
Submission of the Civil Aviation Safety Authority to the Australian Aviation Safety Regulation Review

1. Introduction

- 1.1 The Civil Aviation Safety Authority (CASA) is grateful for the opportunity to make this submission to the Australian Aviation Safety Regulation Review (the Review).
- 1.2 In its many communications with the Review Panel, beginning with the letter from the Director of Aviation Safety, Mr John McCormick, dated 6 December 2013, and the letter from the Chair of the CASA Board, Dr Allan Hawke AC, dated 10 December 2013, CASA has provided the Review with information and responses to questions raised by the Review Panel, along with a number of relevant references and supportive attachments. It is hoped our input thus far has effectively addressed both the particular issues raised by the Review Panel, and pertinent aspects of the broader issues contemplated by the Review's Terms of Reference.
- 1.3 CASA remains ready and willing to respond to any questions or requests the Review Panel might direct to us in the coming days, weeks and months. Mindful of the advice and material we have already provided to the Review, however, in anticipation of the opportunity we will have to meet and speak with Review Panel in the future and in keeping with the Review Panel's expectation that all submissions be framed broadly against pertinent elements of the Terms of Reference, it is not CASA's intention here to go over ground we have already covered, or to respond comprehensively to the kinds of concerns we reasonably expect will have been raised with the Panel in its exchanges with industry participants and other members of the Australian aviation community.
- 1.4 Rather, the object of this submission is to provide a helpful thematic gloss on some of the facts, evidence and opinions the Review Panel will properly take into account in forming its views and recommendations, and to identify critical features of the contextual landscape in which the concerns you have, and of which you will have been made aware, might be understood more clearly.
- 1.5 Reiterating the Director's opening remarks in his letter of 6 December 2013, as a learning organisation, CASA welcomes this review—

From CASA's perspective, this Review provides us with an invaluable opportunity—to highlight our achievements; to demonstrate salient aspects of the important work we are doing now; and, most importantly, to gain greater clarity, a better understanding and crucial insights in relation to those areas in which we can and should improve our performance, in the interests of safety, good governance and organisational efficiency. . . . We readily embrace the edifying benefits of constructive, informed and critical scrutiny, and we eagerly anticipate the instructive lessons we expect to learn for them products of

[this] Review.

- 1.6 That said, we are cognisant of the observations of the House of Representatives Standing Committee on Transport and Regional Services (as it then was), in its 2003 report on regional aviation and island transport services (*Making Ends Meet*), acknowledging the perennially ‘vexed issue’ of aviation safety regulation—and the role of the aviation safety regulator in Australia—as evidenced, at least in part, by the 15 reviews to which CASA and its predecessors had already been subject at that time.¹ In the ten years since the *Making Ends Meet* report was published, CASA has been the object of no fewer than five further reviews, commonly referred to as:
- the **Hawke Task Force Review** (2007);²
 - the **Miller Review** (2007);³
 - the Senate Inquiry into the **Administration of CASA** (2008);⁴
 - the Senate Inquiry into **Pilot Training and Airline Safety** (2011);⁵ and
 - the Senate **Pel-Air Inquiry** (2013).⁶
- 1.7 Collectively, these reviews have touched on one or more of the issues covered by the Review’s Terms of Reference, and all have generated findings and recommendations directly or indirectly germane to important aspects those issues. Beyond this, CASA’s performance across virtually all of its regulatory, operational and corporate functions is routinely subject to public comment in the aviation and popular news media, and regular, rigorous parliamentary scrutiny in estimates proceedings of the Senate Rural and Regional Affairs and Transport Legislation Committee, which convenes at least three times a year.⁷
- 1.8 For CASA, as for anyone seriously committed to the maintenance and continuing improvement of aviation safety in Australia within a rational regulatory framework calculated and administered to achieve those objectives, the findings and

¹ House of Representatives Standing Committee on Transport and Regional Services (2003). *Regional Aviation and Island Transport Services: Making Ends Meet*, Inquiry into commercial regional aviation services in Australia and alternative transport links to major populated islands, p. 181. The Review Panel has presumably been made aware of the Air Safety Regulation Review, instigated in 1987 by the then Minister for Land Transport and Infrastructure Support, the Hon. Peter Duncan MP, and the first report published by the Task Force established to conduct the Review, *The Legal Framework of Air Safety Regulation* (December 1988).

² *Aviation Regulation Review* (Hawke Task Force), report published 17 December 2007.

³ *ATSB/CASA Review* (Miller Review), report published 21 December 2007.

⁴ Senate Standing Committee on Rural and Regional Affairs and Transport, *Inquiry into the Administration of the Civil Aviation Safety Authority and Related Matters*, report published September 2008

⁵ Senate Rural Affairs and Transport References Committee, *Inquiry into Pilot Training and Airline Safety; and Consideration of the Transport Safety Investigation Amendment (Incident Reports) Bill 2010*, report published June 2011.

⁶ Senate Rural and Regional Affairs and Transport References Committee, *Inquiry into Aviation Accident Investigations* (Pel-Air Inquiry), report published May 2013.

⁷ Transcripts of these proceedings are available on the Senate’s public website at http://www.aph.gov.au/Parliamentary_Business/Senate_Estimates/rtratctte/estimates/index.

recommendations of these reviews, inquiries and proceedings are viewed in the historical, but still powerfully instructive, light of:

- the investigation report of what was then the Bureau of Air Safety Investigation into the accident involving a **Monarch Airlines** Piper Chieftain (VH-NDU) at Young, New South Wales on 11 June 1993,⁸ and the report of the findings of the New South Wales Coroner into the deaths resulting from that accident;⁹
- the Report of the Commissioner of the Commission Inquiry into the accident involving a **Seaview Air** Rockwell Commander (VH-SVQ) on 2 October 1994;¹⁰ and more recently—and all the more edifying on that account—
- the report of the Queensland Coroner into the deaths resulting from the accident involving the Fairchild Metro 23 Aircraft (VH-TFU) operated by Transair Australia near **Lockhart River**, Queensland, on 7 May 2005.¹¹

1.9 The reports of all of these reviews, inquiries, investigations and inquests are matters of public record, as are the responses of the governments and ministers of the day (where these have been published). CASA assumes these materials have been made available to the Review Panel, and we encourage Panel members to consider them with circumspection.

1.10 To the extent the 2013 Pel-Air Report¹² may be seen to have played even only a catalytic part in the instigation of the instant Review, as the Government has not yet given its response to the recommendations contained in that report, CASA may not properly comment on either the substance of the report or the Committee's recommendations. Transcripts of the Committee's public hearing and copies of the submissions received by the Committee are matters of public record, however;¹³ and in so far as CASA's position on the issues and claims raised in the context of that Inquiry is concerned, we respectfully draw the Review Panel's considered attention to CASA's principal and two supplementary submissions.¹⁴

⁸ Bureau of Air Safety Investigation, *Piper PA31-350 Chieftain VH-NDU, Young, NSW, 11 June 1993* (Investigation Report No. 9301743), July 1994.

⁹ *Coronial Inquest into Deaths Resulting from Air Crash of Monarch Airlines Aircraft at Young of 11 June 1993*.

¹⁰ Report of the Commissioner [James Henry Staunton AO CBE QC], *Commission of Inquiry into the Relations between the CAA and Seaview Air*, September 1996. See also Bureau of Air Safety Investigation, *Rockwell Commander 690B, VH-SVQ, Enroute Williamtown to Lord Howe Island NSW, 2 October 1994* (Investigation Report No. 9402804), December 1996.

¹¹ Report on the *Finding of the Coronial Inquest into the Aircraft Crash at Lockhart River* on 7 May 2005, 17 August 2007. See also Australian Transport Safety Bureau, *Investigation into the Collision with Terrain 11km NW Lockhart River Aerodrome, 7 May 2005, VH-TFU, SA227-DC (Metro 23)* (Aviation Occurrence Report No. 200501977), 4 April 2007. Transair Australia was the trading name of the operator, Lessbrook Pty Ltd.

¹² http://www.aph.gov.au/~media/wopapub/senate/committee/rrat_ctte/completed_inquiries/2010-13/pel_air_2012/report/report.ashx.

¹³ See http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Rural_and_Regional_Affairs_and_Transport/Completed%20inquiries/2012-13/pelair2012/index.

¹⁴ http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Rural_and_Regional_Affairs_and_Transport/Completed%20inquiries/2012-13/pelair2012/submissions.

2. Structures, Effectiveness and Processes—CASA’s Role and Functions as Australia’s Aviation Safety Regulator¹⁵

- 2.1 As explained in material and advice previously provided to the Review, and as we will be pleased to elaborate on in further discussions, CASA’s current structure, which was introduced in 2009, is aligned by design with the Authority’s core regulatory functions, principal safety-related functions and other corollary functions, as specified by the Parliament in the Civil Aviation Act. In this way, CASA’s organisation is clearly and logically structured to conduce optimally to the rational allocation of resources and responsibilities, the effective performance of our functions, the exercise of our powers and the discharge of our duties.
- 2.2 Arranged hierarchically in three subsections, section 9 of the Act first sets out CASA’s **core regulatory functions**. These include:
- developing and promulgating appropriate, clear and concise aviation safety standards;
 - developing effective enforcement strategies to secure compliance with aviation safety standards;
 - issuing certificates, licences, registrations and permits;
 - conducting comprehensive aviation industry surveillance;
 - conducting regular reviews of the system of civil aviation safety in order to monitor the safety performance of the industry, to identify safety-related trends and risk factors and to promote the development and improvement of the system; and
 - conducting regular and timely assessment of international safety developments.¹⁶
- 2.3 CASA’s non-regulatory **safety-related functions** are then specified to include:
- the development and provision of comprehensive safety education and training programs;
 - the dissemination of accurate and timely safety advice and education; and
 - the fostering of awareness in industry management, and within the community generally, of the importance of aviation safety and compliance with relevant legislation.
- 2.4 All of these educative are to be performed for the express purpose of ‘encouraging a greater acceptance by the aviation industry of its obligation to maintain high standards of aviation safety’.¹⁷

¹⁵ This portion of our submission addresses matters called up by the first dot-pointed Terms of Reference under ‘Objectives’ and ‘Outcomes’, respectively.

¹⁶ See subsection 9(1).

¹⁷ See paragraph 9(2)(a).

- 2.5 Explicitly recognised here, too, as a further safety-related function, is the promotion of ‘full and effective consultation and communication with all interested parties on aviation safety issues’.¹⁸
- 2.6 A number of subsidiary, but nonetheless important, functions are conferred on CASA in subsection 9(3) of the Act. Of particular significance here is the function of ‘cooperating with the Australian Transport Safety Bureau’.¹⁹ A corresponding and complementary provision appears in the *Transport Safety Investigation Act 2003*, which expressly identifies as a function of the Australian Transport Safety Bureau (ATSB):
- cooperating with an agency of the Commonwealth . . . that has functions or powers relating to transport safety or functions affected by the ATSB’s function of improving transport safety.²⁰

3. Structures, Effectiveness and Processes— The Primacy of Safety

- 3.1 Guiding and directing the application and interpretation of every provision of the Civil Aviation Act is the explicit statement of the Act’s ‘main objective’, which is:
- to establish a regulatory framework for maintaining, enhancing and promoting the safety of civil aviation, with particular emphasis on preventing aviation accidents and incidents.²¹
- 3.2 The practical and legal corollary to this fundamental legislative proposition is the equally explicit mandate in section 9A of the Act, which in no uncertain terms provides:
- In exercising its powers and performing its functions, CASA must regard the safety of air navigation as the most important consideration.²²
- 3.3 Two critical points should be made in relation to the specification of, and the implicit limits on, CASA’s functions and powers. First, whilst the primacy of *safety* in every action CASA takes and every decision CASA makes is indisputable, this does *not* mean that safety is necessarily or properly the only factor CASA is expected or permitted to take into account when performing its functions or exercising its powers. The practical and economic impact and implications of CASA’s actions and decisions on all persons affected by those actions and decisions are vitally important and relevant factors, which, as a matter of law as much as a matter of common sense, CASA must and does consider in taking any regulatory action or making any regulatory decision.

¹⁸ See paragraph 9(2)(b). CASA’s consultative obligations are given additional emphasis in section 16 of the Act, which provides:

In the performance of its functions and the exercise of its powers, CASA must, where appropriate, consult with government, commercial, industrial, consumer and other relevant bodies and organisations (including ICAO and bodies representing the aviation industry).

¹⁹ See paragraph 9(3)(a).

²⁰ See subparagraph 12AA(2)(a)(i).

²¹ See section 3A.

²² See subsection 9A(1).

- 3.4 To be sure, safety must and will always be the ‘most important’ consideration for CASA. The Act requires nothing less. But whilst other considerations will properly be subordinated to any safety-related considerations with which the former are irreconcilably inconsistent, where two (or more) alternative courses of action are open to CASA, each equally conducive to optimal safety outcomes, but one less burdensome or economically problematic than another for a person whose rights, interests or legitimate expectations will be affected by CASA’s action, CASA is effectively obliged to entertain and, in the absence of any other legitimate and legally sustainable reasons for not doing so, to adopt the less burdensome option.
- 3.5 Second, whilst cogent and compelling arguments can certainly be mounted in support of active governmental efforts to promote and advance aviation enterprise in and for Australia, it is beyond CASA’s legislative authority, and fundamentally inconsistent with CASA’s clear and explicit remit as Australia’s aviation safety regulatory authority, for CASA to engage in the ‘promotion’ of aviation business enterprises, generally or in any particular instance.
- 3.6 The promotion of aviation *safety*, and the promotion and development of Australia’s *safety* capability, *safety* skills and *safety* services, for the benefit of the Australian community and for export, are indeed functions which CASA is authorised to perform,²³ which CASA has performed and performs well today, and which CASA is coming increasingly to perform better, at home and abroad. But whilst governments may well be entreated to take an active hand in the promotion of the Australian aviation industry, the Civil Aviation Act has been clearly, conscientiously and prudently formulated to prohibit, and thus avoid the pitfalls inherent in, conferring such a dual mandate on the safety regulator.
- 3.7 At the same time, and without compromising this critically important feature of Australia’s aviation safety regime, in the same way CASA may and should take the financial and administrative implications of its regulatory actions and decisions into account, as decidedly cognisable if necessarily subordinate considerations, there is nothing to prevent CASA from exercising its regulatory powers in a way that is more, rather than less, conducive to legitimate economic growth or advantage, so long as such action is consistent with the applicable legislation, is taken in a lawful and even-handed way and in no case unacceptably compromises CASA’s obligation to ensure that the achievement of optimal and appropriate safety-related outcomes is given primacy in the process.

4. Structures, Effectiveness and Processes—Relationships and Interactions²⁴

CASA’s Relationship with the ATSB

- 4.1 There should always be a measure of dynamic tension in the relationship between the accident investigation agency and the aviation safety regulatory authority. This is

²³ See section 3A and paragraphs 9(3)(e) and (f) of the Civil Aviation Act.

²⁴ This portion of our submission addresses matters called up by the first and second dot-pointed Terms of Reference under ‘Objectives’ and ‘Outcomes’.

natural and appropriate, given the complementary, but differently focused, safety-related roles and responsibilities of these organisations. CASA is, and should be, subject to ATSB scrutiny in any case in which issues of safety regulation appear to be at issue. To that extent, CASA may well and quite properly be the object of constructive critical comment in the ATSB's analysis of an accident or incident, as indeed it has been. Carried to an extreme, however, such tension can be counterproductive, inimical to the overarching interests of aviation safety and erosive of public confidence in each organisation's ability to fulfil its distinctive safety-related functions. The maintenance of an appropriate balance in this relationship is essential to the ability of both organisations to discharge their distinctive responsibilities.

- 4.2 The history of the relationship between CASA and the ATSB, and their respective predecessors, up to the latter part of 2007 is instructively and dispassionately summarised in the Miller Review.²⁵ Without rehearsing here what are today the historical facts and circumstances that gave rise to the Miller Review, suffice to say it is a singular mark of positive and beneficial achievement, on the part of the CASA and the ATSB alike (prompted in large measure by the recommendations of the Miller Review) that the relationship between the two agencies is now, not just manifestly improved from the unfortunate state to which it had fallen, but solidly anchored in a sound, modern foundation, calculated to conduce to the achievement of both agencies' shared objectives—namely, the maintenance and improvement of air safety, and the prevention of aviation accidents and incidents. It is also entirely consistent with the kind of relationship between agencies of this kind envisaged by the International Civil Aviation Organization (ICAO) within the framework of a viable State Safety Programme.²⁶
- 4.3 A clearer recognition of, and a healthy mutual respect for, the differences between CASA's and the ATSB's distinctive roles and functions, is coupled today with a corresponding appreciation for the need for cooperation and coordination in their respective safety-related activities. This salutary state is reflected in the current Memorandum of Understanding between the ATSB and CASA—²⁷ the substance of which is a reflection of constructive responses to many of the very issues highlighted in the Miller Review recommendations.
- 4.4 Recognising that there is room for improvement—and both the ATSB and CASA are continuously engaged in identification, refinement, articulation and implementation of necessary and appropriate improvements in their relations—Australia can and should be proud of the relationship between the ATSB and CASA, which has

²⁵ See especially pp. 24 to 29.

²⁶ Australia's State Safety Program can be found on the website of the Department of Infrastructure and Regional Development at http://www.infrastructure.gov.au/aviation/safety/ssp/files/Australias_State_Safety%20Program_2012_FA7.pdf. ICAO's

²⁷ The current version of the Memorandum of Understanding (MoU) between the ATSB and CASA can be found on the CASA public website at http://www.atsb.gov.au/media/1371655/mou_atsb-casa.pdf. Pending the Government's response to the Pel-Air Inquiry, and deliberations on any pertinent recommendations of the current Review, CASA and the ATSB have agreed to hold the further consideration of revisions to the MoU in abeyance, and to extend the operation of the current (2010) MoU until December 2014.

progressed in a consistent and constructive way in the years since the Miller Review, and which is fairly regarded as an exemplary model of the kind of relationship between the aviation safety regulator and the independent accident investigation agency to which other States aspire.

- 4.5 These days, it would appear that some considerable misunderstanding has arisen in the Australian civil aviation community about the roles and functions of the ATSB and CASA in relation to the propriety of the exchange of certain kinds of information between the two agencies. This may be due, in part, to the fact that, somewhat unusually, occurrence (or 'incident') reporting in Australia, of the kind formally mandated by what previously appeared in Chapter 8 of Annex 13 to the Convention on International Civil Aviation (the Chicago Convention)—*Aircraft Accident and Incident Investigation*²⁸ is managed and administered by the ATSB, rather than CASA. Occurrence *reporting* is to be distinguished from the *investigation* of accidents and incidents, the latter being a function expressly conferred on independent accident investigation agencies (like the ATSB), the details and records of which are accorded a high degree of protection under Annex 13, and in many respects, an even higher degree of protection under Australian legislation.²⁹
- 4.6 In most jurisdictions, operators and individuals may be required to *report* occurrences to the relevant aviation safety regulatory authority, which is both empowered and expected to take such safety-related action as may be appropriate in the circumstances. ICAO has recently acted to clarify the nature and purposes of these reporting functions by relocating what had been Chapter 8 of Annex 13 into the new Annex on *Safety Management* (Annex 19), where it now appears as Chapter 5.³⁰ Further work is underway at ICAO to develop new and refine existing international standards and recommended practices (SARPs) governing the use and protection of safety information derived from both mandatory and voluntary occurrence reporting, among other processes by which safety information is generated and collected. Australian nominees from both CASA and the ATSB have been actively engaged in this work, out of which a considered consensus of a diverse group of lawyers and other experts representing air service operators, air navigation and airport service providers, pilot and air traffic controller associations, accident investigation agencies and regulatory authorities and independent air safety organisations, will inform the development of new ICAO SARPs and guidance material in this important and understandably controversial field.
- 4.7 In the meantime, reflecting that remarkable consensus, and consistent with what is coming to be ever more widely recognised as best international practice, CASA and the ATSB have adopted an interim policy designed to ensure important information is responsibly shared, responsibly protected and available for appropriate use *in the demonstrable interests of safety*.³¹

²⁸ Tenth Edition (July 2010), before the inclusion of Amendment No. 14 (effective 14 November 2013).

²⁹ See Parts 4 and 6 of the *Transport Safety Investigation Act 2003*.

³⁰ First Edition (July 2013).

³¹ The policy appears on both CASA's and the ATSB's public websites at http://www.casa.gov.au/scripts/nc.dll?WCMS:STANDARD::pc=PC_101466 and <http://www.atsb.gov.au/aviation/safety-information-policy->

- 4.8 The development of these processes, including the promulgation of necessary and appropriate safe-guards, is proceeding at a measured pace at home and abroad. Recognising that, in some cases, popular misconceptions about the nature and scope of both extant and envisaged limitations on the appropriate use and protection of safety information may be tendentiously generated and propagated, in some cases for reasons having rather less to do with the genuine interests of safety than their proponents might suggest, both CASA and the ATSB, with the support and oversight of the Department of Infrastructure and Regional Development, are committed to ensuring that any formal changes to existing arrangements are subject to full consultation in which all relevant stakeholders can play a part.
- 4.9 CASA welcomes the opportunity to discuss with the Review Panel any aspect of its relationship with the ATSB in which Panel members may have an interest.

CASA's Relationship with the Airservices Australia

- 4.10 The provision of air navigation and air traffic management services in Australia is ably conducted by Airservices Australia, whose remit and functions in these and related areas were, prior to the creation of CASA in 1995, the responsibility of both entities' predecessor organisation—the Civil Aviation Authority.
- 4.11 The separation of these critical service-provision functions from the conduct of regulatory oversight of their performance, and CASA's establishment, nearly twenty years ago, as the authority exclusively responsible for the latter, was a complex and challenging exercise. For quite different reasons, but much like the relationship between CASA and the ATSB, the relationship between the regulator of, and the regulated, air navigation and air traffic management service provider is unavoidably subject to a measure of tension. This need not, and has not been, overly problematic in the case of CASA's relationship with the Airservices Australia, and such differences of opinion as have unavoidably developed from time to time over the years have never proven to be insurmountable. Serious as some of these differences have been, they have all been, and continue to be, addressed maturely, responsibly and effectively—and always in the overriding interest of safety.
- 4.12 The relationship between CASA and Airservices Australia is appropriately grounded in a shared understanding and mutual respect for each organisation's functions and duties, and an increasingly clearer recognition by each, of each's particular safety-related responsibilities. CASA welcomes the opportunity to discuss with the Review Panel any aspect of its relationship with Airservices Australia in which Panel members may have an interest.

CASA's Relationship with the Department of Infrastructure and Regional Development

- 4.13 CASA is a Commonwealth entity and statutory authority within the portfolio of the Department of Infrastructure and Regional Development (DIRD). The matters with which CASA is concerned fall within the ambit of matters relating to DIRD, as the responsible Department of State. The Minister for Infrastructure and Regional

Development is the Minister of State responsible for the administration of DIRD and the legislation governing CASA's activities.³² Consistent with these arrangements, and the provisions of Parts VII and VIIA of the Civil Aviation Act,³³ CASA enjoys an appropriate and effective relationship with DIRD.

- 4.14 Free, frank and frequent exchanges between CASA and DIRD occur at appropriate levels within both entities. These are managed within CASA by and through the Corporate Relations Branch in the Office of the Director.
- 4.15 The Director of Aviation Safety sits on various committees and consultative bodies, along with the Secretary of the Department (and the chief executive officers of other Commonwealth government agencies and departments), and the two communicate directly and bilaterally as and when required.
- 4.16 The Deputy Director of Aviation Safety and the Deputy Secretary of DIRD meet regularly to discuss a range of issues of mutual interest and concern to CASA and DIRD. The Associate Director of Aviation Safety meets quarterly with the Deputy Secretary of DIRD and the First Parliamentary Counsel (Office of Parliamentary Counsel) to discuss progress in the drafting of forthcoming Civil Aviation Safety Regulations.
- 4.17 CASA welcomes the opportunity to discuss with the Review Panel any aspect of its relationship with DIRD in which Panel members may have an interest.

5. Regulatory Reform—Outcomes, Processes, Direction and Costs³⁴

- 5.1 CASA has already provided the Review with information and supportive materials describing aspects of the history, current status and prospective developments of the Civil Aviation Safety Regulations, and comparing CASA's consultative processes with those of other major aviation jurisdictions. A considerable amount of information on many of these issues also appears on CASA's public website and the links embedded in those items.³⁵
- 5.2 A useful summary of the current and prospective state of affairs in this challenging and perennially controversial area can be found in the remarks of the Director of Aviation Safety before the Victorian branch of the Aviation Law Association of Australia and New Zealand in March 2013, extended excerpts from which are reproduced below.

³² See Part 14 of the Schedule to *Administrative Arrangements Order* of 12 December 2013 at <http://www.comlaw.gov.au/Details/C2014Q00003>.

³³ These Parts deal with the role and functions of the CASA Board and the Director of Aviation Safety, respectively.

³⁴ This portion of our submission deals with the third and fourth dot pointed Terms of Reference under 'Objectives' and fourth, fifth, sixth and seventh dot pointed Terms of Reference under 'Outcomes'.

³⁵ See *Changing the Rules: Information on CASA Regulatory Development Process*, at http://www.casa.gov.au/scripts/nc.dll?WCMS:PWA::pc=PC_91070.

Rules cannot remain static

Updating our regulations is part of the continual improvement of aviation safety. Rules cannot remain static – as safety knowledge and understanding improves, the rules must evolve to reflect better safety practices, new technology and science. We are in the midst of transitioning to new operational regulations, flight crew licensing regulations and airworthiness and maintenance regulations.

CASA seeks to align any new regulations as closely as practicable with International Civil Aviation Organization standards and recommended practices, and to harmonise where appropriate with the standards of leading aviation countries, unless differences are justified on safety risk grounds.

Naturally, some aviation people are asking why change the regulations and what are the benefits? The overarching aim is, of course, to create a safer aviation system in Australia. It is important to understand that the current rules are old and in some cases out-dated. Many were first drafted more than 30 years ago and the origins of some go back even further. The current rules do not properly fit with a modern aviation system and latest technologies. To make them work CASA has been issuing exemptions to allow the aviation industry to meet ongoing operational needs. Right now there are more than 1,700 exemptions on the books, meaning the regulation of aviation activities is not necessarily a level playing field and some of the rules are not fit for purpose. In addition, our current rules have not kept pace with international developments in aviation safety.

For the aviation industry there will be a range of benefits flowing from the new regulations. The CASRs are logically organised into clear parts. This will make it much easier for the industry to find and apply the relevant requirements. For example, under the current system, requirements and standards are spread across the CARs, CAOs and the myriad of exemptions. This means the current rule set can be hard to access, to follow and to use. Specific aspects of the regulations are designed to address known and likely safety risks, and aim to further strengthen the current regulatory structure to deliver improved safety outcomes.

Wherever possible regulations are being drafted to specify the safety outcome, unless in the interests of safety, more prescriptive requirements need to be specified. This objective, however, is not always easy to achieve or implement. While outcome based regulations may be easier to write, their implementation is a challenge in terms of determining whether regulated individuals and organisations are doing enough to ensure that the desired outcomes are achieved, and that there is a standardised approach adopted by our inspectors in all regions of Australia.

In addition, where non-compliance with a regulation is an offence, we are constantly pressed by the legislative drafters at the Attorney-General's Department to ensure that the regulation is clear and unambiguous in its intent, so that persons will know what action to take or avoid, in order not to be subject to criminal sanctions. These drafting considerations can, of course, result in regulations that are more prescriptive than we would prefer.

Drafting the regulations – it's a long and arduous process

A *taskforce* approach has been adopted to facilitate completion of CASA's regulatory reform program. To expedite the drafting of the regulations a Task Force was formed with the Attorney-General's Department. This has proved successful in terms of providing additional and dedicated legal drafting resources to the reform program. New regulations are typically developed through the combined effort of CASA and expert industry working groups with an

aim to address known safety risks in a cost effective manner.

Operational regulations (CASR Parts 91, 119, 121, 129, 132, 133 and 135)

Each new CASR part covers a particular group of aircraft operators and builds from the foundation parts – Part 91 and Part 119. The current distinction between Regular Public Transport (RPT) and Charter operations will be removed. The two will be dealt with in an integrated fashion as Air Transport operations. Part 121 will deal with large aeroplane operations while Part 135 will set the standards for small aeroplane operations in this category. The intent is to narrow the gap that currently exists between the current RPT and Charter categories while at the same time recognising that some of the RPT provisions may not be directly transferrable to an on-demand Part 135 operation. It is expected that most of the Operational (Air Transport) suite of CASRs (Parts 119, 129, 133, 135), other than Parts 121 and 131, will be close to being finalised by the middle of the year, with commencement likely at the end of 2014. The drafting of Parts 121 and 131 is lagging a bit behind, but we also expect these to be finalised and commence at the end of 2014.

Legal drafting and industry/public consultations of the Aerial Work CASR Parts will be on-going through the first half of 2013 followed by three Sport and Recreational Aviation Operations CASR Parts. Recognising that some of the envisaged changes will be significant, CASA will ensure that the transition period to the new rules gives operators adequate time to allocate resources and make changes to their operations and other relevant manuals.

Flight crew licensing regulations (CASR Parts 61, 64, 141 and 142)

Many of you would know that Australian aviation has a new set of modern and improved regulations covering flight crew licensing and training. The new regulations were made in early February, although they do not take effect until 4 December 2013. *[NB. The date on which these regulations will take effect has been extended to September 2014³⁶]* This means pilots and flying training organisations do not need to take any immediate action at this time. Pilots will have their licences moved across to new Part 61 over a four-year period. All pilots will retain their current flying privileges during and after the transition.

Flying training organisations will have three years from December 2013 to move across to the new Parts 141 and 142. Part 141 covers 'simple' flying training – that is for recreational, private and commercial training in single pilot aircraft. It does not include intensive integrated training for private and commercial licences. Part 142 covers integrated and multi-crew pilot training, such as training for an air transport pilot licence, as well as contracted training and checking activities. The new suite of licensing regulations also includes Part 64, which deals with approvals for people other than pilots to taxi aircraft and use aircraft radios.

The introduction of the new licensing rules will bring a range of benefits to Australian aviation. Safety standards will be lifted in a number of key areas. There is a closer fit with international licensing standards. Training standards will be more clearly defined. In addition, the new suite of rules addresses important lessons learnt from past accidents in the areas of low level flying and night visual flying.

The new Part 61 also includes a recreational pilot licence, with medical standards based on the Australian road transport driver licensing medical requirements, along with some additional aviation specific standards. Pilots with a recreational licence will be able to operate smaller aircraft under day visual flight rules for private purposes, with some operational limitations. There is a new minimum age of 15 years for a student pilot licence, a move we hope will encourage more young people to enter the aviation industry.

³⁶ The background to the decision to delay commencement of the licensing regulations from 4 December 2014 to 1 September 2014 is explained in the Director's CASA Briefing for November 2013, which can be found on the CASA public website at http://www.casa.gov.au/scripts/nc.dll?WCMS:STANDARD::pc=PC_101831.

CASA will be providing comprehensive information and education on the new licensing rules to help everyone in aviation make the transition as smoothly as possible. Our aim is to minimise disruption to everyday operations, while ensuring new requirements are properly met by individuals and organisations.

Continuing Airworthiness and maintenance regulations (CASR Parts 42, 66, 145, 147 and Subpart 21.J)

The new continuing airworthiness regulations in Parts 42, 66, 145 and 147 of the CASRs have been made and Parts 42 and 145 are being progressively implemented from June 2011 to June 2013 for aircraft that are used in RPT operations. All CAR 31 LAME licences have been transitioned to the CASR Part 66 licence arrangements and, under the transitional arrangements, the old and new qualification arrangements are operating in parallel until June 2015.

Standards development and consultation work is now expanding into the second phase of the reform, to establish the continuing airworthiness and maintenance requirement for other sectors of the aviation industry, e.g. aircraft currently used for charter, aerial work and private operations. The future expanded application of CASR Parts 42 and 145 to cover all other classes of aircraft operations, is dependent on the finalisation of the proposed amendments to the CASR operational regulations, which as I have mentioned previously, will combine RPT and Charter operations.

Finalisation of the policies related to expanded application of Parts 42 and 145 are also contingent on a review of the proposed CASA policies in comparison to other major aviation countries, such as the United States. The future expanded application of the continuing airworthiness legislation will be fully consulted with the industry and the public.

A series of five discussion papers was released at the end of last year. These papers present options related to the following key elements of the continuing airworthiness suite of regulations as they apply to non-RPT aircraft and maintenance providers. These include:

- Maintenance providers
- Continuing Airworthiness Management Requirements
- Maintenance Programs
- Airworthiness Reviews
- Maintenance Personnel Licensing for Small Aircraft.

Also, a new Subpart 21.J (Approved Design Organisations) has been consulted publicly and we expect these regulations to be made in the next few months.

Misconceptions by some sections of the industry

Recently there has been some disturbingly misinformed debate within sections of the general aviation community about the still to be developed new maintenance regulations. It is clear some people believe all of the new maintenance regulations currently covering the regular public transport sector are to be directly applied to general aviation, as is. Let me make it very clear – this is not the case. As I have said before, the new suite of maintenance regulations that came into effect in late June 2011 apart from licensing Parts, only applies to operators and maintainers of RPT aircraft.

At the time CASA clearly and publicly stated that '*revised maintenance regulations for other sectors of aviation such as charter, aerial work and private operations will be developed at a later date, after wide consultation with these sectors*'. This position and CASA's commitment to it have not changed.

Over the last year, CASA has been working with expert representatives from the aviation industry on proposals for new maintenance regulations for the general aviation sector. The Discussion Papers have been published and will be followed up by Notices of Proposed Rule Making. Everyone will have ample opportunity to have their say. In summary, no matter what you may have heard or from whom you have heard it, and contrary to some of the ill-informed statements in the aviation press, the new maintenance requirements for the non-RPT sectors have not been determined.

We fully recognise the RPT maintenance regulations cannot simply be applied across the board. Each sector of aviation is different and the new regulations will reflect those important differences. However, if aspects of the RPT maintenance regulations are relevant and appropriate to some other sectors of the industry, then, subject to the outcome of the consultation process, those provisions may be incorporated into the proposed new rules.

CASR Part 13 Enforcement Procedures

It is proposed that in the first half of 2013, CASR Part 13 will be amended to consolidate and largely replace certain parts of the CARs (Parts 16 to 19, and regulations 33, 5.38, 5.39, 107 and 117). These provisions will be simplified and modernised, and brought into line with current Commonwealth law enforcement policies and the *Criminal Code Act 1995*. The Part enhances and supports the enforcement provisions in Part III of the *Civil Aviation Act 1988*.

CASR Part 13 will provide for such matters as:

- CASA's powers to cancel, suspend or vary authorisations for cause (subject to Part III of the *Civil Aviation Act 1988*)
- the issue of infringement notices for regulatory breaches
- administration of the demerit point scheme
- CASA's powers to require testing and examination of authorisation holders
- routine audit and surveillance powers of CASA inspectors
- general matters in relation to enforcement processes, such as, identification of aircraft operators and pilots, surrender of authorisation and aviation documents, protection of persons providing information to CASA and detention of aircraft etc.

Industry consultation

The development of new rules is not a process done in isolation by CASA. I encourage all of you to play an active role in providing feedback when our Discussion Papers, Notice of Proposed Rule Making and draft regulations are out for industry consultation. Each of you individually – and collectively in bodies such as this represented here today – can provide valuable input to the successful development of new rules.

We will carefully consider the views of all interested sectors of the industry and the wider aviation community, and we will take all reasonable comments and submissions into account before any rules are finalised.

Implementation of new regulations

CASA recognises that there are constraints on the ability of sections of the industry to absorb extensive and rapid changes to regulations, and this is a factor CASA will carefully consider in the development of timelines for regulatory implementation. CASA has established a dedicated team to ensure the smooth implementation of new regulations. The team has been tasked with developing implementation plans for each of the new CASR parts as they are developed.

When new regulations are made there will be an appropriate transition period for individuals and organisations to move across to the new rules. CASA understands the aviation industry must be able to get on with normal business while taking the necessary steps to adopt the new regulations. During the implementation phase, CASA will provide information, support, training and advice to make the change as smooth as possible.

Closing remarks

As we move into this new stage of regulatory change, I can assure you it is not CASA's intention to disrupt the smooth operations of aviation. We are striving to deliver an aviation safety system that performs even better, with risks identified and managed to minimise accidents and incidents.

Everyone in Australia is rightfully proud of the aviation industry and our safety record. Orderly and progressive change to the regulations will mean we can hold our heads even higher.

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- 5.3 Given the significance and complexity of the issues involved, and the volume of material that may bear on a round consideration of these issues, CASA looks forward to the opportunity to discuss a range of matters germane to regulatory reform and implementation with members of the Review Panel, in the course of which additional pertinent information and supportive materials can be provided, along with responses to any specific questions Review Panel members may have about:
- the processes by which CASA develops, consults on and finalises changes to aviation safety regulations and other legislative instruments (including Civil Aviation Orders);
 - planned and proposed improvements to these processes generally, and in relation to legislation related to the activities of particular sectors of the aviation industry;
 - the identification and reduction of costs and other administrative burdens involved in the implementation of new legislation, and the conduct of operations under that legislation;
 - priorities for future regulatory development and implementation strategies; and
 - the suitability and appropriateness of existing and anticipated Australian aviation safety regulations, benchmarked against other comparable overseas jurisdiction.
- 5.4 In respect of the last point above, a comprehensive, although by no means exhaustive, document has been prepared showing where Australia's new flight crew

licensing requirements (which are not now scheduled to commence until September 2014) differ significantly from those of Canada, the European Union, the United States and the New Zealand. Differences between these requirements and the relevant ICAO Standards and Recommended Practices have also been noted, where these have been published.

- 5.5 A complementary tabular summary displaying requirements pertaining to the authorisations issued by each of these jurisdictions (for example, eligibility standards for obtaining a particular kind of flight crew licence) has also been prepared. Both of these documents can be provided to the Review on request, and representatives of CASA's Standards Division will be prepared to address any particular questions members of the Review Panel may have in relation to this information.
- 5.6 In the meantime, members of the Review Panel will be interested to know that, beginning well before the Review was announced, consideration has been given to the establishment of a small consultative body, with members drawn from the ranks of CASA's major stakeholders (private and public), to provide CASA with informed, high-level advice and counsel across a range of issues affecting and affected by CASA's activities. To be set up to operate in a way bearing some resemblance to Management Advisory Council that supports the work of the Administrator of the United States Federal Aviation Administration,³⁷ it is envisaged that such a body would complement, but in no sense duplicate or cut across, the role, functions or authority of the CASA Board.

6. Improving Oversight and Enforcement of the Aviation Regulations³⁸

- 6.1 Consistent with our functions under the Civil Aviation Act,³⁹ CASA is continually developing, refining and improving effective, fair and appropriate enforcement strategies to secure compliance with aviation standards. Enforcement is an important, but by no means the only, or even the primary, means by which CASA works to help ensure compliance with aviation safety standards.
- 6.2 On those rare occasions when resort to the use of our enforcement powers becomes necessary, CASA is proud of its demonstrable ability and willingness to act with resolve and without fear or favour. At the same time, however, we are keenly aware of the fact that the exercise of our enforcement powers can have a profound effect on the reputation, affairs and livelihood of the persons affected by our actions, and of our corollary obligation to ensure that, when we do take action, we do so in an even-handed, proportionate and in all other respects entirely appropriate—and lawful—manner.

³⁷ See subsection 106(p) of title 49 of the United States Code (Pub.L. 104-264, as amended).

³⁸ This portion of our submission deals with the eighth (last) dot pointed Term of Reference under 'Outcomes'.

³⁹ See paragraph 9(1)(d).

- 6.3 CASA's high-level enforcement policy and details of our enforcement processes are described in detail in the *CASA Enforcement Manual*,⁴⁰ which is readily available on CASA's public website.⁴¹
- 6.4 Concise explanations of our policy and processes also appear on the CASA website, with links provided to the relevant sections of the *Enforcement Manual*.⁴²
- 6.5 For many years, and in recent years more particularly, CASA has actively reviewed and reflected on all aspects of its approach to enforcement, continuously introducing reforms and refinements to ensure our practices meet or exceed best practice, and operate to deliver the most appropriate results—including, in many more cases than some of our critics care to acknowledge, the determination that enforcement action of any kind is unnecessary and inappropriate.
- 6.6 A range of enforcement options are available to CASA, all of which are described in detail in the *Enforcement Manual*.⁴³ Some key features and elements of CASA's enforcement processes are summarised below.

Coordinated Enforcement

- 6.7 In 2008, CASA's Coordinated Enforcement Process became formal CASA policy. This policy is designed to ensure that decision-makers have the benefit of necessary legal and regulatory input, as well as critical operational and technical input, when considering the actions they may take in response to a situation involving an identified or suspected breach of the aviation laws.
- 6.8 The Coordinated Enforcement process is continually being refined with a view to enhancing consistency in relevant decision-making, ensuring that matters proceed without undue delay and providing greater certainty that the decisions we make will stand up to the most rigorous scrutiny.
- 6.9 In recent years, refinement of the Coordinated Enforcement Process has focused on:
- **Education.** All CASA staff, and our inspectorate in particular, are receiving instruction on the importance of the Coordinated Enforcement Process, and a deeper appreciation for the principles of better decision-making on which that process (and its underpinning policy) rests. Re-establishing a program of focused instruction on decision-making (and providing advice to those making decisions), a series of CASA-specific training sessions dedicated to better decision-making are being offered in 2014 to all appropriate CASA managers and staff. This is in addition to related components included in CASA's Core Regulatory Training program.

⁴⁰ Version 4.3 (January 2013). See Chapter 2, pp. 2-1 to 2-9.

⁴¹ http://www.casa.gov.au/scripts/nc.dll?WCMS:STANDARD::pc=PC_91291.

⁴² See http://www.casa.gov.au/scripts/nc.dll?WCMS:STANDARD::pc=PC_91181.

⁴³ See http://www.casa.gov.au/scripts/nc.dll?WCMS:STANDARD::pc=PC_91291.

- **Practical Training.** With an emphasis on real and realistic case studies, inspectors are being trained to approach the situations they routinely encounter, with a clearer understanding of the importance of identifying relevant facts and circumstances, obtaining and relying on evidence, disregarding irrelevant considerations, avoiding prejudicial delays, clearly articulating what CASA requires, and clearly specifying what CASA will regard as acceptable and unacceptable conduct (in accordance with applicable requirements) and a range of other practical (and, as it happens, legal) tenets inherent in good decision-making.
- **Improving Reporting Systems.** CASA is currently in the process of securing a new case-management system to improve the way matters are identified, tracked and progressed in accordance with the Coordinated Enforcement Policy. These enhancements are expected not only to improve the administration of the Coordinated Enforcement Process, but to contribute to the quality and consistency of the analysis and decision-making that drives that process.

Transitioning from Surveillance to Enforcement

- 6.10 With the introduction of CASA's *Surveillance Manual* in 2012, greater clarity was provided in relation to the process by which matters may properly move from the normal audit/surveillance situation to consideration in accordance with the Coordinated Enforcement policy.⁴⁴ The elucidation of this critical nexus—which provides as much guidance and support for sound, sensible, safe and lawful decisions *not* to proceed to enforcement, as it does for a move in that direction—is a significant step forward in the inculcation of an integrated approach to CASA's regulatory policy and practice, in which the *consideration* of fair, reasonable and proportionate enforcement options, if by no means necessarily the *election* of such options, is part and parcel of a circumspect assessment and decision-making process.⁴⁵

Reviewing Decisions

- 6.11 As discussed in CASA's response of 30 January 2014 to the Review Panel's questions about the disposition of CASA decisions in the Administrative Appeals Tribunal (AAT), virtually all of CASA's decisions under the Act and the regulations are 'reviewable decisions',⁴⁶ which means they can be fully and independently reviewed, as a matter of right, on the merits and *de novo*, in the AAT. The process of applying to the AAT is simple, quick and inexpensive; and the relatively small application fee (\$816) charged to an applicant may be reduced considerably by the Tribunal on a reasonable

⁴⁴ See section 4.9 in the *CASA Surveillance Manual*, version 2.1 (August 2013), available on the CASA public website at http://www.casa.gov.au/wcmswr/assets/main/lib100193/csm_full.pdf.

⁴⁵ See section 8 below.

⁴⁶ See section 31 of the *Civil Aviation Act 1988*, regulation 297A of the *Civil Aviation Regulations 1988*, regulation 201.004 of the *Civil Aviation Safety Regulations 1998* and section 27A of the *Administrative Appeals Tribunal Act 1975*.

showing of financial hardship.⁴⁷ Procedural rules are relaxed, and there is no requirement that an applicant be represented by a lawyer (or anyone else), if they choose not to be.

6.12 In many respects, Australia's administrative review processes, which include access to the AAT, are regarded as among the fairest, most progressive, accessible and 'applicant-friendly' in the world. This, coupled with the 5-day automatic stay applicable to most of CASA's reviewable decisions under the Civil Aviation Act,⁴⁸ which may be extended by the Tribunal on a sufficient showing by the applicant,⁴⁹ means that, to whatever extent a person may feel aggrieved of a reviewable decision taken by CASA, there could hardly be a more effective, efficient or objective means by which a person might seek and, if warranted, obtain a review of such a decision than in the AAT.

6.13 CASA has considered the introduction of a formal process for the internal review of decisions in the past.⁵⁰ In all the circumstances, however, and for reasons we would be happy to discuss with the Review Panel, it was recognised that (a) the disadvantages and difficulties (for aggrieved 'appellants' as much as for CASA) attendant on such a process outweighed any advantages and benefits it might provide; and (b) the interest of the individuals and organisations affected by CASA's decisions, the public interest and the overarching interests of aviation safety would be far better served by:

- focusing CASA's efforts, energy and resources on better ensuring that every decision CASA makes is, in the first instance, fair, reasonable, proportionate and in all other respects the 'best and correct decision' open to CASA;
- assiduously ensuring the transparency of every aspect of the process leading up to a decision, as well as the process by which a decision is made; and
- developing, implementing and continually refining 'pre-decisional' review processes, whereby the legitimate concerns of a person potentially aggrieved of a decision CASA is considering, and any shortcomings, errors or deficiencies in the pre-decisional actions taken or contemplated by CASA can be identified and corrected, before the decision is made.

6.14 In ways we have already mentioned, and about which we would be happy to provide the Review Panel with more information in discussion, CASA's efforts to ensure we conduct our decision-making processes in ways that are conducive to the achievement of the first two objectives listed above have been demonstrably

⁴⁷ See <http://www.aat.gov.au/ApplyingForAReview.htm>.

⁴⁸ See section 31A of the Civil Aviation Act.

⁴⁹ See subsection 41(2) of the Administrative Appeals Tribunal Act.

⁵⁰ As Chief Legal Officer at the time, the Associate Director of Aviation Safety advanced two options papers on the proposition for consideration by CASA's then Chief Executive Officer and CASA's senior management team in 2007 and 2008, respectively.

successful. To be sure, there is always room for improvement in these areas, and we are continually striving to do better.

6.15 In so far as the process contemplated by the last dot point above is concerned, CASA's introduction and ongoing refinement of the Show Cause Conference process has provided an effective and efficient process for considering and reviewing—informally, conveniently and at no cost to the person involved—virtually every aspect of the process by which CASA has come to the view that a particular decision should be taken, but *before any decision is actually taken*.

6.16 On this basis,

- errors, omissions or misunderstandings, on CASA's part, about the matters giving rise to a proposed decision;
- subsequent demonstrations or showings, by the person who would be affected by a proposed decision, of a genuine ability and willingness to address effectively and appropriately the shortcomings or deficiencies identified by CASA as giving rise to the need for a proposed decision;
- the reconsideration of relevant facts or circumstances CASA had not properly or fully considered in the first instance; and/or
- the fresh consideration of new information, not previously drawn to CASA's attention, and on the strength of which CASA might re-assess its proposed decision,

may all be taken into account—as said, *before any decision is actually taken*, and therefore without disadvantage to the person involved, especially in the event CASA determines not to proceed in the way we had initially intended to do.

6.17 The Show Cause Conference process is described at length in the *Enforcement Manual*.⁵¹ We would be happy to discuss any aspect of this process, or any other issues related to the review of CASA's decisions, or actions in contemplation of a decision.

Punitive Enforcement Action

6.18 CASA is committed to an enforcement philosophy and approach that regards the achievement of optimal safety outcomes as the most important end product of any event or situation in which a person has demonstrated an inability or an unwillingness to act in a manner reasonably calculated to achieve those outcomes in accordance with the requirements of the applicable legislation.

6.19 In those rare cases where misconduct involving the contravention of the civil aviation legislation is deliberate, intentional or reckless, or otherwise unwarranted and inexcusable, it may well be necessary and appropriate to investigate actions of that kind with a view to punitive action. Such action may involve the issuance of an

⁵¹ See sections 6.7 and 6.8, pp. 6-10 to 6-21. <http://www.casa.gov.au/wcmswr/assets/main/manuals/regulate/enf/009r06.pdf>.

Aviation Infringement Notice, involving the payment of a modest, legislatively fixed administrative penalty, in default of which the matter may be referred to the Commonwealth Director of Public Prosecutions (CDPP), who then determines whether the matter should proceed to prosecution. If this course is adopted, and a conviction is obtained and/or a finding of guilt is made by a court, the offender may be subject to a more substantial pecuniary fine.⁵²

- 6.20 Even more rarely, CASA may conduct an investigation with a view to the referral of the matter to the CDPP for prosecution. Once again, it is the CDPP, not CASA, who decides whether to mount a prosecution. That decision is taken in accordance with *the Prosecution Policy of the Commonwealth*—⁵³the principles of which also govern CASA's initial determination to refer a matter for prosecution. If the CDPP decides to prosecute, and the prosecution is successful, it is the court that decides what the penalty will be, in accordance with the provisions of the applicable legislation. Pecuniary penalties may be assessed, and in very exceptional cases involving certain offences under the Civil Aviation Act, custodial sentences may be imposed.⁵⁴

Assessing the Effectiveness of Enforcement

- 6.21 As all regulators, and those who closely study the processes of regulation, know only too well, it can be difficult to accurately and reliably measure the effectiveness of enforcement action.⁵⁵ One useful and objective measure of the effectiveness of CASA's enforcement processes is reflected in the number of CASA decisions affirmed in the AAT and the number of prosecutions mounted by the CDPP in which convictions or findings of guilt were obtained.
- 6.22 On these measures—which appear in CASA's 2012-13 *Annual Report* for that year and the preceding five years,⁵⁶ and which have been updated to 31 December 2013 in material recently provided to the Review Panel—CASA's performance may fairly be characterised as very good and steadily improving. As the Review Panel will have seen in the data we have already provided, there has been a significant increase in the number of what might be described as 'successful' enforcement outcomes for CASA over the past three years. And whilst there may be a number of reasons for this, one compelling explanation is that the enforcement action taken in response to the breaches identified has been more appropriate, and the decisions taken were

⁵² The process is described in detail in Chapter 8 of the *Enforcement Manual*. See <http://www.casa.gov.au/wcmswr/assets/main/manuals/regulate/enf/009r008.pdf>.

⁵³ (November 2008). <http://www.cdpp.gov.au/wp-content/uploads/Prosecution-Policy-of-the-Commonwealth.pdf>.

⁵⁴ This process is described in detail in Chapter 11 of the *Enforcement Manual*. See <http://www.casa.gov.au/wcmswr/assets/main/manuals/regulate/enf/009r11.pdf>.

⁵⁵ See Michael Barker, ed. (2002) *Appraising the Performance of Regulatory Agencies*. Papers presented at the 2002 National Administrative Law Forum. Canberra: Australian Institute of Administrative Law; and see generally R. Baldwin, M. Cave and M. Lodge (2012) *Understanding Regulation: Theory, Strategy, and Practice*, 2nd ed. Oxford: Oxford University Press; A. Freiberg (2010) *The Tools of Regulation*. Annandale, NSW: Federation Press; M.K. Sparrow (2000) *The Regulatory Craft: Controlling Risks, Solving Problems, and Managing Compliance*. Washington, DC: Brookings Institution Press.

⁵⁶ See pp. 177 to 179.

the product of greater circumspection and consideration. At all events, these results arguably reflect the positive effects of CASA's commitment to, and a growing appreciation amongst CASA's managers and staff for the importance of, better informed and better disciplined decision-making.

- 6.23 More importantly, as the majority of potential enforcement matters that have arisen in recent years have been subject to the Coordinated Enforcement Process, it is notable that, in the last 12 months, of the approximately 300 matters referred to the Coordinated Enforcement Process, 46 resulted in recommendations for initiating administrative action (usually to vary, suspend or cancel an authorisation), 103 infringement being notices issued and 14 matters being referred to the CDPP.

7. Future Directions—Civil Penalties

- 7.1 CASA has prepared drafting instructions for legislation introducing civil penalties for the contravention of provisions of the civil aviation regulations, and as an alternative to criminal prosecution for provisions of the Civil Aviation Act. Civil penalty schemes are commonly used by aviation regulatory authorities in other countries and by other Australian regulatory authorities. Their availability has a number of advantages.
- 7.2 Where punitive enforcement action is otherwise appropriate, the imposition of a meaningful financial penalty on a person can help to reduce the likelihood that the person will re-offend, and to deter others from committing the same or similar offences. In such cases, the treatment of the conduct involved as a criminal offence, and the consequences of the imposition of a criminal sanction (pecuniary or otherwise) that carries the added stigma of a conviction or finding of guilt, often exceed the gravity of the misconduct. The ability to impose a proportionate civil penalty in such cases provides an alternative that is, and will tend to be seen and experienced as, more equitable, more proportionate and equally efficacious.
- 7.3 There are other advantages to the imposition of civil penalties over the mounting of a criminal prosecution. First, without compromising an alleged offender's entitlement to an appropriate measure of procedural fairness, the standard of proof required to prevail in a civil penalty action (namely, a 'balance of the probabilities') is lower than the standard applied in a criminal prosecution (namely, 'beyond a reasonable doubt'). This reduces the effort, complexity and costs involved in obtaining evidence, preparing for and presenting a successful case.
- 7.4 Second, almost invariably, far less time will pass between an identified contravention and the imposition of a civil penalty than normally passes between the alleged commission of a criminal offence and the imposition of a sentence following a conviction and/or a finding of guilt. The shorter the interval between the detection of an offence and the imposition of a consequential penalty, the more likely it is that the sanction will serve as an effective deterrent.
- 7.5 Third, CASA would be in the position to mount its own civil proceedings for the imposition and recovery of a civil penalty, rather than having to refer matters to the Commonwealth Director of Public Prosecutions (CDPP), to await a decision by the CDPP about whether to proceed with a matter and to rely on the CDPP to mount and conduct a prosecution.

- 7.6 It is proposed that the majority of current offence provisions in the Civil Aviation Act and selected regulatory provisions will become both civil penalty and criminal offence provisions. In general, the remainder will become civil penalty provisions. Where the alternative exists (i.e., to opt either for a civil penalty or a criminal prosecution), clear guidelines will inform CASA's determination of which option to elect in any particular case.
- 7.7 The draft legislation would also require CASA to make application to the Federal Court or the Federal Circuit Court (rather than a criminal court) for an order that a pecuniary penalty be paid to the Commonwealth—not to CASA. Such applications could be contested by the recipient of the order. It is proposed that, prior to seeking an order, CASA would have the option of issuing a civil penalty infringement notice (which would be quite different to an Aviation Infringement Notice of the kind CASA may currently issue for certain offences). The recipient of such a notice would be invited to pay on the notice if they wished to do so.
- 7.8 Further details on the civil penalty scheme CASA has proposed can be provided, and we welcome the opportunity to discuss these proposals with the Review Panel.

8. Future Directions—Regulatory Policy and Practice

- 8.1 CASA recognises the need and propriety for having an effective and appropriate array of enforcement mechanisms available, and the importance of maintaining a creditable record in both the AAT and the courts, in those cases where we are called upon to show that our actions have been sound, sensible and legally justified. At the same time, however, CASA is deeply committed to the direction of our energy and efforts toward ensuring that the decisions we make and the actions we take are correct, appropriate and lawful *in the demonstrable interests of safety*.
- 8.2 Indicative of that commitment, we are concentrating on the meaningful steps we can take to reduce the need for enforcement action in response to conduct that is inconsistent with regulatory requirements—in the first instance, *because such conduct is perforce unsafe*, on the basis of which it has presumably been made subject to a regulatory requirement. Of course, our ability to take such action as may be necessary in the interests of safety is dependent upon the existence of clear and tenable legal authority to do so.
- 8.3 Consistent with this recognition and commitment, we are striving to emphasise and elucidate the critical difference between enforcement action taken in the demonstrable interests of safety—that is, action taken for *protective, corrective, remedial* and *educative* purposes—from action taken for *punitive* or *disciplinary* purposes, the latter of which are ultimately and quite properly the province of the courts, not the regulatory authority.
- 8.4 At the same time, and in much the same way responsible members of the industry and the wider civil aviation community (including CASA) are working to see the enduring inculcation of a positive commitment to safety as an integral element of every aspect of aviation-related operations and activities, rather than a peripheral or subsidiary feature of the operational environment, CASA is working to see the enduring inculcation of a positive commitment to fair, consistent, effective, appropriate and informed decision-making amongst our managers and staff, as an

integral element of the regulatory environment within which we operate, rather than a legal 'add-on' or afterthought.

- 8.5 To this end, the same commitment and considerations that lead to the establishment of what constitutes CASA's *enforcement* policy and practice function, for which the Legal Services Division is currently responsible, is being reanimated in the Office of the Director, under the supervision of the Associate Director of Aviation Safety, to better ensure the implementation of a more broadly encompassing CASA-wide approach to *regulatory* policy and practice. This, too, is something about which we look forward to discussing with the Review Panel.

9. Concluding Remarks

- 9.1 The Terms of Reference for this Review are broad, and many of the points captured by those Terms contemplate a multitude of multifaceted, timely and, in certain cases, contested and understandably controversial issues. In the circumstances, the preparation of adequately developed responsive comments that are, at once, concise and cogent has been a daunting challenge. As it is, our submission is longer than we would have wished, and probably longer than the Review would have preferred.
- 9.2 For all that, to have left unsaid what we respectfully submit here could well have meant that critical information might not otherwise have been brought to the Review's attention and, as a consequence, the Panel might have been less well equipped to formulate its findings and recommendations on the basis of what CASA certainly considers to be important and relevant considerations.
- 9.3 CASA looks forward to the opportunity we will have to meet and speak with the Panel members, to continue to respond, as we have been doing, to the Panel's particular questions, and to comment, as we understand we will have the chance to do, on some of the claims and assertions of others.
- 9.4 Once again, we thank the Review for the opportunity to present this submission, which we trust has been useful and informative.
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