

31 January 2014

The Aviation Safety Regulation Review Panel

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Dear Sir,

**SUBMISSION :      Aviation Safety Regulation Review Panel**

I enclose the following submissions for consideration by the Aviation Safety Regulation Review Panel.

Aircraft operations may be roughly divided into two sections:

- (a) Operations in Class A aircraft, which have a maximum take-off weight of 5700kg or more, and regular public transport ['RPT'] operations (ie: airlines) including the maintenance of Class A aircraft; and
- (b) Operations in Class B aircraft, which have a maximum take off weight of less than 5700kg and which are not engaged in RPT. These aircraft operate in what is known as the General Aviation ['GA'] section of the industry, which includes, *inter alia*, charter operations (ie: the carriage of passengers for reward but not in accordance with fixed schedules), flying training and other aerial work operations which include air ambulance operations, aerial agricultural operations (ie: "crop dusting"), heli-mustering (ie the mustering of livestock by helicopter), aircraft survey, aerial spotting, aerial photography and private flight operations; including the maintenance of Class B aircraft.

These submissions are concerned with GA operations, licencing and maintenance.

**The writer:      Aviation qualifications and experience**

I currently practise as a Lawyer specialising in aviation-related matters. Prior to my admission to legal practice, I was actively involved in the General Aviation ['GA'] industry as a pilot and as an operator of a fleet of light aircraft based at Essendon Airport, Victoria. At its peak, my business (Skybird Aviation) operated 45 aircraft ranging from small single engine training aircraft through multi engine aircraft to turbine powered aircraft and executive jets. Its business activities included flying training, charter, cross hire of aircraft to third parties and aircraft maintenance. The flight operations averaged about 15,000 flight hours per annum with an excellent safety and compliance record. We enjoyed a good relationship with the Regulator.



I hold an Airline Transport Pilot Licence ['ATPL'] and I have accumulated over 10,000 flight hours experience during which I held a command multi engine instrument rating, a grade 1 flight instructor rating, chief pilot and chief flying instructor approvals; and an instrument of delegation from the Civil Aviation Safety Authority ['CASA'] as an authorised test officer ['ATO'] for the issue and renewal of multi engine command instrument ratings, flight instructor ratings (all grades), and for the issue of commercial and private pilot licences and night VFR ratings.

Since my admission to legal practice in 1998 I have been involved in hundreds of aviation-related legal matters, many of which have concerned litigation with CASA in the Administrative Appeals Tribunal ['AAT'] and/or the Federal Court of Australia, during which I gained extensive experience in relation to disputes and issues of concern between CASA and members of the GA industry (ie: pilots, licenced aircraft maintenance engineers ['LAME'], operators and aircraft maintenance organisations).

## **TERMS OF REFERENCE**

There are three primary agencies involved in aviation safety: The Civil Aviation Safety Authority ['CASA'], the Australian Transport Safety Bureau ['ATSB'], and Air Services Australia, which includes Air Traffic Control ['ATC']. In the past, these three agencies were contained within the same government department. The (then) Bureau of Air Safety was made into an independent body after it was discovered that members of the aviation industry involved in incidents and/or accidents appeared reluctant to speak fully and frankly with air safety investigators who were seen to be closely associated with the Regulator.

Airservices Australia, which is governed by the *Airservices Act 1995*, provides *inter alia*, the Aeronautical Information Publication ['AIP'] for pilots, including maps, charts, instrument approach and departures publications, and pre-flight information and en-route air traffic control and flight information services. Airservices was contained within the same department as the predecessors to CASA until they were separated into two agencies for reasons unknown to the writer. It is my personal opinion from an industry viewpoint that Airservices and CASA should be merged and be responsible to the same Departmental Minister responsible for Aviation..

These submissions are primarily focussed on CASA. I have identified a number of problem areas and I have attempted to provide some constructive suggestions herein.

### **1. STRUCTURES, EFFECTIVENESS AND PROCESSES OF AGENCIES INVOLVED IN AVIATION SAFETY - CASA**

- 1.1 The Civil Aviation Safety Authority ['CASA'] is governed by the *Civil Aviation Act 1988* ['the Act'], which prescribes that CASA is responsible for the regulation of aviation. Section 9A of the Act states that the safety of air navigation is the primary concern of CASA, however, section 9A it is not the only concern of CASA. Section 9(2) of the Act requires CASA to engage with the industry and, *inter alia*, to provide education and timely safety advice.

1.2 Regulation of the aviation industry is currently effected through the *Civil Aviation Regulations* 1988 ['CAR'], the *Civil Aviation Orders* ['CAO'] and the *Civil Aviation Safety Regulations* 1998 ['CASR']. In addition, regulation is also effected via Instruments issued by CASA in relation to various activities.

1.3 I will refer to the following topics in turn:

- (a) Overview
- (b) Costs - CASA services
- (c) Costs - compliance
- (d) Interpretation of the Regulations
- (e) Airworthiness
- (f) Aviation medicine
- (g) Operations and licencing
- (h) Conduct of CASA officers

*(a) Overview*

1.3 I have observed the role of the Regulator evolve over the years from when it was known as the Department of Aviation (and other names given to the Regulator by various successive governments) through the then Civil Aviation Authority ['CAA'] to the present day CASA. I have observed that although some of the changes made to the regulation of GA have been beneficial to the industry, many of the changes to the regulations and the policy behind those changes have been detrimental to the industry, and have resulted in its decline:

1.4 I have observed a change in the policy of the role of the Regulator from one which directed its experienced officers to communicate directly with Members of the GA industry on operational and regulatory matters to provide advice "one-on-one" to enhance the Members' knowledge and understanding of the rules and operational / maintenance issues which may affect air safety, and to foster good relations with the industry so as to encourage valuable fee-back; to the Regulator of today, which appears to be focussed on an inflexible policy of strict compliance and penalties. This has had the regrettable result that many Members of GA have expressed a reluctance to talk to CASA out of fear.

1.5 I make the observation at this juncture that during the period of "open communication" with the Regulator, the accident rate in GA declined.

*(b) Costs - Services*

1.6 The cost of services provided by CASA to persons who are obliged by the Regulations to obtain the approval of CASA for a certificate, authorisation or permit are now very high, and continue to escalate. CASA has a monopoly for the provision of these mandatory services.

1.6.1 A person who is required by legislation to obtain the approval of CASA for the appointment of key personnel, or for a Certificate, licence, permit or authorisation must engage the services of CASA.

- 1.6.2 There is an insurmountable inequality in bargaining power between the person who is required under the Regulations to obtain an approval or assessment from CASA, which is the sole authority for the issue of Certificates, licences, permits and other authorisation under the Regulations. CASA has a monopoly in the market of these services.
- 1.6.3 There is no alternative provider for the above services, and the only choice available to a person who is required by the legislation to obtain a CASA approval or assessment is to either pay the price and accept the quality of the services provided by CASA, or withdraw the application for the Certificate, licence, permit or authorisation.
- 1.6.4 There is no transparent accountability of CASA officers providing the mandatory services to the applicant. Often, the time taken by CASA to provide these mandatory services is quite prolonged, which is an exacerbating factor.
- 1.6.5 Although CASA is subject to both the provisions of the *Competition and Consumer Act 2010* (which has incorporated the provisions of the earlier *Trade Practices Act 1974*), and to the principles of contract law, in reality, and in circumstances where CASA is a monopolistic provider with no statutory accountability, a person who must engage CASA for these mandatory services has no real choice but to accept the cost and (sometimes poor) quality of service from CASA due to the significant costs and practical difficulties involved in enforcing the person's rights in respect of contractual breach or misuse of power.
- 1.6.6 In the matter of *Oasis Flight Training Pty Ltd v CASA* [2013] AATA 600, the applicant paid to CASA an "up front" fee of \$8000.00 for CASA to assess its application for the issue of an Air Operator's Certificate ['AOC']. The assessment by CASA of the key personnel and other aspects of the AOC application was mandatory by legislation. A serious problem existed in this case in that although CASA demanded and was paid the fee for the assessment, the officers of CASA had already determined that the application for the AOC would be refused on the alleged grounds that its CEO and proposed chief pilot/CFI was not a fit and proper person to hold the chief pilot/CFI position.
- 1.6.7 Despite CASA having determined that the applicant's application for an AOC would be refused, CASA refused to stop its assessment, retained the \$8000 and demanded that the applicant pay another \$1600
- 1.7 Section 46 of the *Competition and Consumer Act* (which mirrors s46 of the earlier *Trade Practices Act*) prohibits the misuse of market power.
  - 1.7.1 The High Court considered section 46 of the *Trade Practices Act* in *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177, which was a case in which BHP took advantage of its market power, and was held liable for breach of s46.

- 1.7.2 BHP produced a product, known as a "Y bar", which was a steel picket (for which there was no real competition) which it refused to supply to Queensland Wire otherwise than at an unrealistically high price. The High Court held that BHP had infringed section 46 of the *Trade Practices Act*.
- 1.7.3 In *Queensland Wire*, the High Court also held that the content of section 46 was economic law and that contravention did not require predatory intent.
- 1.8 In considering whether CASA, as a monopolistic provider of services to the aviation industry is caught by the "taking advantage" concept by engaging in conduct which it would not have engaged in under competition conditions, the following statement by Lockhart J in the Federal Court in *Dowling v Dalgety Australia Ltd* (1992) 34 FCR 109 at 144 may be of assistance to the Panel:
- "If a corporation has market power which causes it to exercise rights which it would not exercise under competitive conditions then the exercise of those rights is the exercise of market power, and it is this consideration that runs through the judgment of Queensland Wire v Broken Hill Proprietary.....*
- The central determinative question to ask is: Has the corporation exercised a right that it would be highly unlikely to exercise if the corporation was operating in a competitive market ?"*
- 1.9 I would respectfully suggest that a review of the Regulations should include a section on the cost of services to be provided by CASA; and further, that the section should provide a mechanism by which any dispute and/or a review of the costs for services charged by CASA can be resolved.

(c) ***Costs - Compliance***

- 2.0 The cost of compliance has unnecessarily escalated in recent times. The term "unnecessarily escalated" has been used because of the changes to the regulations that merge the requirements for compliance to the effect that a small GA operator which operates and/or maintains simple light aircraft must now meet all of the regulatory requirements which were designed for and are applicable to the large airline companies which operate RPT .
- 2.1 The number of GA operators and maintenance organisations has seriously declined over the past 20 years. Many of the pilots, LAMEs, operators and maintenance organisations who have consulted me over the past 15 years have blamed the decline on the ever-increasing costs involved with compliance with the ever-changing, complex and increasingly onerous requirements of CASA, which has forced many previously prosperous businesses out of the industry.

- 2.2 The current policy and trend of regulatory changes towards a "one regulation fits all" objective has resulted in an unnecessarily onerous and complex regime of compliance, which will result in further unnecessary costs being borne by the GA industry and a further decline as many more businesses will fail to cope and be forced to close.
- 2.2.1 CASR Part 121 provides the regulations for RPT aircraft, and CASR Part 135 provides the regulation for GA aircraft.
- 2.2.2 Notwithstanding that RPT and GA aircraft are regulated by two different Parts of the CASR, the CASA web site contains the statement that it is a CASA policy to "minimise the distinction between aircraft charter and regular public transport".
- 2.3 I would respectfully suggest that a Review of the regulations should reflect a differentiation in the compliance requirements between small GA operations which operate simple light aircraft, and those which are applicable to a major airline or operating RPT. It is trite to say that the maintenance and flight operating requirements applicable to an aerial agricultural aircraft or helicopter are vastly different to that of a major airline, and accordingly the Regulations should reflect the differences.

(d) *Interpretation of the Regulations*

- 2.4 The CAR, CASR and CAO are complex regulations which overlap and which regulate, *inter alia*, pilots and aircraft maintenance engineers, many of whom have merely a basic secondary school education, or not much more.
- 2.5 The interpretation of the rules by officers of the Regulator is often varied between Regional Offices and individuals and is sometimes quite wrong.
- 2.6 A common theme I have observed in relation to the issues raised by my GA clients is that although they share the primary objectives of CASA in making the safety of air navigation the most important consideration in running a GA operation, they have expressed concern that the regulations and sub-regulations are often confusing and that the practical application and interpretation of the regulations by CASA can vary widely between different offices of CASA, and from the interpretations and practices adopted by other National Aviation Authorities, notably the *Federal Aviation Regulations* ['FAR'] issued by the Federal Aviation Authority ['FAA'] in the United States, upon which the current CASR is stated to have been modelled. Some of these aspects are also discussed in the paragraphs below relating to airworthiness.
- 2.7 It was commonplace in the GA industry for operators and maintenance organisations to ask officers of CASA for advice and guidance in relation to the interpretation and practical application of the more complex rules.

- 2.8 A problem will arise when either the advice provided by CASA is wrong at the outset, or when the advice was correct at the time but is later rejected by subsequent CASA officers. This issue was raised in the recent Administrative Appeals Tribunal ['AAT'] case of *G B Shaw & Co t/as Dalby Air Maintenance v CASA* [2013] AATA 736 where the applicant gave evidence that he had followed the advice provided by previous CASA officers in respect of aircraft maintenance procedures for many years with no adverse CASA audits; but a subsequent CASA auditor decided that the earlier advice was no longer appropriate, and as a result adverse administrative action was taken against the applicant. (This matter is currently before the Federal Court on appeal)
- 2.9 I would respectfully suggest that any review of the Regulations should include clear explanatory memoranda and definitions to aid in the consistency of interpretation of the more complex sections of the Regulations and Orders.

(e) *Airworthiness*

- 3.0 The issue concerning the changes to the Regulations affecting organisations which hold a Certificate of Approval ['CofA'] for carrying out maintenance on aircraft which do not appear to differentiate between the small maintenance facility which carries out maintenance on Class B aircraft and maintenance carried out on Class A aircraft for RPT was discussed above in paras 2.0 – 2.3

*"Harmonisation with the FAR"*

- 3.1 Regulation 1.003 of the CASR states, *inter alia*:

*"These regulations contain provisions based on the FAR.*

*An object of these regulations is to harmonise certain parts of Australia's aviation safety law with the FAR"*

- 3.2 Parts 21 and 39 of the CASR expressly state that compliance with the practices and procedures of the National Aviation Authority ['NAA'] of a contracting state (being the recognised countries listed in CASR 21.012) in relation to airworthiness and maintenance of aircraft manufactured or maintained in the respective NAA, will meet the Australian requirements.
- 3.3 A consistent problem which arises in relation to maintenance carried out on aircraft which have been manufactured outside Australia (the majority of GA aircraft have been manufactured in the United States) is the often widely different interpretation placed on the United States practices by CASA:
- 3.4 An example is as follows:

The owner of an aerial agricultural aircraft which was manufactured in the USA but is currently registered in Australia wishes to carry out a modification to the aircraft. The intended modification has been approved in the United States. When the owner contacts the FAA for approval, the FAA refers that person to the manufacturer for the approval. The manufacturer says that there



is no specific approval required provided appropriate engineering practices are adopted pursuant to (the US) AC 43-1B. If the owner of the aircraft then puts together an engineering proposal to the manufacturer which incorporates the use of the engineering practices set out in AC 43-1B, the manufacturer will say that it "has no technical objection" to the proposal; however, CASA will not approve the modification in Australia on the purported basis that a letter of "no technical objection" does not constitute a manufacturer's authority.

In making such a determination, CASA ignores the fact that the manufacturer has issued a letter of "no technical objection" to a specific proposal for an engineering procedure, which if followed as per the proposal, would be approved by the manufacturer. Curiously, CASA does not agree to this.

- 3.5 Likewise, approvals for the installation of a more powerful engine and/or a more efficient propeller which have been approved for use by both the FAA and the manufacturer in the United States are met with severe resistance by CASA with the result that working aircraft have been "grounded" for over 2 years waiting to have the "red tape" cleared by CASA. A recent example is an aerial agricultural aircraft operated by Dalby Air Maintenance, which has remained "grounded" unnecessarily since November 2011 with "red tape".
- 3.6 A further example is the approval for operational use "on condition" of an engine which has exceeded the time by which the manufacturer recommends the engine be overhauled, but which is still able to be operated within the manufacturer's limitations. The approval for use on a "on condition" basis is subject to the regular and on-going testing of the engine and its components to ensure it is able to safely operate on an "on condition" basis.
- 3.7 The history of an "on condition" engine is of little importance if the testing of the engine and its components concludes that the engine is of an acceptable standard for such use but notwithstanding, CASA will often refuse the approval to operate an engine on an "on condition basis" solely on the basis that every hour in its complete history may not be known.
- 3.8 Another example is the refusal by CASA to accept an inspection procedure which is approved by the FAA and the manufacturer to extend the wing spar life of a Queen Air. The procedure is widely used around the world and is accepted in all countries except Australia. CASA admits that it does not hold any testing data relating to the Queen Air type to support its grounds for refusal, but instead has simply said "no" which has left the operator (Airfast) with no option but to develop its own testing procedures "for consideration by CASA", a process that will take years and cost well over \$100,000.00.
- 3.9 We would respectfully suggest that any review of the Regulations should include an expansion of the CASR to address the many and varied problems which currently exist as a result of the reluctance of CASA to accept the practices and procedures for maintenance, airworthiness and modifications which are approved and widely adopted in the United States (and in such other recognised countries of manufacture).



(f) *Aviation medicine*

- 4.0 By far the most common complaint I receive regarding the processes and administration by CASA officials is in relation to Aviation Medicine.
- 4.1 The regulation of aviation medicine for the purpose of the issue and/or refusal of aviation medical certificates is in Part 67 of the CASR. The CAR prohibits a pilot from exercising the privileges of his or her licence unless he or she holds a valid aviation medical certificate.
- 4.2 The CASR requires pilots to regularly undergo a medical examination with a CASA-approved Designated Aviation Medical Examiner ['DAME'] on an annual basis for a class 1 medical certificate, and on a bi-annual basis for the issue of a class 2 medical certificate (the class 2 certificate is for private pilots) who will send the results to CASA upon completion of the examination.
- 4.3 Problems arise when a pilot fails to meet the requirements of the relevant table set out in CASR 67.150 (for class 1) or CASR 67.155 (for class 2). CASR
- 4.4 CASR 67.180 provides a mechanism by which a pilot who fails to meet the medical standards set out in CASR 67.150 or CASR 67.155 may still be issued with an aviation medical certificate if CASA is satisfied that issuing a medical certificate to the applicant would not endanger the safety of air navigation.
- 4.5 A dispute often arises in situations where the applicant may have suffered a medical condition which his or her medical specialist has determined will not affect his or her ability to safely operate an aeroplane, but notwithstanding the assessment by the medical specialist in the field, CASA aviation medicine will often ignore the specialists' expertise and advices; and refuse or cancel the applicant's aviation medical certificate.
- 4.6 CASR 67.165 and CASR 67.230 provide power to CASA to direct an applicant to undergo a further examination with a specialist in relation to discrete medical issues. In my experience, these sections have rarely been used, and yet CASA aviation medicine has displayed a consistent reluctance to accept the expertise and advices of the applicant's own treating specialist.
- 4.7 The above problem was highlighted in the recent AAT case of *Bolton v CASA* [2013] AATA 941. The applicant had suffered a head injury which required surgery which was successful. The applicant reported the occurrence to CASA which he was obliged to do pursuant to CASR 67.265, however, when the applicant applied for the reinstatement of his medical certificate after he had completely recovered from his injury, CASA refused to re-issue it. The Applicant made an application to the AAT for review of the decision to refuse the certificate. The legal officer for CASA suggested that the Regulator would call evidence from its regular neurosurgeon, Dr John Cameron, in support of the Decision to refuse the certificate due to a claimed risk of epilepsy. The applicant made an appointment with Dr Cameron and was examined by him.

The result of the examination by the CASA-preferred neurologist Dr Cameron was that Dr Cameron deemed Mr Bolton as being fit to fly. Regrettably, CASA rejected the advice of its own preferred neurological expert and maintained its refusal to reissue Mr Bolton's medical certificate. CASA called evidence from a neurosurgeon in the United States to give evidence in support of its decision to refuse the medical certificate, however, the Tribunal properly accepted the evidence from Dr Cameron and found in favour of Mr Bolton.

- 4.8 Although Mr Bolton was successful with his application to the AAT, it is my submission that he should not have been put to the significant expense and time involved in seeking a review by the Tribunal, particularly when CASA was presented with an opinion from its own preferred neurological specialist which clearly showed that Mr Bolton was fit to fly. There are many cases involving disputes with CASA aviation medicine, all of which have a common theme in that CASA aviation medicine, with relatively little specialist expertise of its own, will regularly reject a *bona fide* application for a medical certificate in the face of specialist medical advice to the contrary.
- 4.9 I would respectfully suggest that in reviewing the Regulations, the panel should give consideration to expanding the operation of Part 67 of the CASR to include a direction that the assessment of a DAME is to be taken as being effective except in special circumstances where there is a reasonable suspicion that the applicant does not meet the medical standards; and further, in matters which involve the treatment by a medical specialist, the opinion of the medical specialist is to be afforded primary credence except in special circumstances where it could reasonably be inferred that the applicant's medical condition and/or treatment for same would likely pose a risk to air safety if an aviation medical certificate was to be issued, with or without conditions.

(g) *Operations and licencing*

- 5.0 There is no disagreement from any quarter that I know of that the Rules have been put in place for the safety of air navigation, and that CASA has a job to do to in ensuring that the rules are followed. The method employed by the Regulator in its surveillance and regulation of the industry has varied and changed over the years. Some of the changes are not so good:
- 5.1 The current practice adopted by CASA is to apply a strict and bureaucratic approach to compliance which is rigid and uncompromising. Although the majority of the officers in CASA are experienced and fair-minded in relation to enforcing compliance with the Rules, regrettably, there are also a number of other, often less experienced officers who have been over-zealous, arrogant and dismissive in their dealings with members of the GA industry, which has had the unfortunate result that many in the GA industry are reluctant to talk to CASA, for fear of reprisals from these very few over-zealous CASA officers.
- 5.2. The issue of the conduct of CASA officers is discussed below, however, it has been raised at this juncture in the context of the proposed changes to the CASR with the introduction of CASR Part 61 (licencing) and CASR Part 91

(general operating and flight rules), which appear to be a consolidation of the existing Rules with some changes made; but which have been re-written in a format akin to the *Criminal Codes*. The draft of Part 61 on the CASA website is 577 pages long of complex regulations, which contain penal provisions.

- 5.3 Most of the provisions in CASR Parts 61 and 91 commence with words to the effect " A person commits an offence when..." and conclude with the words to the effect that "an offence against this provision is one of strict liability".
- 5.4 The vice in the manner and format of the new provisions is that the proposed new regulations are replete with minutia, all of which attract strict liability; and accordingly a person who makes any honest mistake, no matter how small will attract the strict liability provisions. These provisions of strict liability for minutia will become fertile ground for those few "overzealous" CASA officers
- 5.5 CASR Part 91 is still under development. CASR Part 61 was to be introduced late in 2013, however, its introduction has been deferred to later in 2014. I have not yet examined the draft Part 61 in detail, however, from my perusal of the draft thus far the provisions contain some unnecessarily complicated and restrictive provisions, which do little (if anything at all) towards the safety of air navigation, but which add a further burden and cost on the GA industry
- 5.6 Three short examples are the restrictions imposed by CASR 61.245 on the use of an aircraft for an endorsement if there is a simulator available for use; and the unnecessary complications and requirements imposed by CASR 61.370 for photographs for a simple aircraft type endorsement. The last example is the imposition of a restriction on the flight testing officer concerned with a flight test at the conclusion of training. In many flying training institutions, the Chief Flying Instructor ['CFI'] who conducted the training is able to carry out the flight test subject to the existing caveat that CASA always retains the right to conduct the test itself or nominate another authorised test officer ['ATO']. The new provision unnecessarily removes the option of a CFI conducting the test, which will prove to be a burden on remote and regional flying schools which may not have an independent ATO available in their respective areas.

#### *Administrative sanctions*

- 5.7 All certificates, licences and permits issued by CASA are subject to the holder continuing to comply with the terms and conditions imposed thereon. In the circumstance of a breach or a non-compliance, CASA has a range of options available to it, including, *inter alia*:

Talking to the certificate holder if the non-compliance is relatively minor  
Counselling  
The imposition of conditions  
Variation of the Certificate  
Suspension of the Certificate ( but see the note below)  
Cancellation  
Prosecution

I have observed that in the majority of cases which have come before me that CASA almost invariably elects to cancel the certificate, licence, permit or authorisation without even considering the alternative available options.

**NOTE – re "suspension":**

Although CAR 269(1) provides power to CASA to suspend an authorisation, certificate, licence or permit, any suspension which is imposed by CASA to punish a person, which is a judicial function, as opposed to an administrative action, is *ultra vires*: See s71 of the *Constitution* whereby the judicial power is vested in the Courts alone, and not in the Executive.

5.8 We would agree that CASA can and should impose a suspension on the flight crew licences held by a person for the purposes of preserving the safety of air navigation pending an assessment or a flight test being carried out on the holder of the authorisation (eg: a suspension of a pilot licence pending a flight test pursuant to CAR 265), however, the suspension of a flight crew licence for the sole purpose of "grounding" a pilot for a period of time, at the expiry of which the suspension is lifted without any form of assessment or flight check is a suspension imposed for the purpose of punishment rather than for any safety-related purpose, and is therefore *ultra-vires*.

5.9 In the High Court case of *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129, McHugh J said (at paragraphs 41-43):

*"[41] ...I think that the factors that courts take into account when ordering disqualification and fixing periods of disqualification under the corporations legislation make it impossible to hold the "civil penalty" provisions and, in particular, the disqualification provisions, are purely protective in nature. Despite frequent statements by the judges who administer the legislation that the purpose of the disqualification provisions is protective, what the judges actually do in practice is little different what judges do in determining what orders or penalties should be made for offences against the criminal law. Elements of retribution, deterrence, reformation and mitigation as well as the objective of the protection of the public inhere in the orders and periods of disqualification made under the legislation.*

*[42] If the disqualification provisions were purely protective, the only issue for the court would be whether the defendant is now or will in the future be a fit and proper person to manage corporations. If the court were to find that, despite the misconduct, the defendant is now a fit and proper person to manage corporations, the court should refuse to make an order of disqualification. If the court were to find the defendant would be a fit and proper person to manage corporations in the future, the only issue for determination would be the time when that would occur. Moreover, if the jurisdiction were purely protective, it is hard to see why orders for disqualification should be for fixed periods, as they almost invariably are. Fixed periods of disqualification suggest punishment rather than protection in the same way that disqualification from driving for a period is a punishment rather than an act protective of the public. If the jurisdiction were purely*

*protective, one might have thought that the proper order would be indefinite disqualification with the onus on the defendant to show at some future date that he or she were not a fit and proper person to manage corporations (98). At all events, if the jurisdiction were purely protective, the defendant should have liberty to apply during the period of disqualification to show that he or she is now a fit and proper person to manage corporations.*

*[43] In exercising their discretion, however, courts which administer the legislation do not concern themselves solely with the issue of whether the defendant now is or in the future will be a fit and proper person to manage corporations. They take into account a wide variety of factors in addition to determining whether any and, if so, what period of disqualification should be imposed. They consider more than the present and future fitness of the defendant to manage corporations. They take into account factors such as the size of any losses suffered by the corporation, its creditors and consumers, legislative objectives of personal and general deterrence, contrition on the part of the defendant, the gravity of the misconduct, the defendant's previous good character, prejudice to the defendant's business interests, personal hardship and the willingness of the defendant to render assistance to statutory authorities and administrators. No doubt some – maybe all – of these matters are relevant in determining whether the defendant ought to be disqualified or the period of disqualification that is required in order to protect the public.*

*But in practice courts do not use these matters merely as evidentiary indicators of the time when the defendant will, if ever, be fit to manage corporations. Rather, they become part of the synthesis from which the judges made a value judgement concerning whether to order disqualification and, if so, the period of disqualification that should be imposed.*

*It is not the practice of judges to say: "On the evidence, I find that after (say) 5 years, the defendant will be sufficiently reformed to make it safe for him or her to manage corporations". This suggests that the disqualification provisions are not purely protective in nature."*

- 6.0 Regrettably, and notwithstanding the observations of the High Court in *Rich v Australian Securities and Investments Commission*, CASA has continued to impose suspensions on the holders of certifications and licences for no reason other than to remind the person of his or her safety-related legislative obligations. Curiously, this error of law was ignored by the AAT in Melbourne (see "*Confidential*" v CASA [2013] AATA 927).
- 6.1 We would respectfully suggest that in reviewing the Regulations and the processes of CASA, consideration is given to inserting provisions which can effectively address the problems outlined above, and in particular, to address the issue of a suspension imposed for no purpose other than to punish.

**(h) Conduct of CASA officers**

- 6.2 We reiterate that although the majority of the officers in CASA are experienced and fair-minded in relation to enforcing compliance with the Rules, regrettably, there are also a number of other, often less experienced officers who have been over-zealous, officious and dismissive in their dealings with members of the GA industry, which has had the unfortunate result that many in the GA industry are reluctant to talk to CASA, for fear of reprisals from these very few but over-zealous CASA officers.
- 6.3 The added vice with the problem of arrogant, over-zealous and bullying CASA officers is that almost invariably a complaint to CASA Senior Management about the said conduct goes nowhere. CASA has an officer entitled "Industry Complaints Commissioner" , who answers to the CEO and to the senior internal CASA lawyer, however, this office is ineffective in fact.
- 6.4 I have received complaints from GA members concerning CASA officers trespassing in hangars without authorisation, an activity which is both *ultra vires* and against the law (see, eg: *Nevill v Halliday* [1983] 2 VR 553), and complaints of bullying, harassment and the demonstration of a dictatorial, patronising and/or dismissive approach by CASA officers to honest members of GA. Some offices of CASA (notably the airworthiness sections of CASA in Brisbane, Perth and Sydney; and the offices in Kununurra/Darwin) feature often in the complaints I have received from my clients.
- 6.5 The problems arising from such inappropriate conduct of CASA officers is, in my view, threefold:
- 6.5.1 It detracts from the otherwise good image of CASA
- 6.5.2 It alienates the industry to the extent GA members are reluctant to talk to CASA, with the result that valuable "feedback" is denied; and
- 6.5.3 It can deter pilots and other GA members from communicating with authorities on safety matters which may be of an urgent nature:
- 6.6 I provide the following example of an incident which occurred in the Broome area recently, and the subsequent actions of the CASA officers which, in my view were inappropriate and perhaps contrary to the objects of section 9A:
- 6.6.1 The nature of flight operations in remote areas such as the Broome / Kimberley region attracts relatively inexperienced pilots to the area, and it is the task of the Chief Pilot to check and monitor these pilots.
- 6.6.2 The task of training and supervising relatively inexperienced pilots is not easy and mistakes can be and are occasionally made. That mistakes and oversights are made does not necessarily lead to a conclusion that the Operator's systems are unacceptably deficient, or that the Chief Pilot is not doing his or her job, but it does mean that identified mistakes and oversights should be corrected and/or rectified.

- 6.6.3 CASA has role to play in assisting an Operator and its Chief Pilot with timely safety advice pursuant to its obligations under section s9(2) of the *Civil Aviation Act* 1988.
- 6.6.4 Where the system can break down is when there is friction between the relevant surveillance officers of CASA and the operator and/or its Chief Pilot, with the result that trust is eroded and the communication and feed back necessary for both parties is diminished.
- 6.6.5 The case example that follows is in relation to a young pilot who had spent an overnight stay remote from Broome and was intending to return to Broome. The weather forecasts indicated that the weather was suitable for a flight to Broome under the visual flight rules ['VFR'], which requires visual flight clear of cloud with a prescribed visibility.
- 6.6.6 En route to Broome the weather deteriorated which forced the pilot to fly lower. The pilot wanted to obtain up-to date weather information so as to properly plan the remainder of his flight (ie: whether to proceed to Broome or to divert to an alternate aerodrome), however, as a result of him flying lower (to avoid cloud) he was unable to reach Broome ATC by radio to check the current weather at Broome and other areas.
- 6.6.7 The pilot did what he was taught to do, namely, he radioed other pilots in the area to ask for assistance in relation to the weather. At the conclusion of the flight the pilot was "bullied" by CASA officials.
- 6.6.8 I was particularly concerned to learn of the tactics used by some of the investigating officers of CASA in relation to the events which occurred during the flight conducted by Daniel Smith on 13 May 2013, and in particular the outcome of the telephone conversation between CASA FOI Lyons and Mr Smith, which left Mr Smith visibly upset and shaking. There was subsequent discussions between Mr Smith and CASA FOI Julie Asher, during which the prospects of criminal prosecution and loss of licence were raised, and action against Broome Aviation was mooted. Mr Smith feared retribution from CASA.
- 6.6.9 During the writer's long experience in general aviation, it was a fundamental essence of good airmanship and indeed survival that a VFR pilot who encounters adverse weather, and/or is experiencing difficulty with respect to unexpected weather events, to get on the radio and talk to someone about it. Such timely advice would be aimed at assisting the pilot to decide his or her best course of action, and may include advice about the actual conditions in the area and at alternate aerodromes.
- 6.6.10 Mr Smith did as he was taught, however, the actions of the CASA officers subsequently involved in "investigating" this occurrence clearly upset this young pilot to the extent that I am quite concerned that, as a result of his experience with CASA, he may now be reluctant to again get on the radio to



report any difficulty he may encounter in the future with respect to weather or any other operational matter, so as to avoid again being subjected to bullying by the CASA officials.

6.6.11 The accident files are full of pilots who failed to talk to officials when it was most needed. In my view, the tactics employed by CASA in this instance may have actively discouraged this pilot from speaking out in the future for fear of retribution. This unfortunate but not unexpected result, would run against the safety objectives set out in section 9A of the *Civil Aviation Act*.

6.7 Regrettably, there are many complaints about CASA officials who have "acted first" before ascertaining all of the facts, with the result that the matter ends up in a dispute before the AAT at a significant cost to both the taxpayer and to the person subjected to administrative sanctions which might otherwise have been avoided if the CASA officials took the time to actively listen before acting.

6.8 A recurring problem is that CASA will make a decision, and it will escalate its commitment to adhering to that decision, regardless as to whether the decision was wrong, and notwithstanding cogent arguments to the contrary.

6.9 Some CASA officials treat any breach or non-compliance with any aspect of the Rules as tantamount to a conclusion that the person is no longer "fit and proper" to hold the certificate, licence, authorisation or permit; regardless of whether the person may have held the licence or authority for decades with an exemplary safety and compliance record, and notwithstanding that the exercise of power by the Regulator to impose the most severe administrative sanctions on the person will destroy his or her livelihood, and may also be unnecessary

#### *CASA officers "unaccountable" for their actions*

6.10 The vice in respect of inappropriate action being taken by CASA officials is that, in effect, these officers are virtually unaccountable for their actions

6.11 The argument from CASA is invariably "the administrative action was taken in the furtherance of air safety- see section 9A of the *Civil Aviation Act*". however, there are varying degrees of administrative action, and not every instance of a non-compliance or breach should result in cancellation:

6.12 In the case of *Repacholi v CASA* [2003] AATA 573, the applicant had developed and tested an improved method for the launching of a seaplane from the back of a truck. The exercise was well planned and carried out, and a video of the exercise was sent to CASA in good faith. Rather than consider the merits of the exercise, CASA cancelled the applicant's commercial licence. The matter was brought before the AAT which heard evidence from seaplane experts from the United States that the method demonstrated by the applicant for the launching of a seaplane was appropriate, and that it had merit. In determining that the applicant's pilot licences should not be cancelled, the Tribunal determined that small, "technical" breaches of the Rules which do not

give rise to any real safety concerns should not attract the administrative sanction of cancellation, but rather, they would merely warrant counselling.

The Tribunal said at paragraph [95]:

*"(The) cancellation of the applicant's pilot licence, thereby jeopardising his aviation business and livelihood, can only be regarded as grossly excessive and unreasonable and, therefore, highly inappropriate"*

- 6.13 CASA did not appeal the decision in *Repacholi*, however, it took exception to the decision, and it refused to consider returning Mr Repacholi's chief pilot approval; which resulted in a further application to the Tribunal, which ruled in favour of the applicant: See *Repacholi Aviation v CASA* [2006] AATA 578
- 6.14 The AAT is a no-costs jurisdiction, and although a party may eventually be successful before the Tribunal, the cost in obtaining justice in respect of a wrong administrative decision can be very high but is not recoverable. The *Repacholi* cases, like dozens of others, were and are no exception.
- 6.15 In the case of *Polar Aviation and Butson v CASA* [2006] AATA 270, which was a case in which CASA had identified some administrative deficiencies and had issued "non-compliance" notices ['NCN'] in respect of same. CASA was not satisfied with the detailed responses provided by the applicant and cancelled Polar's air operator's certificate ['AOC'], and the chief pilot and CFI approvals held by Clark Butson. An application was made to the AAT during which CASA offered to restore the AOC and re-issue it for a 3 year term if Mr Butson gave up his rights to seek a review before the AAT in respect of his own chief pilot and CFI approvals. CASA's unreasonable request was refused and the matter proceeded to a hearing at which Polar and Mr Butson were successful, but at a great cost to the applicants and to the taxpayer.
- 6.16 Both Repacholi and Polar Aviation sought compensation from CASA for their loss and expenses unnecessarily incurred in setting aside the CASA decisions. Separate proceedings were brought in the Federal Court against CASA and certain of its officers for, *inter alia*, misfeasance in public office and negligence. Both of the claims failed: See *Polar Aviation v CASA* [2012] FCAFC 97 and *Repacholi and Repacholi Aviation v CASA* [2011] FCAFC 122
- 6.17 The Full Federal Court, in referring to *Sullivan v Moody* [2001] HCA 59 and other cases, held that although a Regulator like CASA and its officers could be sued, the grounds for action are very narrow and they must identify with precision the particular duty owed by the Regulator and/or officer concerned with the claim for damages, and it must particularise with precision exactly what conduct was engaged in that fell outside of the scope of the duties owed to the public by the Regulator and/or its officers.
- 6.18 The above examples show that although a person can proceed to the AAT to have a wrong administrative decision made by CASA set aside, the costs incurred in seeking justice from the Tribunal cannot ordinarily be recovered, and further, that the enormous costs and difficulty involved in bringing an

action to hold CASA and/or its officers to account for inappropriate conduct makes any contemplated action against CASA and/or its officers virtually impossible. There is a culture within CASA which protects these officers.

- 6.19 It is for the reasons outlined above that I believe the industry has lost its confidence and trust in CASA, and I would respectfully suggest that during its review of the Regulations, the panel gives consideration to the setting up of an effective CASA Complaints Commission which has the power to make CASA and its officers accountable for inappropriate conduct.

## **2. RELATIONSHIP AND INTERACTION BETWEEN AGENCIES**

### **7.0 *Airservices and CASA***

The functions and services of Airservices Australia ['Airservices'] and CASA are so intrinsically entwined with each other that these two agencies should again be merged, and be responsible to the one Departmental Minister.

- 7.1 Airservices Australia, which is governed by the *Airservices Act* 1995, provides *inter alia*, Air Traffic Control ['ATC'] services and other services concerned with flight planning, en-route in flight services, and the provision of the Aeronautical Information Publication ['AIP'] for pilots, including maps and charts for VFR, and IFR instrument approach and departures procedures.
- 7.2 CASA, which is governed by the *Civil Aviation Act*, provides the licencing and the manual of standards for Air Traffic Controllers under CASR Part 65.
- 7.3 Part 10 of the CAR regulates Air Traffic Services and other services. CAR 99AA provides that CASA may give directions or instructions about the use of a class of airspace, a controlled aerodrome, a control area or a control zone. ATC controls the airspace in a control zone. CAR 100 requires the pilot in command of an aircraft to comply with air traffic control procedures.

### **8.0 *ATSB and CASA***

The Australian Transport Safety Bureau ['ATSB'] and CASA are each concerned with promoting air safety, but their functions are different

- 8.1 The ATSB is governed by the *Transport Safety Investigation Act* 2003 ['the TSI Act'], and is concerned with the investigation of accidents, including aircraft accidents. Section 28 of the TSI Act provides that the ATSB powers are to be used solely for the purposes of investigating. The ATSB is concerned to determine why an accident occurred so that the information gained can be used to aid in the prevention of accidents. It is not the function of the ATSB to determine the criminal or civil liability of a person. By section 27 TSI Act, an ATSB report is not admissible in either civil or criminal proceedings.

- 8.2 CASA's functions are for the regulation of aviation, with the most important consideration being the safety of air navigation: s9A *Civil Aviation Act*.
- 8.3 Sections 32 to 42 of the TSI Act provide the ATSB with wide investigative powers to enter premises and vehicles to seize documents, and to require persons to attend and answer questions. If CASA has information which is relevant to an ATSB investigation concerning air safety, it should be made available to the ATSB pursuant to the intention of s9A *Civil Aviation Act*.
- 8.4 If vital safety-relevant information is withheld from those persons who may be affected, the result can be disastrous, as the following example demonstrates:

***Mr Dominic James: Aviation Occurrence Investigation AO-2009-072  
Ditching of IAI Westwind 1124A aircraft NGA on 18.11.2009 at Norfolk Island***

- 8.4 A relatively recent accident involving the ditching of a corporate Westwind Jet aircraft into the sea off Norfolk Island on 18 November 2009 uncovered a serious deficiency in the investigation carried out by the ATSB in that the details of an earlier CASA audit report conducted on the operator of the Westwind, Pel-Air, had not been included in the draft ATSB report. The deficiency was discovered during the course of an application made to the AAT by the pilot of the Westwind, Dominic James, to have his ATPL restored
- 8.5 The draft Report, at page 58, referred in passing to the special audit report conducted by CASA into the operator of the Westwind, Pel Air Pty Ltd.
- 8.6 What the draft did not say was that the CASA special report found, *inter alia*, that the Pel-Air policy and practice may have led the pilot in command into error, and that the CASA special audit identified a number of serious deficiencies which included:
- a. Inadequate fuel policy for Westwind operations,
  - b. inadequate fuel policy for Lear military operations,
  - c. pilots use their own planning tools and there is no control exercised by Pel-Air to ensure that the fuel figures entered are valid,
  - d. no policy exists to ensure that flight and fuel planning is cross checked to detect errors,
  - e. no alternate requirements are specified for remote area and remote island operations,
  - f. the Pel-Air operations manual specified 30 minute fuel checks, which was largely ignored by operating crew,
  - g. the criteria to obtain weather updates was not specified in the operations manual, and
  - h. the practice of obtaining weather advice varied among pilots and did not appear to be conducted at appropriate times to support decision-making.
- 8.7 The draft ATSB report also did not refer to other issues raised in the CASA special audit report concerning operational control and training; and in particular, no reference was made to any findings that Pel-Air was deficient in that:

- i. No operational decision-making tools were provided to support crew in balancing aviation v medical risks;
- j. once tasked, the pilots operated autonomously and made all decisions based on behalf of the AOC; and further, the AOC exercises little, if any, control over the operation once a task commences;
- k. Pel-Air did not provide charts or publications to pilots and did not ensure that the pilots maintain a current set;
- l. in many cases, inadequate flight planning time was provided,
- m. there was a failure to maintain required flight records and no apparent checking by Pel-Air,
- n. pilots used their own flight planning tools without any control exercised by Pel-Air to ensure the data entered was valid,
- o. there was inadequate CAO 20.11 training,
- p. there was inadequate documentation of training programs,
- q. there was no formal training for international operations,
- r. there were inadequate training records for pilot endorsement and progression,
- s. there were inadequate records of remedial training,
- t. there was no "mentoring" program for First Officer to Command, and
- u. there were deficiencies in training records and fatigue management for pilots.

8.8 When the deficiency was discovered, I wrote to the ATSB to express my concern that the draft report (which I understood the ATSB intended to publish with very few changes) appeared to "point the finger at" the pilot in command to the exclusion of both the operator and CASA, with the result that the reasonable reader of the final publication might be led into believing that the ditching was simply the result of errors and mismanagement on the part of the pilot in command, with no reference to the very significant factors of the policies of the operator, which the CASA found to be seriously deficient, and of CASA itself, which did not detect or take action regarding the deficiencies of the operator, which eventually led the pilot in command into error.

8.9 The ATSB and CASA should remain as separate agencies but responsible to the same Departmental Minister, however, I would respectfully suggest that the Panel should consider recommending the making of appropriate amendments to the regulatory requirements of both the ATSB and CASA to address the type of issues arising from the above-mentioned incident

### **3. OUTCOMES AND DIRECTION OF THE REGULATORY REFORM PROCESS UNDERTAKEN BY CASA**

I provide no further submission under this term of reference in addition to the material provided in the above- paragraphs

### **4. SUITABILITY OF AUSTRALIA'S AVIATION SAFETY RELATED REGULATIONS WHEN BENCHMARKED AGAINST COMPARABLE OVERSEAS JURISDICTIONS**

- 9.0 The vast majority of GA aircraft operated in Australia have been manufactured in the United States, and accordingly the majority of maintenance practices and procedures adopted in Australia have historically been based on the U S experience. CASR 1.003 states that the Regulations contain provisions based on the FAR, and that an object of the regulations is to harmonise certain parts of Australia's aviation safety law with the FAR
- 9.1 Notwithstanding the objectives of the CASR, in practical terms the Australian Regulations appear to be more restrictive than their US and European counterparts ['the JAR'] . The reasons for the more restrictive approach in Australia are manifest, and in my opinion they include, *inter alia*, the interpretive difficulties outlined in paragraphs 2.6 and 3.0 – 3.9 above; the fact that we have a comparatively small number of aircraft, pilots and engineers and accordingly we have a small database upon which to rely in formulating our own effective safety regulations when compared to overseas.
- 9.2 The Australian Regulator has historically held a very conservative approach to GA when compared to the United States with the result that from an operator's viewpoint the "red tape" in Australia is far more constrictive than in the United States, and yet our accident record is no better than that in the United States, which has a far more hostile weather environment for light aircraft.
- 9.3 Likewise, pilot licencing in Australia, including medical certificates, is more restrictive than in the United States. Further, the United States promotes and fosters the growth of aviation, which is unlike the situation in Australia.
- 9.4 The stated objective in the CASR to "harmononise" with the FAR is a good start, however, in my view the Australian Regulations have a long way to go to catch up with the world leaders in general aviation.

## 5. OTHER MATTERS – RIGHTS OF REVIEW

- 10.0 The rights of review of the holder of a Certificate, licence, permit or authorisation adversely affected by a CASA Decision need to be improved .
- 10.1 Section 31 of the *Civil Aviation Act* provides the circumstances in which a person may make an application to the AAT for a review of an adverse Decision made by CASA. Section 31(1) provides the definition of a "*reviewable decision*" which can be reviewed by the AAT.
- 10.2 A difficulty often arises when the Decision made by CASA does not appear to fall within the prescribed definition in s31(1). The CASA lawyers are vigilant and quick to pick up on any matter which might possibly exclude the adverse decision from the scrutiny of a Review by the AAT.
- 10.3 In past AAT matters, the lawyers from CASA argued strongly against a review by the AAT of a Decision to cancel a Chief Pilot approval on the grounds that the cancellation of such an approval did not fall within the ambit of the definition of a "reviewable decision" in section 31(1).

- 10.4 In the matter of *Cape York Airlines Pty Ltd v CASA* [2004] AATA 727 the AAT determined that the cancellation of a Chief Pilot approval was in fact a reviewable decision, however, the time and expense incurred by the applicant in that case in obtaining a decision regarding the jurisdiction of the AAT, which was strongly denied by CASA, could never be recovered: See the discussion below regarding the powers of the AAT regarding costs.

*"stay" provisions*

- 10.5 Notwithstanding the AAT ruling in *Cape York Airlines*, CASA will not agree that the cancellation of a chief pilot or chief flying instructor ['CFI'] approval falls within the ambit of CAR 269(3), which requires CASA to issue a "show cause" Notice prior to taking adverse administrative action; and accordingly, according to CASA, the "automatic" stay provisions in section 31A of the *Civil Aviation Act* do not apply: See the matter of *Ekinici v CASA*.
- 10.6 The "automatic" stay provisions in s31A are invoked to stay an adverse Decision for a period of 5 working days, if, before making the Decision, CASA was required by the Civil Aviation Act or the Regulations to give a "show cause" notice to the holder of the civil aviation authorisation concerned. If, before the expiry of the 5 business days, an application for Review and a Stay is lodged with the AAT, the period of the "automatic" stay is extended until the Tribunal makes an order under section 41(2) of the *Administrative Appeals Tribunal Act 1975*, or decides that no order should be made..
- 10.7 An AOC becomes inoperable if the chief pilot authorisation is cancelled or suspended (See CAO 82.0). Likewise, a flying training organisation is shut down if the CFI authorisation is cancelled or suspended; and accordingly a decision by CASA to cancel or suspend the approvals for a chief pilot an/or a CFI will immediately close down that aviation business, unless a stay is invoked (to allow rational argument to be heard in a Review by the AAT).
- 10.8 The above problem could be rectified by an amendment to the definitions in CAR 263(1) to include in the definitions of "authority" a chief pilot approval and a chief flying approval. Such an amendment would clearly bring the chief pilot and CFI approvals within the ambit of "an authorisation" for the purposes of CAR 269(1), and accordingly, it would attract the provisions of CAR 269(3) and the "automatic" stay provisions of s31A *Civil Aviation Act*.
- 10.9 Most GA operations are small businesses which do not have the capacity to survive if their business is closed down, even for a few days. An AAT application requires a substantial amount of time to proceed to a hearing, even if expedited. If a stay is not granted, the application to the AAT will probably become nugatory because the GA business will fail before the hearing date.
- 10.10 It is for the above reasons that the Regulations need to be urgently reviewed.



### *CAR 38(1) directions*

- 10.11 CAR 38(1) provides power to CASA to make directions regarding the maintenance of aircraft. I have seen dozens of instances where the CASA official has made a wrong decision pursuant to CAR 38(1), however there is difficulty facing an applicant seeking a review of such a wrong decision:
- 10.12 A Direction made by CASA pursuant to CAR 38(1) relating to maintenance, the effect of which "grounded" the aircraft was held in one instance by the AAT not to be a reviewable Decision, however, there has also been another AAT decision to the contrary. The argument that a CAR 38(1) direction is reviewable can be raised where the "Decision" effectively suspends the operation of a valid maintenance release certificate for an aircraft, which but for the CAR 38(1) Direction would allow the aircraft to fly.
- 10.13 In the absence of an effective review of the Regulation to address the problems of a narrow reading of the definition of a "reviewable decision", the CASA lawyers will continue to argue against the jurisdiction of the AAT to review decisions made pursuant to CAR 38(1) and other regulations until the jurisdictional issues have been determined by the AAT or the Federal Court.

### *"model litigant"*

- 10.14 Consistently with the Attorney-General's responsibility for the maintenance of proper standards in litigation, the Commonwealth has issued Legal Services Directions pursuant to section 55ZF of the *Judiciary Act* 1903 directing all Commonwealth agencies to behave as "model litigants" in the conduct of litigation, which includes an obligation to act honestly and fairly.
- 10.15 The nature of the obligation includes, inter alia, acting consistently in the handling of claims and litigation, not taking advantage of a claimant who lacks the resources to litigate a legitimate claim, not relying on technical defences unless the Commonwealth agency's interests would be prejudiced by the failure to comply with a particular requirement, endeavouring to avoid, prevent and limit the scope of legal proceedings wherever possible, including by giving consideration in all cases to alternative dispute resolution; and to use its best endeavours to assist the Tribunal.
- 10.16 Regrettably, it is often the case that CASA does not attempt to limit the scope of litigation or to participate *bona fide* in alternative dispute resolution. It is true that some settlement agreements have been reached, however, these are the exception rather than the rule.

### *AAT*

- 11.0 The powers of the AAT are governed by the *Administrative Appeals Tribunal Act* 1975 ['AAT Act']. Section 43(1) of the AAT Act provides that the Tribunal may exercise all of the powers and discretions that are conferred by any relevant enactment on the person who made the decision, and accordingly the Tribunal may either affirm, vary or set aside the Decision under review.

- 11.1 Unlike its State counterparts, the AAT Act does not have a provision which enables the Tribunal to award costs to a party to a proceeding.
- 11.2 The major difficulty for an applicant seeking a review of a wrong Decision made by CASA is the cost to the applicant in Tribunal and legal fees. It is permissible for an applicant to appear before the Tribunal unrepresented, however, in any application for review, CASA is invariably represented, often by senior barristers.
- 11.3 If the applicant is to have any chance at all of success in having the adverse Decision set aside, the applicant has no realistic option but to engage legal advisers, the cost for which cannot ever be recovered.
- 11.4 Section 109 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ['VCAT Act'] provides that the general rule in VCAT is that each party bears their own costs, however VCAT may, if it considers it "fair to do so", and having regard to the factors in s109(3) of the VCAT Act, order a party to pay the other party's costs.
- 11.5 We would respectfully suggest that the Panel makes a recommendation to the Attorney-General's Department that the AAT Act be amended to give power to the AAT to order that a party pays the other party's costs, in its discretion, if it considers it fair and just to do so, having regard to the circumstances of the application. We would also suggest that Section 109 of the VCAST Act would provide a useful guide for any such proposed amendment to the AAT Act.

If I can be of further assistance to the Review Panel, please do not hesitate to ask.

Yours faithfully



**E. JOHN MAITLAND**