

PETER LITHGOW

BARRISTER
AICKIN CHAMBERS
200 QUEEN STREET
MELBOURNE VIC 3000

31 January 2014

The Aviation Safety Regulation Review Panel
Mr Richard Farmer
General Manager Review Panel

By email: richard.farmer@infrastructure.gov.au

Dear Sir,

RE: Submission – Aviation Safety Regulation Review Panel

Enclosed is the following Submission from myself for consideration by the Aviation Safety Regulation Review Panel.

The Writer

I am a lawyer engaged in private practice. For approximately the last 15 years I have been engaged by a significant number of clients in providing advice and on occasion, representation for them in relation to regulatory and commercial disputes arising in an aviation context.

Many of these dispute involve review or appeals of CASA decisions, other matters do not relate to CASA directly (i.e. insurance claims, disputes arising from the buying/selling/hiring of aircraft, employment of pilots or other licensed personnel).

I have no other involvement in the aviation industry (save as a paying passenger on commercial airlines) and have never held nor sought a pilot's license.

I make these observations from my experiences and observations over the past approximately 15 years.

STRUCTURES, EFFECTIVENESS AND PROCESSES OF AGENCIES INVOLVED IN AVIATION SAFETY

Attitude of the Industry to CASA

It is my clear impression over the past 15 years that there has been a steady increase in skepticism towards CASA by the general aviation industry.

This issue is difficult to measure, but it is my clear impression that over recent years CASA has and continues to lose the trust and confidence of the participants in the aviation industry.

While it remains true that the majority of the industry express a reasonable (although declining) level of confidence in CASA, it is also true that an increasing number actively distrust CASA and overall, even those who retain confidence in CASA place more caveats upon that confidence.

The “fiasco” regarding the implementation of the new Parts 61 and 91 of the *Civil Aviation Safety Regulations* 1998 is a case in point. Regardless of where “fault” may lie, this process has been seen by the GA industry as a CASA disaster.

This lack of confidence arises from a perception held by many that rather being “partners in air safety,” CASA is increasingly more interested in being a “policeman of air safety”. The perception is that there is less common sense and cooperation and instead there is dogmatic (and sometimes idiosyncratic) interpretations and requirements. Further, fees are charged and there is less cooperation regarding CASA “services”.

A sentiment along the lines of “well if you can’t make it in GA (private and general aviation), you’ll get a job at CASA” has become all too common. A corollary of the decline in confidence in CASA is that more and more participants in the GA industry

actively disengage as far as possible from involvement with CASA. Similarly, where engagement is required, activities are conducted in a much less transparent way. This may lead to the non-reporting of events or if reporting is done, it is done in a much less transparent way. Further, CASA is deprived of feedback, reports and general discussion which private industry participants would provide save in that CASA is seen as more of a policeman than a partner in aviation safety.

CASA Decision-Making Processes

Through the AAT and court discovery process the written documents of CASA are disclosed together with the occasions where CASA officers have had to give evidence as to their decisions in court, I believe I have some understanding of the decision-making process within CASA.

It is clear that the decision-making is a bureaucratic process, however the bureaucratic process is not on occasions “reasonable” or “responsive”.

By this I mean that on occasion, one sees a decision that has been made by CASA that has become operative because of the “lowest common denominator”. For instance, a decision may be influenced by a number of factors particularly in technical areas. On occasions it can be observed that the least important objection to an otherwise favourable determination carries the day and as a consequence, some relatively irrelevant consideration overrides the balanced and well considered view.

Similarly, when sanctions (counseling, imposition of conditions, variations, suspension, cancellation) are considered, too often the most serious (and punitive) approach is taken in circumstances that cry out for a more nuanced option that may allow for education and ongoing oversight.

Second, too many CASA decisions appear to have as their fundamental basis that CASA should avoid being criticised for the decision, rather than CASA making a proactive and positive decision that supports the development, expansion and upgrading of aviation in Australia. Too often new or novel approaches, even when such matters may be

countenanced overseas, are subject to delay or rejection by CASA. Similarly, as stated above, punishment (cancellation) overrides education and improvement.

Third, there is an unfortunate tendency in some of CASA's decision-makers that when challenged, rather than considering the basis of the challenge and seeking to find an appropriate response, including overruling or modifying the original decision, the fact of the challenge becomes the basis upon which a search for further grounds or justification for the original decision is made. This is an "escalation of commitment" rather than a practical and positive engagement in seeking an appropriate disposition.

On occasions, the determination to uphold the original decision in spite of further evidence and submissions to the contrary becomes almost obsessive. This approach continues through formal review at the AAT where too often no flexibility or alternatives seem to exist for CASA other than to maintain their original decision.

This review panel need only look at some of the many AAT decisions overturning prior decisions of CASA to realise the costs, expense, delay and poor administration that this attitude of "justification" rather than "objective and considered re-examination" of CASA of its own decisions has on the GA industry in general.

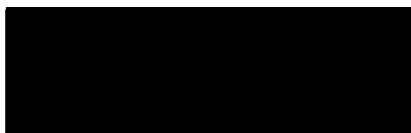
To this end, I would respectfully refer the review panel to some of the following decisions I have been involved in. In each case original decisions of CASA were overturned after lengthy legal proceedings. In several of these cases CASA was subject to significant adverse comment (particularly *Repacholi* and *Bolton*).

- *Repacholi v. CASA* [2003] AATA 573 and [2006] AATA 578
- *CASA v. Boatman* [2006] FCA 460
- *Brazel Agricultural Services v. CASA* [2006] ATTA 379
- *Polar Aviation v. CASA* [2006] AATA 270
- *Bolton v. CASA* [2013] AATA 941

Suggestions

- CASA should adopt independent internal peer review of disputed decisions (prior to AAT review).
- CASA should, in appropriate circumstances, be liable for adverse cost orders being made against it in AAT proceedings.
- A culture of engagement with industry as a “participant and partner” rather than “policeman” needs to be adopted and developed within the CASA corporate culture.
- CASA industry expertise and understanding needs to be promoted to the industry by CASA’s deeds, not just its words.
- The legal and medical [DAME] advisors within CASA need to provide independent professional advice and assessment and not act merely as an instrument (“rubber stamp”) to those CASA officers instructing them.

Yours faithfully



Peter Lithgow

A handwritten signature in black ink, appearing to be 'P. Lithgow', written over the redacted area.