

Aviation Safety Regulation Review

**Towards increasing air safety: strengthening
regulation and specific recommendations**

Submission of the Australian Lawyers Alliance

31 January 2014

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The ALA acknowledges that this submission was written by ALA member and Co-chair of the ALA Aviation Subcommittee (Qld), Joseph Wheeler, Senior Solicitor at Shine Lawyers.

WHO WE ARE

The Australian Lawyers Alliance ('ALA') is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

Many of our members engage in the provision of free legal services, "no win no fee" representation and pro bono representation. Additionally, many members provide volunteer services outside their places of employment at Community Legal Centres.

The ALA started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – typically victims of accidents, whether by negligence or other civil wrong.

The ALA is represented in every state and territory in Australia. We therefore have excellent knowledge regarding legislative change and what impact this will have upon our clients.

More information about us is available on our website.¹

OUR STANDING TO COMMENT

The ALA is well placed to provide commentary to the Review Panel in this Aviation Safety Regulation Review (ASRR).

Members of the ALA regularly advise clients all over the country that have been caused injury or disability by the wrongdoing of another. The ALA is particularly well placed to comment on the workings of aviation safety regulation as our members, variously, act for those who have been injured, and relatives of those who have died, in aviation accidents, plus those who have been aggrieved by regulatory and administrative decisions within the realm of aviation.

¹ Australian Lawyers Alliance (2014) <www.lawyersalliance.com.au>

INTRODUCTION

The ALA welcomes the opportunity to provide a submission to the ASRR. While the review is necessary and timely in the wake of deficiencies and criticisms noted by the Senate Rural and Regional Affairs and Transport Committee in May 2013 (RRAT Report),² it also provides a refreshing opportunity to return focus to the broader context of Australian aviation law, and for recommendations to be made for future regulatory efforts in areas such as administrative decision making oversight, and specific regulatory issues which currently lead international discussion and should properly guide future rulemaking activity in Australia.

Moreover, the opportunity to present a submission represents a chance to focus attention back on the necessity of having uniform, workable, and practically relevant laws rather than let the focus in this domain be obscured by a never-ending refrain of criticism of the air safety regulator's perceived legislative and process-related shortcomings.

For these reasons, this submission will take a look at some areas where perceived fairness in regulatory decision making may be assisted; some certain substantive risk management issues of current legislative and policy prominence; and, some of the more borderline aviation safety regulatory issues (and aviation-related legal issues generally) which are likely to arise and present challenges for lawmakers in the 44th Parliament. These will be approached in the broader context of the need for keeping pace with the ever changing technical understanding of aviation, especially in relation to human factors.

These submissions will, therefore, focus less on criticisms of the Civil Aviation Safety Authority (CASA) in relation to the speed or scope of the regulatory reform process presently being undertaken (and to which considerable resources have already been devoted). In our submission we do not recommend sweeping changes, but look more at the matters which will substantively need to be addressed by the regulator to help it support the aviation industry, and thereby safeguard aviation into the coming years.

It is hoped these suggestions will be considered as elements of a broader theme of moving the discourse of aviation regulatory decision making away from adversarial

² Senate Rural and Regional Affairs and Transport Committee, *Aviation Accident Investigations*, (2013), available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Rural_and_Regional_Affairs_and_Transport/Completed_inquiries/2012-13/pelair2012/report/index>, last accessed 31 January 2014.

standoffs between regulator and regulated, and towards looking at available ways of independently overseeing decision making in such a way that all aviation stakeholders view CASA as providing transparent administrative oversight.

TERMS OF REFERENCE

As set out on the ASRR website³ the principal objectives of the review are to investigate:

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

The ALA notes the terms of reference are drawn fairly broadly for the most part, and includes an objective to investigate "any other safety related matter". This submission will primarily focus on the first and last two terms of reference as much has already been made public or will likely be aired throughout this ASRR process from other (particularly industry) stakeholders in relation to the second and third terms of reference.

The ALA's concerns lie foremost with the prevention of aviation accidents through the adoption and enforcement of a uniform, reasonable and best practice suite of aviation safety and related regulatory mechanisms (including legislation, but also including appropriate statutory schemes for dealing with accidents, incidents, and statutory contraventions by the air safety regulator, CASA).

The ALA submits that lessons from previous accidents should be adequately translated into positive systemic and/or legislative change where appropriate, and

³ ASRR website, <http://www.infrastructure.gov.au/aviation/asrr/files/ASRR_Terms_of_Reference.pdf>, last accessed 31 January 2014.

finally, there should be no impediments to those who fairly seek compensatory damages for injury and death following air accidents and incidents.

The ALA recognises that the importance of these outcomes is underpinned by the value of commercial air transport as a major driver of economic activity in Australia and abroad.

The system worldwide carried 2.9 billion passengers in 2012 and, when measured as revenue passenger kilometres (RPKs⁴) grew at a rate of 5.5% over the previous year.⁵ As for the Asia Pacific region, airlines in our geographical area increased their performance by 8.6% in August 2013 as compared with August 2012.⁶ In Australia, the report into Domestic Aviation Activity released by the Bureau of Infrastructure, Transport and Regional Economics (BITRE) on 28 January 2014 showed that domestic carriage of passengers was trending upwards with a 1.8% increase in passengers being carrier to 30 November 2013 than to the same date in 2012.⁷ The simple message is that global connectivity is reliant on aviation working with the least regulatory hindrance possible, especially in countries which suffer the tyranny of distance, such as Australia.

Aviation regulation in Australia is voluminous, and complicated. Quite rightly litigants, operators, and authorisation holders who engage with this law or are affected by it find that legal advice upon it is typically only provided by specialist practitioners who have thoroughly engaged with operational aviation itself, or have specific experience in traversing the multi-faceted regulation in Australia and elsewhere.

Recognising this complexity, this submission to the ASRR cannot, necessarily, reflect nor comment on all aspects of the aviation safety regulatory suite, but merely seeks to identify selected areas where change would be welcomed, or the status quo bolstered. This is particularly the case given the brief time provided for submissions to be made (6 December 2013 to 31 January 2014).

⁴ A standard measure of actual passenger traffic.

⁵ ICAO <http://www.icao.int/92CA3DD2-409B-4DDF-BD7C-8EAD39A3B79C/FinalDownload/DownloadId-892CA8625D07A55AFCBCCF731A5D00A8/92CA3DD2-409B-4DDF-BD7C-8EAD39A3B79C/safety/Documents/ICAO_2013-Safety-Report_FINAL.pdf>

⁶ Statistics published by IATA <<http://www.iata.org/pressroom/pr/Pages/2013-10-02-01.aspx>>

⁷ See Domestic RPT passenger traffic: <<http://www.bitre.gov.au/statistics/aviation/domestic.aspx#summary>>, last accessed 28 January 2014.

What is hoped to be captured for the benefit of the Panel and interested readers of these submissions, is the need to remember first principles in international aviation regulation and note that in aviation in particular safety, economy, and cooperation are recognised staples to ensure the continued safe development of the industry.

Despite Australia's admirable domestic and international air safety record, and its respected place among International Civil Aviation Organisation (ICAO) States, Australia does not occupy as high a place as it should in terms of international adherence to ICAO standards and recommended practices (SARPs) – the principal measure of a nation's air safety oversight obligations. The ALA is grateful that the ASRR implicitly recognises that more can be done to learn from past regulatory deficiencies to better safeguard aviation safety for all stakeholders in future, and further improve Australia's standing in aviation worldwide. In particular, the ALA is interested in securing better law for the regulation of aviation stakeholders, as clearer workable legislation can do nothing but ensure the safety of both passengers and crews.

It is hoped that by returning to the first principles of aviation law it will be remembered by all who approach this ASRR that Australian aviation law does not exist in a vacuum, as it is motivated and informed by international obligations and developments in research on aviation technology and human factors both here and abroad. Furthermore, it is hoped that by so pointing to these external factors the focus of the ASRR will be drawn away from an overly skewed focus on ironing out the systemic deficiencies already being attended to by CASA and the ATSB,⁸ and which were brought to the public's attention in the RRAT Report in May 2013.

Our focus is less on criticising past perceived and actual deficiencies with aviation regulators, but more in line with proposing suggestions to challenge and improve.

To that end some of the suggestions herein may appear difficult to tackle in the political haze which has developed following the RRAT Report, but it is hoped a fresh look at these issues under the guidance and advice of the ASRR will at the very least stimulate refreshing productive discussion on a more effective and accountable regulator/regulated relationship.

⁸ For example on 2 August 2013 the Australian Transport Safety Bureau (ATSB) announced that the Transportation Safety Board of Canada will independently review the ATSB's investigation processes and publish its results. Such a review is in line with the outcomes sought from the ASRR, as it traverses subject matter criticised by the Senate Committee in the RRAT Report: see <<https://www.atsb.gov.au/newsroom/news-items/2013/canadian-investigators-to-review-atsb.aspx>>, last accessed 31 January 2014.

SUMMARY OF RECOMMENDATIONS

The ALA's recommendations are in summary that the Panel should advise Government that:

1. Guidance material on CASA's enforcement policy which guides CASA decision makers should be legally binding and itself enforceable under an Ombudsman-type arrangement akin to the Aircraft Noise Ombudsman.
2. Strict adherence to AAT expert evidence guidelines and procedural rules be demanded of all litigants in aviation administrative matters (both CASA and represented applicants).
3. Australia's fatigue risk management system rules should be further developed by CASA in light of the merits of the US FAA approach which came into effect on 14 January 2014.
4. Australian aviation drug and alcohol management (DAMP) policy should be clarified by adding an "Objects" section to either Part 99 of the *Civil Aviation Safety Regulations 1998* (Cth), or Part IV of the *Civil Aviation Act 1988* (Cth), to reflect Parliament's intention that DAMP rules operate to minimise harm in aviation, not punish.
5. In light of the Pel-Air and Transair air disasters, Australia should update its State Safety Program in recognition and reflection of Australia's adherence to safety management standards set out in Annex 19 to the Chicago Convention which entered force on 14 November 2013, to assure the public of confidence in future regulator oversight and surveillance of operators.
6. CASA should undertake as a priority, a review of the need for regulations on cockpit automation and adapt and implement relevant recommendations of the FAA in its comprehensive September 2013 report on this subject including, in particular, a proposed requirement for Australian AOC holders to create explicit flight path management policies.

1. AUSTRALIA'S PLACE IN INTERNATIONAL AVIATION SAFETY REGULATION

CASA was established by the *Civil Aviation Act 1988 (Cth)* (the Act),⁹ its role necessitated by Australia's treaty obligations under the *International Convention on Civil Aviation*¹⁰ (Chicago Convention). The Chicago Convention was incorporated into Australian law by the *Air Navigation Act 1920 (Cth)*. Australia is one of 191 parties to the Chicago Convention. This multilateral treaty codifies customary international law principles, such as airspace sovereignty, and provides the constitution for a permanent international organisation, ICAO.

The Chicago Convention established a basis for technical and operational aspects of civil aviation, such that technical SARPs – promulgated by ICAO through prescriptive Annexes adopted under the Chicago Convention – serve as a worldwide guide to civil aviation.¹¹ There are currently 19 Annexes to the Chicago Convention, the most recent coming into force the day the ASRR was announced (14 November 2013).¹² The Annexes cover technical standards on matters such as airworthiness certification, registration of aircraft, international operating standards, and licensing.

The *standards* in Annexes are considered legally binding on ICAO States, in the absence of notification of a State's inability to comply. *Recommended practices* are merely desirable, in the interests of air safety, regularity or efficiency.

Australia has distinct agencies with regulatory oversight functions in relation to aspects of civil aviation oversight, all falling under the umbrella of the Department of Infrastructure and Regional Development. CASA is responsible for Annexes 1, 2, 6-8, 14 and 18, and shares responsibility with Airservices Australia for Annexes 10 and 11.¹³ At the time of writing, Annex 19 was not formally "allocated" to a particular agency but likely falls within the ambit of CASA's responsibility. As a practical

⁹ *Civil Aviation Act 1988 (Cth)*

¹⁰ *International Convention on Civil Aviation*, 61 STAT, 1180 (1944) ('Chicago Convention')

¹¹ Chicago Convention, Art 37.

¹² Annex 19, 'Safety Management' transplants and harmonises provisions from six other Annexes into the new one which is dedicated to safety management, and which helps to stress and reinforce to States the importance of the concept of safety risk management in all aviation domains. The difficulties of harmonising and incorporating principles of safety risk management into an operational context are a perennial aviation problem and will be discussed in this submission in the context of rules for flight crew fatigue risk management.

¹³ See <<http://www.infrastructure.gov.au/aviation/international/icao/annexes/>>, last accessed 29 January 2014.

matter, CASA administers a significant body of legislation¹⁴ and, as a corporatised entity with other strategic and educational roles, it is recognised that this requires it to be responsive to the needs of the other entities with air safety regulatory functions (the Department of Infrastructure and Regional Development, Airservices Australia, and the Australian Transport Safety Bureau).

This is a heavy burden, as not only is safety a preeminent factor in all regulatory and legislative decisions,¹⁵ the level of legislative implementation of SARPs is continuously monitored by ICAO. ICAO broadly measures the “safety” of an ICAO State by its adherence to and implementation of SARPs within the Universal Safety Oversight Audit Program (USOAP). Results are publicly available on ICAO’s website in summary form. By completing an audit protocol based on the SARPs required to be implemented by each country, a comprehensive picture emerges about each country/State’s capability for safety oversight.¹⁶

The audit protocol used by ICAO officers results in a percentage of compliance with each of eight different “critical elements” of aviation safety regulation: legislation, organisation, licensing, operations, airworthiness, accident investigation, air navigation services, and aerodromes.¹⁷ In time, and following the 2010 (triennial) ICAO Assembly, the system has evolved to allow more regular information about compliance with SARPs than under the previous audit approach, and this “continuous monitoring approach” is still being implemented worldwide.

¹⁴ *Civil Aviation Act 1988* (Cth), s9. The principal legislation – that is, the Act, *Civil Aviation Regulations 1988* (Cth) (CAR), and *Civil Aviation Safety Regulations 1998* (Cth) (CASR) account for approximately 3,000 pages. This figure does not include other legislative instruments falling within CASA’s responsibility, such as Civil Aviation Orders, which will progressively cease to have effect as corresponding CASRs come into force to replace them; Airworthiness Directives, Approvals, Designations, Determinations, Directorate of Aviation Safety Regulations, Directions, Exemptions, Instructions, Permissions, Permits, and Specifications. Various exemptions, approvals and delegations are published as non-legislative instruments under the CAR and CASR.

¹⁵ *Civil Aviation Act 1988* (Cth), s 9A: “In exercising its powers and performing its functions, CASA must regard the safety of air navigation as the most important consideration”.

¹⁶ In this submission “State” and “country” will be used interchangeably with the meaning intended in both cases to be a country which has ratified the Chicago Convention.

¹⁷ ICAO 2013 Report <http://www.icao.int/92CA3DD2-409B-4DDF-BD7C-8EAD39A3B79C/FinalDownload/DownloadId-892CA8625D07A55AFCBCCF731A5D00A8/92CA3DD2-409B-4DDF-BD7C-8EAD39A3B79C/safety/Documents/ICAO_2013-Safety-Report_FINAL.pdf>

1.1 WHERE DOES AUSTRALIA SIT IN TERMS OF USOAP COMPLIANCE?

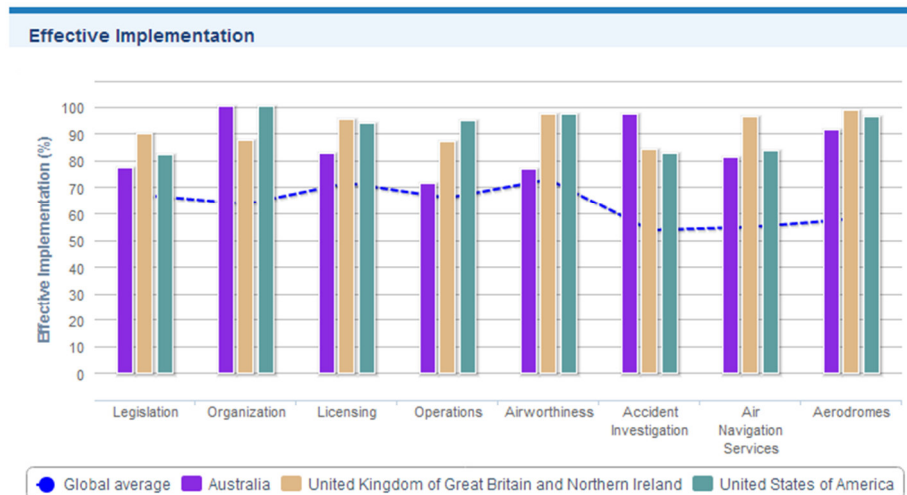


Figure 1: Effective implementation of SARPs – ICAO website as viewed 28 January 2014 Source: <<http://www.icao.int/safety/Pages/USOAP-Results.aspx>>

The ICAO website allows comparison between States- and the worldwide average, and States- and other States in relation to adherence with SARPs. The resulting levels of safety oversight are depicted graphically as shown in Figure 1. Australia fares reasonably well, and beats the global average in each of the eight critical elements of aviation safety regulations. Notably, when compared with peers like the United States and United Kingdom, Australia generally scores lower than these States (but higher than the global average) in the areas of *legislation*, *licensing*, *operations*, *airworthiness* and *aerodromes*. However, within the context of the results of these aviation partners and peers, Australia could and is striving to reach higher compliance.

In terms of what these results mean, it is difficult to make any overarching generalisations. The SARPs and relevant legislation is extensive, and the suitability of one nation's aviation regulatory approach is affected by many factors including political, economic, and other homeland priorities. For this reason, the level of economic development of a State tends equate with its compliance with SARPs. Thus, to tritely conclude "Australia should follow the US" or any country with a better USOAP result would be meaningless. That being said the following submissions will identify where some particular lessons may be learned from other

States where foreign techniques and approaches may usefully be adapted for domestic regulatory purposes.

More importantly though, the approach in these submissions is to identify and relate some of the multiplicity of factors which can and should inform the making and enforcing of law in this domain. Australia, as identified above and for better or for worse, is only one player in an interconnected matrix of law intended to safeguard users of civil airspace. Law does not exist in a vacuum and current aviation trends and subject matter developments overseas can and should be recalled when pursuing better law, as the ALA hopes will result from the Panel's collaborative efforts in the present ASRR. The overall result can then only be safer skies for all stakeholders.

2. ADMINISTRATIVE DECISION MAKING – NEED FOR AN OMBUDSMAN?

CASA is in a peculiar situation in that it is often (severally) responsible for safety oversight of aviation operations, the delegated lawmaker in relation to such operations, the investigator of infractions of the rules, and decision maker in relation to potentially career ending administrative processes relating to suspension or cancellation of operators' and pilots' authorisations.

While this is in and of itself a difficult position to be in, it is tenable if appropriate safeguards are in place to ensure not just the appearance, but also the consistent and pragmatic application, of lawful and principles-based administrative decision making.

CASA has developed and publishes an Enforcement Manual (EM), which provides an insight into the administrative decision-making process as it is intended to apply at CASA, and to provide the appropriate safeguards for aviation authorisation holders.¹⁸ The EM sets out useful details about various kinds of enforcement action, including enforceable voluntary undertakings, administrative action in relation to variation, suspension, and cancellation of civil aviation authorisations, infringement notices, the demerit points scheme, and criminal prosecution.

¹⁸ The CASA Enforcement Manual (EM) (last updated January 2013) is available at <http://www.casa.gov.au/scripts/nc.dll?WCMS:STANDARD::pc=PC_91181, http://www.casa.gov.au/scripts/nc.dll?WCMS:STANDARD::pc=PC_91181>, last accessed 29 January 2014.

In order for the EM to remain relevant and produce the desired result of satisfying CASA's legal obligations to develop effective enforcement strategies and to secure compliance with aviation safety standards,¹⁹ it is submitted that CASA must commit itself to this aim more so than by providing unenforceable guidelines (albeit mandatory for staff) as to how decision makers may satisfy their obligations under the law. Anecdotally, confidence in decision making by CASA is at an all-time low. Furthermore, there have been several indications from Administrative Appeals Tribunal (AAT) members indicating that the AAT has been the (erroneous) venue for criticisms of CASA's investigative or decision making processes.²⁰ Unless an independent alternative forum for such critique is available, Tribunal resources and CASA resources will be wasted in the pacification of litigants who claim misfeasance or similar civil wrongs, and/or decide to use particular decisions of CASA as springboards to attack CASA policies. This assists no-one.

It is recommended that the decision making processes and considerations outlined therein be reduced into a legislative instrument to ensure accountability by CASA decision makers as a matter of right, and that this oversight be the responsibility of an independently established Ombudsman in the vein of the Aircraft Noise Ombudsman (ANO).

We submit that the EM is so precise that it lends itself to independent oversight for contravention. This would reassure aviation stakeholders that potentially incorrect or "not preferable" decisions would not just be reviewable in the case of individually affected or aggrieved stakeholders, by virtue of an application to the Administrative Appeals Tribunal (AAT). Thus, independent oversight as proposed here is not intended to supplant proper access to administrative review in the AAT. Rather, the mechanism proposed below or any variation of it, has the capacity to reduce costly litigation in the AAT and Federal Court which can sometimes be motivated by allegations of erroneous or misapprehended decision making, to a forum of its own, where compliance by CASA officers with the EM can be addressed practically and openly to ensure future adherence with the policies underpinning it.

Such a scheme as proposed below, or any variant of it, should not be punitive but merely provide for a transparent mechanism by which the public, and more specifically industry stakeholders and their representatives, can be assured that

¹⁹ *Civil Aviation Act 1988* (Cth), ss 9(1)(d).

²⁰ See, for example, *Trans Air Ltd and Civil Aviation Safety Authority* [2010] AATA 42 (22 January 2010); *Repacholi Aviation Pty Ltd (ACN 009 054 022) v Civil Aviation Safety Authority* [2009] FCA 1487; *Polar Aviation Pty Ltd v Civil Aviation Safety Authority (No 4)* [2011] FCA 1126.

CASA's own administrative guidance and processes are being correctly followed as far as possible, and in line with the ultimate goal of securing aviation safety.

2.1 A PROPOSED SCHEME AND WHAT IT MIGHT ENTAIL

1. The EM would first be reduced into a suitable legislative instrument which makes compliance with the decision making processes by CASA decision makers a statutory duty; breach of which results in some form of civil penalty borne by CASA:
 - a. It is recognised that while this might satisfy smaller aviation operators and pilots, such a scheme would have difficulty finding favour elsewhere in the industry or Government owing to the potential administrative burden of establishing and funding a suitably authoritative person or body with the oversight of what should, in principle, be a self-regulating entity;
 - i. In response to that issue (a) we would suggest that only high level, key parts of the Introduction and Chapter 1 of the EM be reduced into a legislative instrument to help ensure confidence in the safety regulator.²¹
2. Whatever Legislative Instrument results, breaches of the decision making policy it enumerates should be referred to the overseer (Minister or an Ombudsman like the ANO - who oversees independent administrative reviews of Airservices Australia's management of aircraft noise-related activities), for an independent examination of the decision making followed, or the handling of complaints or enquiries made to CASA in relation to the decision, but free of the subject matter and context of the decision itself (ie, free of the constraints of the AAT in either setting aside, varying or affirming a particular decision by virtue of s43(1) of the *Administrative Appeals Tribunal Act 1975* (Cth) and the ambit of the legislation providing the relevant CASA decision making power).
3. In our opinion the CASA Industry Complaints Commissioner is not a suitable entity for such oversight, given its strictly limited and dissimilar roles under its own Terms of Reference.²² Rather the oversight of regulatory decision making should lie with an entity which is particularly charged with the

²¹ For example, the whole of the Introduction, up to and including page v could be included, plus sections 2.4.1 – 2.4.3 inclusive (the latter which set out the high level principles supporting CASA's enforcement policy).

²² See <http://www.casa.gov.au/wcmswr/_assets/main/download/icc-terms-of-reference.pdf>, last accessed 25 January 2014.

singular and unfettered role of examining regulatory *decision making* by reference to CASA's own policy, and setting suitable penalties for non-compliance in instances where the policy has not been adhered to.

4. Appropriate penalties may be in the range, at one end of the scale, of re-education or repeat induction into CASA's regulatory decision making obligations, policies, and responsibilities, or at the other end of the scale, an order that a class of or particular decision made by the decision maker should be considered to be (perhaps at the choice of the concerned stakeholder) set aside by consent within the AAT at CASA's cost.
5. Anyone in the industry with aviation operational knowledge (ie, any CASA authorisation holder) should be given standing to complain with respect to any particular decision with the proviso that "one complaint" will be counted per substantive issue raised by a particular complaint rather than the sheer number of complaints on a particular decision or issue (eg, 10 complainants complaining about one issue would be recorded as one complaint). This approach would result in better identification of systemic issues with decision making.

The costs and administrative burdens could be borne by CASA or an independent fund contributed to for this purpose by and for the aviation industry in a similar vein to the Airline Customer Advocate.²³

2.2 RATIONALE FOR THE SCHEME AND INDEPENDENT OMBUDSMAN

To any criticism that such a scheme could and would be a punitive measure against CASA officers, it is submitted that this is neither the intention nor expected result. An analogous situation is the approach taken by the ANO which has delivered success, not by reducing or eliminating aircraft noise complaints to Airservices Australia or federally leased airports *in toto*, but by educating stakeholders and complainants about aircraft noise and its impact on the community more broadly. Thus, while complaints may not have *ended* under the tenure of the ANO, results to date demonstrate²⁴ that systemic issues can better be

²³ See <<http://www.airlinecustomeradvocate.com.au/General/AboutUs.aspx>>, last accessed 31 January 2014.

²⁴ For example, as reported by Ron Brent, the first appointed ANO, to meetings of the Melbourne Airport Community Aviation Consultation Group in 2012, which were attended by

understood, explained and minimised through such an independent complaints mechanism, especially where that complaints body has the power to make recommendations to the service provider (here, Airservices Australia) to better do what it is legislatively charged with doing.

The exposure to particular complaints and classes of complaints can lead to tangible outcomes by identifying repeated mistakes or problems and helping to prevent them in future decision making, with subsequent benefits for future directions in regulation making.

3. MODEL LITIGANT CONSIDERATIONS – EXPERT EVIDENCE IN THE AAT

A matter which has bolstered aviation operators' lack of confidence in administrative decision making, which criticism has been relayed to the ALA, together with our own examination of decisions on CASA decisions reaching the AAT, results in the identification of a further issue which should be considered by the Panel.

The AAT recently set aside the decision of CASA to cancel the medical certificates of a Queensland commercial pilot who was alleged to have no longer met medical standards after suffering an attack while out with friends in March 2013: *Daniel Bolton and Civil Aviation Safety Authority* [2013] AATA 941 (23 December 2013). In this decision what is remarkable is that this conclusion could have been jeopardised by seemingly minor *procedural* omissions by the representatives of the parties who were prosecuting the action.

The Tribunal was critical of both parties for failing to provide expert medical opinions which satisfied the AAT's *Guidelines for Persons Giving Expert and Opinion Evidence* (Guidelines). The Guidelines ensure that independent experts are made aware that their role is to assist the Tribunal rather than advocate for the party which asked for their expert comment. Under the Guidelines:

9. A person giving evidence based on his or her special knowledge or experience in an area

a. has an overriding duty to provide impartial assistance to the AAT on matters relevant to the person's area of knowledge or experience;

the author of these submissions, Joseph Wheeler, in his capacity as an Assistant Director of South East Airports, in the (then) Department of Infrastructure and Transport. See <<http://melbourneairport.com.au/docs/annual-report-2012-final.pdf>>, last accessed 29 January 2014.

b. is not an advocate for a party to a proceeding.

Furthermore, written reports prepared for proceedings before the Tribunal must include a declaration:

I acknowledge that I have an overriding duty to provide impartial assistance to the Tribunal. No matters of significance have been withheld from the Tribunal.

While CASA's medical expert, Dr Pooshan Navathe (also CASA's Principal Medical Officer) did provide a statement which satisfied the Guidelines, the Tribunal explicitly stated that it would *not* have regard to his opinions as he was also the decision maker with respect to the cancellation of Mr Bolton's medical certificates. Therefore, he was not truly independent. The Tribunal considered it highly irregular that Dr Navathe briefed CASA's other expert (a consultant neurologist) by telephone, and never clearly showed what information was conveyed.

Deputy President Hack's admonishments aside, the case demonstrates the need for both represented litigants and regulatory agencies to ensure all relevant evidential and procedural matters are properly dealt with in AAT proceedings. Should the medical evidence have been different then the choice of expert witness for CASA would not just have been more embarrassing, but potentially resulted in an unsafe pilot being returned to the sky, as the Tribunal was not prepared to accept its evidence.

The ALA does not wish to pontificate in relation to the performance of our professional colleagues' functions within CASA in the context of AAT matters, but does wish to identify to the Panel that confidence in the air safety regulator will be enhanced if oversights as noted in *Bolton*, are remembered when preparing cases for the AAT by both applicant's solicitors and CASA.

4. FATIGUE RISK MANAGEMENT SYSTEMS

Fatigue risk management is presently a hotly debated aviation issue, and one which conveniently iconifies the major range of issues which must inform any aviation safety regulation reform. This analysis and submission is intended to demonstrate to the Panel that it should consider not just the direction regulatory reform should take based on the submissions and opinions of aviation stakeholders who will make written or oral submissions to the ASRR (such as airlines and pilots) but also those inevitably affected by such laws, and who will potentially not make submissions, nor know their rights are being so debated: the travelling public.

The ICAO defines “fatigue” as a:

physiological state of reduced mental or physical performance capability resulting from sleep loss or extended wakefulness, circadian phase, or workload (mental and/or physical activity) that can impair a crew member’s alertness and ability to safely operate an aircraft or perform safety-related duties.²⁵

The US National Transportation Safety Board has cited pilot fatigue to have been a contributing safety factor in several accidents, most recently and most spectacularly the loss of Continental Connection Flight 3407 (operated by Colgan Air Inc) in Buffalo, New York on 12 February, 2009.²⁶ In the wake of the Colgan crash, when ICAO, on 13 June 2011, adopted amendments to Annex 6 of the Chicago Convention for States to establish regulations for the management of fatigue in operational flight crew, it did so in recognition of such disastrous effects of mismanaged pilot fatigue and the fact that human factors research on fatigue and air safety had developed with time.

The state of the science in ICAO’s document, together with the FRMS Manual for Regulators (2012 Edition) published by ICAO,²⁷ and the CASA Fatigue Risk Management System Handbook²⁸ which is based on it are, it is argued publicly by some groups, flawed.²⁹ The new SARPs contained in section 4.10 of Annex 6 require States to establish regulations for the purposes of managing fatigue through fatigue risk management systems³⁰ (FRMS) to ensure operational flight crew remain at a level of alertness adequate for the performance of their duties.

²⁵ ICAO Annex 6, Part 1, Chapter 1, p 1-5.

²⁶ See <<http://www.nts.gov/investigations/summary/AAR1001.html>>, last accessed 12 December 2013.

²⁷ ICAO *FRMS Manual for Regulators* (2012), available at <<http://www.icao.int/92CA3DD2-409B-4DDF-BD7C-8EAD39A3B79C/FinalDownload/DownloadId-CE71EA5666DC2453C07C1CC28BBE5CFC/92CA3DD2-409B-4DDF-BD7C-8EAD39A3B79C/safety/fatiguemanagement/frms%20tools/doc%209966%20-%20frms%20manual%20for%20regulators.pdf>>, last accessed 12 December 2013.

²⁸ *The Fatigue Risk Management System Handbook*, ver 1: April 2013, available at <http://www.casa.gov.au/wcmswr/_assets/main/lib100206/frms.pdf>, last accessed 13 December 2013.

²⁹ See <<http://www.aipa.org.au/media-room/safety-risked-flawed-aviation-rules-would-result-fatigued-pilots-landing-planes-after-20>>, last accessed 29 January 2014.

³⁰ An FRMS is a “data-driven means of continuously monitoring and managing fatigue-related safety risks, based upon scientific principles and knowledge as well as operational experience that aims to ensure relevant personnel are performing at adequate levels of alertness”: *Ibid.*

The aim of introducing FRMS is to permit scientifically supported operator flexibility which results in equivalent or better safety outcomes than prescribed flight time limitations alone.

FRMS was not a new concept at the time of ICAO's amendment to Annex 6, rather it was one of the aspects of risk mitigation which some operators had already incorporated into their organisations' broader safety management systems. However, FRMS now represents one of many broader (official) recognitions and acknowledgements of safety risk management *principles* which the industry has itself promoted over several years, leading to the decision in 2006 of the need for an Annex dedicated to safety management.³¹

As such most States were quick to adopt the new ICAO approach, including Australia, which introduced FRMS through the commencement of a Civil Aviation Order (a binding legislative instrument) in 2013 which introduced ICAO's system into Australian law. In essence, the system of regulation provides a regime under which flight crew member fatigue risks can be managed with obligations/duties for the aviation authorisation holder and responsibility for implementation being shared by management, flight crew members and other relevant personnel. Such factors must in fact be reduced into a policy statement which must promote an open and fair reporting culture.³²

4.1 PEL-AIR AND SYSTEMIC REGULATORY ISSUES WITH FATIGUE RISK MANAGEMENT

Mention has been made above in passing of criticisms proffered by the Senate Committee RRAT Report.³³ Many of the criticisms made about the ATSB report of the Pel-Air accident investigation³⁴ are outside the scope of this submission, and include systemic issues as and between CASA and the ATSB. One of the substantive systemic issues reported and agreed to have been a shortfall in the investigation report, was CASA's lack of oversight of the relevant operator's fatigue risk management, training and checking systems in the context of a CASA Special

³¹ Annex 19 on Safety Management came into force on 14 November 2013 as a result.

³² CASA Fatigue Risk Management System Handbook, ver 1.0 (April 2013), at p 2-7.

³³ Available at

<http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Rural_and_Regional_Affairs_and_Transport/Completed_inquiries/2012-13/pelair2012/report/index>.

³⁴ Ditching – Israel Aircraft Industries Westwind 1124A, VH-NGA 5 km SW of Norfolk Island Airport 18 November 2009, ATSB Aviation Occurrence Investigation AO-2009-072, available at <http://www.atsb.gov.au/media/3972692/AO-2009-072_Final.pdf>, last accessed 15 January 2014.

Audit which resulted in several CASA-issued requests for corrective action by the operator.³⁵

The relevant CASA surveillance which resulted in the requests for corrective action predated the existing FRMS requirements, but post-dated the commencement of CASA's original Civil Aviation Order 48.1 which prescribes duty flight time limitations.³⁶ This means that minimum rest time for pilots was set by CAO 48.1 and not strictly the subject of a formal risk management system as it might be argued might now apply to such an operator. The issue then becomes less one of FRMS *per se*, but one of FRM regulatory oversight. Is a prescribed duty time limit easier to enforce and better than a FRMS which leaves such decisions to pilots and operators in the high demand environment of commercial aviation?

Some argue FRMS is the lesser of two evils, but this submission aims to outline the difficulty in coming to a regulatory solution given the competing interests of aviation operational employees and airline management, in the context of the international standards and recommended practices Australia should adopt, but also recognising the difficulties of adopting any particular standards as all have both economic and air safety consequences for airlines and individuals (pilots and passengers).

Pilot groups have argued that the scientific principles and knowledge said to inform the ICAO SARPs are in fact flawed and that both the US Federal Aviation Administration (FAA) and European Safety Agency Rules (EASA) rules in this regard continue to prescribe actual time limits to ensure there is no balancing of safety through "CASA bowing to industry pressure to deliver a less restrictive system".³⁷

In our submission the criticism for the Panel to note is that the FRMS rules now applicable by virtue of the commencement of the *Civil Aviation Order 48.1 Instrument 2013 (No. 1)*³⁸ on 30 April 2013 are not only subject to major contrary views but this view was acted upon by a motion to disallow in the Senate which

³⁵ *Ibid*, at 5.11.

³⁶ Civil Aviation Order 48.1 – Flight time limitations – Pilots (02/12/2004), available at <<http://www.comlaw.gov.au/Details/F2005B00876/Html/Text#para0.69>>, last accessed 13 December 2013.

³⁷ Australian and International Pilots Association, "Safety risked by flawed aviation rules that would result in fatigued pilots landing planes after 20 hours at the controls", 26 June 2013, available at <<http://www.aipa.org.au/media-room/safety-risked-flawed-aviation-rules-would-result-fatigued-pilots-landing-planes-after-20>>, last accessed 30 January 2014.

³⁸ Civil Aviation Order 48.1 Instrument 2013 (No. 1): <<http://www.comlaw.gov.au/Details/F2013L00628/Download>>, last accessed 29 January 2014.

lapsed when the Parliament was prorogued on 5 August 2013 prior to the Federal Election. Since that time, and following the opening of submissions to the present ASRR, a second motion to disallow was made, and is presently pending for resolution in the Senate by 24 March 2014. These indications of public discontent must not be forgotten in determining a way forward for resolving the debate on flight time limitations.

That being said, an element of circularity exists in what can be done about the situation in Australia while still holding Australia out as a State attempting to provide international best practice regulation in accordance with our obligations as an ICAO State. Departure from SARPs in local law is something which directly affects Australia's USOAP scores unless a notification of differences is filed with ICAO under Article 38 of the Chicago Convention.

The best solution going forward may be, in this instance, to adopt the approach of the US in 14 CFR Parts 117, 119 and 121³⁹ which provides some prescription in relation to duty limitations and makes FRMS use optional, whereas the Australian approach makes FRMS applicable for current and new holders of flight crew licences but not air operators (AOC holders) until 30 April 2016, unless they voluntarily opt in to the scheme. Certainly, the US approach in this instance may be viewed by industry stakeholders as the preferable option, notwithstanding the costs to CASA of amending the present instrument should it be amenable to that approach. In our submission, the compromises in the US approach better serve the interests of both air operators and secure confidence in the safety of pilots for travellers.

4.2 WHY IS THIS IMPORTANT TO OTHER STAKEHOLDERS INCLUDING THE PUBLIC?

The ramifications of flight crews exceeding duty time limitations can, at the extreme, contribute to consequences like the Colgan crash of 2009. It can also have ripple effects in practice (eg, flight delays) which typify the cost-benefit analysis which often emerges as a refrain in all facets of aviation safety regulation: airline operations and management's demands for flexibility in regulation to get on with business and ensure their services – ie, the “product” provided when one buys an air ticket – operate on schedule, versus the rights and responsibilities of the pilot in

³⁹ The US Department of Transportation/FAA final rule became effective on 14 January 2014, and is available at <<http://www.gpo.gov/fdsys/pkg/FR-2012-01-04/pdf/2011-33078.pdf#page=70>>, last accessed on 29 January 2014.

command who bears the (regulatory) responsibility for the final disposition of any *particular* flight including the safety of all onboard. This is not a new issue.

However, recent examples where flight time limitations have operated to cause passenger delays by an airline (in addition to economic losses from having to cancel/reschedule an international flight) in circumstances beyond the airline's control, indicate that some measure of flexibility might be warranted in the system which eventuates in Australia (vindicating the approach advanced by CASA in the 2013 Instrument).

In March 2013 a Qantas flight from Dallas to Brisbane was delayed by mechanical issues, and on 15 January 2014 Qantas (due to unrelated infractions of US DOT tarmac delay rules) received a civil penalty from the US DOT. In the "Consent Order" which described the steps Qantas took to mitigate the inconvenience for passengers of the tarmac delay, it is revealed the flight, which was delayed by more than 4 hours, was ultimately cancelled because the crew's duty time limitations were insufficient to complete even a flight to an alternate, and closer, destination (Auckland).

Certainly this would have resulted in disruption to the airline in terms of scheduling both its crew, and a replacement flight notwithstanding the unquestionable air safety benefit (ie, no pilot flew tired). However, it also has several economic consequences for the airline in relation to compensation for delay to passengers under relevant international law which may not be so readily apparent, but which should serve as a reminder of one of the many consequences of inflexibility in flight duty times for flight crew members. Under the *Convention for the Unification of Certain Rules for International Carriage*,⁴⁰ under which most if not all the passengers on the Dallas to Brisbane flight, Qantas would have been liable for compensation for proven losses brought about by delay of each passenger in an amount limited presently to 4,694 Special Drawing Rights (approximately \$8,200 AUD as at the date of writing).⁴¹ In an aircraft that carries over 300 passengers this amount is substantial. Furthermore, under US DOT rules and the airline's own policies, refunds of fares must be offered in some cases.

⁴⁰ *Convention for the Unification of Certain Rules for International Carriage*, done at Montreal, 28 May 1999, available at <<http://www.jus.uio.no/lm/air.carriage.unification.convention.montreal.1999/portrait.pdf>>. This Convention is incorporated into Australian law by the *Civil Aviation (Carriers' Liability) Act 1959* (Cth).

⁴¹ Source: <www.xe.com> as at 29 January 2014.

An additional complication of matters arises when one considers that, as is the case in the US, pilots may have contractually negotiated limitations on their duty times. In the US at least, the FAA has taken the view that the more restrictive FAA rules would not supersede collective bargaining agreements where those arrangements were not in conflict with an FAA requirement.⁴²

In summary then, our submission is that the Panel should ensure in any continuing regulatory reform in relation to FRMS, the multiplicity of stakeholder interests be considered, in the light of alternative States' ways of handling the same competing interests in aviation law (safety/airlines/pilots/passengers).

5. SYSTEMIC OVERSIGHT ISSUES FOLLOWING LOCKHART RIVER CRASH IN 2005

No submission to a review of aviation safety regulation would be complete without addressing the regulatory safety factors identified by the ATSB in its investigation report of Australia's worst modern air crash disaster, the collision with terrain of a Fairchild Aircraft Inc aircraft operated by Transair north west of Lockhart River in Queensland on 7 May 2005.

In the report, just as with the Pel-Air report,⁴³ deficiencies with industry surveillance and consistency of oversight activities with CASA's policies, procedure and guidelines were implicated in relation to the lack of detection of fundamental problems associated with Transair's management of regular public transport flights operations (such as pilot training, checking, supervision of line flight operations, standard operating procedures, risk management processes etc).⁴⁴

The ATSB's principal findings included that "CASA did not provide sufficient guidance to its inspectors to enable them to effectively and consistently evaluate several key aspects of operator management systems", and "CASA did not require operators to conduct structured and/or comprehensive risk assessments, or

⁴² See Jerman, T, and MacPherson, R "FAA Clarifies 2012 Flight Duty and Rest Final Rule – Areas of Potential Ongoing Concern", Jones Day, available at <<http://www.mondaq.com/unitedstates/x/229634/Aviation/FAA+Clarifies+2012+Flight+Duty+And+Rest+Final+RuleAreas+Of+Potential+Ongoing+Concern>>, at p 248, last accessed 29 January 2014.

⁴³ Above, n 34.

⁴⁴ ATSB *Collision with Terrain 11 km NW of Lockhart River Aerodrome 7 May 2005 VH-TFU SA 227-DC (Metro 23)*, Aviation Occurrence Report 200501977, released 4 April 2007, available at <http://www.atsb.gov.au/publications/investigation_reports/2005/air/air200501977.aspx>, last accessed 29 January 2014.

conduct such assessments itself, when evaluating applications for the initial issue or subsequent variation of an Air Operator's Certificate [AOC]".⁴⁵

CASA had reported to the ATSB, by the time the final report was published, that it had expanded its surveillance focus with a move away from compliance audits to all industry sectors, regardless of relative risk, to one where risk was a key determinant of the level and nature of surveillance.⁴⁶ However, at the time of the report, risk management processes were in their (regulatory) infancy and no requirement was on AOC holders to conduct risk assessments or for CASA to do them itself.

As stated earlier in these submissions, safety risk management has become a key component of aviation regulation in the eyes of ICAO, with the commencement of Annex 19 on 14 November 2013. While the Annex is new it, for the most part, consolidates material from the other Annexes regarding safety management systems to draw attention to the importance of each State integrating its safety management activities, and at the same time facilitating the future development or evolution of safety management SARPs.⁴⁷ The Annex creates or recreates SARPs in relation to both safety management of aviation service providers, and State safety management provisions in relation to the safety management responsibilities of the State itself.⁴⁸

An example of the awareness of and tendency towards risk assessment and mitigation strategies by regulators has been its approach to drug and alcohol management plans under Part 99 of the *Civil Aviation Safety Regulations 1999* (CASR). In the scheme set out in Part 99 CASA provides a framework for certain sectors of the industry to assess and manage their own safety risks related to drug and alcohol use by personnel licensed or engaged in safety sensitive aviation activities.⁴⁹ Part 99 became effective on 23 September 2008 following research conducted by the (then) Department of Transport and Regional Services (DOTARS) and CASA in 2006, which was prompted by a fatal accident in September 2002 at Hamilton Island which implicated possible effects from pilot drug use as a cause.⁵⁰

⁴⁵ *Ibid*, at p 260.

⁴⁶ *Ibid*, at p 265.

⁴⁷ See Foreword to Annex 19, *Safety Management*, ICAO, 14 November 2013, p ix.

⁴⁸ *Ibid*, at p 3-1.

⁴⁹ Civil Aviation Safety Regulations 1999 (Cth), Part 99.

⁵⁰ CASA/DOTARS, *Review into safety benefits of introducing drug and alcohol testing for safety sensitive personnel in the aviation sector*, 2006, available at <http://casa.gov.au/wcmswr/_assets/main/media/drugsubmissions/finalreport.pdf>, last accessed 29 January 2014.

In the aftermath of the Lockhart River crash it is recognised that the broader trend worldwide towards risk assessment and management led to the development and approaches being implemented at the operational level by CASA. See for example, the publication “SMS for Aviation – A practical guide: Safety Management System Basics”.⁵¹

The ALA’s submission is that while there is now a proactive aviation atmosphere with respect to safety risk management for aviation service providers, as evidenced by CASA’s reliance on such principles in preparing its own responses to SARPs on fatigue risk management and drug and alcohol risk management in aviation, these principles should also not be forgotten in the *broader* context of the results which can eventuate in the absence of such principles in guiding *surveillance or oversight* of AOC holders (such as the crash at Lockhart River).

Thus, the ALA recommends and endorses updating of the Australian State Safety Program, as published on the Department of Infrastructure and Regional Development’s website, as this was last considered in April 2012, well before the commencement of Annex 19.⁵² The benefit of this would be to demonstrate to the public the Government’s continuing adherence to regulatory oversight and surveillance at a *national level* and inspire confidence in smaller air operators to embrace safety risk management principles in the management of their aviation businesses.

6. CLARIFICATION OF POLICY OF DRUG AND ALCOHOL MANAGEMENT PLANS (DAMP)

Pilots have raised to ALA members issues with understanding the requirements and policy behind the DAMP rules prescribed in Part 99 of the CASR. While it is of the opinion of the ALA that the interests of air safety must certainly dictate regulations in this space, it is able to do so while not impacting on the legitimate interests of those in the industry who currently suffer from the ambiguity in the regulation which fails to properly express that the policy behind DAMP rules is not punitive.

⁵¹ CASA, 2012, *SMS for Aviation – A practical guide: Safety Management System Basics*, available at <http://www.casa.gov.au/wcmswr/_assets/main/sms/download/2012-sms-book1-overview.pdf>, last accessed 29 January 2014.

⁵² *Australia’s State Aviation Safety Program April 2012*, available at <<http://www.infrastructure.gov.au/aviation/safety/ssp/index.aspx>>, last accessed 29 January 2014.

Under these rules large aviation operators like regular public transport AOC holders must set out their policies in relation to drug and alcohol testing and the consequences for employees performing safety sensitive aviation activities as required by the *Civil Aviation Act 1988* (Cth) and Part 99 of the CASR.

Such “DAMP Plans” place a strong emphasis on drug and alcohol education and rehabilitation through case management where appropriate. Furthermore, Part 99 forms part of a statutory regime governing alcohol and other drugs (AOD) which is not intended to be punitive, but rather to enhance air safety by identifying problematic AOD use and providing appropriate rehabilitation and education to those affected. This is a policy borne out by CASA’s own statement of the policy on its website:

*The purpose of the [DAMP] Plan should be to influence attitudes, knowledge and behaviour in relation to AOD use so that AOD related harm is minimised in the aviation sector.*⁵³

Furthermore, the Explanatory Statement of the statutory instrument which amended the CASR to bring Part 99 into effect (*Civil Aviation Safety Amendment Regulations (No. 1) 2008*) says that organisations’ DAMP Plans, under the Regulations, are to:

*[focus] on early detection and management of issues that may arise from the use of alcohol and other drugs.*⁵⁴

The ALA recommends that the ambiguity can be resolved by adding an amendment to regulation 99.005 of Part 99 of the CASR which adds to the regulation a sub regulation indicating the objects or policy purposes of the Part. Alternatively, an “Objects” section to Part IV of the *Civil Aviation Act 1988* could be added clarifying for stakeholders that the intention of DAMP rules prescribed under Part IV of the Act is not punitive.

Such amendments would go a long way to ensuring both the industry and individual employees performing safety sensitive aviation activities are aware of Parliament’s true intention, as expressed in the Explanatory Statement, rather than importing into

⁵³ See <http://www.casa.gov.au/scripts/nc.dll?WCMS:STANDARD::pc=PC_100956>, last accessed 29 January 2014.

⁵⁴ Explanatory Statement, *Civil Aviation Safety Amendment Regulations 2008 (No. 1)*, available at <http://www.austlii.edu.au/au/legis/cth/num_reg_es/casar20081n192o2008523.html>, last accessed 29 January 2014.

their DAMP Plans ambiguous notions of quasi-punishment for contravention of all aspects of DAMP regulations.

7. PILOT DRIVERS LICENCE TYPE RULES FOR MEDICAL CERTIFICATES

Pilots have expressed to the ALA their disappointment with the deferral to 1 September 2014 of amendments to Parts 61 and other provisions of the CASR as part of the CASA flight crew licensing and other matters reforms, which were originally to become effective from 4 December 2013, and which are principally geared towards harmonising this aspect of Australian regulation with ICAO SARPs.⁵⁵

One of the long awaited amendments incorporated in the amendment suite, is to Part 67 (Medical) of CASR which will extend a new concept, the “recreational aviation medical practitioner’s certificate” (essentially a medical certification that the person meets medical standards in Australia and New Zealand for drivers of private and commercial vehicles, as promulgated by Austroads).⁵⁶ The extension of this privilege is a long awaited development, and follows similar concessions made to US FAA licensed pilots who fly recreationally, but laws to extend the privilege to US private pilots flying larger general aviation aircraft have not yet, at the date of writing, been passed by the US House of Representatives and Senate (ie, the General Aviation Pilot Protection Act of 2013).⁵⁷

The interests of the aviation community in particular in relation to the “driver’s license medical” would no doubt benefit from the Australian amendment to piloting requirements as set out in CASA’s present amendment Act, which, experience has shown, has provided limited or negligible impact on air safety when the same rules were applicable only for lighter recreational type aircraft pilots.

⁵⁵ *Civil Aviation Legislation Amendment (Flight Crew Licensing) Regulation 2013*, Briefing Document, available at

<http://www.casa.gov.au/wcmswr/_assets/main/newrules/parts/061/download/part61-briefing-doc.pdf>, last accessed 30 January 2014.

⁵⁶ Austroads, *Assessing Fitness to Drive for commercial and private vehicle drivers – medical standards for licensing and clinical management guidelines*, March 2012 (as amended up to March 2013); the Austroads standards are referenced by the definition of “recreational aviation medical practitioner’s certificate” in the new regulation 61.010 (Definition for Part 61) and will apply upon commencement from 1 September 2014.

⁵⁷ H.R. 3708: *General Aviation Pilot Protection Act of 2013*, available at <<https://www.govtrack.us/congress/bills/113/hr3708>>, last accessed 29 January 2014.

In essence, pilots themselves, just like drivers of motor vehicles, assess their medical fitness before getting behind the controls, and should not be restricted from recreational, private or other such non-passenger carrying operations due to minor medical complaints.

8. NEED FOR FOCUS ON COCKPIT AUTOMATION

In September 2013, the US FAA released a comprehensive report which reviewed 26 accident reports worldwide from 1996 – 2009.⁵⁸ The report revealed that pilots sometimes rely too much on cockpit automation, particularly given the modern prevalence of automated flight path management systems, and noted that in some instances pilots may have been reluctant to intervene with such systems as a result. The FAA made 18 recommendations which will lead to US regulatory changes in future.

The issue of cockpit automation has been raised in NTSB hearings in December 2013 in relation to the crash of Asiana Airlines Flight 214 in San Francisco on 6 July 2013.⁵⁹ This was the first serious accident involving a Boeing 777 aircraft and resulted in three fatalities and the loss of the aircraft. While the NTSB is yet to issue its final investigation report early indications are it is focusing on the issue of the pilots' over reliance on automated systems over manual control skills. This focus was predicted in light of the recent FAA study which considers this to be a more generally applicable safety issue which is in need of direct attention by regulators in the face of technological advancement in cockpit systems. The focus on so called "automation addiction" follows the investigation into the Air France Flight 447 crash on 1 June 2009, which was partially attributed to a lack of training of commercial pilots at manually flying aircraft at high altitudes due to the high level of automation pilots are becoming accustomed to.

The ALA recommends that the detailed report and recommendations of the FAA in its September 2013 report be considered as a priority for adaptation and implementation of relevant rules or guidance in Australia. The conditions in which Australian operators are required to deal with demand this (including long distances

⁵⁸ FAA,(2013), *Operational use of flight path management systems: Final report of the performance-based operations Aviation Rulemaking Committee/Commercial Aviation Safety Team Flight Deck Automation Working Group*, available at http://www.faa.gov/about/office_org/headquarters_offices/avs/offices/afs/afs400/parc/parc_reco/media/2013/130908_PARC_FltDAWG_Final_Report_Recommendations.pdf, last accessed 31 January 2014.

⁵⁹ See <http://www.reuters.com/article/2013/12/10/us-asiana-crash-hearing-idUSBRE9B905D20131210>, last accessed 31 January 2014.

for flight legs into and out of Australia from all eastern and western ports; long stretches of cruise flight on intra-continental flights; the modern fleets used by Australian airlines including advanced avionics packages with increasing automation).

One of the better recommendations of the FAA which it is believed should be mandated in Australia, perhaps within the context of an existing safety management system, is a requirement for a clearly stated flight path management policy.⁶⁰

CONCLUSION

As forecast passenger numbers increase for aviation in Australia, and aviation continues to be the mode of transport which ensures the vitality and economy of the country, Australia's internal problems with its regulators needs attention. However, this can be done either productively and in a forward thinking manner, or in an adversarial which breeds a climate of non-cooperation which is far from conducive to positive aviation safety outcomes. It is the hope of the ALA that this ASRR is seen as an opportunity of not disparaging the work of CASA and the rules which have evolved over the years, rather to help all recognise that industry stakeholder confidence can be returned to the regulator without drastic changes to regulation.

This simply requires an element of independent oversight presently perceived by many sectors of the industry to be missing. If this confidence returned then the priorities and selection of issues in this submission (and the consultative challenges they and other such issues present) would be the subject of less regulator/regulated discord as all entities work towards their mutual goal of ensuring aviation safety.

FURTHER INFORMATION

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⁶⁰ *Ibid*, at Recommendation 9