the legal expenses to which you refer to relate to a criminal prosecution of you in which CASA officer was the informant, I note that he did not seek payment of your legal costs when the charges were dismissed*.

On 2 Mar 2010, Responding to a media enquiry former CASA Industry Complaints Commissioner Michael Hart provided the following information, all of which was in any case either already in Mr Rudd's possession or available on the public record:[4]

> My views on Mr Rudd's complaint(s) concerning CASA are as follow in this letter. They are the same views I would express publicly and hence do not regard as confidential.
>
> Mr Richard Rudd made a complaint to myself with respect to the actions of CASA officers and provided advice to me, confirmed and documented by Mr Rudd's legal representative of material and matters with respect to the prosecution by the CDPP of Mr Rudd for offences under the Civil Aviation Act. The crown evidence and information was provided to the CDPP by CASA legal officers. The matter was listed for Mareeba Local Court for mention in 2007. Mr Rudd's solicitor provided the CDPP with relevant statements and other evidence regarding the matters, on review of that material the CDPP withdrew the matters and sought not to proceed. The matters were referred back to CASA by the CDPP. The foregoing are all corroborated by relevant court and legal documents.
>
> Mr Rudd [has] vigorously contested and still contests the facts in issue; namely that he engaged in maintenance activities without authority provided under the CA Act, as attested to by persons employed by the Civil Aviation Authority who made sworn statements and agreed that this evidence be tendered to the Court.
>
> I note the following about the matters:
>
> - Mr Rudd's evidence is that no such maintenance activity was occurring.
> - Mr Rudd disputes the words and actions and movements alleged to support the case to the Court in statements by Commonwealth Officers.
> - Mr Rudd is able to call as witnesses; three other persons who were present on the day and observed both Mr Rudd and the movements and actions of CASA officers. These three persons are able to provide evidence that corroborates the evidence of Mr Rudd and contradicts the evidence of the Commonwealth officers.
> - Mr Rudd is able to provide evidence from a licensed engineer as to whether or not any maintenance action of the section of the aircraft alleged was able to be carried out.
> - Mr Rudd is able to provide evidence that the tailplane of the subject aircraft is in form and shape, completely different in form and shape to that described by CASA officers in their statements, and thus the actions described by Commonwealth Officers are not physically possible of being done by him.

[4] Letter on file

- CASA have provided no full and complete explanation to Mr Rudd with respect to these matters, other than advice of the recommendation of the ICC to the CEO contained within a report by the ICC to the CEO of CASA.
- An independent investigation conducted by a qualified investigator provided the same recommendation to CASA; that of referral to the Australian Federal Police.
- CASA have provided a letter to Mr Rudd providing an account of their handling of the matters and made a number of observations or comments concerning the matters. CASA vigorously disputes that Commonwealth officers have engaged in any intentional wrong doing.

My view of the matters remains unchanged and it is; that the facts of these matters and the evidence available is such that they are matters that require investigation by an appropriate body with authority to investigate with a view to providing advice to the CDPP as to whether or not there are breaches of the Criminal Law by any person and whether or not the matters are ones that warrant being placed before a Court of Law. Sufficient doubt attaches to the evidence to allow for the view that that *actus reus* for criminal proceedings exists beyond a reasonable doubt and only a proper investigation will determine whether the *mens rea* of the protagonists is also so evidenced.

I have no view nor would have expressed any view as the culpability of any person nor of the issue of mis or mal feasance by any person, such a view is a matter for a Court or a duly sworn officer.

It would also be a matter for a Court to decide on the matters of law relating to the issue of the

I am mindful of the competing demands upon the Australian Federal Police and the need for the AFP to allocate resources to matters of public interest or pressing protection of the state. I am of the view that these matters which involved Mr Rudd and CASA officers and other persons are of such a nature that the public interest would not be served by them not being investigated by the Australian Federal Police. A high standard of care applies to the bringing of charges in a Court by the state where the outcome is risk of imprisonment for the person so charged, that is not a minor matter and where there are strong indications and possible evidence of a failure of that duty of care then the Commonwealth has a responsibility to carefully and properly investigate the matters. If after such an investigation a view is formed that the matters lack sufficient gravity or that the matters do not meet the *mens rea* test, the matters should then be dealt with respect to issues of governance or internal CASA process.

Yours sincerely

Mr Michael Hart

Sequel

In a bid for some measure of natural Justice, Kevin Rudd sought the intervention of the Commonwealth Ombudsman's office. The Ombudsman advised it had commenced an investigation and later summarised its findings, based on the Australian Federal Police decision not to pursue the matter. The punch line was,

> *In terms of your out-of-pocket expenses, I suggest that you make a written claim to CASA. The discretionary compensation schemes available to Australian government agencies are not available to CASA. However, we would expect CASA to consider whether or not there is a legal obligation to pay any expenses incurred as a direct result of the actions of* [the three AWIs.].

Meanwhile on 22 to December 2009 a four page letter written by somebody else at the direction of Mr Terry Farquharson, describing himself as Chair, Ethics and Conduct Committee. The letter walked Richard through the details of who said and did what and when, and alleging numerous errors on the part of Mr Hart, and ending with th the e suggestion that Richard apply for access to the investigators report under the Freedom of Information Act.

"The closing paragraph shows they still have a sense of humour," says Richard. It said:

> *Indeed, it is with a clear view to better ensuring that all complaints levelled against CASA employees are managed with a high level of professional expertise and integrity, in full accordance with applicable principles of procedural fairness and consistent with the values of good governance in public administration, that the Director of Aviation Safety has decided to establish the ethics and conduct committee.*

"An Ethics and Conduct Committee; what a great idea."

Case Study: Outing Ord Air

Ord Air (OA), a charter business operated by Maxine Reid, had been in operation for over 30 years. As in many of Australia's northernmost regions, the company had developed two "mail runs" to serve towns and communities spread over the vast distances of the Kimberley region. To regularise the arrangements under which these services are provided, OA submitted to CASA that a rule exemption made to accommodate similar arrangements in Northern Queensland, should be applied to the Kimberley since the services were of so similar a nature. Ord Air claimed it had been delivering this service for over 30 years with an unblemished safety record.

Mrs Reid's husband Peter was killed in an accident in the presence of Maxine, her father and their four young children, while performing an acrobatic display at the local annual Paddy's Market. Not only did Maxine overcome this enormous hardship, but also took control of the family business, Ord Air Charter, and proceeded to manage and expand the business in a world previously considered to be not a woman's world. Maxine not only did this extremely successfully but also brought up 4 young children.

Jul 28-99: The dispute between CASA and Ord Air began when CASA required OA's chief pilot to investigate one of the company's 'mail runs' and to determine if it was in compliance with CASA's interpretation of its own regulations. In a letter approving the chief pilot appointment, CASA told Maxine Reid:

> *"The chief pilot approval process presented the opportunity to address with your nominee, the serious compliance problem CASA sees with the regular Monday and Thursday "E53" service you operate in single-engined aircraft over the approximate route: [and went to on to list the ports]"*

Aug 23 99: Maxine Reid wrote to CASA Darwin office explaining that the two flights in dispute were respectively

(a). under contract with Australia Post, who had the prerogative to say what and whom was able to travel on their aircraft; and

(b). a joint charter by five partners - three cattle stations and two communities, who each paid a retainer to receive the service. As for the Australia Post flight they had the right to determine who and what travelled on their aircraft.

The letter stated that neither run was available to "persons generally" any more than the freight flights done by Alligator Airways from Kununurra to Kalumburu, or Slingair's 'Kimberley Air Pass' regular flight out of Kununurra, selling seats to the general public and operating to a schedule decided by Slingair.

She offered to approach Australia Post to ascertain its willingness to have a direct contract for the Thursday flight, to make it similar to Australia Post run.

Aug 26-99: In a letter to Darwin office, the CP indicated that in his view the operation did not constitute an RPT service, and provided considerable supporting argument.

Jul 28 99: Darwin office wrote to Maxine Reid:

> *"Careful consideration of both letters has not altered our opinion that the E53 flights must be classified as regular public transport operations," and indicated that "CASA has decided to commence the procedures required to suspend or cancel your air operators' certificate on the grounds of your non-compliance with its conditions. You may expect to be served with a Notice to Show Cause in due course."*

The Chief Pilot was provided with a copy of this letter as a response to his letter.

Sep 24 99: Maxine Reid wrote to the (then) General Manager of General Aviation Operations:

> *Given that the letter of the 28th July is the first time we have received a letter on the issue, and given the fact that the mail run has been operated by this company for about 30 years without any incident, we would appreciate a more constructive approach by CASA to solving the problem.*
>
> *As stated in the letter by the Chief Pilot there are very basic needs of the stations and two large aboriginal communities that are trying to be met; they have no other way of receiving their mail, freight or personnel as there are no trafficable roads for up to five months of the year and when they are open it is at least a day's trip to one of the communities - 4WD only.*
>
> *If you have any queries on the matter please do not hesitate to contact us as we are keen to resolve the situation with the least impact on the receivers of the service.*

On the same date Maxine Reid wrote to CASA's Darwin office:

> *We feel that [CASA's letter] is an entirely inappropriate letter, in light of your letter of the 28th July requesting that the Chief Pilot investigate the situation as regards to the mail run in question. The Chief Pilot has given his response to his investigation and common courtesy would be that CASA advise as to whether they agree or disagree with the Chief Pilot, and if they disagree the reasons why. The company would then be able to change the situation possibly. Both the Chief Pilot and the company have put forward suggestions for changes and we have no response to those ideas.*

The letter was copied to the GM GA operations, the Aviation Minister, and several other parliamentarians.

11 Nov 99: The chief pilot wrote to CASA Darwin office, constructively proposing several possible models for resolving the situation.

Jan 28 00: Ord Air was served with a show cause notice by CASA

Jan 31 00: An informal telephone conference is held between CASA FOI Riceman and chief pilot John Cridland.

Feb 1 00: Maxine Reid wrote to CASA indicating that she proposed to resign as Managing Director of Ord Air Charter Pty Ltd and that the position would be taken over by Mr Alisdair Reid. She acknowledged this would require a change in the company's AOC and requested application forms

Feb 3 00: Ord wrote to CASA advising of a new company structure in which Maxine Reid was not a participant. She would be replaced by Alisdair Reid.

Feb 08 00: AOC application was altered to list John Cridland as the Managing Director instead of Alisdair Reid.

Feb 11 00: Riceman wrote a "Notice of Formal Counselling to Ord Air (Cridland) saying in part:

> *On 28 January 2000 Ord Air Charter Ply Ltd ("Ord Air") was served with a Show Cause Notice ('the Notice") Proposed Refusal to Issue Air Operator's Certificate ("AOC"), Ord Air's responses to the Notices were:'*
>
> - *a written response dated 28 January 2000,*
> - *verbal responses at the Informal Conference held by telephone on the 3I January 2000,*
> - *a letter regarding a change to its managing director dated February 2000*
> - *a revised AOC application and covering letter dated 3 February 2000,*
> - *an amendment to the revised AOC application and covering letter dated 3 February 2000,*
> - *a letter containing, further information about Its new managing director dated 4 February 2000,*
> - *a letter changing its managing director-elect dated 8 February 2000, and*
> - *Mrs Reid's letter dated 9 February. 2000 certifying she is not involved in the company's operations.*
>
> *After considering all of the information referred to in the preceding paragraph, particularly Mrs Reid's resignations as managing director, I have concluded that if Ord Air generally accepts counselling regarding the matters set out in the Notice, particularly the "Unauthorised RPT Operations - E53 Flight' matter, then there would be insufficient grounds to recommend refusing to issue Ord Air's charter and aerial work AOC. Also, I could not recommend withholding the authorisation of regular public transport ("RPT") operations once a maintenance controller has been approved.*
>
> *However, under sub paragraph 28(l)(b)(iv) of the Act; CASA must now also decide if it is satisfied that Ord Air's managing director-elect has appropriate experience in air operations. Your responses to this counselling will be used as part of the process to make this assessment.*

14 Feb 2000: Middap Services circulated an advice to users of the service saying in part:

> *You are no doubt aware of the fact that the Civil Aviation Safety Authority has discontinued the Mail Runs in their present format. However if the users are agreeable to using an Agent (one only), then the Mail Runs are able to continue as they are, at least for the present. To this end I offer my services (Middap Services) to be the agent for all passenger and freight bookings. My*

fees will result in about a 5% increase on existing passenger fares and a charge of $15.00 per freight consignment This charge is regardless of the number of parcels in the consignment There will be no change in the present per kg. freight rate and no landing fee will be charged

I am aware that Ord Air may have already intimated this option to you and just wish to confirm my offer and advise of to charges involved. Please fax back your response to Middap Services on Phone/Fax 91612964.

14 Feb 2000: Ord Air (managing Director) writes to Riceman requesting:

- a written undertaking that my signature on the counselling letter puts an end to any criminal, civil or other action (however described), stemming directly or indirectly from any of the matters referred to or described in the said counselling letter dated 11 February 2000."
- an amplification of the term 'interposing an entity (agent), "so as to bring us within the CAR'S"
- Confirmation that implementation of this system or arrangement will satisfy CASA's assessment /requirements as to Ord's charter status

"I would also like you to confirm that initially ORD AIR CHARTER will be issued with an AOC for charter and airwork as discussed at our meeting, with RPT to follow on approval of Dave Barnett. I wish to query the reason for the limited period restriction on our new charter / airwork AOC as this was not discussed at our meeting last Friday. It is my understanding that if our AOC application is approved then it should run for the standard period."

The letter also undertook that documentary evidence of other requested matters would be forthcoming; and concluded with the statements that:

In relation to paragraphs 27 & 28, I accept they reflect CASA's belief. However by signing the letter ORD AIR CHARTER does not accept that CASA's view is necessarily correct.

ORD AIR CHARTER also does not accept that it has knowingly contravened Subsection 29(2) of the CAA either in fact or in law although ORD AIR CHARTER does acknowledge that view is held by CASA.

Feb 18 2000: CASA (Riceman) wrote to Ord (Cridland) advising of CASA's intention to make a recommendation to the delegate that he should not issue Ord Air with an AOC. The letter is reproduced below:

Comment:

It seems axiomatic that Mr Riceman arrived at conclusions without any proper examination of the evidence, to wit, the relationship between Ord Air Charter Pty Ltd and Middap Pty Ltd.

Also noteworthy is the manner in which this matter has unfolded, the inexplicable timing of CASA's actions so as to effectively shut down Ord Air, its unwillingness to negotiate other means of keeping the company in business with a view to maintaining even just the mail run; and the refusal of CASA's legal counsel to even discuss the matter.

21 February 2000: Ord (Cridland) writes to Riceman enclosing:

- An undertaking signed by himself, and
- A statutory declaration sworn by himself concerning a number of the matters of concern to CASA. (see below)
- The Counselling letter from CASA dated 11 February 2000 signed by himself.

With a view to endeavouring to persuade CASA to recommend to the delegate that an AOC issue to Ord Air Charter Pty Ltd, the chief pilot confirmed that:

- "The company now has myself as the director and Chief Pilot,
- "The company wishes to move on from the past under its new direction;
- "[The designated maintenance controller] has not been able to secure an interview appointment with CASA's Mr Steve Bennet due to the absence of Mr Bennet although I anticipate that such an appointment will be available very soon;
- "Ord Air Charter Pty Ltd has no control over which business or entity can be interposed as envisaged by clause 5 of the GAOB policy."

The statutory declaration stated:

1 I am the Chief Pilot of Ord Air Charter Pty Ltd since being appointed in July 1999 by Instrument No. DN 157/99.

2. On 11 Feb 2000 I accepted the offer to replace Ms Maxine Sinclair Reid as the sole director of Ord Air.

3 . On or about 10 February 2000 I was informed by Ms Maxine Reid that she wished to resign all her office-holding positions with Ord Air.

4. On 11 February 2000 the accountant for Ord Air, Mr Allan Paroissien was instructed to prepare the ASIC documentation to effect the necessary changes.

5 . Between 14 and 19 February 2000 I had a number of telephone conversations with Mr Paroissien who told me that the relevant documentation had been prepared and sent to me by prepaid express post.

6. On 13 February 2000 I know that Ms Maxine Sinclair Reid left the State of Western Australia and I believe that on 14 February 2000 she left Australia.

7. I have had no contact whatsoever with Ms Reid since she left Wyndham in the said State on 13 February 2000.

8. Since 14 February 2000 I have been acting as the director of the Ord Air and making the decisions for it.

9. On 18 February 2000 I received by facsimile transmission what I believe to be a true copy of the form to effect the change in directorship of Ord Air and it is that form which I will sign and return to Ord Air's accountant once it has been received by me in Wyndham. Now produced and shown to me and marked with the letters "JFC 1" is a true copy of the Form 304 which I received from Mr Paroissien.

10. On 21 February 2000 I was informed by Mr Paroissien that he had sent a copy of the documentation lodged with the ASIC in relation to the change in directorship of Ord Air to Mr Riceman on 21 February 2000. Mr Paroissien also informed me that that there is no documentation per se in relation to the change of share-holdings and that those changes have been submitted to ASIC in electronic form.

11. On 11 February 2000 I participated in what is described by CASA as a conference with representatives of the Civil Aviation Safety Authority (CASA) following the issue of a Show Cause Notice dated 28 January 2000 to Ord Air.

12. I participated in the Conference in my capacity as Chief Pilot of Ord Air.

13. During that conference which involved, amongst other things, a dissuasion of a divergence of view as to the categorisation of what is known between the parties as the "E 53 run' and with a view to complying with CASA's interpretation of Civil Air Regulation 206, a CASA representative suggested interposing an entity in accordance with clause 5 of the CASA GAOB Policy Position dated June 1999.

14. Annexed hereto and marked with the letters "JFC 2" is a copy of the GAOB Policy on which I have relied.

15. I refer to the second paragraph under the sub-heading ','Scope and effect of this minute" which relevantly reads:

> *"CASA's interpretation and application of regulatory provisions is not "the law" only a court can make binding decisions as to what the law is and requires.* "

16. I refer to clause 5 of the policy annexed hereto as "JFC 2" which relevantly reads:

"Subject to the following paragraphs, if.

- *a third party enters into contracts for carriage with passengers, and*
- *the third party contracts with an operator on an arm's length commercial basis to acquire exclusive rights in relation to all space on an aircraft (to "back to back" the third party's actual or prospective contractual obligations to passengers) ; and*

- *the third party and the operator are not related*
- *accommodation on the aircraft should not be regarded as being available to persons generally ...*
- *If the third party and the operator are closely related (for example, in a Corporations Law sense); or are not dealing with each other on an arm's length commercial basis, the activities of the third party and the operator should be considered as if they were one operator.*

On 11 February 2000 Middap Services made it known to Ord Air that it was prepared to be interposed as a third party entity for the purposes of clause 5 of the CASA GAOB Policy.

> *I know that on 11 February 2000 the former Director of Ord Air wrote to the remote stations, missions, stores, health clinics and other corporations which it had previously undertaken mail runs to and outlined what she understood CASA's position to be and suggested they appoint Middap Services.*
>
> *I believe that letter or notification dated 11 February 2000 and referred to in the preceding paragraph, was sent to simply notify various persons and organisations of what was being proposed.*
>
> *On 14 February 2000 I know that Middap Services wrote to various persons and organisations involved with the mail service operated by Ord Air and promoted itself as a viable third party entity and provided an outline of the costs and charges in that regard.*
>
> *On 15 February 2000 I know that a copy of the letter dated 14 February 2000 from Middap Services was sent to CASA under cover of a facsimile header sheet. I did not sign the 15 February 2000 facsimile header sheet.*
>
> *I can say that the offices of the business trading as Middap Services and Ord Air are geographically and physically separate.*
>
> *I can say that there is no inter relationship between Ord Air and Middap Services in a Corporations Law sense or indeed in any other sense.*
>
> *I can say that Ord Air's director, company secretary, shareholdings and registered office is not connected with Middap Services.*
>
> *I can say from my own knowledge that Middap Services has a number of disparate business interests, none of which are, to my knowledge connected with civil aviation or Ord Air.*

25 Feb 99: CASA (Riceman) to Ord (Cridland)

The super-intrusive process of manoeuvering a member of a family company out of her senior management role on the basis of a policy document is something you're unlikely to witness in any other industry:

CIVIL AVIATION SAFETY AUTHORITY AUSTRALIA
Ref., 9919664-04
Mr John Cridland
Managing Director
Ord Air Charter Pty Ltd
PO BOX 73
WYNDHAM WA 6740
BY FACSIMILE 08 9161 1456
Dear Mr Cridland,

YOUR LETTER DATED 21 FEBRUARY 2000 AND ITS ATTACHMENTS

Thank you for your letter dated 21 February 2000, together with its attachments. I also acknowledge the phone call which you and I had yesterday, 25 February, in which we discussed certain aspects of your letter.

Middap Services

As discussed, I still have some concerns about the proposed arrangement between Ord Air and Middap Services in relation to the E53 flights.

You will recall that paragraph 5 of the policy on the classification of operations states, in relation to interposed entities.

> *Subject to the following paragraphs, if.,*
>
> - *a third party enters into contracts for carriage with passengers, and*
> - *the third party contracts with an operator on an arm's length commercial basis..... ; and*
> - *the third party and the operator **are not related** [my emphasis],*
> - *accommodation on the aircraft should not be regarded as being available to persons*

The information which CASA has is that the principal of Middap Services, Mr Middap, is related to the Reid family, who are the past and present owners of Ord Air. Further, correspondence received from Middap Services by CASA was signed on behalf of Middap Services by Kirsten Cridland, whom I understand is your wife.

In addition, both organisations share the same registered address, a private home.

In the absence of any evidence to the contrary, the above matters indicate to me that Middap Services and Ord Air are related. Further, you have not provided any evidence that Middap Services and Ord Air are contracting with each other on an arm's length commercial basis. Finally, the information provided to CASA from Middap Services and from Ord Air both refer to Middap Services acting as an agent for various stations and communities. Therefore, it does not appear that Middap is entering into a contract for carriage with the proposed passengers.

Please would you respond to this and, in your response, make reference to paragraphs 22 to 25 of your Statutory Declaration.

Shareholdings of Ord Air

During our conversation yesterday you advised that you would ask your accountant to ring me to assure me of the change of ownership of the company. However, I confirm my advice to you that the share holdings of the company are recorded by ASIC and that that information is publicly available. Consequently, rather than having your accountant ring me, please would you access that information from ASIC and forward a copy to me.

Para 28(1)(a) of the Civil Aviation Act 1988

As you are aware, paragraph 28(1)(a) of the Act states 'if a person applies to CASA for an AOC, CASA must issue the AOC if, and only if, CASA is satisfied that the applicant has complied with, or is capable of complying with, the provisions of this Act, [and] the regulations..."

In your previous letter to me of 14 February you wrote, referring to CASA's belief that Ord Air's E53 flights should properly be classified as RPT flights, the following: "in relation to paragraphs 27 and 28 [of the counselling letter]..... Ord Air. Charter does not accept that CASA's view is necessarily correct'. You further wrote that “Ord Air Charter also does not accept that it has knowingly contravened subsection 29(2) of the CAA (sic) either in fact or in law-.-"

You said to me, yesterday, that paragraph 1 of your Undertaking (dated 22 February 2000) should be sufficient for CASA to be satisfied that Ord Air is capable of complying with the provisions of the Act and the regulations. However, if Ord Air does not accept, or understand, that in the past the E53 flights were in breach of regulation 206, then CASA cannot be satisfied that Ord Air can comply in the future.

I acknowledge what you say in paragraph 1 of your Undertaking and I acknowledge that you have now signed as having accepted the counselling letter. However, there appears to be a contradiction between that and the statement (referred to above) in your previous letter of 14 February. ! ask you, therefore, to resolve that apparent contradiction in writing.

Your request for an "exclusion on the E53 run"

In the covering letter which you wrote on 21 February, you asked that CASA give "urgent consideration to the issue of the AOC with an appropriate exclusion on the E53 run".

CASA would not issue an AOC allowing some charter operations but not others. Rather, we need to be satisfied that any flight which Ord Air operates will be in compliance with CASA's understanding of regulation 206. If the E53 mail runs cannot be operated in compliance with that understanding, then Ord Air itself must make the decision not to operate them.

Para 2 of your Statutory Declaration

In paragraph 2 of your Statutory Declaration you state that you have accepted an offer to replace Ms Reid as the sole director of Ord Air. However, it is my understanding that there is at least one other director of Ord Air. Please would you clarify that?

Para 13 of your Statutory Declaration

In paragraph 13 of your Statutory Declaration you state that a CASA representative suggested certain interposed entity arrangements at our 11 February meeting. My recollection of that meeting was that those arrangements were discussed but not on CASA's initiative.

Yours sincerely,

W.D. Riceman

Area Manager, Central Area

25 February 2000

The following phone interview with Maxine Reid on 20-Mar-00 throws considerable light on the matters surrounding this issue:

M.R. They [CASA] have required that I resign but they have given no reason. It was put to me on about February 4, I rang and said what can we do? He said: “the main problem we have with your company is you.”

Q. Was he specific? Did he have any particular complaint to give as an example?

M.R. He just said: “We don’t like the culture that you bring to the company. We don’t like the attitude that you have to safety.”

Did he expand on that? Did he talk about procedures, manuals or anything?

M.R. Nothing. He would expand no more on that, and any other time **it’s always been: “We don’t want Mrs Reid to have anything to do with the company, we can’t do anything until she is right out of the company,” he says I’ll have to resign my directorship, and that they had to approve the new managing director, he was most concerned it was my son-in-law, he wouldn’t accept my son as the new managing director** (he is only 19 so perhaps that could be used as a valid reason), except that I don’t think they go around approving every managing director of every other company.

Has he ever raised any questions of safety with you?

MR. **No. He demanded evidence of shareholding**. He went into a long rigmarole about demanding proof from John that I have got out of the company, and it took some time before our accountant could explain to them what actually goes on with company law, and the fact that only once a year you can look at the shareholdings. He basically wasn’t going to accept the accountant’s word for it.

Q. Does he say that he has the support of his Canberra masters when he makes these demands?

M.R. No, I haven't because every time – he went into a complete seizure last week because I've been answering the phone in the office. He wrote to John again and said to please outline my exact position with the company, and accused John of (unintelligible)

Q. Surely if he's imposing as a requirement of doing business with you that you disassociate yourself with the company, that he should have to do that in writing?

M.R. Yes, but if I ask him to do that also, we're worried he will use that as a delaying tactic

Q. But obviously you're in a position of benefiting from the company's operations?

M.R. I don't have a majority shareholding now.

Q. Do I have your permission to place this before the people in Canberra and tell them I'm investigating it with a view to writing it up, that you've been told you have to get out of the company before CASA will have anything to do with you? That it hasn't been explained to you why that is required, and that if CASA has that view it should have to put it in writing? That somebody in the organisation has taken a dislike to you and just seems to be running riot?

M.R. No problem. They have all the latest amendments to go into the ops manual, if they're any good it would take them at most an hour and a half to go through them, but Ian Ogilvie, the man who's doing it, says he doesn't know when he'll get time to do them, he has to go back to Canberra. He's from Adelaide, and he's the man who's supposed to have been going through the operations manual. He won't be back till Wednesday and all this sort of bullshit. Should be able to do it in half an hour.

Q. Where are you up to with the AAT?

M.R. Appealing to the AAT, as they know very well, costs me a lot of money and I can't see any benefit because they wouldn't hear it for another two or three months, by that stage if we don't have the AOC we won't be here, so what difference is it going to make? If you do have an AAT appeal, CASA just jump up and scream safety, safety, safety, and that's the end of it.

Q. Have they made any demands of you, or imposed any requirements on you, about things like safety systems, manuals or anything of that kind, or is it that they just don't like you?

M.R. Yes, that's it.

Q. In fairness before I question their behaviour I have to put these things to them, and I don't want to be told they've detailed complaints against you that you haven't told me about.

M.R. No, they haven't sent me anything that would indicate that it's my managerial activities that have been remiss. It's all been verbal. It's been very nasty, even John Cridland would agree with that. Everybody's just aghast that I can't do anything because if I do, the guy goes into a frenzy and the whole thing is delayed. … [NOT INCLUDED, TO PROTECT INDIVIDUALS]…. I hate saying this because I hate seeming paranoid, but **one of the airworthiness officers from Darwin made the remark to [an employee] in the hangar, that a company like Ord Air shouldn't be run by a woman**. I've always suspected that because of their attitude, but I don't believe in running round using that as an excuse. There's nothing else.

Q. I raise that because of a reference to criminal charges or other actions in Cridland's letter.

M.R. Yes, it was a condition of him signing the counselling letter that we wouldn't be charged with anything. That was on the advice of our solicitor that he put that in. They wouldn't agree to it and it had to be taken out. The solicitor said well it's probably not too bad because it's only CASA's opinion that that has happened. They're entitled to their opinion and John signing the counselling letter doesn't mean we agree with that opinion. They asked him to sign a whole lot of things of which he had no knowledge, no input, some of it was 15 years ago for goodness sake, when I wasn't even managing director. That I think is another thing where it's very personal, because 15 years ago my husband was killed in an aircraft accident, they know that, and I think they have brought it up personally in this counselling letter, I think purposely to be hurtful, because I can think of no other reason, it has no bearing on what's going on today. They just don't like me, and from what I can see – they've admitted that on every visit we've been totally honest, totally truthful, told them everything they've asked. I think it's just because I'm a woman. Some of the dinosaurs in Darwin still have that attitude**.**

Q. When did it switch from Darwin to Adelaide handling the case?

M.R. Riceman came into it fairly early in the piece, as soon as they issued the show cause letter. He became involved then. After the show cause I was given the option of an informal conference very quickly or not at all, it was so quick that I had no chance of organising any legal representation.

Q. Are you supposed to have legal representation at an informal conference?

M.R. At an informal conference they say they will take down anything you say and it may be used in evidence, almost like a police warning, so therefore you should have legal counsel to represent you. I went ahead because unless your legal counsel is very experienced with CASA, they're battling too.

Q. Any communications about maintenance?

M.R. There's a statement from the airworthiness man in Darwin that they have not any problem with the actual maintenance, but they had a problem with Joe's [maintenance controller] paperwork, but they never had any doubts about the actual maintenance so safety is not an issue. I'll send that as well as the show cause and our response.

Q. No criticism of your flight operations procedures, your appointment of a chief pilot, safety systems, anything like that?

M.R. No, they told John when he applied for the job that he needn't take it, and one of my previous chief pilots, it must have been Christmas '98, they said to him, 'I think you should go and find a job somewhere else.' I think at that stage they were planning to try and do something because there was still somebody decent in Darwin who'd attend to the AOC, but nothing was written to me. The chief pilot just came back and asked me 'What's happening? I've just been told by (a CASA official) I should go and look for another job.' John was [given similar advice].

Sequel

Maxine Reid reports on the tail end of this tawdry affair:

"In the end it all went nowhere. Nothing in Riceman's letter ever eventuated. After that I think it was just phone calls, and it was really all about 'I don't care what you say or do, it's just not going to happen,' and I think that was their intention all along. Eventually I had a letter from Mick Toller on March 23 that didn't say anything about all the wrongs that had been committed; it was all about my personality. Unfortunately it's the only letter I can't find, but I'm sure there'd be a copy around CASA. He didn't really say anything more about changing office bearers in the company, nothing about the particular route, it was all about 'we don't like you, we don't think you're a good influence, so this is the end of the road.'"

At least two of the leading CASA officials involved in this affair are now retired but their philosophies live on. CASA has apparently never been required to provide a cost benefit/safety analysis of its actions against Ord Air, nor to justify its actions in a court of law.

Case study: Two weeks of shame

"Two weeks of shame for the Australian Aviation Industry exposed internationally. Unnecessary and totally avoidable!"[5]

It would be impossible to identify a single individual who has contributed more to Australia's commercial pilot training industry than Barney Fernandes.

But in the view of some individuals, Mr Fernandes didn't fit the mould. Anglo-Indian by birth, he began his aviation career in the Royal Indian Air Force in 1944 as a flight mechanic, and progressed through an impressive list of assignments to Wing Commander rank in 1966. His Air Force career reflects a strong and almost continuous involvement in training.

In October 1966, he sought and received voluntary retirement from the IAF to migrate to Australia with his family. They became Australian citizens in February 1970.

Since than Mr Fernandes' work in Australia had been exclusively in the area of air pilot education and training. From 1967 to 1972 he was an instructor at the Qantas Cadet Pilot Training College in Sydney teaching aviation theory subjects up to Flight Navigator Licence level, training about 200 pilots for the airline. He was retrenched in March 1972 when Qantas closed its cadet pilot training scheme.

In 1973 he established the first ever "ground school" for pilot training at Sydney's "Bankstown Aviation College".

In 1974 he launched the Australian Flying Training School (AFTS) at Bankstown with a training syllabus based on the concepts of the Qantas Cadet Pilot Training Scheme. AFTS conducted formal CPL/IR courses for Australian student pilots and cadet pilots sponsored by overseas airlines. Its first customers were Malaysia Airlines, Garuda Indonesian Airlines and Zambia Airways.

In 1981 he established the Australian Aviation College (AAC) at Parafield. Both AFTS and AAC held the prestigious Integrated Commercial Pilot School training – Australia's highest-standard flying school licence. In addition, both schools achieved the status of a "Malaysian DCA Approved Flying School"- the first flying schools in Australia to be approved for CPL/IR training by the Malaysian Government.

The ICS Rating did not limit "standards" set for graduation to aviation subjects alone. It enabled the schools to embark on expanding the course of education and flying training for professional air pilots that would keep abreast of modern technology, while also giving graduate commercial pilots a tertiary qualification. The rating took the school five years and at least half a million dollars to attain.

In 1987 – for the first time ever in Australia - nine cadet pilots of AAC graduated with a CPL/IR that was part of a two year Associate Diploma in Civil Aviation course given by the South Australian Institute of Technology. These eight young men and one woman received professional flying and tertiary qualifications at the same time.

In 1989 Hawker DeHavilland (Australia) purchased AAC Parafield. Mr Fernandes also sold AFTS and moved to Perth where he established Jandakot Flying College, which in 1991 became the Australian International Flying College (AIFC) conducting flight grading for Cathay Pacific Airways. This was the first time ever that flying grading was carried out in the airline pilot pre-selection process. JFC graded 91 HK Chinese candidates for Cathay Pacific.

In 1992 JFC became the Australian International Flying College (AIFC) and once again Mr Fernandes started training cadet pilots for Malaysia Airlines.

In October 1993 he signed a life long joint venture agreement with China Southern Airlines and became Founder Principal and Managing Director of the China Southern West Australian Flying College. This joint venture involved considerable personal investment in money, long hours of work, and a high degree of responsibility for graduation standards and safety: "It was the only way I could secure this prestigious business for Australia virtually on a permanent basis," he recalls.

His Chinese partners were extremely pleased with the development of the technical and domestic facilities and the standard of the graduate pilots. His initiative to relocate *ab-initio* flying training away from the busy Jandakot general aviation aerodrome (mainly for safety reasons) received support from the Government of Western Australia. The Company purchased an aerodrome that was owned by Meriden, a small country town

[5] Tony Mitchell, businessman, aviator and (then) director of China Southern West Australia Flying College

in the wheat belt, and on 15th August 95 the new facility was opened for flight training. Soon after this, Mr Fernandes received a written commitment from China Southern Airlines to spend US$250 million in Australia to train 3,000 pilots for the airline during the coming 20 years - another first in Australia, and yet another ground breaking achievement.

To this day two of the three flying colleges Mr Fernandes established across the continent are still providing employment, supporting the airline industry in pilot training, and earning substantial export income for Australia each year.

But Mr Fernandes believes that in events which occurred from 1996 and culminated in 2000, the China Southern College began to be subjected to "continuous harassment from CASA – all of it aimed at me personally."

At this time the college was undergoing rapid growth as well as coping with complex management issues related to the decision to move a large part of its operations to Merredin. Those issues include the fact that young pilots typically value their social life and career opportunities as highly as they value their accumulation of flying hours and qualifications; and it is undeniable that more diverse social opportunities for young people exist in Perth than in Merredin. Such pilots, when employed as junior flying instructors, also value working in an aviation environment where they can closely watch for opportunities to further their careers – again more likely to exist in Perth than in Merredin.

Nonetheless, a business decision was made to relocate a considerable part of the business, and to relocate (or employ) staff to meet its needs.

The alleged harassment took most of the forms complained of by other operators apparently chosen by CASA or by individuals on its staff for special treatment. These include repeated random "audits" of company documentation; the canvassing of staff for complaints; subjective assessments of management issues by individuals with no background at all in the management of civil aviation organisations; and an almost constant flow of aggressively threatening correspondence and of the kind many other operators have become accustomed to. Characteristically the claims made against such operators are short on fact, proof, or relevance to air safety, are consuming of time and energy, and the need to respond is likely to divert management focus from attention to safety-relevant issues.

Examples of these activities were:

- Frequent allegations that the school was in breach of regulations because (for example) "the college has yet to demonstrate modification to the flying training management structure to fully comply (sic) with Civil Aviation Regulations and Civil Aviation Orders"[6] In all the correspondence available, it is not possible to identify a single CASA communication which defines what it considers to be an appropriate management structure; nor is any such prescription contained anywhere in the Act,[7] the Regulations, or the Civil Aviation Orders.
- Intervention in management decisions of a non-safety related nature, an example of which are comments on staff morale and accommodation arrangements. A specific example is the comment:
- *Staff morale appeared to be a major problem, causing high staff turnover and low staff numbers. The low morale could have an adverse effect on flight safety and the quality of the student graduates. The location of Merredin and the industry pattern for young instructors to move on to progress their careers are no doubt factors, but the major cause detected by the audit team was one of very poor man management by the college senior management.* [8]
- Eventually a "Special Audit" was conducted at the instigation of CASA Aviation Safety Compliance Branch. (See details below headed *The Tizzard Report*).
- In an event which had a serious negative effect on staff and student morale, the "special audit" was announced to Mr Fernandes late on a Friday afternoon,[9] on a fax in the flight training area which was immediately available for staff and students to read, thus spreading concern and alarm among its

[6] Letter from FOI Winston James to Mr Fernandes 30 January 1996

[7] Civil Aviation Act, Section 28BF Organisation, personnel etc.

[8] This statement was made in a 6,700 word "Minute" subsequent to a "special audit", written by CASA's Acting General Manager, Aviation Safety Compliance Branch, Jonathan Aleck. Mr Aleck's qualifications to make such statements were not detailed. ("Man management" is a military term, although we understand Mr Aleck's background is not a military one.)

[9] CASA has very frequently chosen that time of the week to send faxed advice of actual or proposed regulatory action.

readers.[10] Numerous operators have experienced the familiar tactic of transmitting bad news by fax at or after close of business on a Friday.

- Issuance of approvals for only an extremely limited period. This can have a grave effect on commercial and financial credibility and a thus direct negative bearing on costs.
- In one extraordinary initiative, a "requirement" for the Chief Flying Instructor to prepare a written self-criticism (of the college) in the following terms:[11]

  "a written statement specifying: the particular organisational and structural problems he has identified in CSWAFC's operations, in so far as those issues may be seen to have significant safety-related implications of a kind contemplated by relevant provisions of the Civil Aviation Act, Regulations and Orders (and thus formed the basis of the subject NCNs).

  "With regard to the problems specified in the statement described immediately above, Mr Fyfe (the CFI) should also prepare an appropriately detailed action plan, indicating what steps have already been taken and what steps will be taken to remedy each of the problems identified. The action plan should specify the date by which, or the time frame within which, remedial action in respect of each item is expected to be completed.

  "Once the terms of the statement, action plan and time-table have been finalised, the document should be signed by the Chief Pilot and countersigned by you and Ms Wu Chang, on behalf of the Operator, attesting to your intention to employ your best efforts to achieve the specified results by the specified times or within the specified time frames.

  "It is expected that this document will be prepared and presented to the Jandakot District Flight Operations Manager, Winston James, within fourteen (14) days of the date of this letter. In the meantime, any questions as to the form or substance of the document should be directed to Mr James."

- Pressure by senior CASA executives on the CSWAFC Board to remove Mr Fernandes, a 35% shareholder, from the Board and management.[12] This as we will see was ultimately successful, at considerable financial and emotional damage to Mr Fernandes.
- Action to shut down flying operations, based on CASA's misunderstanding that the Chief Flying Instructor had resigned and therefore that CSWAFC was in breach of a condition of its AOC.[13]
- Subsequent criminal charges against Mr Fernandes on 28 separate counts of conducting training flights without an AOC.

Mr Fernandes and his associates became convinced that the activities they interpreted as harassment in the main, were initiated not in the local office, but at CASA headquarters. They became convinced that CASA had an agenda to drive Mr Fernandes out of the industry. In most of their dealings and despite considerable conflict, CSWAFC and the local (Jandakot) office took care to try to remain on terms which did not preclude their interaction.

They remain convinced that the events which led up to Mr Fernandes' departure and the subsequent laying of criminal charges were engineered by senior CASA executives to justify their earlier actions.

The Tizzard Report

The "Special inquiry" to be led by CASA FOI Steve Tizzard,[14] was announced (as above) by telex. The formal advice which caused such disruption arrived by Fax, but Mr Fernandes was put at ease when Mr Tizzard arrived. Mr Fernandes' account of these events, as related to Mr Mick Toller[15], is as follows:

> *The visit by Steve Tizzard and two other CASA officers (whom I did not know) on Monday 20th and Tuesday 21st April 1998 was conducted in a most informal and friendly manner. My first question to Steve when I met him was "I hope you are not here on behalf of Jonathan Aleck". He said "No mate,*

[10] In a letter to Mr Aleck on April 4, 1998, Mr Fernandes angrily denounced this tactic. Mr Aleck responded that his personal assistant had been given the number following a telephone inquiry as to the appropriate fax number. Mr Fernandes could not identify anybody at CSWAFC who had given the number.
[11] Letter from Jonathan Aleck to Mr. Fernandes dated 26 Sept 1997
[12] Letter on 28 February 1999 from CASA General Manager, General Aviation Operations, Clinton McKenzie, and subsequent meeting of CASA Director Mick Toller with CSWAFC Board excluding Managing Director Fernandes.
[13] This was incorrect. The CFI had indicated his intention to resign but had not yet resigned and was still on the payroll.
[14] The announcement of the inquiry, its terms of reference, and a subsequent report in the form of an 8,700 word "minute" by Mr Aleck, are at Appendices 1/2 of the original of this document and are available for inspection by appointment.
[15] Letter from Mr Fernandes to CASA Director Mick Toller 12 Feb 1999

don't worry about those blokes in Canberra. I haven't seen you for nearly twenty years and would like to catch up".

Steve was pleasantly surprised at seeing our facilities at Jandakot and the first thing he said to me was " Mate CASA should be supporting this college, not obstructing you".

Most of Steve's day at Jandakot was spent discussing training concepts and listening to the difficulties we are having in trying to train pilots for an international airline using a CASA syllabus designed for aero clubs. Steve Tizzard said, I believe quite sincerely —" mate give me a wish list and I'll see what I can do when I get back to Canberra — but I can't promise".

It is a three hour drive to Merredin, so the time that Steve and his team spent in Merredin the following day (21st April 98) was only about four or five hours at the most. Again, I must point out that everything was done on an informal basis. Our facility at Merredin was operating under its own AOC. There was no briefing given to my staff at Merredin and no debriefing prior to departure. The impression given to us was except for the usual minor shortcomings present in most flying schools, there were no major problems.

On Wednesday (22nd April 98) morning Steve came to my office at Jandakot to pick up our "wish list" and the paper I had written for the re-introduction of the Integrated Commercial Pilot School Rating. He promised to do his best to help when he got back to Canberra.

Two months later when the renewal of our AOC was threatened, purportedly as a result of Steve Tizzard's report, I phoned Steve at his home in Canberra to find out what exactly he had put in his report that was so bad. His exact words to me were "mate I really don't know what's going on, the blokes upstairs don't tell me anything — they are playing it close to their chest. There was nothing serious in my report —just the usual things we find wanting in most flying schools".

I have every reason to believe that Steve Tizzard has been telling me the truth.

However Mr Fernandes insists that the "final report" prepared by Mr Aleck bears no resemblance to what he had been led by Mr Tizzard to expect.

Author's comment

The "Final Report" has all the hallmarks of having been prepared as a means to an end for the following reasons:

1. If Mr Fernandes' account of events is accurate with respect to on-site comments by Steve Tizzard and the team's subsequent movements, it would have been physically impossible for the audit team to accumulate the volume of data set out in the report, within the time spent inspecting the college.
2. Again, if Mr Fernandes' account of events is accurate, one cannot ignore the possibility that the information set out in support of the proposed action was obtained from officers at the Jandakot or Perth offices subsequent to the special inquiry. The time lapse Apr 22 (when the special audit was completed) to June 9 (when Mr Aleck's Minute was circulated) is a period which would have provided ample time for the report to be prepared in concert with the local CASA offices.
3. Mr Aleck's account is also at considerable variance with the timings and staff movements quoted by Mr Fernandes. In particular, the team's movements as detailed by Mr Fernandes and other CSWAFC staff is completely inconsistent with the movements detailed in Mr Aleck's final report in his summary of staff costs and allowances.
4. Mr Tizzard should have been asked by a completely independent investigator to illuminate the issue of the disparity between the conversation which Mr Fernandes recalls, and the content of the report which Mr Aleck described as being only "subject to certain minor (non-substantive) amendments." The investigator should not be from a law firm regularly used by CASA, and in fact if there is any reason to investigate whether criminality is involved in these processes, it should be conducted by the Australian Federal Police or the Independent Commission Against Corruption.

   It is also notable that CASA has consistently refused to respond to Mr Fernandes' repeated requests for a copy of Mr Tizzard's report as he wrote it, and he has also been unable to contact Mr Tizzard in any way. Mr Tizzard has certainly never publicly confirmed Mr Aleck's assertion that his report is substantially identical to his (Tizzard's) original report.

Chief pilot fiasco

The next major issue affecting CSWAFC's fortunes was the aftermath of yet another "special audit," this time initiated by the (then) Acting General Manager, General Aviation Operations, Clinton McKenzie.

The following (overleaf), in blue typeface and written by aviation consultant and former CSWAFC director Tony Mitchell is a detailed briefing for concerned parties following the shutdown of CSWAFC's training operations by CASA on the basis that it operated 27 training flights while (as CASA alleged) it did not have an approved chief pilot as required by the Civil Aviation Orders at that time.

CHINA SOUTHERN WEST AUSTRALIAN FLYING COLLEGE PTY. LTD.

Briefing paper outlining the background to the recent two-week interruption of the flying training programme of China Southern W.A. Flying College. 1st March to 15th March 1999

Two weeks of shame for the Australian Aviation Industry exposed internationally. Unnecessary and totally avoidable!

Sequence of events leading up to the "two week grounding" of the flying college.

The Civil Aviation Safety Authority (CASA) exercises "control" of Flying Schools and other "Air Operators" through its appointment of the Chief Flying Instructor, (CFI) and Chief Pilot.

The "Operator" of a flying school employs and nominates the person for the job of Chief Flying Instructor. The appointment of the CFI however, is the prerogative of CASA. The CFI reports directly to CASA in the conduct of his duties.

In addition, CASA appoints its own delegates — known as "Approved Test Officers" (ATOS) to conduct "Flight Test " on behalf of CASA for the issue of "Private and Commercial Pilot Licences" as Well as "Flight Instructor and Instrument Ratings". It is usual for the CFI to be a CASA Approved Test Officer.

Captain Albie Fyfe was appointed by CASA to be the Chief Flying Instructor, Chief Pilot and Approved Test Officer for China Southern West Australian Flying College.

CASA specifically required the Managing Director of the Company and Principal of the Flying College - Barney Fernandes, "not to interfere in the conduct of the schools operational affairs or with the ability of the Chief Flying Instructor to carry out his statutory responsibilities".

Accordingly, Captain Albie Fyfe was given a free hand to run the flying college operation based at Merredin and to carry out his statutory responsibilities to CASA. He therefore reported directly to CASA in all matters relating to compliance with the Civil Aviation Act, Orders and Regulations and in regard to his responsibilities as an ATO. CASA dealt directly with the CFI. The Company, which holds the "Air Operators Certificate" (AOC) was seldom in the information loop!

Introduction

On Monday 26 October 1998, at 15:46 Perth time, Clinton McKenzie, Acting General Manager, General Aviation Operations, Canberra, faxed a letter addressed to the "Chief Pilot" and cc: "Principal" informing that a "special audit" of the flying operations at Merredin would take place the following day.

The Principal (Barney Fernandes) and the CFI (Albie Fyfe) were overseas on that day. CASA had "approved" Mr Morris Tilak to act as CFI from 26th October 1998 to the 7th November 1998 - the period Albie Fyfe was expected to be away from base.

CASA therefore had knowledge that the Chief Pilot would be absent from base and it seems that this period was deliberately chosen to conduct the special audit.

A CASA team comprising of three people from Melbourne and Canberra arrived at Merredin on Tuesday 27 October 98. They collected documents such as flight authorisation sheets, aircraft maintenance releases and aircraft flight records and left Merredin the same day.

The acting CFI, Morris Tilak was present at Merredin but was not given information as to the reason for the special audit. On arrival, the team leader did say to Morris Tilak that the flying college may be issued "non-compliance notices" as a result of the audit, but when they departed all he said was " no news is good news"!

On 7th November 1998, the Principal (Mr Fernandes) wrote to the Director of CASA — Mr Mick Toller and all Board Members of CASA complaining of disruption to training caused by frequent audits and inspections, generally at very short notice. The letter pointed out that in every case there was never any safety issue involved, merely administrative trivia. Moreover, the Company, the holder of the AOC, is not kept informed and CASA generally chose to ignore the Principal and deal only with its delegate - the Chief Flying Instructor.

This letter was not addressed by CASA. There was no proper reply.

On 27th November 1998, Clinton McKenzie, General Manager General Aviation Operations, CASA, Canberra wrote a personal letter to "Mr A J S Fyfe, 8 Pollock Street, Merredin" — a "Notice of Proposed Action — Show

Cause". The letter referred to Captain Fyfe's responsibilities as an ATO, and alleged that Captain Fyfe "did not conduct flight tests in accordance with the requirements set out by CASA". This letter was not copied to the Company.

Since the "Show Cause" letter was addressed to Albie Fyfe personally, he saw no need to inform the Company. Mr Fernandes came to know about this matter informally. Mr Clinton McKenzie continued to deal directly with Mr Fyfe. The justification for not keeping the Company informed was that Albie Fyfe was being investigated regarding his duties as an ATO — a CASA delegate.

On 14th December 1998 Mr Fyfe responds to Clinton McKenzie (CASA Canberra) regarding the "show cause notice". A copy is given to Mr Fernandes (Principal). The Company is still kept in the dark by CASA. There is no communication whatsoever!

Two Flight Instructors are issued "show cause" letters by CASA. Flight Instructor David Arthur gave a copy of his letter to the Principal. Mr Fernandes now begins to have serious misgivings about the professional conduct of the CFI (Albie Fyfe) and institutes an internal inquiry into the matter. The findings were of grave concern to him. To be sure, Mr Fernandes authorised a further inquiry by a more qualified "external" source. The findings were the same.

On 23rd February 1999 Mr Fernandes wrote to Clinton McKenzie (CASA Canberra). This letter made two important points as quoted below:

(1.) "You (Clinton McKenzie) obviously knew that something "dishonest" or "illegal" was going on at my flying school at Merredin, yet you chose not to warn me about this or seek my help in investigating your concerns".

(2.) "As the holder of the AOC the Directors of the Company have the right to know what's going on, particularly since the action that CASA may take in regard to the three staff members under investigation, will effect the operation of the flying school".

The response from Clinton McKenzie was legal in tone and aggressive.[16]

Given the "high and mighty" attitude of CASA towards the Company, the long drawn out process of an investigation conducted by Canberra and the likelihood of an unsatisfactory end result, Mr Fernandes (in his position as Company Director) decided to act in the matter without further delay. He did so correctly and decisively.

On Thursday February 1999 Mr Barney Fernandes and Mr Tony Mitchell (who conducted the external inquiry on behalf of the Company) arranged a meeting with Winston James, the District Flight Operations Manager, CASA. The meeting was held at the CSWAFC office in Jandakot. FOI Winston James was briefed on the findings of the inquiry conducted by Mr Mitchell and the Company's position in this regard.

Mr James was informed that:

(1.) Mr Fyfe would be meeting Mr Fernandes at 10 am Saturday 27th February 1999 and that Mr Fernandes intended to make known to Albie Fyfe the details of his own inquiry as to the allegations made against him by CASA. Among other allegations, the Company had proof that Mr Fyfe had upgraded the Flight Instructor Rating of David Chappell from Grade 2 to Grade 1 without actually flying with the instructor. This amounted to "professional dishonesty" with possible serious implications to training standards and the quality of the graduate professional pilot.

(2.) Mr Fyfe would be told that his "professional conduct" as had come to light in the matters being investigated by CASA and by the Principal of the flying college, was not acceptable to the Company. Mr Fyfe would have to leave.

Mr James was told that, most probably, Albie Fyfe would resign. He had a restricted medical category and would use this as a way out. This would be good for all concerned. The important thing was to keep the flying college flying.

Mr James "applauded" Mr Fernandes on his intended action and said that he would make sure that flying operations of CSWAFC would not be disrupted. Winston James could not see any problem in Mr Tilak being

[16] Letter to Mr Fernandes from Mr McKenzie dated 28 February 99. CASA Reference: 98/7563-02

appointed as the CFI. Tilak has considerable flying experience (about 15,000 hours) and had been CFI for 15 months previously when the flying school operated from Jandakot. He was a CASA "Approved Test Officer" (ATO) and his position in the Company was in the area of "safety and standards". He was the best person for the job.

On Friday 26 February 1999, Mr Fernandes hand delivered a letter to Winston James (CASA Jandakot) confirming their discussions the previous day. Again, Winston James said to Mr Fernandes that, if Albie Fyfe resigned, he (Winston) would strongly recommend that Morris Tilak take over as CFI. He asked Mr Fernandes to keep him informed.

As anticipated, Mr Albie Fyfe resigned on Saturday 27th 1999. The reason given was poor health and stress imposed on him by CASA. In addition (surprise, surprise) Albie Fyfe gave Mr Fernandes a letter dated 11th February 1999 which he had received from Mr Richard Yates, Acting Director, CASA, Canberra, revoking his ATO delegations.

CASA Canberra chose not to inform the Company and hence the Company had no knowledge of this important letter to Mr Fyfe taking away his flight test approvals thus greatly reducing his effectiveness as CFI. This again shows the inappropriate manner in which CASA conducts its affairs.

On Sunday 28 February and again on Monday 1st March 1999 Mr Fernandes informed Mr Winston James, District Flight Operations Manager, CASA, Jandakot that Albie Fyfe had resigned. The Company expected Winston James to sign the approval for Tilak to take over as CFI (as promised) so that there would be no disruption in flying training.

On Monday 1st March 99, Winston James informed the Principal (Barney Fernandes) that the matter had been taken out of his hands by Clinton McKenzie CASA Canberra and suggested that Barney phone Clinton.

Monday 1st March 1999 at 1000 EST (Canberra time) Barney Fernandes phoned Clinton McKenzie. McKenzie is in a meeting and is not available to talk with Mr Fernandes. A message is left for Clinton McKenzie to say that the matter was most urgent since flying training at CSWAFC had been stopped awaiting the approval of Tilak as CFI. Mr Fernandes made the point that this approval had been requested (in writing) on Friday 26th February 99 and it was strongly recommended by Winston James, District Flight Operations Manager, CASA, Jandakot.

Three days later — on Wednesday 3rd March 1999 at 1100 (Canberra time) McKenzie returns Barney's phone call. A "friendly" conversation takes place, the matter of Tilak being approved as CFI is discussed and Clinton asks Barney Fernandes to put in writing the "steps the Company would take" to make sure that this sort of thing would not happen again.

The issue related to the way Albie Fyfe conducted his duties as an ATO and had nothing to do with his duties as CFI and Chief Pilot (also delegations from CASA).

However, to get the school flying again, without more delay, Barney Fernandes sent Clinton McKenzie a letter the same day (Wednesday 3rd March 1999) outlining action he (as Principal) would take to control the activities of the CFI and the flying school. Clinton McKenzie had verbally accepted these steps as being satisfactory.

The response from CASA on Thursday 4th March 1999 was — "China Southern's request for approval of a new Chief Pilot will be dealt with in accordance with CASA's priorities, within the constraints imposed by CASA's limited resources".

Legally, without a CFI — a flying school is not permitted to conduct flying training. The Principal made sure that this would be the case until Morris Tilak was approved as CFI. Therefore, the flying college was effectively grounded, because the "powers that be in Canberra" took their own time to approve Tilak as CFI.

The Director of CASA — Mick Toller had full knowledge about what was going on and the consequences of delaying the approval of Tilak as CFI. It is presumed that he agreed with the way that Clinton McKenzie was handling the situation.

There was no safety issue involved. Mr Fernandes had acted decisively to address the concerns CASA had about Albie Fyfe. Mr Winston James, CASA, Jandakot appreciated the action taken by Mr Fernandes. Apparently CASA Canberra did not!

The letter Mr Fernandes sent to Clinton McKenzie on 31(1 March 1999 cleared up the situation completely and should have been the basis for Clinton McKenzie to "approve" Morris Tilak as CFI immediately. Nothing was going to change after Wednesday 3rd March 1999. Mr Clinton McKenzie had all the assurances he wanted.

Had CASA Canberra approved the appointment of Morris Tilak as CFI on Thursday 4th March or even on Friday 5th March, then the matter would not have come to the attention of the media and would not have been aired publicly. The Company would have suffered the loss of flying training for one week; that's about all!

The "limited resources of CASA" as an excuse now came in handy. It was a technical knock out! Yes, temporary, but it caused the desired result some people wanted.

The "grounding" of CSWAFC was leaked to the media by unknown persons on Saturday 6th March 1999. Mr Fernandes was confronted with biased reports that were given to the Sunday Times (Perth) and the TV media by parties still unknown to the Company. At a later date CASA Canberra also issued a "press release" which did not reflect the true situation and did not say that this fiasco was caused by "CASA's limited resources". The innuendo was — "Safety Authority investigates China Southern Flying College".

All previous approvals for CFI of CSWAFC were signed by Winston James, CASA, Jandakot. Since they were "so busy in Canberra" Clinton McKenzie should have delegated this task to Winston James who would have taken just two minutes to sign the "approval" which he had already prepared.

On Friday 12 March 1999, Clinton McKenzie, CASA, Canberra, formally signed the approval for Tilak to be CFI. Flying training resumed on 13th March 1999.

The situation as in April 1999.

The Principal — Mr Barney Fernandes, has assumed full control of all the operations of the flying college and is quickly rectifying past errors and omissions. He is getting a lot of moral support from Mr Winston James, CASA, Jandakot — but not much from anybody else. The CASA West Region and Canberra are still in control and are not helpful.

Although training operations are back to normal and the morale of the flying college is improving, the matter is far from resolved. The future of CSWAFC is still under threat from questionable "compliance" in trivial matters demanded by a few faceless bureaucrats in Canberra. At no time during their many audits and surprise inspections has CASA flown with any of the students of the flying college to assess training standards and the quality of the CSWAFC Graduate Pilot; not even once!

In spite of its many achievements the college has yet to receive one single word of praise or acknowledgment from Canberra. The reasons are hard to imagine. One thing for sure — there is no safety issue involved. The flying college is achieving high standards as it always has — in spite of CASA! It can achieve a lot more without the continuous harassment from CASA.

CASA itself is in disarray. Dick Smith, the Chairman of the CASA Board and one other Board Member has resigned. There is a lot of confusion all round and in this regard, Australia is the laughing stock of the aviation world.

It seems the "regulator" needs "regulating". A safe, happy and thriving aviation industry is vital to our national well being. It is hoped that the present Howard Government, will act soon and act decisively to protect our Aviation Industry by reforming the regulator. In a free country, like Australia, there is always "hope".

"Bastardising Barney" – almost the final thrust.

At the time of these events, Mr Mitchell remained a director of CSWAFC. CASA had asked the WA Department of Transport, Mick Belyea, through the WA Dept of Transport aviation manager, to host a meeting between China Southern directors and CASA director Mick Toller, other CASA officials, and officials of the WA Department. The meeting was attended by Yu Yan En (at that time the chairman of China Southern; Captain Yu; Captain Yang (who is now the Chinese Minister for Aviation, and who was sickened by the whole thing); and by Cheng Lee who was running China Southern. Mr Mitchell understands Mr Toller and (then) CASA Government Affairs director Rob Elder were present, along with the WA FOI Terry Farquharson. Mr Mitchell says "The purpose of the meeting was to address the contretemps between CASA and China Southern which had been continual running sore for some period of time with the inferences from CASA

officials that the standards of training in China Southern weren't high enough, and people were being given licenses under false pretences, which wasn't happening at all."

Mr Mitchell adds that the subsequent outcomes were consistent with his belief that CASA told the Chinese that "if they couldn't get Barney, they'd have to have a go at the Chinese." Whatever was said, subsequent to the meeting the Chinese directors offered to buy Mr Fernandes' interest, albeit at a necessarily depressed price in the absence of competing purchasers.

Mr Mick Toller, then CEO of CASA, wrote to Mr Fernandes saying that CASA would no longer be dealing with him, and that all correspondence would be addressed to his Chinese partner. His position as Principal and Managing Director of the Company was simply ignored.

Coup de Grace

Only days before the statute of limitations ran out, CASA brought 27 criminal charges against Barney Fernandes, at that time aged 78, alleging that while he was a director of CSWAFC, he was "knowingly concerned" in the operation of 27 training flights over a two day period, while the school did not have an approved chief pilot. Neither the corporation nor any of Mr Fernandes' fellow-directors was charged. Each charge carried a penalty on indictment of 2 years imprisonment and a $13,200 pecuniary penalty. Technically at least, Mr Fernandes was looking down the barrel of 54 years in the slammer, and fines of up to $356,400.

Mr Fernandes described CASA's tactics: "While I was absent in India my wife was forced to accept a summons in which I was charged with the offences under the Civil Aviation and Crimes Acts. There was some mention to her that if she did not accept the summons and if I did not respond as required, I would be arrested. I believe this is nothing but insensitive bullying of an ageing lady. These charges have no bearing on safety whatsoever, and their prosecution is highly technical, totally unmeritorious, and as far removed from public interest as they could possibly be. The Commonwealth Director of Public Prosecutions [CDPP] has supported this pathetic action by CASA for the past twenty months and has decided to proceed with the prosecution. So far it has cost me – a self-funded retiree - about $35,000 that could have been put to better use! And wasted my time."

Writer's comment (Opinion)

It appears that CASA acted illegally in respect of the events surrounding the cancellation of the chief pilot approval. CAO 82.0, sub-section 6 specifies that:

> *6.2 Where CASA cancels or suspends a person's appointment as a Chief Pilot CASA must:*
>
> *(a) notify the person and the operator in writing of the cancellation or suspension; and*
>
> *(b) provide the person and the operator with reasons for the cancellation or suspension.*

Under CAR 1988, 5.58, CASA can cancel a CFI approval but only in writing.

> (5) CASA may, in writing, revoke a person's approval if:
>
> (a) the person ceases to hold the approved qualifications; or
>
> (b) there are reasonable grounds for believing that the person has contravened a condition to which his or her approval is subject;
>
> or
>
> (c) it is necessary to do so in the interests of the safety of air navigation.

The grounds for cancellation must be provided, but oddly, under that regulation, CASA is *not* required to notify the company. No available evidence suggests that either happened.

The lack of a direction in CAR 5.58 as to whom CASA is required to advise of the withdrawal appears to be negligent. There can however be no excuse for CASA to:

(a) Insist that Mr Fernandes distance himself from the day to day management of the college and require that communications with its delegate (the CFI) be between himself and appropriate CASA staff; **then**

(b) Being aware that (in its view) a breach of the conditions of the chief pilot approval is occurring, CASA investigates the issue and arrives at a finding that a breach is occurring/has occurred; **then**

(c) Cancel the chief pilot approval, knowing that because of the way it had directed the reporting arrangements to be structured, the principal or other directors had no way of being made aware that a breach had occurred/was occurring; **then**

(d) Used the conduct of flights after the chief pilot approval had been cancelled, as the basis of regulatory action against the organisation, **and then**

(e) Have the incredible gall to launch criminal charges **not** against the corporation or its directors, **but** against one individual who, because of CASA's own reporting structure **and** its failure to take available action to prevent the conduct of the flights, had absolutely no way of knowing that an "offence" was being/would be committed.

Opinion

It is the writer's opinion that if the conduct of the flights was a crime as CASA has sought to establish, then the individual within CASA would have been an accomplice in the commission of the offence. There is no available evidence to suggest even that any CASA employee was as much as counselled over this matter.

Apparently the Commonwealth Director of Public Prosecutions finally got the message in the form of a *nolle prosequi* submission by top Western Australian criminal lawyer Malcolm McCusker in July 2003; but CASA reacted only days before this legal extravaganza was to begin. Perhaps CASA had failed to advise the CDPP (or didn't know?) that although he had given notice of resignation, the chief pilot had still been on the company payroll and was still carrying out his duly authorised duties at the time the training flights were conducted. After two years of worry for the couple, the entire case was abandoned, albeit at huge cost to both the taxpayer and Mr Fernandes.

This backdated and apparently malicious kick in the teeth surely warranted competent external investigation as to its background and motivations, and its relevance to CASA priorities. If that trail was deeply and competently examined, the true motivations, relevant personal alliances, and conduct of some of the individuals involved might be identified, and appropriate action taken.

Prior to CASA Director Bruce Byron's arrival on the scene, at least three CASA officials with direct involvement in these issues have left the organisation prior to the expiry of their contracts. They are former Director Mick Toller, former Government affairs executive Rob Elder, and former General Manager of General Aviation Operations Clinton McKenzie. Although all three played direct roles in these events, there is no evidence to suggest that the involvement of any of these officials in the affairs described here was or was not related in their departures.

Several other (apparently) wasteful and incompetent misdirections of CASA resources over the past ten years are well known but remain uninvestigated. The diligence Mr Byron applies to further significant staff changes will be the measure of his final success.

There appear to be two categories of people working for CASA. Most want to restore the industry's trust and respect by delivering efficient, effective, competent and prompt regulatory services, and to comply with their guidelines in respect of procedural fairness and priorities. Others identify themselves by their actions, which often seem capable of the interpretation that they're driven by contempt for general aviation and its participants, and that in some cases this results in unreasoned and malevolent actions.

At the age of 78, Barney Fernandes is looking back on his life and wondering if it's all been wasted because of this contretemps.

In April 2000, he sold his 35% interest in the joint venture Company to his partner - China Southern Airlines - and pulled the shutters down on a highly productive 34 year working life in the field of education and training professional pilots. The trust and gratitude he has earned among airlines in Asia and elsewhere, whose flying standards and safety records are a direct product of the efforts of Barney Fernandes, and his contribution to the national economy, should be sufficient assurance that his personal contribution to Australian airline pilot training will far eclipse that of any Australian aviation regulatory employee in our history.

Case study: A skilfully mismanaged stuffup

"CASA will do all it can to ensure that a person whose licence, certificate or authority is suspended or cancelled has ready access to full external merits review in the AAT. Once before the AAT, CASA will conduct itself as a model litigant." CASA, in a document entitled: A new approach to enforcement. March, 1989.

"Anyone other than Dick Smith who joins CASA, becomes 'infallible" - Dick Smith, August 1998.

"*That's the way the system works. They think: "We are powerful and we are totally unaccountable."* - Dick Smith, August 1998.

When he made those comments, Dick Smith had already found the battle against authoritarian, intransigent and what he sometimes called 'incompetent' bureaucracy, tougher going than he had anticipated. But at that time events in the Torres Strait had already shown how much further there was to go. This incident was far from being the first in which CASA had used its administrative procedures to impose crippling financial burdens on an operator, while totally sidestepping the accountability Smith had fought for. The fatal crash of a Britten-Norman Islander in April 1996 had resulted in the immediate suspension of another AOC and forced that operator out of business. The operator had not been negligent, nor had any of its aircraft had any significant mechanical problems. The final Bureau of Air Safety Investigation finding was not one that supported that view. I commented at that time: "Anyone contemplating investment or a career in aviation should read this and study its implications. There's still hope for the industry, but a lot of things have to be fixed first, and the industry is wondering whether the right people and motivations are in place to fix them."

They have been wondering that ever since.

Most of the documentation of these events would never have surfaced, had the affected operator not dug its heels in and fought for their release. Uzu Air's friends, as well as many of its commercial rivals, were united in their belief that these events represented an ongoing threat to the orderly conduct of aviation, and correspondingly a negative impact on air safety. They also observed that CASA had developed a tactic to subvert the Administrative Appeals Tribunal (AAT) process, by cynically sheltering behind Section 9A of the Civil Aviation Act. That belief has been strengthened many times since the Uzu Air debacle and in higher courts in several other cases.

A CASA public relations officer commented at the time when we queried the fairness of the process by which an administrative decision of one individual can put a company out of business: "Well, that's the decision we have made. If (the victim) doesn't like it, he can appeal to the AAT, can't he?" When that comment went to press there was another victim of this affair. The LAME licence of the chief engineer of Uzu's engineering company, was cancelled. That engineer, one of the best-respected in the industry, simply couldn't afford the AAT process, especially when the AAT was disposed to accept a bald CASA statement that it was acting within its 'safety responsibility' in accordance with Section 9A(1) of the Act.

Jul 96 to Dec 98: Uzu Air's General Manager wrote a total of thirteen letters to CASA and its predecessors, seeking clarification of the anomalies surrounding the carriage of individual paying passengers at fixed fares on subsidised remote area mail service flights. None were answered, and a CASA officer later told Uzu: "Officially, they don't exist."

9A Performance of functions

(1) In exercising its powers and performing its functions, CASA must regard the safety of air navigation as the most important consideration.

14 Aug 96: A CASA safety systems assessment profile report on the company noted: "The company management has spent a considerable time trying to clarify the status of its Australia Post mail services, which appear to have been in non-compliance since the repeal of Civil Aviation Regulation 203. CASA must address the operation of vital rural mail services to remote communities and draft appropriate legislation to allow their continued operation, [the company] endeavour to conduct their operation in accordance with regulatory requirements. However, they feel frustrated by the lack of appropriate legislation and CASA's reluctance or inability to allow regular passenger/mail services into non-surveyed landing strips or operation of single-engine IFR aircraft on such services."

Nov 4-6 97: A periodic inspection was conducted by FOI Neale Crawford from CASA's Cairns District office. That officer's report, subsequently obtained only at the direction of the AAT, crowed: " 20 NCNs in

total!" (underlining and exclamation marks as in Mr Crawford's report.) The report added the further comment that: "This is no longer a compliant operator."

Nov 17-20, 97: Uzu was visited by an unannounced team headed by the Manager, Safety Audits, Southeast Region. The four-man team conducted a four-day audit over 52 man-hours, which resulted in the issue of four NCNs. Three of these detailed minor errors in maintenance documentation, and one questioned dangerous goods acceptance procedures. The report concluded: "Uzu Air are considered not to be an unsafe operator."

1-4 Dec 97: At the direction of CASA's Canberra office, two investigators and one Cairns FOI conducted an investigation with the following terms of reference:

> *Determine the extent of operations in the Torres Strait region which are being conducted for fare paying passengers that fall into the definition of RPT and which are currently being conducted as charter.*

The TOR directed that:

> *The differentiation between RPT and charter that is to be used for this investigation shall be drawn from the "draft" paper prepared by (a CASA lawyer) as attached*.

The draft opinion, later obtained by Uzu, attempted to define the five elements which must exist to constitute RPT. However it provided no definitions of two of the critical elements: "specific route" and "fixed terminal"

The investigators had thus been instructed to investigate whether operators were in breach *not* of a regulation, order or published ruling, but of a draft opinion, which failed to provide critical definitions.

Uzu's position was based on its contention that CASA incorrectly interpreted CAR206 (1)(c), says Bob Fulton: "They had an interpretation for "fixed terminals", "defined routes" etc which was bullshit. Those terms are not defined in the CARs. Our interpretation was based upon the original ANRs [Air Navigation Regulations, the precursor of CARs, now again re-named CASRs.]

Dec 23 97: A new FOI, whose training had not yet been completed, conducted a "risk observation report" inspection of Uzu. He commented: "Aviation manager [Fulton] appeared to be consistently involved to the point of apparent interference with duties of operational staff – pilots and CP [chief pilot]." The report, the contents of which were never conveyed to the company, ended: "CASA should support the new CP to raise standards and resist (the manager's) commercial pressures."

Jan 7 99: CASA issued a notification of proposed action to suspend or cancel the AOCs of four operators including Uzu. The notification summarised the reasons CASA believed the companies were undertaking unauthorised RPT flights, contrary to the Civil Aviation Act.

Uzu's notification also resurrected a number of NCNs issued over the previous two years, all of which had previously been acquitted.

Jan 16 99: Uzu Air's Britten Norman Islander was involved in a fatal accident at Coconut Island.

Jan 17 99: An "Immediate safety report" signed by CASA Assistant Director Laurie Foley on the advice of a Cairns FOI who had not visited the site or communicated with the operator, outlined the few known circumstances of the accident, and stated under recommended action: "DFOM (District Flying Operations Manager) to now recommend 28 day suspension of AOC." The report, faxed to Canberra at 10.55 am, on that day (a Sunday), did not state any reason for the recommendation.

Jan 19 99: BASI, insurer and operator representatives flew to the accident site. In a faxed message, CASA suspended Uzu Air's AOC for 28 days, with effect from 2359 that night.

Jan 20 99: Uzu filed a notice of application for review of the CASA decision to suspend its AOC, claiming that the Authority had acted *ultra vires* (outside its legislated authority); breached rules of procedural fairness and natural justice; failed to provide adequate reasons for the decision; misapplied administrative principles, and "failed to correctly interpret and apply the law."

Jan 21 99: Uzu lodged a detailed 127-page response to CASA's notice to show cause. The response was never acknowledged. At the same time, the operator attended the first hearing on the matter in the AAT seeking a stay of its AOC suspension. CASA succeeded in having the stay denied. CASA's use in such stay proceedings of Section 9 of the Civil Aviation Act, appeared to question the ability of any operator to gain a stay. The operator believed the AAT's effectiveness in reviewing administrative processes may be neutered by this tactic. Uzu would have to wait for the 28 day suspension to expire, before being able to proceed to a substantive hearing. Uzu sought an order for the release of CASA documents related to its decision. CASA

said it would take up to 30 days to produce the documents. AAT directed CASA to provide Uzu with all relevant documentation within seven days. (The documents were made available about 10 days later. The 13 letters seeking clarification of RPT/charter status were not included in the documents.)

Jan 22 99: BASI investigators recovered the engines from the Islander and returned to Cairns. BASI held a meeting at CASA Cairns with CASA AWI. BASI advised CASA the left engine did not appear to be developing power at impact and the fuel mixture control rod was found to be broken at the accident site, but advised the component would require metallurgical examination to determine cause and time of breakage.

Jan 26 99: Uzu Air lodged a 40-page response to CASA's proposed AOC suspension.

Jan 27 99: BASI advised Uzu and CASA that laboratory analysis verified that: "Laboratory examination of a failure of the left engine mixture control rod confirmed that the failure occurred at impact as a result of impact induced stresses."

Feb 2 99: BASI stripped down the left engine at Archerfield. On the following day, BASI advised all interested parties of the outcome of the engine strip down.

Feb 4 99: CASA served a *Notice to Show Cause* on Uzu Air's associated company, Tamco Engineering, asserting that BASI investigations "resulted in a finding of a disconnected mixture control rod on the left engine, which was not delivering power prior to time of aircraft impact, and was considered by these BASI Investigators to be a contributing factor to the loss of control of the aircraft prior to that impact. The subject mixture control was found to have suffered failure which exhibited severe corrosion of the mixture control ball end connection."

The BASI Investigator verbally denied the assertions were ever made and advised Uzu that BASI was lodging a protest with CASA regarding the allegations.

Feb 8 99: Uzu Air held an informal conference in Cairns with the CASA regional manager, the acting DFOM, and the assigned FOI. Uzu made a proposal that it implement check and training and Class A aircraft maintenance, immediately upon reinstatement of the AOC. The company believed this met with CASA approval.

Feb 12 99: BASI Deputy Director Alan Stray faxed BASI's Preliminary Report to Uzu Air. The preliminary report was also faxed to General Manager, Aviation Safety Branch, CASA, Canberra; and CASA Canberra was telephoned to confirm CASA's receipt of the report. The report stated *inter alia*: "Examination of the left engine, while still in the wreckage at the accident site, revealed the linkage between the mixture control cable on the carburettor had failed. Subsequent metallurgical examination of these components confirmed that failure was due to overload as a result of impact forces, and that it had not contributed to the accident." (our underlining)

Feb 15 99: CASA suspended Uzu Air's AOC for a further 28 days and asserted *inter alia*: "The Bureau of Air Safety Investigation (BASI) has been investigating the crash but has not published a preliminary or final report on its causes." The final report was published on Dec 16, 1999, and updated on Nov 29, 2010.

Feb 17 99: The *Cairns Post* newspaper published an article headed "Crash report rocks CASA," (by this writer) detailing the contrasts between CASA's allegations and those of the preliminary BASI report. A faxed letter was received on the same morning from Laurie Foley, saying: "I have now been made aware of the content of a preliminary report of the accident by BASI. Please note that neither the crash itself, nor the possible causes of the crash, were a decisive consideration in my decision to suspend your AOC. I would have suspended your AOC even if I had been aware of the content of the BASI preliminary report." Assistant Director Foley did not reveal his reasons for this damning assertion.

Feb 18 99: An AAT-directed teleconference was scheduled for 1700, between Uzu counsel, the AAT registrar, and CASA's office of legal counsel, to determine the process of an AAT hearing on the second suspension, and to enable Uzu's counsel to advise CASA of the witnesses Uzu required to examine. Uzu counsel and the AAT were connected. CASA's phone rang out without answering.

Feb 19 99: Uzu counsel telephoned CASA Office of Legal Counsel, who advised they had forgotten the teleconference set for the previous day. CASA advised the further "T" documents (documents which CASA relied on to make its decision to suspend the AOC further and which Uzu required under the AAT court order) would now be made available to Uzu. Uzu's counsel advised that he had the AAT booked in Sydney for Wednesday Feb 24. CASA advised they would be unavailable on that day but Thursday Feb 25 would be acceptable.

On the same day Uzu Air provided CASA with a detailed 50-page response to the proposed further 28 day suspension of its AOC, detailing the foregoing events and again raising the question of RPT versus charter.

Feb 23 99 Uzu's lawyers requested the AAT issue three subpoenas to involved CASA staff members:

- Assistant Director of Aviation Safety Compliance Laurie Foley;
- District Flying Operations Manager Robert Collins, and;
- The case FOI Neale Crawford

to be present at the hearing. AAT declined due to inadequate time. "We later learned that CASA did not want them questioned under oath," said Bob Fulton. The Deputy Commissioner of the AAT gave CASA until 5.30 pm to agree to return the AOC or she would list a substantive hearing on the following Monday and issue writs for the witnesses.

"CASA agreed to return the AOC but included a string of ludicrous conditions including that our Cessna 206 be maintained under an approved Class A system of maintenance, which was absurd and in fact, illegal."

Feb 25 99 At a cost of about $6,000, Uzu attended AAT Sydney at 0915. At 0930, AAT Vice President's associates advised that CASA would not be attending due to commitments in Brisbane, but CASA would not object to a telephone hearing. However CASA objected to any evidence being tendered or any witnesses being called, as it is 'not practical to cross examine by telephone.' Uzu, which had now not earned any revenue for 36 days, was therefore again denied an opportunity to confront its accusers, some of whom were on "stress leave," a luxury unavailable to Uzu General Manager Bob Fulton or his staff, some of whom had been stood down. CASA however successfully objected to the lifting of the suspension on the grounds of "Air Safety," relying on Section 9 of the Civil Aviation Act.

Mar 2 99: A meeting in Canberra was attended by Uzu's chief pilot, an Uzu consultant, a CASA lawyer, and CASA's public affairs manager. Uzu was told that CASA wouldn't extend the suspension, but would either lift it, or let it run its course until March 16. The company was also told that CASA would not renew the suspension or cancel the AOC. No explanation was offered as to why, having made that decision, CASA would not lift the suspension immediately.

It was agreed that draft checking and training and maintenance procedures were required and had been submitted, and that checking and training and progressive maintenance would be progressively incorporated.

Mar 5 99: An AAT teleconference between CASA office of legal counsel and Uzu confirmed all required documents had been submitted and that the AOC would not be cancelled, no further suspension would be imposed, and the suspension would be lifted between March 10 and 12.

Mar 8 99: CASA acting DFOM Cairns advised he was satisfied with the draft manuals and would be making "unspecified recommendations" to CASA Canberra. Uzu's optimism was heightened.

Mar 9 99: CASA published an amended CAO 82.3 and three blanket exemptions, authorising air charter operators in the Torres Straits to operate RPT until June 9 without meeting the aerodrome, maintenance, or training and checking requirements for RPT.

The principal expertise of the three CASA officers preparing the new rules lay in the respective areas of airworthiness, legal and navigation. Uzu was again told its AOC would be restored by the end of that week.

Mar 10 99: AM - CASA shifted the goalposts again. While its competitors, who had been operating for the two months Uzu had been grounded, were still in the air and had 90 days to comply with RPT rules, Uzu was told it must comply BEFORE its AOC was restored.

PM -Uzu's solicitor contacted CASA office of legal counsel and was told the manuals the company had submitted were only DRAFT and that Uzu had not nominated a maintenance controller or check and training captain.

This writer faxed a draft of this chronology to CASA with an invitation to review it for accuracy.

Mar 11 99: CASA phoned and indicated that a response, detailing some "errors and omissions" would be faxed "tomorrow." I admitted that because of space limitations I had omitted considerable material, much of it damaging to CASA. (Information provided in CASA's response is incorporated in this narrative.)

Mar 12 99: The CASA response did not arrive. Or maybe, obliquely, it did. A faxed message from CASA to Uzu suspended the AOC for a *third* period, "pending an investigation by CASA into your company's operations, and the risk to the safety of air navigation in allowing the AOC to continue in force……. The

reasons for this decision and the facts and circumstances on which I rely are set out below." The letter detailed thirty-eight points as "facts and circumstances,"

Mar 15 99: A fax to the Hon. Warren Entsch, Member for Leichhardt, in response to a phone call to CASA from Mr. Entsch, said that for Uzu to have its AOC reinstated, it must comply with three requirements – training and checking, Class A maintenance, and an approved maintenance controller, which Uzu had already addressed.

In a pre-hearing teleconference between Uzu, CASA and the AAT, the Tribunal indicated that it expected CASA to restore the AOC by close of business on Friday March 26, provided the three CASA conditions were met (which Uzu insisted they already had been.) The AAT official indicated that she would be in her office for a further half hour after close of business, and that if the AOC was not restored by that time she would arrange a "substantive" hearing on Monday 29.

In anticipation of a full AAT hearing of the case, Uzu had already requested the AAT to issue subpoenas requiring the presence at the hearing of Assistant Director of Aviation Safety Compliance Laurie Foley, Cairns District Flying Operations Manager Robert Collins, and the case FOI Neale Crawford to be present at the hearing. This meant they would almost certainly be called upon to give evidence, and to face cross-examination regarding what Uzu had already alleged to be inconsistent and discriminatory conduct.

Late on Friday afternoon, CASA blinked. In a faxed message, Uzu was advised that its charter AOC was restored "subject to the company implementing Class A maintenance" - a unique requirement, but at least the company was back in business.

But Uzu Air, which was subsequently sold to a new owner and renamed, did not survive the financial stresses imposed upon it. Despite having undergone considerable restructure and the acquisition of new equipment, the airline had simply gone into receivership.

General aviation is not one big, happy family; but other operators watched the process with keen interest, and even Uzu's commercial rivals were horrified at its implications for the rest of the industry.

Bob Fulton reflects on the final outcome of this adventure: "Mick Toller came to Horn Island and we flew him to Mabuiag Island (where he flew the C208 Caravan under the supervision of a Grade 1 Instructor) and during the course of my discussions with him he admitted: 'It could have been handled differently.'"

Case study: How wrong can it get?

Could the Australian Transport Safety Bureau's final report on the fatal night ditching of a Piper Chieftain into the sea enroute to Whyalla in May 2000 have inadvertently overlooked some potentially very relevant matters.

The Australian Transport Safety Bureau's decision to release its Whyalla Airlines crash investigation report on December 19, 2001, was promptly branded by industry cynics as a Canberra ruse to bury the report and any resulting debate in the festive period, in the hope that it would be stale news when post-Christmas normalcy returned.

Author's note

This article has been only slightly updated and is re-published with the kind consent of Yaffa Publishing's *Aircraft & Aerospace* magazine where it first appeared in March 2002

Seven passengers and the pilot died when the Piper Chieftain was ditched at sea at night following a double engine failure on May 31, 2000. The airline voluntarily suspended operations the following day in the hope of an early return to the air. But Whyalla airlines never flew again.

In a post-accident pattern of behaviour now familiar to the general aviation industry, the Civil Aviation Safety Authority (CASA) launched a series of post-accident "special audits," interviewing various individuals including a former chief pilot (who had been dismissed six weeks earlier for alleged misconduct not related to his aviation duties); the chief pilot of another operator; and the bereaved partner of the deceased pilot.

The then chief pilot and manager, Kym Brougham, recounted that the statements of these individuals were preferred by CASA above the detailed information offered by a long term employee:- "A mature, adult, sensible person, who was ignored because he answered the questions too well, and was accused of being coached to answer them."

The CASA investigation quickly homed in on "evidence to suggest" that pilot flight and duty time records had not been properly maintained - "leading to the risk of incorrectly calculating the statutory rest periods." To date, CASA has not released the outcome of its investigations into these allegations; and the ATSB findings did not suggest that fatigue issues were a factor.

CASA then called in extra staff from Canberra, says Brougham: "They kept saying 'we need more time to look at it,' meaning to look at whatever allegations were made against us. On June 10, on the day of the memorial service at the beach, they served a "suspension notice pending investigation." The notice, signed by (then) Assistant Director Aviation Safety Compliance Division, Laurie Foley, said the suspension was based on "reason to believe that there exist facts and circumstances which justify the suspension." Quoting no demonstrable facts and circumstances to support the suspension, CASA used language such as:[17]

- "It therefore appears that…….. some of the records of the duty times of the members of the operating crews …..may be inaccurate";
- "It appears that, on some occasions…….dead head transportation of pilots was not taken into account when calculating flight and duty times";
- "Some…..pilots interviewed by the Authority consider the "turnaround" between two sectors on your regular public transport routes may be inadequate";
- "Some of the pilots …….. expressed concerns about the adequacy of the accommodation provided";
- There is evidence to suggest that the company's pilots are under undue pressure to comply with time constraints imposed by the company; may not be recent to conduct the operations required of them; and the company is not providing adequate rest facilities.
- On the basis of the facts and circumstances described above, I have reason to believe that there is a serious risk to air safety if the AOC…….were not suspended;"
- Therefore, until these facts and circumstances can be investigated thoroughly and such further action as may be appropriate may be taken by CASA, I have reason to be believe that to permit the continued operations of the company would pose a potentially serious and immediate safety

[17] Suspension notice

threat to other aircraft, and to such persons and property as may be effected by the operation of aircraft under the control of Whyalla Airlines Pty Ltd

CASA did not provide the company at any time with details of the progress of the investigation; nor any indication of a time when its conclusion was expected. This mirrors the authority's conduct in similar investigations such as those related to the suspensions of Aquaflight Airways, Uzu Air, and Yanda Airlines.

"We cooperated with them all through June and early July, but it looked like they weren't going to relent. They kept saying 'we need more time.' We were desperate at that stage to create some flying and some cash flow, and finally we went to the AAT (Administrative Appeals Tribunal) to appeal against the suspension. In the third week in July they got the sitting under way, but CASA weren't ready to start until the following day because the expensive QC they'd hired hadn't yet done any homework. In fact, at one stage he fell asleep while he was cross-examining his own witness. CASA didn't care, because they knew the longer they dragged it out the more they'd hurt us."

In the AAT, under its in-house rules which are more relaxed than those of formal courts, a number of allegations and unsigned statements became public property and were duly miss-reported in the non-aviation media, says Brougham: "Anything tendered in the AAT was available to the media. That means that CASA can make a wild allegation, and the media can print it like it can print evidence given under oath in a normal court case. The media had taken an above-average interest, and CASA circulated these documents, some of which were unsigned witness statements. The pilots wouldn't sign them, because they said they were bullshit, but the media printed them as evidence, and people read terrible stories about us." (One television report interpreted the ATSB findings interestingly, saying: "The ATSB said the company had been trying to save money by using a weak mixture of fuel!")

As well, CASA indicated in the AAT hearings that if the tribunal overturned its decision to suspend the company's AOC, it would probably then suspend or cancel Brougham's chief pilot approval, which would have the effect of a further suspension or cancellation of the AOC, and a return to the AAT for a further confrontation with CASA's expensive legal firepower. Assessing that further AAT hearings would send them insolvent, Kym and Chris Brougham voluntarily surrendered their suspended AOC.

Meanwhile both had provided full cooperation to the ATSB, but they and many of their staff were unimpressed with the level of technical knowledge displayed by some of the investigators, whom they say appeared to have decided that incorrect fuel mixture leaning practices were a key factor in both engine failures: "I finished up asking them technical questions about operating engines, and I found their knowledge deficient," says Brougham. "We spent two weeks researching and drafting the reply, getting the facts right, but that's how far off track they were; they just wouldn't talk to us."

In its draft report (which was leaked to the media), the ATSB focused strongly on the use of excessively lean fuel mixture as the cause of both engine failures, says Brougham: "That was when a lot of people turned against us, because we were blamed for running the engines too lean to save money, and for causing the accident. The draft report actually said the chief pilot was more interested in saving money than in his safety program. The ATSB report finally vindicated us, but by then it was too late."

The final report release date, advised to interested parties when the ATSB's draft report was circulated to them in April 2001, was set before significant new evidence was thrust under the ATSB's nose, which compelled a complete review of the investigation, and a comprehensive rewrite of its conclusions. The disparities between the preliminary and final reports raise serious questions about the quality of the ATSB investigation, as well as CASA's role in the airline's shutdown. The report also raises more questions than it answers, about other possible and credible causes of both mechanical failures. The removed material related to the mixture leaning issue was not replaced by other analysis, leaving notable apparent gaps, omissions and errors in the final report.

Under "Significant Factors" in the draft report, the ATSB said the Manager/Chief Pilot had instructed pilots to use fuel mixture leaning procedures that did not provide an adequate margin for error from exceeding fuel mixture leaning limitations; and that these practices had resulted in unintentional mechanical damage, which had resulted in the two engine failure, even though they were of dissimilar types.

Normal mixture leaning procedures in high-performance piston engines are to lean the mixture until the exhaust gas temperature (EGT) reaches a peak; and then to richen the mixture until the EGT drops by 25 to 50 degrees according to engine manufacturer recommendations. Some aircraft manufactures publish alternative procedures, usually not supported by the engine manufacturer, under which the mixture may be

further leaned until the EGT reduces to a similar degree. Although the draft report claimed those practices had been extant at Whyalla Airlines, the final report made no such claim; and noted: "The Chieftain engine handling procedures described by most pilots were generally in accordance with those described by the Manager. Most pilots used a mixture setting in cruise that resulted in an EGT 50°F rich of peak."

Repeatedly throughout the draft report, the ATSB made statements in support of its mixture leaning theory, saying that specialty analysis had found the damage in both engines to be consistent with the effects of abnormal combustion; that it had found the airline's management policy had been to encourage fuel leaning practices which had the unintended consequences of inducing engine damage; that reports from various sources suggested that the actions of the pilot might have been adversely influenced by the manager; that no company pilot, including the Manager/Chief Pilot, expressed any knowledge of the engine manufacturer's recommendations; that new pilots were being taught to operate the engines on the lean side of peak EGT as part of a normal cruise power regime; and that the chief pilot's continual advocacy of minimising fuel consumption was likely to have encouraged a culture within the company that operating the engines within reduced fuel leaning margins was the norm."

Labelling several of these and other statements in the report as "ill founded and defamatory," Whyalla executives Chris and Alan Brougham sent the ATSB a 17-page analysis of the draft and successfully demanded their removal as well as raising several apparently relevant new issues which the investigation had not addressed.

They later provided a more detailed and technical analysis of some of the draft's findings, prepared by Doug Sprigg, a powerplant mechanic and commercial pilot who has spent 30 years studying engine reliability, failure causes, and the development of strategies to extend engine longevity. This analysis posed the serious possibility that the ATSB had developed a tunnel-vision view of its "aggressive leaning" theory, which had caused it to overlook available information of high potential relevance. While ATSB postulated that the left engine's bearing failure was caused by combustion abnormalities creating high combustion chamber pressures and resulting high loads on the engine's reciprocating components, Sprigg's analysis rejected this on what other engine specialists agreed were credible technical grounds. He believed that there was ample evidence that faulty bearing manufacture had caused a large number of bearing failures in similar engines; and that this was an issue which ATSB had not investigated adequately. Sprigg's analysis also credibly questioned a number of ATSB conclusions relating to the nature and cause of the evidence of pre-ignition identified by ATSB, and its role in the engine failures.

Two current issues in the USA and failures of a number of factory remanufactured engines in Australia supported Sprigg' view that this issue must be evaluated in the Whyalla context. A large number of engine bearing failures in high-compression Textron Lycoming power plants had now caused the grounding of a fleet of new turbocharged Cessna 206Ts in California, and given rise to a class action against Textron Lycoming and New Piper by Malibu Mirage owners. Sprigg believed these had occurred as a result of changes in the metallurgical composition of the bearings themselves.

The Californian Highway Patrol had taken delivery of 14 of an order of C206Ts, and had already introduced 12 into service, when it grounded the entire fleet following a series of forced landings due to bearing failures in aircraft which had all flown less than 500 hours since new. Bearing failures had also triggered a class action by Piper Malibu Mirage owners against Textron Lycoming and New Piper; and court documents provided copious evidence that Piper, Textron Lycoming and bearing manufacturer KS Bearings Inc were well aware of the problem, and had been working on remedies for at least two years.

ATSB Executive Director Kym Bills however said: "Based on careful analysis of the engine failures and recorded radar and audio data, it is likely that the left engine failed first as a result of a fatigue crack in the crankshaft. This was initiated about 50 flights before the accident flight due to the breakdown of a connecting rod bearing insert. The combined effects of high combustion gas pressures developed as a result of deposit-induced pre-ignition, and lowered bearing insert retention forces due to an 'anti-galling' lubricating compound used during engine assembly by the manufacturer, led to this breakdown.

"It is likely that because of the increased power demanded of the right engine after the left engine failed, abnormal combustion (detonation) occurred and rapidly raised the temperature of the pistons and cylinder heads. As a result, a hole melted in the number 6 piston causing loss of engine power and erratic engine operation."

Although issues were identified in the company that the ATSB believes had the potential to adversely influence safety, the report says: "There was insufficient information to conclude that any of these issues

were of significance with respect to the accident." The Bureau had stated publicly that: "No one should be blamed for this accident."

In its technical analyses, Sprigg insisted that ATSB was probably wrong on several counts: "I dispute that cracking was initiated fifty flights before the loss of the aircraft. That would mean the engine ran for fifty flights with a de-metalled big end bearing that had excessive clearance and a lack of lubrication, which had already caused a "planar discontinuity", cracking of the nitrided surface of shaft. I believe the fatigue crack propagation would have to be far more rapid, associated with first order vibrations in the shaft, causing almost immediate failure after the initial heat stress crack. How can a journal or a connecting rod bearing last without lubrication, cooling and cushioning for fifty flight cycles after lubrication breakdown has already caused heat stress cracking? "Fifty (fatigue) cycles leading to ultimate failure of the shaft would be likely to be related to first order disturbance (power stroke forces) in the shaft, and not flight cycles, which are far more likely to show up in turbine engines during rapid temperature changes. If the fatigue crack propagation were related to flight cycles, then it is more likely that the planar discontinuity was caused by heat stress of the nitrided crankshaft surface during re-grinding as part of the engine remanufacture process 200 hours before."

Similarly Sprigg contested ATSB conclusions that the left engine failed because of pre-ignition-inducing deposits in the combustion chamber which melted and created regions of incandescence that led to pre-ignition and increased bearing loads: "Advanced ignition timing caused by pre-ignition, should show increased heat flow to combustion chamber surfaces. That would be manifested in melting damage to piston crown, top ring land and/or cylinder head, before any damage could be attributed to this cause in the connecting rod assemblies. Massive pre-ignition detonation *could* cause bearing failure, but combustion chamber surfaces should have evidence of overheat and or overload."

Sprigg also did not accept it was possible that the right engine was operated under different conditions to the left engine until the failure of the left engine: "That is, had there not been the catastrophic failure of the left engine, both engines would have had the same piston crown deposits. I strongly believe differences are due to the high power operation of the right engine to maintain flight after the failure of the left engine. Examination of failures in engines of similar type revealed similar piston crown deposits, because they are normal combustion products. Again we are looking at a sudden and unforseen, catastrophic bearing failure which may be due to babbit material (bearing overlay) fatigue."

Both Brougham and Sprigg, independently say several other credible causes of the partial failure of the right engine have not been duly investigated or eliminated:

- a misfiring magneto
- a blocked injector
- a faulty fuel control unit or
- the pilot omitting to adjust the mixture from its lean cruise power setting with the engine on climb power.

Brougham says "CASA claims the hole was recent, in the last ten minutes of flight, because it would otherwise have dumped all the oil. We say that's nonsense, because we've holed two pistons before and the flight has continued its whole duration. So we know they'll run for another hour with a hole that size in the piston."

The ATSB made recommendations to Textron Lycoming and the FAA on engine deposits that may cause pre-ignition; and on the use of anti-galling compounds between connecting rod bearing inserts and housings during engine assembly. It had however apparently not sought to explore the relevance to the Whyalla events, of the unusually large number of bearing failures in similar powerplants in the US and Australia.

Author's note: A lucid and informative review of these events by US aviation commentator John Deakin presents a knowledgeable countervailing view that raises and answers further queries over these events.

Compliance and enforcement

For over 20 years the aviation industry has repeatedly complained that on compliance and enforcement issues, CASA has assumed the roles of "judge, jury and executioner," without exposure to normal legal procedures which should provide natural justice and procedural fairness under the rule of law.

In fact this appears to be an understatement because the roles adopted by CASA are not infrequently the equivalent of "accuser, investigator, prosecutor, judge, expert witness, jury, court of appeal and executioner."

Former Minister John Anderson introduced the Civil Aviation Act Amendment Bill 2003 and claimed enhancement of these aspects, and also provided an "automatic stay provision."

The "Rundle Analysis" below demonstrates that the Minister of the day was led down a path which ran counter to the claims he made that the system had been improved in response to industry complaints. As a result, the amendment Bill of 2003 had the effect of misleading Parliament and the public. Not only has CASA retained the ability to cancel an approval and ground a pilot based only on a "reason to believe", but has now added the ability to ground an operator on the same basis of "reason to believe"; without any show cause notice, and without that person or operator being protected by the new automatic stay provisions.

This has had the effect of reducing, rather than enhancing some of the former restraints on CASA, which now has more free power to penalise persons and operators by suspending authorisations.

The following analysis was provided by former CASA Flying Operations Inspector and District Flying Operations Manager (Townsville) Peter Rundle. Although time restraints have prevented us from exposing this analysis to checking with appropriate specialist sources, we have always found Mr Rundle's analyses well-informed and helpful, as have many in the industry when seeking the path of common sense. If as we would expect, the Panel finds itself examining existing law and the need to change it, we would strongly recommend that this material be evaluated professionally in that process, since it raises questions we have not seen exposed to critical review elsewhere, and because it appears to identify significant avenues to abuse of process by the regulator.

The entire analysis is in blue typeface to aid in identifying its extent. Otherwise it has only been lightly edited, largely in its formatting.

The Rundle Analysis

Situation prior to Act Amendment Bill 2003 the

Pilots Under the old CAR 268 CASA had the power to suspend a pilot on the basis that CASA had "reason to believe."

- No show cause notice was required. (refer appendix "A" to this report for CAR 268)
- CASA could suspend or cancel a licence for one simple breach which carried a penalty of $1000.
- That decision relied on either CASA policy, or the policy of the individual CASA delegate.

AOCs Sect 28 BA (3) of the Act - CASA had the power to suspend an AOC "**IF**" there was a breach. No show cause notice was required

"**IF**" there is a breach – not "an allegation of a breach", or "a reason to believe", or "to investigate." Refer appendix "B" for Section 28 BA (3), CASA could suspend or cancel an AOC for one simple breach. A breach carried a penalty of $1000

That decision relied on CASA policy, or the policy of the CASA delegate

The Civil Aviation Act Amendment Bill Of 200

The Amendment Bill of 2003 repealed the old CAR 268 (suspension for investigation); and introduced:

- The "Automatic Stay Provision;"
- "Demerit Points System;" and
- The "Serious and Imminent Risk Prohibition"

The Amendment Bill amended Section 28BA of the Civil Aviation Act 1988 by adding sub-section (4) which requires CASA to give a show cause notice before suspending or cancelling an AOC.

The Amendment Bill also amended the definition of **Civil Aviation Authorisation** – (See page 4 of the Act_ –

"means an authorisation under this Act or the regulations to undertake a particular activity (whether the authorisation is called an AOC, permission, authority, licence, certificate, rating or endorsement or is known by some other name)"

NOTE 1: A Civil Aviation Authorisation includes Pilot's licence and Air Operator Certificate

NOTE 2: No definition of "**Serious and Imminent Risk**" is provided – the decision therefore relies on CASA Policy, which is not subject to any checks and balances.

NOTE 3: No show cause notice is now required under Section 30DC

NOTE 4: The new "Automatic Stay provision" does not apply because no show cause notice is required

Pilots- The amended Act section 30DC -"**Serious and Imminent Risk**"- empowers CASA to suspend a pilot's licence, or any other authorisation, based only on the prescription: "if CASA has a reason to believe." There is no provision for external validation of, or challenge to, a CASA statement that it has "reason to believe."

- This means there is no change to CASA powers for the suspension of a pilot's licence.
- CASA can suspend or cancel a licence for one simple breach – a penalty of $1000
- CASA can still, as it has done in the past, place the pilot out of work on the basis of a claim that it has a "reason to believe" – without a requirement to produce evidence beyond a doubt.

AOCs: CASA can now suspend an AOC under Section 30DC, "Serious and Imminent Risk", based on a "reason to believe." Prior to the Amendment Bill 2003, CASA could only suspend "**IF**" there was a breach.

SUMMARY

- The new amendment makes it legal for CASA to suspend an AOC based on "a reason to believe"
- CASA can suspend or cancel an AOC for one simple breach – a penalty of $1000
- Place an operator on the ground for 7 days, the operator will loose most if not all contracts and is then out of business, the outcome of that is the employees are also placed out of work
- Where an AOC is suspended or cancelled the business suffers, all the employees suffer job security.

QUESTION – Who actually drafted the wording for the new amended sections?

Basic Principles in a Democracy

Where Parliament enacts Legislation in accordance with the Constitution requiring citizens to comply with various standards and specifies the penalty for those found guilty of breaching the legislation – those breaching the Law are charged and appear in a Court.

Constitution – Section 71 – "Judicial power and Courts"

> *"The judicial power of the Commonwealth shall he vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes".*

Constitution – Section 80 – "Trial by jury"

> *"The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall he held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes".*

Those "bad folks" - murderers, rapists, house invaders, robbers, violent assaulters, and terror suspects, all have the right to appear before a Judge in a Court, before being penalised; (where a suspect is considered a risk to society a Judge may place that person in custody) – while on bail waiting for the Trial the suspect can still earn a normal income.

- The Police and other Government agencies cannot penalise a person in the context of "Punishment" – only a Court can penalise.
- Under the basic democracy principles we would have a fair system of justice

Suspension and **cancellation = punishment**

The variation, suspension, or cancellation of an authorisation is a form of Punishment for an offence against a Commonwealth Law. (refer Section 80 of the Constitution.)

MacQuarie Dictionary:

Penalty - **1.** a penalty imposed or incurred for a violation of law or rule **2.** a loss or forfeiture to which someone is subjected by non-fulfilment of an obligation

Penalise - **1.** to subject to a penalty, loss, confinement, etc, for some offence, transgression, or fault: penalise a criminal **2.** to inflict a penalty for (an offence, fault etc)

Penalty - **1.** The act of penalising – **2.** the act of being penalised, as for an offence or fault – something that is inflicted as a penalty

Suspend - **7.** to cause to cease for a time from operation of effect a privilege = that is a loss of licence privilege

Cancel - **3**. to make void or annul = that is a loss of licence privilege

Parliament enacted legislation, inconsistent with the Constitution, that provides two options for CASA, to prosecute in Court, or to make an administrative decision penalising the suspect based on "a reason to believe" – consider Australia's claim to be a Democracy enjoying the British system of justice – innocent until proven guilty

- CASA's powers of "trial and punishment" are inconsistent with Sections 71 and 80 of the Constitution
- CASA hides behind "in the interest of safety" claiming they only protect the safety of air navigation; - in many situations persons are penalised for breaching CASA policy; not always for breaching the legislation; invariably based on inspector opinion rather than evidence beyond doubt.
- The CASA Delegate (Judge) does not attend the hearing, but makes a decision based on an Area Office recommendation – the defendant is not permitted to address the delegate, or cross-examine CASA witnesses.
- REFER separate paper – Show Cause Conference = "CASA Kangaroo Court"

UNDER the Civil Aviation Act and Regulations 1988 - WE HAVE AN UNFAIR SYSTEM OF JUSTICE

From National Press Club address - Feb 2001

The CASA "culture of penalising" by suspending and cancelling licenses and certificates rather than prosecuting in a court was confirmed at the National Press Club by former Director Mick Toller

> *"We do not go around pulling people's certificates for the fun of it. We don't do it very often. As I say, if we do it twice or three times a year, I would be surprised. I would only condone the removal of a certificate when we have strong evidence that there is an immediate threat to safety."*
>
> *"If we were to go through, as some people have suggested, the sorts of processes that you have discussed whereby we investigate, find the evidence, give the evidence to the Director of Public Prosecutions and wait for a decision from the Director of Public Prosecutions, who may or may not then take the matter to court, we're talking about a period of time that is often unacceptable in safety terms; one or two years in many cases."*
>
> *Toller stated - "You may also then get an outcome that is not appropriate."*

Mr Toller was saying CASA does not trust the independent umpire –the judge

NOTE: **The CASA culture has NOT changed** – CASA continues its propensity to "suspend or cancel" pilots and operators - the 'charges" by CASA charging the operator where pilots breached regulations that expressly apply to pilots; charges based on individual inspector opinions, no genuine evidence being provided; CASA knowing the DPP would not prosecute as a Judge would find the suspect not guilty. There are numerous documented cases where the above has occurred.

Automatic stay provision

See the new **Section 31A** of the Civil Aviation Act 1988

Minister Anderson made much noise about the new "Automatic Stay Provision" providing a fair system of justice.

Sect 31A (1) "This section applies to a decision under the Act or the Regulations that is reviewable by the AAT, if before making the decision CASA was required by the Act or the Regulations to issue a show cause notice".

NOTE: Decisions under the Civil Aviation Orders to cancel a chief pilot or check pilot approval are not covered by the Automatic Stay, and no show cause notice is required by the CAO under the relevant regulation.

BUT – under Section 31A (2) the automatic stay does not apply in a number of circumstances

Sect 31A (2) "This section does not apply to a decision under Section 30DI" - (follows on from Serious and Imminent Risk suspension); and -"Does not apply to a decision under the Regulations to cancel a licence, certificate, or authority on the grounds the holder contravened a provision of this Act, or the regulations.

NOTE 1: If CASA alleges the holder contravened a provision of the Act or the Regulations, there is **NO** automatic stay.

NOTE 2: CASA can therefore cancel a person's licence or qualifications based on a CASA claim that the person is not a "fit and proper person" due to the person allegedly contravening a regulatory requirement. (Refer Appendix "C" - CASA's use of CAR 269 to cancel a licence or authority)

Demerit points scheme

Division 3D Amended Division of the Civil Aviation Act 1988

Section 30DY First-time demerit suspension notice

NOTE: "Civil Aviation Authorisation" includes AOC and pilot licence

Under Section 30 DY of the Demerit Points Scheme CASA must suspend the civil aviation authority even though the holder has been fined by the Courts. The first time suspension for a score of 12 demerit points is 90 days. That loss of salary for a pilot is greater than the fines imposed by the courts, and in the AOC situation, a 90 day suspension will force the operator out of business.

Demerit points values – CASR 13.370

13.370 (1) – applies to all CARs and CASRs that are specified as "strict liability "

13.370 (2) (a) – max prescribed penalty 10 units = 1 demerit point

(b) – max prescribed penalty 11 to 25 units = 2 demerit points

(c) - max prescribed penalty 26 or higher = 3 demerit points

Examples: CAR 5.109 "recent experience":- aeroplane pilot not flown for 95 days instead of 90 days – penalty $2500.

CAR 5.125 "recent experience": helicopter pilot had flown 200 take-offs and landings - but had not flown a circuit for 90 days – penalty $2500

CAR 92 - any pilot landing area – penalty $2500

CAR 100 – penetrate CTA – penalty $5000

Serious and imminent risk

Section 30DB – Serious and Imminent Risk prohibition - no show cause notice required –

"*The holder of a civil aviation authorisation must not engage in conduct that constitutes, contributes to or results in a serious and imminent risk to air safety*"

NOTE 1: Serious and Imminent Risk is not defined in the Act –

NOTE 2 The assessment of what constitutes a serious an imminent risk relies on CASA policy.

Section 30DC - "Where CASA has reason to believe the holder of a civil aviation authorisation has engaged in, is engaging in, or is likely to engage in, conduct that contravenes section 30DB, CASA may suspend the authorisation.

NOTE 1; no show cause notice is required because there is no automatic stay provision

NOTE 2:"Has engaged in " that is imposition of a penalty

NOTE 3:"Is engaging in" It is open to CASA to direct the holder to desist immediately.

NOTE 4:"Is likely to engage in" – It is open to CASA to caution the holder rather than assume the holder may engage in…….

Section 30DC (3) - The "Serious and Imminent Risk" suspension lasts for five business days unless CASA applies to the Federal Court - Unless suspension occurs on a Monday, the net suspension period is therefore seven days

NOTE: Section 80 of the Constitution states the trial on indictment of any offence against any law of the Commonwealth shall be by jury.

Sect 30 DE (1) of the Act - CASA must apply to the Federal Court to obtain a Court ruling for an extension of the Suspension to provide time for CASA to complete the investigation of the situation.

Sect 30DE (2) of the Act – If the Federal Court is satisfied there are reasonable grounds to believe the holder has engaged, is engaging, or is likely to engage in, Serious and Imminent Risk , the Court must make an order that prohibits the holder from using his/her authorisation.

The Federal Court extends the Sect 30DC suspension to allow CASA more time to complete the investigation – CASA penalised the holder without completing an investigation – "reason to believe"

CASA has the power to suspend a person or close an operator down without having appropriate evidence to justify the suspension – just a reason to believe

Under State Liquor Licensing Laws does the State authority close a Hotel down based on an allegation the hotel served alcohol to an under-aged person? Underage drinking can cause a risk to society.

Appendix "A" - CAR 268

268 Suspension of licence, certificate or authority pending investigation – Repealed

(1) Where CASA has reason to believe:

(a) that there may exist facts or circumstances that would justify the variation, suspension or cancellation of a licence or certificate or an authority on a ground specified in regulation 269; and

(b) that there may be a serious risk to air safety if the licence, certificate or authority were not suspended;

CASA may, by notice in writing served on the holder of the licence, certificate or authority, suspend the licence, certificate or authority.

(2) Where CASA suspends a licence or certificate or an authority in pursuance of sub-regulation (1), CASA shall forthwith investigate the matter, and the suspension shall cease upon the completion of the investigation or at the expiration of 28 days from and including the date on which the suspension took effect, whichever is the earlier, but without prejudice to the powers of CASA under regulation 269.

(3) Where:

(a) CASA, upon the completion of an investigation under this regulation, gives to the holder of the licence, certificate or authority a notice under sub-regulation 269 (3); and

(b) the suspension of the licence, certificate or authority under this regulation had not ceased before the completion of the investigation;

The licence, certificate or authority shall remain suspended during the time specified by CASA in that notice as the time within which the holder of the licence, certificate or authority may show cause why the licence, certificate or authority should not be varied, suspended or cancelled under regulation 269

Appendix B – Sect 28BA of Act

28BA General conditions

(1) An AOC has effect subject to the following conditions:

(a) the condition that sections 28BD, 28BE, 28BF, 28BG, 28BH and 28B1 are complied with;

(b) any conditions specified in the regulations or Civil Aviation Orders;

(c) any conditions imposed by CASA under section 28BB.

(2) If a condition of an AOC referred to in paragraph (1) (a) is breached, the AOC continues despite the breach, to authorise flights or operations to which the condition relates.

(2A) If a condition of an AOC referred to in paragraph (1) (b) or (1) (c) is breached, the AOC does not authorise any flight or operation to which the conditions relate while the breach continues.

(3) If a condition of an AOC is breached, CASA may, by written notice given to its holder, suspend or cancel:

(a) the AOC; or

(b) any specified authorisation contained in the AOC; whether or not the breach is continuing.

NOTE: "**IF**" a condition is breached

New Section 28BA (4) – "Before making a decision under subsection (3) CASA must;

- give the holder of the AOC a notice setting out the reasons why CASA is considering making the decision; and
- Allow the holder of the AOC to show cause , within reasonable time as CASA specifies in the notice why CASA should not make the decision

BUT - that is over-ridden by Section 30DC; a reason to believe; no show cause notice required.

INCONSISTENTY – Section 28BA only permits CASA to suspend an AOC "IF there is a breach" **BUT** – Sect 30DC permits CASA to suspend an AOC "on a reason to believe"

Appendix C – CAR 269

NOTE: To cancel a licence under the Regulations CAR 269 is used.

269 (1) empowers CASA to cancel a licence etc.

269 (1) (a) cancel if the holder has contravened a provision of the Act or these regulations

269 (1A) (a) Prevents CASA cancelling a licence etc under 269 (1) (a) unless the holder was convicted by a Court, or

269 (1A) (b) - the holder was charged before a Court, and was found by the Court to have committed the offence but was not convicted by the Court

269 (1) (b) The holder fails to satisfy or to continue to satisfy, any requirement prescribed by or specified under these regulations in relation to the obtaining or holding the licence etc

269(1) (c) the holder has failed in his or her duty with respect to any matter affecting the safe navigation or operation of an aircraft

269(1) (d) the holder is not a fit and proper person

269(1) (e) the holder has contravened a direction or instruction with respect to a matter affecting the safe navigation and operation of an aircraft, being a direction or instruction that is contained in Civil Aviation Orders

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Analysis of numerous regulatory actions against individuals and companies, is an aid to identifying the priorities and strategies that appear to be pursued, and apparent patterns of behaviour in the way in which CASA manages "enforcement" processes.

In the following pages the Panel will find ten "case studies" covering ten separate regulatory actions. These summaries offer an opportunity to identify patterns of behaviour that appear to be observable to readers across more than one of the studies.

At the time of some of these events guidance for CASA staff in compliance and enforcement matters was provided by CASA's *Compliance and Enforcement Manual* which has since been revised several times and is now re-titled *Enforcement Manual*. We suggest that the actions of CASA personnel described here, in most cases merit detailed investigation of the procedures followed in comparison with the documented procedures specified in that manual.

Nobody is suggesting that the industry is totally free of rule-breakers or that there is no need for a set of valid enforcement procedures; however *ProAviation* submits that in numerous past and current regulatory actions we have analysed, the concepts of due process, procedural fairness, the rules of evidence, and particularly the guidelines contained in CASA's own enforcement procedure manuals have simply been ignored.

How it starts

A regulatory action can be triggered by any one of a number of events. Some have been initiated following an accident or incident. Some are the result of input from discontented former employees; and some have followed confrontation with a CASA official about a decision, a ruling, or a dispute over an operational procedure. Some of these events have amounted to serious personality clashes. Action can also be precipitated by a complaint from a passenger, a member of the general public, an adverse tip-off from a competitor, or even a routine audit of operation or maintenance procedures.

Flying school and charter operator **Clark Butson** of Polar Aviation, credibly recounts that what triggered the regulatory action against him was a heated argument during a routine audit over two operational procedures: a claimed "requirement" that simulated engine failure be part of every type endorsement training, and the requirement to carry lifejackets on coastal flights between his Port Hedland base and Broome. He believes the requirements sought to be imposed were not consistent with CASA's Civil Aviation Advisory Publication (CAAP) and other guidelines, and still considers that this has been demonstrated to CASA.

Helicopter pilot **John Quadrio**'s troubles began when a passenger aboard a sightseeing helicopter filmed several clips and published some of them on You Tube, titled *Aerobatics in a Robinson R44 over the reef off Cairns*. The provenance and relevance of the "evidence" is as yet unresolved.

Max Davy was deprived of an income on the basis of several alleged infractions, by withdrawal of his training approvals following an engine failure and forced landing on the reef near Green Island.

Rob Leonard's Air operator certificate was restricted to three months validity following a heated argument with an official whose failure to meet CASA's obligations had already caused Mr Leonard's company **Air Bush Charter** crippling financial harm. (Mr Leonard's case is not examined in our "case studies" because of time constraints.

Former proprietor of Schutt Aviation **Stan van de Wiel**'s fortunes began to fade soon after he vigourously challenged CASA's management of the Mobil fuel crisis. Despite new and revealing evidence obtained under freedom of information processes it remains unresolved.

Uzu Air suspended operations following a fatal accident which was ultimately determined to have involved no fault on the part of the company. An issue that was at the core of the action remains unresolved.

Flying school Managing Director **Barney Fernandes** faced a shutdown of his international flying school as part of a pattern of harassment which was only discontinued by the prosecutor, virtually on the eve of a trial for 27 alleged criminal offences.

Mareeba pilot **Richard Rudd** faced several criminal charges alleging the commision of a physically impossible offence, which any competent staff member would have and should have identified as an utter nonsense.

In other actions it has been clear that action has been initiated on the basis of patently false information that should have been closely examined and tested before any regulatory action was even considered. Our case studies illustrate several examples that suggest the

First strike

As the selected case studies illustrate a menu of diverse processes is available, and the time scale on which some of these matters have proceeded invites the interpetation that CASA tends to favour actions that will have the effect of shutting down a business (or individual) as quickly as possible. In some cases this has been almost instantaneous. **Aquaflight** (alleged breach of AOC conditions) and **Quadrio** (alleged reckless flying), although they differ in method, are both examples.

As CASA well nows deprival of personal income or company cash flow instantly reduces ability to challenge the action and in some cases places the certificate holder under duress to cooperate with subsequent investigations such as “special audits” which can be thinly disguised processes to search for evidence of matters alleged.

In almost all examples “show cause” notices are characterised by litanies of allegations that include matters already acquitted but retained in CASA records; it must be assumed for this purpose. “Show cause meetings” are not normally attended by the delegate who will be making the disputed decision, and most affected parties (and most lawyers) recommend that invitations to attend such meetings be declined.

As one aviation-involved lawyer advises: “You’re being asked to explain to an official why he/she should not recommend that a delegate take action against you, but you don’t get to address that with the delegate. To me it seems a pointless and wasteful exercise.”

Another “enforcement tool” is the withdrawal of a chief pilot or chief flying instructor approval as in the **Polar Aviation** and **Ord Air** cases. For reasons that are unexplained, these “administrative decisions” were not seen as subject to review by the AAT.

Comment - Motivations

In several cases CASA officials have revealed motivations that appear to support the view that their actions are based on “personality assessments.” These events appear to have at least one aspect in common; the fact that there has been a personality clash with a CASA official. It is unclear on what such officials base their character assessments, nor whether the individuals making them have appropriate degrees in business administration and experience in running a commercial enterprise. It is also difficult to understand the attitude that suggests that a person who has a financial interest in a company should be prevented from taking any interest in how it is managed, including how it complies with related regulation.

Examples are:

- “The main problem we have with your company is you.” (CASA official to **Maxine Reid**– Ord Air. (Circa March 2000.) At that time Mrs Reid was acting as Managing Director of the company.
- An audit team member told [operations manager] Hargraves that ‘**Clark Butson** is an impediment to progress in the company’. (Nov 2004 – Polar Aviation.) Mr Butson was at that time Managing Director of the company.
- Mr Mick Toller, then CEO of CASA, wrote to [Managing Director] Mr Fernandes saying that CASA would no longer be dealing with him, and that all correspondence would be addressed to his Chinese partner (Circa March 1999 – China Southern Flying College) At that time **Barney Fernandes** was Managing Director of the company.
- “Gents, be careful. **Stan van de Wiel** is a very slippery operator and he will do anything to get his hands on a LCPT [low capacity regular public transport] AOC) which will include playing both the airline office off against the GA office. DON’T LET THIS OPERATOR PLAY OFFICE POLITICS WITH US” (a Flying Operations Inspector to his colleagues on February 9, 2001.) Stan van de Weil was managing director of his company at that time.
- “Aviation manager [Uzu Air] appeared to be consistently involved to the point of apparent interference with duties of operational staff – pilots and CP [chief pilot].” **Comment:** Well, to any official with an IQ of two or more digits, surely his title would explain that!

Breaches of confidence

In a significant number of matters we have detailed our case studies, information that has been damning to the certificate holder/s concerned, has been conveyed to the industry and/or the general public long before any meaningful investigation had occurred. The most blatant example of this was the case of Aquaflight Airways, when CASA published ten uninvestigated and therefore unsubstantiated allegations against the certificate holder on its website. It is probable that even CASA recognised this was potentially defamatory because there has been no apparent repetition of that action.

However, revelation to others in the industry or to commercial clients has been shown in some of our case studies and other events of which we are aware, to have been enormously and almost immediately damaging because when monitoring of the health and safety obligations of client corporations and government departments reveals that limited-term AOC restrictions have been imposed on operators, the action is

assumed to reflect negatively on the operators safety credentials and forward bookings are cancelled. In fact, many relevant charter contracts impose a requirement on the operator to disclose any adverse action by the regulator.

In one event in regard to which we have been provided with considerable information, an operator complained to CASA that his competitor was overloading an aircraft by a specified amount for flights on a long-term contract. The major contract was cancelled on the basis of that information, which turned out to be an negligent misstatement because the person who made the complaint was unaware that the takeoff weight in question was lawful because of a supplemental type certificate which alter the aerodynamics of the aircraft and increased its maximum takeoff weight by the exact amount specified in the allegation.

In another event which *ProAviation* is currently documenting with intent to publish, an operator's AOC was reissued for a strictly limited period on the basis that CASA had not conducted a compliance audit on the operator in the recent past. Among other things this decision imposed huge commercial penalties of the operator although CASA had admitted it had no reason to believe the operator to be guilty of any infractions at all. We consider that information obtained under freedom of information rules in this matter exposes a wilful disregard on CASA's part for common-law duty of care obligations.

ProAviation is aware of several other instances which should be investigated, in which similar improper sharing of information has seriously disadvantaged certificate holders.

Favouritism, victimisation and bullying,

ProAviation is aware of numerous complaints under the above heading by affected individuals, which appear to be endemic in dealings between some CASA officials and certificate holders. We are prepared to indicate suggested lines of enquiry if the panel wishes to investigate these. Events recently complained of include (but are not limited to) the following examples.

- Constraining AOC/MRO operators to incorporate specifications in their individual procedures manuals, regardless of any anti-competitive disadvantage they impose on the operator, while refusing to issue a written and signed direction to do so. The constraint is simply enforced by the threat of withdrawal of CASA "approval" of the manual. **NOTE:** CASA does not "approve" flight operations manuals (at least in the general aviation environment), apparently because of the obsession of its Office of Legal Services over legal liability[18]. It only "accepts" them but has no apparent formal process for confirming their acceptance in writing. There is one exception to that statement, in that an operator's training and checking manual is deemed to be "approved" by the approval of the "Head Of Training And Checking".
- This situation has in the worst case led to the total destruction of a major GA company based on CASA's assertions that it had been operating under the provisions of an outdated manual for 18 months, despite the fact that a new manual provided to CASA had survived three audits, which led to the understanding that CASA had formally approved the amended manual. We understand that this issue is amply dealt with in the supplementary submission to the Panel of the Professional Pilots' Investigative Network (PAIN)
- The apparent favouring of manuals produced by particular service providers, by simply declining to "approve" proffered manuals and in some cases recommending a named service provider.

Ongoing harassment of individuals

ProAviation suggests that there are several instances contained in our case studies which strongly suggest that activities of various CASA officials reflect a completely unreasonable harassment of an individual, either on the grounds of a personal disagreement or in an attempt to reinforce adverse decisions already made and/or acted upon. Such events are characterised by incidents which are capable of the interpretation that pilots have been accepted by employment for a company, only to have the offer withdrawn at the last moment, in what is believed to have been a decision influenced by persons external to the company.

These actions give the appearance that industry personnel are being prevailed upon in the pilot employment market to reject particular individuals nominated for positions such as chief pilot, which requires a CASA approval. The events to which we refer include but are not limited to senior GA pilots with a lengthy problem-free operating history, a former CASA employee, and a former RAAA pilot whose harassment in the Australian Defence Forces is part of the ongoing investigation of such matters, but who claims that he has

[18] As advised to us by a former flying operations inspector.

also subsequently been targeted by CASA officials with military backgrounds, which has erected barricades against his employment, evidence by last-minute withdrawals of job appointments. Again, we are prepared to indicate suggested lines of enquiry if the panel wishes to investigate these matters...

Legal manipulations

We suggest that even a brief scrutiny of the case studies we have published, would convince the panel at CASA's conduct in the legal arena is capable of the interpretation that having financially disabled certificate holder, there is absolutely no urgency to ensure that the matter is equitably dealt with at the earliest possible time. In this context we suggest that matters to be reviewed would include

- all delays in proceedings;
- requests for adjournments
- alleged withholding of evidence
- allegations of failure to comply with the obligations of witnesses in the AAT,

Aviation medical matters

There is growing alarm among pilot bodies in both Australia and New Zealand at an apparent push by the medical departments of both regulators to reinvent aeromedical science.

One of the most recent manifestations of this, in Australia at least, has been a plan to mount a legal challenge to a long-standing reform that was reached 24 years ago regarding colour vision, between Australian pilots and Australian's (then) Civil Aviation Authority.

Dr Arthur Pape, the engineer of this reform, recounts the events that led up to the groundbreaking decision that CASA is now seeking to reverse:

"The Empire Strikes Back"

An important message concerning aviation colour vision standards:

By Dr Arthur Pape

First, let me give you a concise history of the struggle by and for those pilots who have a colour vision defect (CVD). My role in the struggle is well documented over many years. I am an Australian GP and Aviation Medical Examiner and have been a lifelong campaigner for the rights of colour vision defective pilots.

I started my flying in 1976, at the Mid Murray Flying Club in Swan Hill, Victoria. Within a couple of years I managed to hold a CPL and a Command Instrument rating, but [redacted], I was prohibited from flying at night. I was mystified as to why this restriction was in place and after about ten years of research, I appealed to the Administrative Appeals Tribunal to have the night restriction removed. In the process of preparation I was assisted enormously by AOPA, both morally and financially. One of the memorable highlights in the preparation was a large meeting held at the club rooms of the Mid Murray Flying Club to which a couple of hundred colour defective pilots flew and drove from across the country to offer support and help plan the assault on the aviation colour perception standard.

The success of my own appeal was a just reward for a great deal of hard work and wide support, but the victory was bitter-sweet, as the Authority of the day refused to let the benefit of my success flow to any other pilot with the colour vision problem. That in turn led to a second far more comprehensive appeal for all the colour defective pilots of Australia. This case was nominally on behalf of Jonathon Denison, a young colour defective commercial pilot who had qualified for night flight in New Zealand, but who was prohibited from night flight in Australia. By mutual agreement between the parties, it was decided by the AAT to treat the Denison appeal as a wide-sweeping test case.

Again, the appeal succeeded and the ban on night flight was overturned for all colour defective pilots in Australia. To this date, the Denison appeal is still the most comprehensive examination of aviation colour vision standards that has ever been conducted in the entire world. The hearings lasted for over 30 days and called witnesses including experienced pilots and air traffic controllers, optometrists and visual perception psychologists to name just a few. As a direct result of the appeal's success, many such pilots found doors opening to career opportunities that were previously denied to them.

During a period of relative sanity and pragmatism, the (now called) Department of Transport opened the way for colour defective pilots to use the ATPL if they could pass the control tower signal gun test. A pass on this test earned them a clean medical certificate, on which there was no longer any mention of colour vision related restrictions. I myself passed this test, and, had I been a younger man, I could have entertained a career as an airline pilot, [redacted], which is one of the more severe forms of colour vision defect. I continued in my medical career and enjoyed a modest participation in aviation. The colour vision issue was never far from my mind.

Many pilots with colour vision defects did pass the control tower signal gun test and many, who prior to 1990 would not have been allowed to fly a C152 at night, made it all the way to the rank of Captain in the various airlines in Australia. A significant number are still employed amongst the most senior and experienced crew.

All would have been well, but for the fact that some competent pilots had trouble passing the control tower signal gun test and as a result they remained banished to the rank of First Officer within the various airlines. As their numbers grew, it became obvious to me that the control tower signal gun test was being used as an arbitrary device to determine if a CVD pilot could be classified as “safe” or “unsafe”.

At the level of airline aviation, the control tower signal gun is a device that no airline pilot is ever likely to have to endure. Not only is the chance of exposure to such a signal almost infinitesimally small, the interpretation of such a signal is operationally impossible. Without labouring the point, imagine a B737 captain finding that he has lost radio communication as he calls “ready” at the holding point of a major runway at Sydney airport. There are three possible signals: white (return to starting point), red (not clear for take-off) and green (cleared for take-off). A 737 at a holding point cannot do a U-turn without entering the runway, which can’t be done without a green signal light, which in turn has the meaning of clear for take-off. It amounts to simple nonsense and the control tower signal lamp (at least for RPT operations) belongs in the aviation museum.

So it is that one of the pilots who is being held back from using his ATPL by his inability to pass the signal gun test has lodged an appeal to the AAT to have his restrictions removed. At first, it seemed that his appeal could be limited to just the issue of whether the signal gun test was a real world “practical test” that realistically delineated between “safe” and “unsafe”, but this is not the way CASA is treating the appeal.

Documents lodged to the AAT make it clear that CASA is treating this appeal as a golden opportunity to try to turn the clock back some 25 years in regard to the colour vision standard. It is patently clear that CASA is seeking to reverse every gain made in the Pape and Denison cases a quarter of a century ago and in the years that followed. Their desire is to reimpose restrictions of the most radical nature for those who fail to meet their renewed strict standard. Not only are CASA trying to restrict these pilots from progressing their careers, they are now actively proposing changes that would end their careers entirely.

There are two issues I want to bring to the attention of the entire aviation industry of Australia. The pilot who has lodged this appeal is a dedicated, hardworking and very competent pilot, employed as a First Officer on the Dash 8 for a regional airline. He has some 6000 hours of experience in a wide variety of operations. His company, his superiors and his peers endorse his professionalism and want him to assume command. But he does not have access to the sort of funds that CASA will be throwing into the legal battle that is looming. He has managed to obtain legal representation at a substantially discounted rate, but even with the discount, he would have to find a minimum of about $100,000 in costs to present his case and tackle the might and the apparently unlimited financial resources of CASA. We estimate that CASA is spending over half a million dollars on this case.

The second issue is that a failure of this appeal would have enormous ramifications for several thousand Australian pilots who have a colour vision defect. I know of many airline pilots whose careers would be adversely impacted should this appeal fail. Add to that the hundreds of CVD commercial pilots who could once again find themselves restricted to the pre 1989 limitations, and possibly even more drastic restrictions (for example, no instrument ratings, no carriage of passengers, no night flying at all). It is beyond belief, but these are the aims of the current CASA medical staff in regard to this appeal.

It is indeed patently obvious that CASA is treating this appeal as a de-facto appeal against the Denison decision of 1989 and if they succeed I predict a catastrophic result for the entire colour vision defective pilot community of Australia.

The preparation of this appeal is well advanced. We have a strong case and the likelihood of success is reasonable (there are no certainties in life except death and taxes, isn’t that how the saying goes?). The single most daunting obstacle to success is first and foremost the problem of costs. Whereas Denison’s and my appeal were ultimately funded by the Legal Aid system, it appears that such funding will not be forthcoming for this appeal. I am amazed at this fact, as there is no doubt that CASA is treating the appeal as a “Test Case”. If CASA goes ahead in this planned manner, it will be very much a case of “Might over Right”.

There are two things I want to ask the general pilot community to consider. The first is that each and every pilot considers a contribution to a fighting fund to help fund his case. I ask this of all, but more

so, of those pilots who have enjoyed the benefits of the struggle waged all those years ago in liberating the thousands of Australian colour defective pilots from the irrational and unjust colour vision standard. The second thing I ask is that people write to their politicians and in particular the Minister, Warren Truss, to voice their disapproval of the tactics being employed by CASA to overwhelm and discriminate against a group of deserving, competent and safe pilots.

Last year I set up a not-for-profit organisation called the Colour Defective Pilots Association Pty Ltd which is incorporated in Victoria.

www.cvdpa.com.

Kind Regards,

Dr Arthur Pape

arthur.pape@cvdpa.com

Other medical matters

Our industry contacts assure us that the colour vision issue, although typical of other matters of aviation medicine concern, is far from being the only one that is elevating aggravation among pilots, DAMEs and specialists, and that these matters will be amply brought to the panel's attention by individuals and groups who are affected. One general practitioner brought our attention to the fact that he can no longer access parts of the DAMEs' handbook on the CASA website, and is concerned that it may be in the process of being rewritten by persons whose regulatory and medical experience may be less than optimal.

We are reliably informed that some 450 pilots of one single carrier alone are affected by these policies and practices, which appear to embrace the development of new standards in the complete absence of empirical validation or external consultation.

As with some other matters we are convinced that the Panel will be amply provided with well informed information on these issues.

Avenues of redress

Under the administration of Mr Bruce Byron, industry relations began to improve considerably and there were encouraging signs that authoritarian misrule would be discouraged. Despite early cynicism at the scenario of "CASA investigating itself," the appointment of an Industry Complaints Commissioner was generally welcomed, as was the intervention of some other executives who were prepared to acknowledge that a regulator sometimes makes mistakes, and to do something about it when necessary.

Industry Complaints Commissioner

Mr Michael Hart, CASA's first Industry Complaints Commissioner, was appointed by (then) Director Bruce Byron in June 2007. He already had considerable experience in managing complaints and complex investigations in the public sector including the New South Wales Attorney General's Department and Independent commission against corruption and ASIO. He had also flown for several years in the RAAF as a flying instructor and as a check and training captain with Coastwatch, and was also General Manager of AOPA during the avgas contamination crisis. Following his appointment CASA's organisation chart showed him reporting to Director John McCormick.

Mr Hart's appointment was welcomed by many in the industry, as it became apparent that matters he handled were conducted in an ethical, equitable and reasonable manner.

That remained the case until Mr Hart's role was suddenly and dramatically changed, with his position downgraded by a requirement to report through a newly established organisation called the "Ethics and Conduct Committee".

In a letter to the Director soon after this reorganisation, revealed by Senator Eric Abetz in a Senate Estimates Committee hearing, Mr Hart explained:[19]

> *When I accepted the position of Industry Complaints Commissioner with the Civil Aviation Safety Authority, it was on the basis that the role was to support the then CEO by managing complaints, CASA stakeholders and the authority's relationship with industry. In view of proposed changes to duties, relationship and role of the ICC, together with the advice conveyed to me by the EM [Executive Manager] office of DAS that it is your direction that the ICC should now answer to the newly established Ethics And Conduct Committee, I have had cause to review the terms and conditions of my employment with the authority.*

Mr McCormick was responding to the Senator's queries about Mr Hart's departure from CASA,

That reorganisation had come soon after Mr Hart made four recommendations regarding CASA's handling of a complaint from helicopter owner/pilot Richard Green, one of which was that CASA apologise to Mr Green, which CASA had declined to do. When asked why, Mr McCormick explained that decision to the Committee:

> *I reject the findings of Mr Michael Hart as the independent complaints commissioner—or the industry complaints commissioner, I should say[20]—in that he did quite often act as an independent complaints commissioner or more as an advocate for the industry rather than on the facts of the matter. The facts of the matter are before the AAT and will be proved and, if they are proved, we will see where that goes. At this stage, it is pointless me accepting something from somebody who was unqualified to make that statement—and that is Mr. Hart—and for me to apologise to Mr. Green when it has not been determined that I have anything to apologise for.*

By the time those remarks were made, Michael Hart was long departed. His two successive replacements have been legal practitioners. The most recent appointee has been descibed by CASA as having formerly had "full carriage" of the John Quadrio case (see "birds" article).

The Industry Complaints Commissioner's role now comes with a comprehensive "Terms of Reference" – a task-description package containing so many exclusions that it may leave the reader wondering what if anything might be left to complain to the ICC about. Among other matters it specifically excludes complaints about officials in senior positions including members of the Ethics and Conduct Committee and other senior CASA executives. It also excludes:

- **"General complaints about CASA's policies"** which do in their own right generate not infrequent industry complaints;

[19] Senate Estimates Hansard, October 21, 2010
[20] "Industry Complaints Commissioner" is the official title.

- **"Any matter that is currently, or ought more properly be, the subject of investigation by, or under the authority of, another CASA manager."** How that decision is made and by whom, is unexplained.
- **"Issues arising in connection with regulatory decision-making—which might more appropriately be considered in the course of an administrative appeal or review."** However given the timeframes that often attend AAT proceedings, it is not explained how this is consistent with the stated goal to "ensure that meaningful and appropriate action in response to a complaint is initiated expeditiously and followed through to a fair resolution within a reasonable time." Also unexplained, is the question of exactly what process is available to aggrieved parties to determine whether their case "might more appropriately be considered in the course of an administrative appeal or review."
- **"Any action or decision by a CASA officer or delegate taken under or pursuant to the civil aviation legislation, which is subject to review in the Administrative Appeals Tribunal**." This appears to describe most decisions which are likely to attract complaints. Meanwhile the restructure of the ICC position has left industry wondering what assistance is available to aggrieved certificate holders to make an informed decision on whether to approach the ICC, the AAT, the Ethics and Conduct Committee, or a CASA official from another department!

Most of our industry contacts believe the Industry Complaints Commissioner position would now be an appropriate issue for examination under the government's cost-cutting initiatives.

They also believe a review of the deliberations and outcomes of the Ethics and Conduct Comimttee would be informative – if minutes of those meetings are retained.

Administrative Appeals Tribunal

A former CASA public affairs person once told us: "Well, that's the decision we have made. If (the victim) doesn't like it, he can appeal to the AAT, can't he?"

Well, not always, and also not necessarily. This is particularly the case if you've been running a company with a multimillion dollar turnover whose cash flow has been cut off on the basis of the opinion of somebody who has taken a dislike to you that you are not "a fit and proper person."

It's really time for a critical scrutiny of the Civil Aviation Safety Authority's dedication to its commitments under its 'model litigant' obligations.

There have now been countless protracted and well-documented actions by CASA over the last many years in which the regulator has succeeded in simply running a complainant out of money through administrative decisions without any legal action at all, clearly because CASA accurately assessed that its allegations would not survive proper legal scrutiny. The outcomes it has been able to achieve by manoeuvring its victims into the AAT process explains its obvious preference for avoiding the due legal process required in more formal proceedings.

The damages action filed by Polar Aviation against CASA and some of its officials is a classic example, and some observers believe that CASA must by now have spent many hundreds of thousands of dollars ducking and weaving its way through numerous and increasingly expensive legal actions in this matter. *ProAviation* has some figures in mind and they're well over $1/2 million.

It seems that CASA was almost painted into a corner when Polar sought discovery of relevant documents. But CASA's response to that was the bold stroke of applying for Polar's application be struck out, which would have the effect of barring discovery of documents.

Discovery of documents could have any one of several possible outcomes.

The documents could reveal that CASA's conduct in reaching the disputed decisions was a proper one; that it was improper; that it was illegal and/or inappropriate; that it was not adequately documented, or that it was not documented at all.

What needs to be asked is why it is that CASA, if it is convinced that it has been acting legally, properly and ethically, is so vigorously opposing the revelation of the documents that were sought?

The inference seems obvious.

CASA is a Commonwealth statutory body and the Attorney General has directed agents of the Commonwealth to be 'model litigants.'

The Panel is invited to consider CASA's actions in this and other recent matters against the contents of a document titled *Directions on the Commonwealth's obligation to act as a model litigant* (Post 1 March 2006 Version) which is apparently still current:

The obligation

1. Consistently with the Attorney-General's responsibility for the maintenance of proper standards in litigation, the Commonwealth and its agencies are to behave as model litigants in the conduct of litigation.

Nature of the obligation

2. The obligation to act as a model litigant requires that the Commonwealth and its agencies act honestly and fairly in handling claims and litigation brought by or against the Commonwealth or an agency by:

> (a) dealing with claims promptly and not causing unnecessary delay in the handling of claims and litigation
>
> (b) paying legitimate claims without litigation, including making partial settlements of claims or interim payments, where it is clear that liability is at least as much as the amount to be paid
>
> (c) acting consistently in the handling of claims and litigation
>
> (d) endeavouring to avoid, prevent and limit the scope of legal proceedings wherever possible, including by giving consideration in all cases to alternative dispute resolution before initiating legal proceedings and by participating in alternative dispute resolution processes where appropriate
>
> (e) where it is not possible to avoid litigation, keeping the costs of litigation to a minimum, including by:
>
> > (i) not requiring the other party to prove a matter which the Commonwealth or the agency knows to be true, and
> >
> > (ii) not contesting liability if the Commonwealth or the agency knows that the dispute is really about quantum
>
> (f) not taking advantage of a claimant who lacks the resources to litigate a legitimate claim
>
> (g) not relying on technical defences unless the Commonwealth's or the agency's interests would be prejudiced by the failure to comply with a particular requirement
>
> (h) not undertaking and pursuing appeals unless the Commonwealth or the agency believes that it has reasonable prospects for success or the appeal is otherwise justified in the public interest, and
>
> (i) apologising where the Commonwealth or the agency is aware that it or its lawyers have acted wrongfully or improperly.

The notes accompanying the guidelines for Commonwealth agencies and their legal representatives flesh out those requirements quite adequately.

But in numerous events of which we are aware, those and other guidelines appear to have been completely ignored.

In the Polar Aviation case, CASA's lawyers spent hours expounding the concept (wrapped in reams of soporific case law), that under its powers as defined in the Act, its public safety obligations override everything else, including issues like common law duty to exercise statutory powers with reasonable care, duty of care for the purposes of the law of negligence, reckless indifference, and the list goes on.

CASA's argument appears to reveal breathtaking defiance of the principles set out for the 'model litigant.'

The (AAT) is currently a 'costs free' jurisdiction, set up in 1975 in the wake of the massive expansion of the public service and the associated increase in the level of licensing the virtually everything to 'give the common person an avenue of review and relief from heavy and wrongful administrative action by a government body, without the added burden of legal costs.'

The original intention for the AAT was that 'ordinary people' could air their grievances to the Tribunal without the need for lawyers and without fear of legal costs if the AAT made an adverse decision against the person.

But that intent has been perverted.

What happens in reality is that when a person makes an application to the AAT for review of a decision made by CASA which is believed to be harsh or incorrect, CASA inevitably defends the application with a team of in-house solicitors and external barristers. The applicant has little or no chance of succeeding in an application for Review of a Decision before the AAT without legal assistance, and as a result the person seeking a Review is then obliged to engage lawyers to match the legal expertise of CASA.

As CASA well knows AAT proceedings are often prolonged, and it's not uncommon for an applicant to be faced with a $70,000.00 legal bill for even a simple application for Review which became prolonged CASA's legal ducking and weaving.

And even if the applicant is successful he or she has no recourse to the AAT for an order or direction that CASA, although proven to be wrong, pay for the legal costs of the applicant. This is so, regardless of the fact that CASA may have unjustifiably shut down a person's business of unwarrantedly cancelled or suspended their licence, upon which that person might rely for their livelihood….all without recourse on costs before the AAT.

The only avenue left for an applicant seeking compensation for damages arising from a wrongful or unjust decision made by CASA which has been overturned by the AAT is to make a claim for damages in a Court of competent jurisdiction; which involves more legal expense. The applicant seeking justice will be faced with a further barrage of CASA lawyers, who will use the deep pockets of the Government to fund the defence of CASA and try to run the applicant out of money.

A possible remedy could be put in place if the Government amended the legislation to allow the AAT to award costs, in its discretion, to successful applicants (in a manner similar to what currently exists in State tribunals), CASA might become more accountable for the unwarranted actions and conduct of its officers.

Everybody recognises that CASA has a job to do and industry supports CASA in its role as regulator in keeping aviation safe. However, unjustified or unnecessarily heavy-handed action and/or bullying misconduct on the part of CASA officers, which is unfortunately far too prevalent today, no longer deserves the 'blind eye' afforded to it by CASA management, government and bureaucrats alike.

Polar Aviation proprietor Clark Butson's own costs in his long drawn-out case are in the area of one million dollars. A closer examination of several similar instances of CASA misconduct, would reveal that this type of all-in assault, clearly expending vast amounts of public funds to drain the bank accounts of individuals and companies and disable their financial defences, is far too common and that there is no apparent accountability.

It's really about time CASA was compelled to explain in detail much public money it has spent on this prolonged and ugly attack on Mr Butson and his business, and to exactly what purpose.

Another of the disadvantages of the AAT process is that the tribunal cheerfully admits that it is not subject to the rules of evidence, which appears in recent times to have led to somewhat unpredictable decision-making. Another is the time it takes to bring a matter before the tribunal. In the **Quadrio** case for example, an AAT hearing was suspended to allow a criminal prosecution to proceed. After an interminable wait through nine adjournments, until the DPP dropped the case against Mr Quadrio, and his matter was reopened in the AAT which then affirmed the CASA decision despite the DPP having dropped the case based on the CASA allegations against him.

Ombudsman Commission

Material obtained under FOI suggests that recourse to the Commission may be of limited effect, especially if the matter being dealt with is of a highly technical nature. An example is cited on page 29, *DC3 ditching in Botany Bay*, which suggests that if a complaint against CASA is of a technical nature, the authority is likely to be involved in preparing the Ombudsman's response.

Mr Richard Rudd (see *Dad's Army Rides Again*), also sought recourse from the Ombudsman Commission, when he was put to the $6000 cost of defending himself against a negligently prepared charge which was ultimately dropped by the DPP. Mr Rudd was let down by his lawyer who failed to make a claim for costs when the matter was struck out.

The Commission advised Mr Rudd:

> *"In terms of your out-of-pocket expenses, I suggest that you make a written claim to CASA. The discretionary compensation schemes available to Australian government agencies are not available*

to CASA. However, we would expect CASA to consider whether or not there is a legal obligation to pay any expenses you incur as a direct result of the actions of Mr Larard, Mr Retzki and Mr Clarke.

Mr Anastasi's response rapidly put paid to that suggestion:

> *"CASA denies it owes any liability to you to pay your account and accordingly declines to pay it. If the legal expenses to which you refer relate to a criminal prosecution of you in which a CASA officer was the informant, I note that you did not seek payment of your legal costs when the charges were dismissed. If you would like to discuss this matter please do not hesitate to contact me."*

"Yeah. Thanks Adam."

Model Litigant Obligations (MLO)

Best starting point is the Rule of Law Institute of Australia, which will walk you through the process. The "Model Litigant Rules" oblige the Commonwealth to act as a "model litigant," and the Office of Legal Services Coordination (OLSC), which is an office of the Attorney General's Department, manages that process.

Hopefully, Richard Rudd's case is not typical of the level of service you can expect. FOI material provided to us paints a picture of a number of officials with imposingly expensive titles[21] exchanging emails and file notes on Mr Rudd's case, but the result of this material would not fill a potential MLO applicant with optimism. Amidst copious exchanges of draft responses by email and file note, we were unable to identify any sentiment that reflected adversely on the false evidence given against Mr Rudd. There was a fleeting mention of the fact of Mr Rudd's prior convictions which didn't appear relevant to the MLO application, and one official took the trouble to circulate the entertaining opinion that;

> *If Mr Rudd is a pilot then I don't think he will qualify for legal aid or a CLC* [Community Legal Centre assistance]*, but you never know. Also, he spent $5000 defending the prosecution, so it would seem that he was able to afford legal representation. I would like the opportunity to discuss the matter with you over the telephone*.

Mr Rudd observes that for an age pensioner like himself, a $5,000 penalty for somebody else's negligence doesn't leave many discretionary dollars in the family budget.

We would hope that the frequent email invitations to telephone chats weren't a reference to off-the-record telephone conversations in which irrelevant matters such as Richard Rudd's previous convictions for selling his aerial photographs could be aired.

Frankly, nothing in the entire flow of correspondence suggested to us that time and nervous energy spent on an MLO application, would be likely to be rewarded.

Compensation for Detriment caused by Defective Administration

Warning: In dealings with CASA this appears to be a blind alley. The case studies we have published are rich in examples that would arguably support a claim for Compensation for financial Detriment caused by Defective Administration (CDDA). The scheme covers mechanisms for the treatment of payments made under the CDDA Scheme); and also of "Act of grace" payments made under section 33 of the *Financial Management and Accountability Act 1997* (the FMA Act);

BUT

The Department of Finance points out that "The CDDA Scheme is not available to Commonwealth authorities and companies (our emphasis), which have a separate legal identity to the Commonwealth and operate under the *Commonwealth Authorities and Companies Act 1997*."

As a statutory authority, CASA is accountable under the *Commonwealth Authorities and Companies Act 1997,* and as a result the CDDA scheme is not available in relation to CASA's actions.

Dead end: the Act that covers CASA contains no provision that is parallel with the CDDA Scheme.

[21] "Senior Legal Officer," "Principal Legal Officer (2),"

Some suggested lines of enquiry

The following are some of the issues that arise from various matters discussed in this submission. Time hasn't permitted us to seek answers to any of the questions below, but we trust the panel will find among them some useful guidelines.

Regulatory review program

1. What was the total budget for the program when it was launched?
2. What was the target completion date?
3. What is now the target completion date?
4. What policy changes were adopted during the program and on what authority?
5. What has been the total cost of the program to date?
6. What is the program's budget for the current financial year?

Recruitment and training

7. Please define CASA's current strategies for recruiting, training and retaining adequately qualified flying operations and airworthiness inspectors.
8. What strategies are in place to stem the flow to industry of approved testing officers, including the continued provision of indemnity cover?

Compliance and enforcement

9. What legal, investigative and people skills training do FOIs and AWI's receive on induction, and what program is in place to ensure continuous proficiency?
10. What technical flying operations and airworthiness background is provided in the recruitment and training of S22AA investigators?
11. What technical flying operations, airworthiness and investigative background are provided in the recruitment and training of CASA legal staff who will be involved in enforcement activities?
12. Over the past financial year, how many charges were laid in total against how many offenders, and what is ratio of charges to convictions?
13. What were the total costs to CASA in each of the following cases (as detailed) and what safety benefit analysis has been conducted in respect of each case?

What needs to happen?

We submit that the underlying regulatory problems which our narratives have described will never be resolved without unscrambling the chaotic body of regulation on which they are based. A starting point for that project would be enacting amendments to the Civil Aviation Act to remove anomalies and obstructions to sound regulatory practice that are identified by the "Rundle Analysis" published as part of this submission. Clearly, that process should not involve the Civil Aviation Safety Authority at any level, and we suggest that the Australian Law Reform Commission would be an appropriate body to guide the necessary processes.

We have limited our observations to the aspects with which we are most familiar, and are confident that other organisations will do the same. It is not unusual when one identifies problems, to be asked, "what would you do to fix it?" We respectfully submit the following recommendations.

Regulatory reform

1. A policy of outcome based regulation should be adopted and enforced, to replace the prescriptive micro-management regimen which current processes are seeking to expand.
2. The principles detailed in the *Australian Law Reform Commission Report 95*: *Principled Regulation*: and the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* should be set as the baseline in all new or rewritten regulation.
3. Regulation must be rewritten in a way that does not permit arbitrary administrative decision making to close businesses or destroy the welfare of individuals without due legal process.
4. The development (or re-development) of the regulatory structure should review and reverse the process by which the founding principles of the regulatory review program (RRP) were replaced by policies that overturned significant elements of the original program.[22] .
5. Air operator certificates and AMO certificates of approval should be perpetual.
6. The alternatives of adopting the New Zealand regulations, either an interim measure or as a baseline for further development unded new guidelines, should be seriously considered.

Compliance and enforcement

7. The primary objective of CASA's compliance and enforcement program should be to promote compliance with statutory and regulatory requirements. The initial priority of CASA personnel when a violation is detected must be to ensure safety and to correct any ongoing non-compliance, and this should normally be achieved by advice and education.
8. When enforcement is necessary, improved observance of the graduated scale of options available should be made with early intervention preferred over harsh actions that damage the viability of businesses and the careers of individuals. The options of administrative fines or prosecution, which currently appear to be almost completely ignored, should be considered in this context.
9. Within a revised structure a competent standardisation unit should be established with powers to coordinate various disparite decisions made by various CASA decision makers in all disciplines. The need to disband the various "fiefdoms" that now exist would bring much momentem to the restoration of trust between affected parties.
10. In the initiation of inevitable major reform, a clear, and concise policy document, framed around all the findings of the ASRR, should be developed and circulated by an interim "change team."

Governance and management

11. Whilst the reform process is in progress, CASA must review its internal training and governance to improve the consistency of regulatory interpretation and decision making across the organisation.
12. CASA should seek to optimise its internal processes to improve efficiency and reduce costs.
13. In developing and adopting policies and procedures that support its regulatory obligations, CASA should consult with industry and strive to ensure the costs of compliance are minimised A structure needs to be developed in which genuine and effective consultation with industry is established and

[22] A Freedom of Information application to CASA is currently in progress and may answer related questions; however the CASA FOI decision has recently been deferred to a date which is one week later than the Panel's deadline for submissions.

maintained in respect of regulatory development, policy and guiding principles. An Industry Council with a rotating fixed-term membership of industry representatives would be appropriate.

14. Because the word “safety” has received such undue exposure as to be an insult to the intelligence of the parliament, industry and the community, we submit that it should not be part of the title of a reformed regulatory body.