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Emerging Aviation Technologies Consultation

This submission responds to the 'Emerging Aviation Technologies' National Aviation Policy Issues Paper.

Basis

The following paragraphs reflect my research as an academic at the University of Canberra on autonomous vehicles, sensing systems and privacy.

That research engages with questions about patent protection, regulatory incapacity and tort law in relation to emerging technologies such as robotics. It complements publication on balancing public and private goods through competition and consumer protection law, evident in consultations auspiced by the Treasury, Australian Competition & Consumer Commission and other regulatory agencies.

The submission does not represent what would be reasonably construed as a conflict of interest.

Regulatory Frameworks

The paper asks three salient questions

- What level of service and regulation do you expect from the Government?
- What are your expectations of the Government's role and responsibilities in the management of drones and eVTOL vehicles?
- To what extent should Australia's approach be harmonised with approaches taken in other countries?

In responding to that question it is useful to begin by acknowledging pervasive community disquiet about the politicisation of public administration and growing distrust of politicians, both relevant in considering national aviation policy development, implementation and scrutiny.

The 2019 Australian Election Study for example signalled that satisfaction with democracy is at its lowest level since the constitutional crisis of the 1970s: trust in government has reached its lowest level on record. A mere 25% of Australians believe people in government can be trusted. 56% believe government is run for 'a few big interests'; only 12% believe the government is run for 'all the people'. That disquiet is increasing, with for example a 27% decline since 2007 in stated satisfaction with how Australia's democracy is working. Overall trust in government has declined by nearly 20% since 2007; three quarters believe that people in government are looking after themselves. That distrust is unsurprising given –

- systemic underperformance with initiatives such as the National Broadband Network,

- perceptions of corruption at the national, state and local government levels (with several examples in the past month),
- gross ineptitude in property acquisition for aviation infrastructure,
- denial of responsibility for disasters such as RoboDebt, and
- incapacitation of watchdogs such as the Australian National Audit Office.

In considering what level of service and regulation do Australians expect from the Government in relation to aviation policy one answer is accordingly that the community expects government to act honestly, efficiently, transparently and strategically rather than for example being driven by special interests.

The community wants Governments to lead, rather than to engage in mutual blaming or in the denial that we see with climate change. It expects and indeed needs a public discussion of policy questions about contentious issues such as climate change, hate-speech and public health rather than decision-making predetermined by those entities with a privileged but weakly accountable status within the 'Canberra Bubble'.

That expectation is inadequately addressed in the issues paper, particularly when related to initiatives such as the regulatory framework around the *Civil Aviation (Unmanned Aircraft Levy) Bill 2020* (Cth) which involves the Commonwealth imposing a levy on all commercial drones and foreshadowing a levy on non-commercial drones.

Much of the issues paper internalises claims made by drone proponents, such as Wing (a subsidiary of the same US-based conglomerate whose digital platform arm has been subject to strong criticism by the Australian Competition & Consumer Commission and overseas regulators) and consulting firms whose claims (for example the A$163 billion market value of 'drone powered businesses') do not withstand independent scrutiny.

The community expects a more hard-headed and independent analysis, one that is less impressed by the use of drones for the collection of whale mucus or delivery of coffee and that instead engages with community concerns regarding privacy protection and the importance of a more competitive marketplace.

The paper seeks to elicit expectations of the Government's role and responsibilities in the management of drones and eVTOL vehicles? Disappointingly, it implies that the national government has no role in relation to privacy invasions and other harms, which are tacitly relegated to state governments and seen as trivial relative to hopes for development of a drones supply chain, ironically a supply chain whose skills base is vitiated by radical cuts to tertiary funding and systemic underfunding of the TAFE sector.

The paper acknowledges 'managing public perceptions of privacy and trust in technology is critical to the ability to embed and harness the benefits of technology and innovation'. As discussed below the paper fails to address questions of privacy and trust, instead serving as an exercise in perception management' that is likely to erode rather than build trust within parts of the community that are accustomed to governments not 'walking the talk'. A salient example is misrepresentation by the Health Department and ADHA regarding the MyHR scheme. That unsurprisingly resulted in some 2.5 million Australians choosing not to believe a succession of claims regarding benefits/safeguards and accordingly opting out of that scheme.

The paper correctly assumes that Australia's approach to the regulation of emerging aviation technologies should be harmonised with approaches taken in other countries. In doing so the national government should be harmonising up, encouraging best practice (including accountability on the part of drone operators, discussed below) rather than harmonising down to benefit overseas interests and enshrine a laissez faire regime.

Avoiding Regulatory Capture

Aviation has historically been a field in which there is pervasive regulatory capture, evident for example in regulators interpreting their mission as to benefit the entities they regulate rather than consumers and taking at face value claims made by commercial interests that seek to shape regulatory frameworks in ways that are not productive of public goods. The issues paper takes an uncritical view of claims by industry, for example the assertion by Wing (the Alphabet subsidiary) that drone delivery could add $30 to $40 million in additional revenue for Australian Capital Territory businesses.

The paper correctly notes that there has been no significant published independent analysis of the potential economic impacts of drones in Australia.

Importantly, there is no significant independent analysis of the actual impact. It is naïve for the Department to rely on self-interested 'insight' from Wing, in the same way that assurances from Google, Facebook and Twitter are problematical. Foxes will typically assure listeners that the future is glorious, particularly if government provides a licence, and advise that complaints from the chickens should be disregarded or that the demise of a few birds is the price we need to pay for innovation that will eventually arrive.

Enthusiasm about new technologies is unsurprising. It is conventional for governments within Australia to act as cheerleaders for the latest 'new new thing' (information technology, nanotechnology, genomics, telemedicine, biometrics, robotics, drones, biotech), whether from perceived opportunities to gain investment in a competition with other jurisdictions or because language such as 'digital transformation' differentiates Ministers and agencies from their rivals. Cautions have accordingly been provided by bodies such as the Productivity Commission.

There *are* benefits from use of drones but as with any new technology that uses a public resource – in this instance airspace – and has externalities such as nuisance there must be an independent evaluation, particularly where large corporations such as Alphabet are seeking a monopoly status, which we see in the Australian Capital Territory.

Privacy Protection in a Federal System

The Commonwealth Government clearly does see it has power over drones, illustrated by the *Civil Aviation (Unmanned Aircraft Levy) Bill 2020* (Cth) noted above that involves mandatory registration of operators and serves as a revenue generation mechanism. The paper's Item 6 regarding the proposed approach to policy development states that the Government

> will lead the development of a nationally consistent approach for managing privacy concerns that balances the impacts on privacy with the needs of drone and eVTOL operations.

Action to implement privacy recommendations made by a succession of law reform commission inquiries (notably those by the Australian Law Reform Commission) and parliamentary committee inquiries is long overdue. It is constitutionally permissible and consistent with the implied rights underlying the national Constitution, irrespective of authority under the international rights agreements to which Australia is a signatory.

Those recommendations reflect widespread community concerns regarding disregard by done operators of privacy in relation to collection and dissemination of data. Those concerns will become more salient in future.

They are voiced by agriculturalists, miners, foresters, people in public places and people in residential locations. They are not restricted to thin-skinned sippers of chai lattes in inner suburban metropolitan centres. They are not addressed under the *Privacy Act 1988* (Cth) and state/territory crimes statutes. Reform is necessary

Consistent with comments about the failure of leadership, the paper skips responsibility. Instead it indicates that the national Government (the same Government that sought to abolish the Office of the Australian Information Commissioner and that is fundamentally weakening the *Privacy Act 1988* through the proposed Data Availability & Transparency Acts) will

> engage with state and territory governments to consider national harmonisation of state and territory privacy laws

That engagement is a proposal not a statutory obligation. It is merely a promise, if that, to engage about considering.

Australians who have become used to policy u-turns and equivocation about core promises, non-core promises and mere puffery could legitimately ask why hasn't the Attorney-General already engaged with the state/territory governments through the Council of Attorneys-General?

There is no sign that harmonisation is on the CAG agenda. There is no sign that it is regarded as a priority by the Attorney-General or the Prime Minister.

Self-regulation is inadequate

The paper refers to consideration of

> the potential for non-binding codes of practice or privacy guidelines applicable to drone operators, and to encourage commercial and community uptake of these when operating a drone.

It is unclear what that consideration would involve and what effect it would have. Australian public policy administration is littered with examples of non-binding codes and guidelines that

- are ignored by minor and/or major actors (ie do not cover the sector),
- are developed by industry (typically to favour the dominant enterprises)
- are interpreted by industry in ways that privilege industry in instances where there is a conflict with an individual or other entity outside the industry and
- have no meaningful sanctions.

The experience of regulation under the Trade Practices Act, Competition & Consumer Act, Privacy Act and Therapeutic Goods Act demonstrates that such codes are often pernicious. Given the Government's ability to use drone regulation as a significant revenue source and its proposed registration of non-commercial rather than merely commercial operators it should exercise leadership by requiring adherence to a clear, consistent and respectful code of practice that is complemented by forward-looking privacy law.

Development of such a Code requires independent public consultation over an appropriate period (ie over a period and in a form sufficient to gain genuine 'commercial and community' input) consistent with the paper's question about expectations of the Government's role and responsibilities.

Regulation is more than a PO Box

The paper states that

> The Commonwealth will work with States and Territories to develop, as required, a clearer process to handle privacy complaints regarding an inappropriate use of a drone that unduly impacts privacy, causes nuisance or trespasses.

There has not been an authoritative and comprehensive study of complaints regarding "inappropriate" and "appropriate" uses of drones. I specifically refer to 'appropriate', given indications that many people are annoyed by uses that are expressly or implicitly lawful.

In the absence of such a study across all the Australian jurisdictions there are however consistent indications in submissions to state/territory and Commonwealth parliamentary inquiries, media reports, complaints to a range of agencies and queries to academics such as myself that many people are –

- annoyed by the use of drones, including use by government agencies, businesses and individuals or a commercial, recreational or other basis,
- are keen on restricting those uses of drones that do not provide a strong community benefit,
- supportive of law reform to protect themselves, their associates and their livelihoods from inappropriate interference,
- frustrated by the unresponsiveness of Commonwealth and state/territory agencies that they believe are (or instead should be) responsible for dealing with invasions of privacy.

Unresponsiveness matters. Independent research, notably by Burdon and Siganto, has for example demonstrated that people disengage from the Office of the Australian Information Commissioner on the basis that the OAIC takes an unduly long time to resolve complaints. That disengagement is an internationally recognised phenomenon in regulatory studies; in the case of the OAIC it is a function of systemic underfunding of the agency and the OAIC's historically inward-looking corporate culture.

There is a clear requirement for the national government to work with state/territory agencies to quickly develop a seamless process to handling complaints regarding drones. A corollary is that agencies at the national, state and territory levels should be resourced to deal with both queries and complaints about drone use.

It is incumbent on governments to recognise and quickly address complaints regarding drone use, irrespective of whether that use is what is characterised as "inappropriate". That responsiveness is what is both required and legitimately expected of government.

The process should be more than a web page or recorded message that indicates 'do not complain to CASA: we do not deal with privacy' or 'complaints about inappropriate use of drones should be address to x, y and z agencies in your state government'. In essence, the development of the 'process' should be aimed at providing community-centric outcomes rather than shifting responsibility or administrative inconvenience from one agency to another.

It should encompass data collection, with reports that are readily accessible from outside government rather than though FOI requests that are typically rejected on the basis of cost or administrative inconvenience. That data collection and reporting should provide an empirical base for evaluating community unhappiness with intrusive drones, commercial or otherwise,

in urban and rural locations. Data collection/exposition might indeed by part-funded by the new Drone Levy.

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