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The Secretary
Senate Standing Committee on Rural and Regional Affairs and Transport
PO Box 6100
Parliament House
CANBERRA ACT 2600

Per rrat.sen@aph.gov.au

Dear Sir,

Inquiry into the Administration of the Civil Aviation Safety Authority (CASA) and related matters

This letter forms part of my submission to the Committee, made as an observer and commentator with thousands of contacts in the aviation and aerospace contacts including CASA.

The other part of my submission, attached as a .PDF document is an updated, documented but as yet uncompleted analysis of various events in which has CASA has been involved. Much of the material it contains has already been published in a similar format in September 2000, and I am in possession of at least twice as much information as the document contains, some of it analysed and documented, and some still awaiting processing.

I note that the Committee's role is to assess the effectiveness of administrative reforms undertaken by CASA's management since 2003; however I submit that this material is relevant to the Committee's examination of the effectiveness of CASA's governance structure because it will assist the Committee to:

(a.) understand the depth and gravity of the challenges that CASA management has faced since 2003, along with the reasons why progress in dealing with that inherited challenge has taken so long;

(b.) assess the progress that has been made during that period, which has represented several notable steps toward lasting reform; and

(c.) determine what remains to be achieved along with the optimum means to achieve it.

I do understand that the focus of the material does not comprehensively cover all of the issues that the Committee would wish to examine. However it does provide information, most of it adequately documented, that is relevant in the context of "ways to strengthen CASA's relations with industry and ensure CASA meets community expectations of a firm safety regulator."

It also identifies not only problems, but possible solutions. This has been a result of constant dialogue with industry identities at all levels for about 20 years as an aviation journalist. Prior to that, my aviation involvement has been ongoing since 1960, first as a commercial general aviation and subsequently airline pilot, and in various senior management roles with regional airlines.

Yours faithfully,

Paul D Phelan

June 29, 2008

Inquiry into the Administration of the Civil Aviation Safety Authority (CASA) and related matters

Submission by Paul D Phelan, June 29, 2008

Introduction

Most (but not all) of the material in this document was first published in September 2000. At that time it was circulated electronically to all members of Federal Parliament, leading industry identities, selected aviation writers, airlines and regulators in Australia and in other significant aviation nations, other media outlets, CASA Board members, and identities within CASA management.

This publication represents an update which includes:

- Material that has been rewritten where necessary because of developments which have occurred since publication;
- Additional material relating to events since the original publication; and
- Comment where appropriate. In each such case it will be in colour and headed: **COMMENT** to distinguish it from factual accounts of events.

The writer acknowledges that some of the material published here in may be outdated because of subsequent changes to policies and procedures.

One reason for this is that the convoluted maze of regulatory, advisory and policy documents is as impossible for industry to follow, as it apparently is for regulatory staff, because the various rules and guidelines contain so much contradictory material.

The second reason is the unusually tight timelines set out for submissions to the Committee, the Committee hearings, and more particularly in the seven day timeline between the deadline for submissions and the delivery of the Committee's report. Although much of the material in this submission was already in my files, the timelines have been such that a comprehensive update was not possible

It is however asserted that the picture this document paints is one that is fairly representative of the chaotic situation inherited by Mr Byron, and therefore provides a background against which the considerable reforms which he and a small team have been able to achieve despite the embedded "culture" which remainswithin the organisation.

Improvements include the departure from CASA of a number of individuals who featured in some of the events recounted here. The information provided in this document may help an understanding of the identities of some of the surviving individuals and groups within the organisation who continue to defy reform efforts.

It is acknowledged by industry contacts and by the writer that senior CASA management continue to have their reform efforts frustrated by those individuals and groups, and that this needs to be acknowledged in any investigation of these matters. Support for reform initiatives which have already been taken, has been denied by the reluctance of professional bureaucrats (and formerly those with political responsibilities) to acknowledge that deficiencies exist.

If all the material here were competently investigated (as some of it already has been) I assert that the process would produce an excellent set of guidelines for restoration of working relationships between the industry and its regulator.

Although the majority of events analysed here occurred before 2003, they therefore do provide a background against which governance issues within CASA should be examined. My files contain more than twice as much information on more recent events; however that material is not yet ready for publication as it needs to be further researched, edited and cross-referenced. I am quite willing to open my files to any competently instructed investigation, on the understanding that *some* of the material requires further investigation and therefore can for the present only be considered as "allegations."

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EXECUTIVE SUMMARY

1. The Civil Aviation Safety Authority's handling of its enforcement responsibilities has over most of the last decade seriously degraded Australia's air safety climate by generating mounting mutual distrust and antipathy between the regulator and many in the industry. Until 2003 there was more confrontation and less mutual respect and cooperation, than had ever existed between the regulatory body and the industry.
2. Certificate holders have been continually faced with the threat that their businesses could be shut down almost at the whim of a single and unqualified CASA decision maker through the continued exploitation of apparently unintended provisions of the Civil Aviation Act and Regulations which some describe as "loopholes."
3. The confrontation was worsened by gross and growing deficiencies in the delivery of regulatory services, which shackled the conduct of aviation businesses; and the fear that the apparent abuse of regulatory processes by CASA could shut them down immediately without recourse to due process.
4. At the centre of these twin problems appeared to be the absence of effective management, training, defined and uniform policy, guidance, and prioritisation.
5. This resulted in an appalling degradation of morale amongst operators, industry employees, and the diminishing number of individuals within CASA who still subscribed to the principles of fairness, due process, and the rule of law.
6. CASA apparently elected to circumvent normal and available legal avenues, due process, natural justice and procedural fairness in pursuit of the policy goal of reducing the number of air operator certificate holders. This was demonstrated by the application and the apparent abuse of administrative procedures available to it under the Act, as an alternative to available remedies offered by proper investigation, legal process, and prosecution.
7. Declining to acknowledge the impropriety of its actions, CASA's [former] General Counsel made it clear that while Government allowed it, CASA would continue to pursue its goals through the application of administrative decisions rather than through proper and available legal channels and the legal processes by which other regulatory bodies in Australia are bound.
8. This resulted, in an unacceptable number of cases, in air operators (and significant employers) being forced out of business by the weight of their financial burdens, without CASA's allegations against them ever having faced the scrutiny of a court or without according the victim the opportunity to face and cross-examine its accusers.
9. CASA had clearly been acting contrary to legal advice it obtained from the Attorney General's department which states that "there is a high risk of liability for defamation under current legislation." CASA apparently defamed certificate holders by publishing unsubstantiated allegations against them.[1]
10. The above tactics were apparently necessary because CASA, which had a dismal record in the investigation and prosecution of alleged rule breaking, also had a fear that the use of normal legal processes would expose the inadequacy of its rule structure, and its investigation and surveillance procedures.
11. Since 2003 there has been steady improvement in some of these aspects, but a great deal more remains to be done.

[1] *See B4*

A1 CREDENTIALS AND MOTIVATION

A1.1: The credentials of the writer of this document are:

1) Name: Paul D Phelan, Australian born citizen
2) 48 years as a licensed private, commercial general aviation and airline pilot;
3) Senior management roles in charter, corporate and airline operations including the role of flight operations manager of a major regional airline;
4) Subsequent activity over the past ten years (1990-2000) as an aviation writer with the following assignments:
   - Executive editor, *Australian Flying* magazine;
   - Senior contributor, *Aircraft & Aerospace* Magazine;
   - Australian correspondent, *Flight International* magazine for 10 years;
   - Senior contributor, *Middle East Aviation Journal* (Dubai, United Arab Emirates) for 3 years;
   - Occasional contributor on aviation matters to various current affairs journals and newspapers.
   - Aviation columnist, *Cairns Post* for 4 years.
5) The operation of an aviation consultancy business specialising in flight operations.

A1.2: The motivation for preparing this analysis is an ongoing concern for the fortunes of the general aviation and low capacity public transport sectors of the aviation industry. The analysis was not prepared at the instigation of any other individual or entity, and no monetary benefit is anticipated to be derived from it.

A2 DISCLAIMERS

A2.1: The material provided in this document is based, where possible, on documentation available or information from affected parties. Any opinions expressed are the opinions of the writer except where another individual is quoted as the holder of the opinion. They will be labelled as **COMMENT**

A2.2: This study does not make judgements on the merits of individual regulatory issues, allegations and events which it discusses. It aims to convey facts relating to CASA's performance in meeting its functions and obligations; and to stimulate discussion on whether that performance is consistent with the principles of procedural fairness, transparency and natural justice which Australians require to be part of the fabric of any kind of regulatory activity, regardless of perceptions of guilt or innocence.

A3 IS ALL THIS REALLY HAPPENING?

All this and more. Parliamentarians may find some of the accounts of events and attitudes set out in this document so bizarre as to be barely credible. If so, they are urged to refer them to air operator certificate or workshop approval certificate holders in their electorates.

Apart from some reticence which exists because of fear of administrative retribution by the regulator, any parliamentarian who takes the trouble to investigate, will be surprised at the unanimity between certificate holders on the issues raised herein.

A4 BACKGROUND

A4.1: According to CASA's most recently published annual report there are now about 900 air operator certificate holders, and with the exception of major and regional carriers, all fall into the category of general aviation and/or low capacity RPT, which accounts for a vast amount of flying annually, but for only a small percentage of the revenue extracted from the industry for 'regulatory

services.' It is therefore inevitable that the resources applied by CASA to that industry sector are disproportionate to the revenue it receives from the sector.

A4.2: The regulatory body has undergone almost continuous change in board and management structure since aviation safety regulation ceased to be the function of the Department of Civil Aviation. Over the past twenty years regulatory responsibility has successively been the responsibility of:

- Department of Civil Aviation.
- Department of Transport and Communications (Air Transport Group)
- Civil Aviation Authority
- Civil Aviation Safety Authority

A4.3: It has recently been publicly acknowledged that the Civil Aviation Safety Authority's management recognises the mistakes of the past and the need to put these mistakes behind it. It has also been proposed that the Authority should be allowed a clear path, free of public criticism, to get on with that task. This report asserts and demonstrates that despite the best efforts of the incumbent management the authority is still making grave errors in the compliance and enforcement area. Events outlined here are open to the interpretation that a prevailing “culture” within the organisation has successfully defied those efforts by force of numbers. This assertion is supported by the fact that the same names appear in the accounts of numerous events, although some individuals and groups who have been involved in specific matters have since left the organisation. It is widely believed throughout the industry that those departures have been at the instigation of current management.

A4.4: A series of past inquiries into aviation regulation has resulted from a series of high profile aviation accidents. Some of the more significant of these have been:

- Coronial Inquest into the deaths resulting from air crash of Monarch Airlines aircraft at Young on 11 June 1993
- House of Representatives Standing Committee on Transport, Communications and infrastructure – Aviation Safety Inquiry 1995 (“*Plane Safe* Inquiry.)
- Falcon Airlines inquiry, D.A.Wheelehan QC Sydney 1996
- Commission of Inquiry into the Relations between the CAA and Seaview Air 1996
- Review of the regulation by the Civil Aviation Safety Authority of Aquatic Air Pty Ltd trading as South Pacific Seaplanes – Stephen Skehill October 1998
- Coronial inquest into the deaths of two pilots and 13 passengers in the Metro aircraft accident at Lockhart River in May 2005

A summary of some of the relevant recommendations of inquiries is at B14 of this document.

A5 RECOMMENDATIONS (SOL UTIONS)

A5.1: The Australian Government must acknowledge and address the problem that existing chaotic situations in the compliance and enforcement area have totally failed to address the safety and enforcement problems identified by several recent inquiries over the past ten years, or to deliver upon their safety-related recommendations; and that this has created an intolerable industry climate which is absolutely antithetic to modern air safety principles.

Interim measures

A5.2: An immediate initiative should therefore be a direction that:

a) every proposed or implemented regulatory sanction to be supported by full documentation, including a summary of evidence, identifying the writers and the decision makers who must sign their input, and detailing the reasons for the proposal or sanction including the exact nature of the alleged breach. There can be no valid reason for this information not to be available to the affected party and/or their lawyers.

b) The decision making process with regard to regulatory sanctions must not be based on balance of probabilities or reason to believe, but on the same basis as what binds the courts. This would require

- testing of the accuracy of the material upon which the proposal is based;
- examining its real relevance in the overall safety context as to whether the proposed action is necessary to remove a genuine risk to safety;
- examining whether available evidence would be likely to support a conviction in a court;
- determining whether proposed regulatory activity is correctly directed, i.e. whether it should be directe d against the employee or the certificate holder;
- if so, evaluating the alternative of prosecuting the individual, operator or entity;
- determining what options to suspension or cancellation exist to remove any immediate threat to sir safety, and reasons why they should not be exercised as an alternative.

c) decisions only to be made by individuals who have the technical qualifications to examine the data and make correct decisions, and they should still be open to challenge as above. Delegates and other signatories to the documents must be available at show cause hearings.

d) an independent external examination be commissioned to enquire into the apparently illegal actions of CASA employees in these regards and to replace or re-train the responsible officers;

e) develop and institute replacement legislation which restores the principles of natural justice and the rule of law to the enforcement process in aviation;

f) in the interim, establish an industry ombudsman or ombudsman committee, completely independent of CASA, to examine any proposed CASA initiative to suspend or cancel certificates or licenses as in the above recommendations

Ongoing reform initiatives

A5.3: Any subsequent inquiry will only achieve its goals if it appoints its own panel of independent and accredited expert flight operations, airworthiness, air safety investigation, legal and management advisers, each with extensive relevant aviation industry experience. Each of these should be individually examined as to vested interests. Acknowledged vested interests should however not necessarily be a disqualification because of the limited number of qualified individuals available.

A5.4: These advisers should be members of the inquiry and should constitute as a minimum:

1. An expert in the area of flying operations inspection and surveillance who is either
   (i) not dependent on the Civil Aviation Safety Authority authorisations or approvals for his/her livelihood or
   (ii) is prepared to risk his/her approvals in the interests of the inquiry;
2. An expert in the area of airworthiness inspection and surveillance who is either
   (i) not dependent on the Civil Aviation Safety Authority authorisations or approvals for his/her livelihood or
   (ii) is prepared to risk his/her approvals in the interests of the inquiry;
3. Experts in separate consultancy areas requiring the representation of operators to the Civil Aviation Safety Authority in flight operations and airworthiness matters, specifically including the negotiation of certificates, approvals and authorisations which are currently issued at the discretion of individuals within the Civil Aviation Safety Authority;
4. A senior air safety investigator, drawn from industry, and accredited by the International Society of Air Safety Investigators (ISASI);
5. A lawyer or lawyers with significant experience in commercial aviation and a background in dealings with legal issues related to regulatory practice and policy;

A5.5: Appointments to the panel should be made on the advice of an external consultant appointed without reference to CASA or the Department Secretary.

A5.6: The panel should be provided with specific draft terms of reference and invited to make submissions as to their adequacy and relevance to issues under investigation.

A5.7: The inquiry should have full access to allow it to examine statements or evidence provided by the Civil Aviation Safety Authority; and should examine and report on:

- The validity of that evidence;
- Its real relevance to modern air safety practice; and
- Alternative ways of meeting the Government's safety responsibilities.

A5.8: Submissions should be sought and evidence should be taken, within the established terms of reference, from individuals and industry groups from all affected areas of industry and from individuals within, and management of, CASA.

A5.9: The chairman of the inquiry must have the power to provide indemnities from prosecution.

A5.10: The inquiry should report to the Minister and the report should become a public document.

A6 SUGGESTED TERMS OF REFERENCE

1. Is it the intent of the Act and Regulations to empower CASA to suspend certificates for more than one consecutive 28-day period?

2. Is it the intent of the Act and Regulations to empower CASA decision makers to create a situation where:

   a) an operating certificate may be suspended for any number of successive 28-day periods, with the obvious outcome that the operator will be forced out of business, without the matters purporting to be the reason for the decision ever having been exposed to legal scrutiny or the cross-examination of informants or decision makers; and

   b) in order to give such decisions respectability, all CASA needs to do is to cite its responsibility under the Act, to place safety ahead of all other considerations.

3. Is there a valid reason why aviation should require such a different application of the law than many industries with much greater potential to do public harm, that the normal processes of British law may be reasonably suspended or reversed in aviation matters, to bypass the fundamental tenets which require that:

   a) Justice must not only be done, it must be seen to be done;

   b) Due process as defined in administrative law is served;

   c) The Crown must prove its case.

7 Should a completely different structure for the establishment of Aviation Safety Policy, Aviation Law and Regulation, and securing compliance with the law be considered, as suggested by the Airline Passenger Association/AOPA proposals, based on the NSW State example of the regulation of motor transport, which has been singularly effective in achieving major improvements in road safety outcomes with an approach that is the absolute antithesis of the CASA structure?

8 What percentage of investigated accidents over the past ten years has been attributable to non-compliance with Civil Aviation Regulations, and what is the real air safety relevance of the plethora of allegations against operators and individuals?

9 What recognition does the present regulatory system give to the acknowledged fact that human factors, not deliberate or inadvertent non-compliance with regulatory requirements, is the key causative element in modern air safety events; and what weight does current CASA activity and current CASA expenditure and application of resources give to that well established fact?

10 What is the success record of CASA's pursuit of its regulatory goals through the court system, and why? This line of inquiry should examine CASA's record and performance in the investigation, gathering of evidence, identification and briefing of expert witnesses, and briefing of the Directorate of Public Prosecutions so as to secure a credible record of convictions of individuals and entities identified as having committed safety breaches. It should also determine what expense CASA commits to its legal activities by examining against its budget the returns in terms of safety enhancement of its expenditure on:

   a) Investigations;

   b) Expert witnesses;

   c) External legal services in defence of its processes in the AAT and the ADJR process;

   d) Training of field and management staff on legal issues.

What is the relativity between the practices and performance of CASA and other Australian and international enforcement agencies, inside and outside aviation, in terms of

   a) the achievement of regulatory and safety goals;

b) the development of effective, intelligible, non-contradictory and enforceable regulatory structures;

c) the application of due process and natural justice in the pursuit of its obligations;

d) measurable air safety outcomes;

e) questions of defamation and the publication of data which may disadvantage entities under investigation; and

f) adequate guidelines, established procedures, training, and checks and balances to protect individual and corporate rights.

11. What is an appropriate senior management composition in respect of depth of non-military aviation experience and background in airworthiness and flying operations areas and in the oversight of those appointments?

B: BUREAUCRACY VERSUS SAFETY - CASE STUDIES

B1 INTRODUCTION

The following case studies are only a few examples of the flawed processes and their outcomes, which this study examines. The reader will identify several aspects which are common to each event. Any inquiry into the matters raised in this document should be tasked with identifying other events of a similar nature, comparing them with those described in this study, and recommending a strategy by which such grave errors might be avoided in the course of future enforcement activity.

COMMENT: In the time available I have been unable to research whether the following description of the processes remains accurate or whether there have been recent changes and reforms.

B2 REGULATIONS UNDER WHICH LICENSES AND CERTIFICATES MAY BE SUSPENDED OR CANCELLED

B2.1: The authority to suspend a licence or certificate pending an investigation is provided by Civil Aviation Regulation 268, as follows:

CAR 268 Suspension of licence, certificate or authority pending investigation

(1) Where CASA has reason to believe:

(a) that there may exist facts or circumstances that would justify the variation, suspension or cancellation of a licence or certificate or an authority on a ground specified in regulation 269, and

(b) that there may be a serious risk to air safety if the licence, certificate or authority were not suspended,

CASA may, by notice in writing served on the holder of the licence, certificate or authority, suspend the licence, certificate or authority.

(2) Where CASA suspends a licence or certificate or an authority in pursuance of subregulation (1), CASA shall forthwith investigate the matter, and the suspension shall cease upon the completion of the investigation or at the expiration of 28 days from and including the date on which the suspension took effect, whichever is the earlier, but without prejudice to the powers of CASA under regulation 269.

(3) Where:

(a) CASA, upon the completion of an investigation under this regulation, gives to the holder of the licence, certificate or authority a notice under subregulation 269 (3), and

(b) the suspension of the licence, certificate or authority under this regulation had not ceased before the completion of the investigation,

the licence, certificate or authority shall remain suspended during the time specified by CASA in that notice as the time within which the holder may show cause why the licence, certificate or authority should not be varied, suspended or cancelled under regulation 269.

Comment: The Committee is invited to consider the significance and intent of the phrases:

a. “has reason to believe”

b. “that there may exist facts or circumstances…..” and

c. “that there may be a serious risk to air safety……” and

d. whether it was the intent of the regulation that CASA could justify the actions detailed in the following case studies simply by asserting that it was "satisfied" that such conditions existed; and

e. whether it was the intent of Parliament to create a situation in which a series of successive certificate suspensions could have the effect of forcing an operator out of business without due legal process.

CAR 269 Variation, suspension or cancellation of licence, certificate or authority

(1) Subject to this regulation, CASA may, by notice in writing served on the holder of a licence or certificate or an authority, vary, suspend or cancel the licence, certificate or authority where CASA is satisfied that one or more of the following grounds exists, namely:

(a) that the holder of the licence, certificate or authority has contravened, a provision of the Act or these Regulations, including these Regulations as in force by virtue of a law of a State,

(b) that the holder of the licence, certificate or authority fails to satisfy, or to continue to satisfy, any requirement prescribed by, or specified under, these Regulations in relation to the obtaining or holding of such a licence or certificate or an authority,

(c) that the holder of the licence, certificate or authority has failed in his or her duty with respect to any matter affecting the safe navigation or operation of an aircraft,

(d) that the holder of the licence, certificate or authority is not a fit and proper person to have the responsibilities and exercise and perform the functions and duties of a holder of such a licence or certificate or an authority, or

(e) that the holder of the licence, certificate or authority has contravened, a direction or instruction with respect to a matter affecting the safe navigation and operation of an aircraft, being a direction or instruction that is contained in Civil Aviation Orders.

(2) A notice under subregulation (1) shall set out the grounds for the decision.

(3) Before taking action under this regulation to vary, suspend or cancel a licence or certificate or an authority, CASA shall:

(a) give notice, in writing, to the holder of the licence, certificate or authority of the facts and circumstances that, in the opinion of CASA, warrant consideration being given to the variation, suspension or cancellation of the licence, certificate or authority under this regulation, and

(b) allow the holder of the licence, certificate or authority to show cause, within such time as CASA specifies in that notice, why the licence, certificate or authority should not be varied, suspended or cancelled under this regulation.

(4) The time specified by CASA in the notice under subregulation (3) as the time within which the holder of the licence, certificate or authority may show cause why the licence, certificate or authority should not be varied, suspended or cancelled under this regulation shall be a time that is reasonable in all of the circumstances of the particular case.

B3 CASE STUDY - SUSPENSION OF ORD AIR CHARTER'S AIR OPERATOR CERTIFICATE

Ord Air (OA) was a charter business operated by Maxine Reid, which at the time of these events had been in operation for over 30 years. As in Queensland's most northern regions, the company had developed two mail runs to serve towns and communities spread over the vast distances of the Kimberley region. OA submitted to CASA that a rule exemption made in Northern Queensland's case should be applied to the Kimberley since the services were of so similar a nature. Ord Air claimed it had been delivering this service for over 30 years with an unblemished safety record.

Mrs Reid's husband Peter was killed in an air accident in the presence of Maxine, her father and their four young children, while performing an Acrobatic Display at the local annual Paddy's Market. Not only did Maxine overcome this enormous hardship, but also took control of the family business, Ord Air Charter, and proceeded to manage and expand the business in a world previously considered to be not a Woman's World. Maxine not only did this extremely successfully but also brought up 4 young children.

1. **Jul 28-99:** The dispute between CASA and Ord Air began when CASA required OA's chief pilot to investigate one of the company's 'mail runs' and to determine if it was in compliance with CASA's interpretation of its own regulations. In a letter approving the chief pilot appointment, CASA told Maxine Reid:

   > *"The chief pilot approval process presented the opportunity to address with your nominee, the serious compliance problem CASA sees with the regular Monday and Thursday "E53" service you operate in single-engined aircraft over the approximate route: " [and went on to list the ports]*

2. **Aug 23 99:** Maxine Reid wrote to CASA Darwin office explaining that the two flights in dispute were respectively

   a) under contract with Australia Post, who had the prerogative to say what and whom was able to travel on their aircraft; and

   b) a joint charter by five partners - three cattle stations and two communities, who each pay a retainer to receive the service. As for the Australia Post flight they have the right to say who and what travels on their aircraft.

3. The letter notes that neither run is for "persons generally" any more than the freight flights done by Alligator Airways from Kununurra to Kalumburu, or Slingair's 'Kimberley Air Pass' regular flight out of Kununurra, selling seats to the general public and operating to a schedule decided by Slingair.

   She offers to approach Australia Post to ascertain their willingness to have a direct contract for the Thursday flight, to make it similar to Australia Post run.

   Aug 26-99: In a letter to Darwin office, the CP indicates that in his view the operation does not constitute an RPT service, and provides considerable supporting argument.

4. **Jul 28 99:** Darwin office writes to Maxine Reid:[2]

   > *"Careful consideration of both letters has not altered our opinion that the E53 flights must be classified as regular public transport operations," and indicates that "CASA has decided to commence the procedures required to suspend or cancel your air operators' certificate on the grounds of your non-compliance with its conditions. You may expect to be served with a Notice to Show Cause in due course."*

   The Chief Pilot is provided with a copy of this letter as a response to his letter.

5. **Sep 24 99:** Maxine Reid writes to the (then) general manager of general aviation operations:

   > *Given that the letter of the 28th July is the first time we have received a letter on the issue, and given the fact that the mail run has been operated by this company*

[2] *All correspondence quoted in this narrative is derived from letters retained on the writer's files.*

for about 30 years without any incident, we would appreciate a more constructive approach by CASA to solving the problem.

As stated in the letter by the Chief Pilot there are very basic needs of the stations and two large aboriginal communities that are trying to be met; they have no other way of receiving their mail, freight or personnel as there are no trafficable roads for up to five months of the year and when they are open it is at least a day's trip to one of the communities - 4WD only.

If you have any queries on the matter please do not hesitate to contact us as we are keen to resolve the situation with the least impact on the receivers of the service.

6. On the same date Maxine Reid writes to CASA's Darwin office:

> *We feel that [CASA's letter] is an entirely inappropriate letter, in light of your letter of the 28th July requesting that the Chief Pilot investi gate the situation as regards to the mail run in question. The Chief Pilot has given his response to his investigation and common courtesy would be that CASA advise as to whether they agree or disagree with the Chief Pilot, and if they disagree the reasons why. The company would then be able to change the situation possibly. Both the Chief Pilot and the company have put forward suggestions for changes and we have no response to those ideas.*

   The letter is copied to the GM GA operations, the Aviation Minister, and several other parliamentarians.

7. **11 Nov 99:** The chief pilot writes to CASA Darwin office, constructively proposing several possible models for resolving the situation.
8. **Jan 28 00:** Ord Air is served with a show cause notice by CASA
9. **Jan 31 00:** An informal telephone conference is held between CASA FOI Riceman and chief pilot John Cridland.
10. **Feb 1 00:** Maxine Reid writes to CASA indicating that she proposes to resign as Managing Director of Ord Air Charter Pty Ltd and that the position will be taken over by Mr Alisdair Reid. She acknowledges this will require a change in the company's AOC and requests application forms
11. **Feb 3 00:** Ord writes to CASA advising of a new company structure in which Maxine Reid is not a participant. She will be replaced by Alasdair Reid.
12. **Feb 08 00:** AOC application is altered to list John Cridland as the Managing Director instead of Alasdair Reid.
13. **Feb 11 00:** Riceman writes a "Notice of Formal Counselling to Ord Air (Cridland) saying in part:

   On 28 January 2000 Ord Air Charter Ply Ltd ("Ord Air") was served with a Show Cause Notice ('the Notice") Proposed Refusal to Issue Air Operator's Certificate ("AOC"), Ord Air's responses to the Notices were:'

   - *a written response dated 28 January 2000,*
   - *verbal responses at the Informal Conference held by telephone on the 3I January 2000,*
   - *a letter regarding a change to its managing director dated February 2000*
   - *a revised AOC application and covering letter dated 3 February 2000,*
   - *an amendment to the revised AOC application and covering letter dated 3 February 2000,*
   - *a letter containing, further information about Its new managing director dated 4 February 2000,*
   - *a letter changing its managing director-elect dated 8 February 2000, and*

- *Mrs Reid's letter dated 9 February. 2000 certifying she is not involved in the company's operations.*

After considering all of the information referred to in the preceding paragraph, particularly Mrs Reid's resignations as managing director, I have concluded that if Ord Air generally accepts counselling regarding the matters set out in the Notice, particularly the "Unauthorised RPT Operations - E53 Flight' matter, then there would be insufficient grounds to recommend refusing to issue Ord Air's charter and aerial work AOC. Also, I could not recommend withholding the authorisation of regular public transport ("RPT") operations once a maintenance controller has been approved.

However, under sub paragraph 28(l)(b)(iv) of the Act; CASA must now also decide if it is satisfied that Ord Air's managing director-elect has appropriate experience in air operations. Your responses to this counselling will be used as part of the process to make this assessment.

14. **14 Feb 2000:** Middap Services circulates an advice to users of the service saying in part:

    You are no doubt aware of the fact that the Civil Aviation Safety Authority has discontinued the Mail Runs in their present format. However if the users are agreeable to using an Agent (one only), then the Mail Runs are able to continue as they are, at least for the present. To this end I offer my services (Middap Services) to be the agent for all passenger and freight bookings. My fees will result in about a 5% increase on existing passenger fares and a charge of $15.00 per freight consignment This charge is regardless of the number of parcels in the consignment There will be no change in the present per kg. freight rate and no landing fee will be charged

    I am aware that Ord Air may have already intimated this option to you and just wish to confirm my offer and advise of to charges involved. Please fax back your response to Middap Services on Phone/Fax 91612964.

15. **14 Feb 2000:** Ord Air (managing Director) writes to Riceman requesting:

    1. a written undertaking that my signature on the counselling letter puts an end to any criminal, civil or other action (however described), stemming directly or indirectly from any of the matters referred to or described in the said counselling letter dated 11 February 2000;"
    2. an amplification of the term 'interposing an entity (agent), "so as to bring us within the CAR'S;"
    3. Confirmation that implementation of this system or arrangement will satisfy CASA's assessment /requirements as to Ord's charter status;
    4. "I would also like you to confirm that initially ORD AIR CHARTER will be issued with an AOC for charter and airwork as discussed at our meeting, with RPT to follow on approval of Dave Barnett. I wish to query the reason for the *limited period* restriction on our new charter / airwork AOC as this was not discussed at our meeting last Friday. It is my understanding that if our AOC application is approved then it should run for the standard period;"

    The letter also undertook that documentary evidence of other requested matters would be forthcoming; and concluded with the statements that:

    - In relation to paragraphs 27 & 28, I accept they reflect CASA's belief. However by signing the letter ORD AIR CHARTER does not accept that CASA's view is necessarily correct.
    - ORD AIR CHARTER also does not accept that it has knowingly contravened Subsection 29(2) of the CAA either in fact or in law although ORD AIR CHARTER does acknowledge that view is held by CASA.

Feb 18 2000: CASA (Riceman) writes to Ord (Cridland) advising of intention to make a recommendation to the delegate that he should not issue Ord Air with an AOC. The letter is reproduced below:

> *Mr John Cridland*
> *Managing Director*
> *Ord Air Charter Pty Ltd*
> *PO Box 73*
> *WYNDHAM WA 6740*
> *BY FACSIMILE 08 9161 1456*
>
> *Dear Mr Cridland,*
>
> *ADVICE OF INTENTION TO MAKE A RECOMMENDATION TO THE DELEGATE*
>
> *You will recall that in paragraph 44 of the show cause notice which was issued to Ord Air Charter Ply Ltd ('Ord Air') on 26 January 2000 I stated that "it would appear that CASA cannot be satisfied that Ord Air has complied with the provisions of the Act [and the] regulations ... as required by paragraph 28(1)(a) [of the Act]".*
>
> *Ord Air responded to that notice on 28 January 2000 but nothing in that response gives me reason to change my view on that matter.*
>
> *You will also recall that I wrote to you on 11 February 2000, following our meeting in Darwin that day, in which I asked you to respond to the notice of formal counselling and to provide certain evidence in relation to the management and ownership of the company.*
>
> *On 14 February 2000 you responded to me and, inter alia, you stated that Ord Air did not accept that "CASA's view [in relation to paragraph 27 and 28 of the counselling letter] is necessarily correct."*
>
> *You also stated that "Ord Air Charter also does not accept that it has knowingly contravened Subsection 29(2) of the CAA (sic) either in fact or in law..."*
>
> *Consequently, I conclude from your correspondence of 14 February that Ord Air may not be capable of complying with the provisions of the Act or the regulations in the future.*
>
> *In addition, the correspondence which you sent to Ron Beach on 14 February in relation to the interposed entity indicates to me that Ord Air does not understand the significance of paragraphs 206(1)(b) and 206(1)(c) of the Civil Aviation Regulations 1988 ('the CARs') and that Ord Air does not understand CASA's interpretation of those paragraphs, published in the policy notice, in so far as it applies to "interposed entities". Importantly, that correspondence indicates to me that it is Ord Air rather than Middap Services which is negotiating the contracts for the carriage of passengers and cargo on Ord Air flights. You have claimed that Middap Services will be acting simply as an agent for the stations and communities. However, it seems to me that Middap Services would be acting as an agent for Ord Air and so, as a result, the stations and communities would be "persons generally" for the purpose of paragraphs 206(1)(b) and 296(1)(c) of the CARS. Furthermore, it does not appear to me that Middap Services is contracting at an arms length commercial basis with Ord Air for the carriage of persons and cargo and neither does it appear to me that Middap Services and Ord Air are not related.*
>
> *In paragraphs 45 and 46 of the show cause notice I stated that CASA could not be satisfied in relation to certain matters. <u>Those matters include those set out in subparagraphs 28(1)(b)(i) and 28(1)(b)(iii) of the Act</u>. (MY UNDERLINING) Your apparent continued misunderstanding of paragraphs 206(1)(b) and 206(1)(c) of the CARs and the related policy, particularly in relation to interposed entities, indicates to me that CASA could still not be satisfied in relation to these matters.*
>
> *<u>Basis of my intended recommendation to the delegate</u>*
>
> *I remind you that, pursuant to paragraph 28(1)(a) of the Act, "CASA must issue an AOC if, and only if, CASA is satisfied that the applicant has complied with, or is capable of complying with, the provisions of this Act [and] the regulations....'*
>
> *Furthermore, pursuant to subparagraphs 28(1)(b)(i) and 28(1)(b)(iii) of the Act, CASA must issue an AOC if, and only if, CASA is satisfied that "the organisation is suitable to ensure that the AOC operations can be conducted or carried out safely..." and that "the organisation has a sufficient number of suitably qualified and competent employees..."*
>
> *In my opinion, as a result both of Ord Air's history and your recent communication with me, CASA is not able to be satisfied in relation to these matters and so could not issue Ord Air*

with an AOC. Consequently I advise that, unless you present me with substantive evidence otherwise, it is my intention to recommend to the delegate that he should not issue Ord Air with an AOC. Furthermore, unless you present me with compelling reasons for delaying giving that recommendation, it is my intention to do so after the close of business on Wednesday 23 February 2000.

Finally, I remind you that on 11 February I asked for positive evidence of the alleged change of directors and change of shareholdings. The documents which you have provided me to date are not adequate for that purpose.

Yours sincerely,

W.D. Riceman

Area Manager, Central Area

Comment:

It seems axiomatic that Mr Riceman arrives at conclusions without any proper examination of the evidence, to wit, the relationship between Ord Air Charter Pty Ltd and Middap Pty Ltd.

Also worthy of note is the manner in which this matter has unfolded, the inexplicable timing of CASA's actions so as to effectively shut down Ord Air, its unwillingness to negotiate other means of keeping OA in business with a view to maintaining even just the mail run; and the refusal of CASA's legal counsel even to discuss the matter.

16. **21 February 2000:** Ord (Cridland) writes to Riceman enclosing:
    - An undertaking signed by himself, and
    - A statutory declaration sworn by himself concerning a number of the matters of concern to CASA. (see below)
    - The Counselling letter from CASA dated 11 February 2000 signed by himself.

With a view to endeavouring to persuade CASA to recommend to the delegate that an AOC issue to Ord Air Charter Pty Ltd, the chief pilot confirmed that:

- "The company now has myself as the director and Chief Pilot,
- "The company wishes to move on from the past under its new direction;
- "[The designated maintenance controller] has not been able to secure an interview appointment with CASA's Mr Steve Bennet due to the absence of Mr Bennet although I anticipate that such an appointment will be available very soon;
- "Ord Air Charter Pty Ltd has no control over which business or entity can be interposed as envisaged by clause 5 of the GAOB policy."

The statutory declaration stated:

1 I am the Chief Pilot of Ord Air Charter Pty Ltd since being appointed in July 1999 by Instrument No. DN 157/99.

2. On 11 Feb 2000 I accepted the offer to replace Ms Maxine Sinclair Reid as the sole director of Ord Air.

3 . On or about 10 February 2000 I was informed by Ms Maxine Reid that she wished to resign all her office-holding positions with Ord Air.

4. On 11 February 2000 the accountant for Ord Air, Mr Allan Paroissien was instructed to prepare the ASIC documentation to effect the necessary changes.

5 . Between 14 and 19 February 2000 I had a number of telephone conversations with Mr Paroissien who told me that the relevant documentation had been prepared and sent to me by prepaid express post.

6. On 13 February 2000 I know that Ms Maxine Sinclair Reid left the State of Western Australia and I believe that on 14 February 2000 she left Australia.

7. I have had no contact whatsoever with Ms Reid since she left Wyndham in the said State on 13 February 2000.

8. Since 14 February 2000 I have been acting as the director of the Ord Air and making the decisions for it.

9. On 18 February 2000 I received by facsimile transmission what I believe to be a true copy of the form to effect the change in directorship of Ord Air and it is that form which I will sign and return to Ord Air's accountant once it has been received by me in Wyndham. Now produced and shown to me and marked with the letters "JFC 1" is a true copy of the Form 304 which I received from Mr Paroissien.

10. On 21 February 2000 I was informed by Mr Paroissien that he had sent a copy of the documentation lodged with the ASIC in relation to the change in directorship of Ord Air to Mr Riceman on 21 February 2000. Mr Paroissien also informed me that that there is no documentation per se in relation to the change of share-holdings and that those changes have been submitted to ASIC in electronic form.

11. On 11 February 2000 I participated in what is described by CASA as a conference with representatives of the Civil Aviation Safety Authority (CASA) following the issue of a Show Cause Notice dated 28 January 2000 to Ord Air.

12. I participated in the Conference in my capacity as Chief Pilot of Ord Air.

13. During that conference which involved, amongst other things, a dissuasion of a divergence of view as to the categorisation of what is known between the parties as the "E 53 run' and with a view to complying with CASA's interpretation of Civil Air Regulation 206, a CASA representative suggested interposing an entity in accordance with clause 5 of the CASA GAOB Policy Position dated June 1999.

14. Annexed hereto and marked with the letters "JFC 2" is a copy of the GAOB Policy on which I have relied.

15. I refer to the second paragraph under the sub-heading ','Scope and effect of this minute" which relevantly reads:

"CASA's interpretation and application of regulatory provisions is not "the law" only a court can make binding decisions as to what the law is and requires."

16. I refer to clause 5 of the policy annexed hereto as "JFC 2" which relevantly reads:

"Subject to the following paragraphs, if.

- *a third party enters into contracts for carriage with passengers, and*
- *the third party contracts with an operator on an arm's length commercial basis to acquire exclusive rights in relation to all space on an aircraft (to "back to back" the third party's actual or prospective contractual obligations to passengers) ; and*
- *the third party and the operator are not related*
- *accommodation on the aircraft should not be regarded as being available to persons generally ...*
- *If the third party and the operator are closely related (for example, in a Corporations Law sense); or are not dealing with each other on an arm's length commercial basis, the activities of the third party and the operator should be considered as if they were one operator.*

17. On 11 February 2000 Middap Services made it known to Ord Air that it was prepared to be interposed as a third party entity for the purposes of clause 5 of the CASA GAOB Policy.

18. I know that on 11 February 2000 the former Director of Ord Air wrote to the remote stations, missions, stores, health clinics and other corporations which it had previously undertaken mail runs to and outlined what she understood CASA's position to be and suggested they appoint Middap Services.

19. I believe that letter or notification dated 11 February 2000 and referred to in the preceding paragraph, was sent to simply notify various persons and organisations of what was being proposed.

20. On 14 February 2000 I know that Middap Services wrote to various persons and organisations involved with the mail service operated by Ord Air and promoted itself as a viable third party entity and provided an outline of the costs and charges in that regard.

21. On 15 February 2000 I know that a copy of the letter dated 14 February 2000 from Middap Services was sent to CASA under cover of a facsimile header sheet. I did not sign the 15 February 2000 facsimile header sheet.

22. I can say that the offices of the business trading as Middap Services and Ord Air are geographically and physically separate.
23. I can say that there is no inter relationship between Ord Air and Middap Services in a Corporations Law sense or indeed in any other sense.
24. I can say that Ord Air's director, company secretary, shareholdings and registered office is not connectedwith Middap Services.
25. I can say from my own knowledge that Middap Services has a number of disparate business interests, none of which are, to my knowledge connected with civil aviation or Ord Air.

17. **25 Feb 99:** CASA (Riceman) to Ord (Cridland)

CIVIL AVIATION SAFETY AUTHORITY AUSTRALIA

Ref., 9919664-04
Mr John Cridland
Managing Director
Ord Air Charter Pty Ltd
PO BOX 73
WYNDHAM WA 6740

BY FACSIMILE 08 9161 1456

Dear Mr Cridland,

YOUR LETTER DATED 21 FEBRUARY 2000 AND ITS ATTACHMENTS

Thank you for your letter dated 21 February 2000, together with its attachments. I also acknowledge the phone call which you and I had yesterday, 25 February, in which we discussed certain aspects of your letter.

Middap Services

As discussed, I still have some concerns about the proposed arrangement between Ord Air and Middap Services in relation to the E53 flights.

You will recall that paragraph 5 of the policy on the classification of operations states, in relation to interposed entities.

Subject to the following paragraphs, if.,

- *a third party enters into contracts for carriage with passengers, and*
- *the third party contracts with an operator on an arm's length commercial basis..... ; and*
- *the third party and the operator* ***are not related*** *[my emphasis],*
- *accommodation on the aircraft should not be regarded as being available to persons*

The information which CASA has is that the principal of Middap Services, Mr Middap, is related to the Reid family, who are the past and present owners of Ord Air. Further, correspondence received from Middap Services by CASA was signed on behalf of Middap Services by Kirsten Cridland, whom I understand is your wife.

In addition, both organisations share the same registered address, a private home.

In the absence of any evidence to the contrary, the above matters indicate to me that Middap Services and Ord Air are related. Further, you have not provided any evidence that Middap Services and Ord Air are contracting with each other on an arm's length commercial basis. Finally, the information provided to CA SA from Middap Services and from Ord Air both refer to Middap Services acting as an agent for various stations and communities. Therefore, it does not appear that Middap is entering into a contract for carriage with the proposed passengers.

Please would you respond to this and, in your response, make reference to paragraphs 22 to 25 of your Statutory Declaration.

Shareholdings of Ord Air

During our conversation yesterday you advised that you would ask your accountant to ring me to assure me of the change of ow nership of the company. However, I confirm my advice to you that the share holdings of the company are recorded by ASIC and that that information is publicly available. Consequently, rather than having your accountant ring me, please would you access that information from ASIC and forward a copy to me.

Para 28(1)(a) of the Civil Aviation Act 1988

As you are aware, paragraph 28(1)(a) of the Act states 'if a person applies to CASA for an AOC, CASA must issue the AOC if, and only if, CASA is satisfied that the applicant has complied with, or is capable of complying with, the provisions of this Act, [and] the regulations..."

In your previous letter to me of 14 February you wrote, referring to CASA's belief that Ord Air's E53 flights should properly be classified as RPT flights, the following: "in relation to paragraphs 27 and 28 [of the counselling letter]..... Ord Air. Charter does not accept that CASA's view is necessarily correct'. You further wrote that "Ord Air Charter also does not accept that it has knowingly contravened subsection 29(2) of the CAA (sic) either in fact or in law -.-"

You said to me, yesterday, that paragraph 1 of your Undertaking (dated 22 February 2000) should be sufficient for CASA to be satisfied that Ord Air is capable of complying with the provisions of the Act and the regulations. However, if Ord Air does not accept, or understand, that in the past the E53 flights were in breach of regulation 206, then CASA cannot be satisfied that Ord Air can comply in the future.

I acknowledge what you say in paragraph 1 of your Undertaking and I acknowledge that you have now signed as having accepted the counselling letter. However, there appears to be a contradiction between that and the statement (referred to above) in your previous letter of 14 February. ! ask you, therefore, to resolve that apparent contradiction in writing.

Your request for an "exclusion on the E53 run"

In the covering letter which you wrote on 21 February, you asked that CASA give "urgent consideration to the issue of the AOC with an appropriate exclusion on the E53 run".

CASA would not issue an AOC allowing some charter operations but not others. Rather, we need to be satisfied that any flight which Ord Air operates will be in compliance with CASA's understanding of regulation 206. If the E53 mail runs cannot be operated in compliance with that understanding, then Ord Air itself must make the decision not to operate them.

Para 2 of your Statutory Declaration

In paragraph 2 of your Statutory Declaration you state that you have accepted an offer to replace Ms Reid as the sole director of Ord Air. However, It Is my understanding that there is at least one other director of Ord Air. Please would you clarify that.

Para 13 of your Statutory Declaration

in paragraph 13 of your Statutory Declaration you state that a CASA representative suggested certain interposed entity arrangements at our 11 February meeting. My recollection of that meeting was that those arrangements were discussed but not on CASA's initiative.

YOURS SINCERELY,

W.D. Riceman

Area Manager, Central Area

25 February 2000

THE FOLLOWING PHONE INTERVIEW WITH MAXINE REID 20-MAR-00 THROWS CONSIDERABLE LIGHT ON THE MATTERS SURROUNDING THIS ISSUE:

M.R. They [CASA] have required that I resign but they have given no reason. It was put to me on about February 4, I rang and said what can we do? He said: "the main problem we have with your company is you."

Q. Was he specific? Did he have any particular complaint to give as an example?

M.R. He just said: "We don't like the culture that you bring to the company. We don't like the attitude that you have to safety."

Q. Did he expand on that? Did he talk about procedures, manuals or anything?

M.R. Nothing. He would expand no more on that, and any other time **it's always been: "We don't want Mrs Reid to have anything to do with the company, we can't do anything until she is right out of the company," he says I'll have to resign my directorship, and that they had to approve the new managing director, he was most concerned it was my son-in-law, he w ouldn't accept my son as the new managing director** (he is only 19 so perhaps that could be used as a valid reason), except that I don't think they go around approving every managing director of every other company.

Q. Has he ever raised any questions of safety with you?

MR. **No. He demanded evidence of shareholding**. He went into a long rigmarole about demanding proof from John that I have got out of the company, and it took some time before our accountant could explain to them what actually goes on with company law, and the fact that only once a year you can look at the shareholdings. He basically wasn't going to accept the accountant's word for it.

Q. Does he say that he has the support of his Canberra masters when he makes these demands?

M.R. No

Q. Have you asked him?

M.R. I haven't because every time – **he went into a complete seizure last week because I've been answering the phone in the office. He wrote to John again and said to please outline my exact position with the company,** and accused John of (unintelligible)

Q. Surely if he's imposing as a requirement of doing business with you that you disassociate yourself with the company, that he should have to do that in writing?

M.R. Yes, but if I ask him to do that also, we're worried he will use that as a delaying tactic

Q. But obviously you're in a position of benefiting from the company's operations?

M.R. I don't have a majority shareholding now.

Q. Do I have your permission to place this before the people in Canberra and tell them I'm investigating it with a view to writing it up, that you've been told you have to get out of the company before CASA will have anything to do with you? That it hasn't been explained to you why that is required, and that if CASA has that view it should have to put it in writing. That somebody in the organisation has taken a dislike to you and just seems to be running riot.

M.R. No problem. They have all the latest amendments to go into the ops manual, if they're any good it would take them at most an hour and a half to go through them, but Ian Ogilvie, the man who's doing it, says he doesn't know when he'll get time to do them, he has to go back to Canberra. He's from Adelaide, and he's the man who's supposed to have been going through the operations manual. He won't be back till Wednesday and all this sort of bullshit. Should be able to do it in half an hour.

Q. Where are you up to with the AAT?

M.R. (PART OF RESPONSE IS NOT FOR PUBLICATION) …. **Appealing to the AAT, as they know very well, costs me a lot of money and I can't see any benefit because they wouldn't hear it for another two or three months, by that stage if we don't have the AOC we won't be here, so what difference is it going to make? If you do have an AAT appeal, CASA just jump up and scream safety, safety, safety, and that's the end of it**.

Q. Have they made any demands of you, or imposed any requirements on you, about things like safety systems, manuals or anything of that kind, or is it that they just don't like you?

M.R. Yes, that's it.

Q. In fairness before I question their behaviour I have to put these things to them, and I don't want to be told they've detailed complaints against you that you haven't told me about.

M.R. **No, they haven't sent me anything that would indicate that it's my managerial activities that have been remiss. It's all been verbal**. It's been very nasty, even John Cridland would agree with that. Everybody's just aghast that I can't do anything because if I do, the guy goes into a frenzy and the whole thing is delayed. …(NOT INCLUDED, TO PROTECT INDIVIDUALS)…. I hate saying this because I hate seeming paranoid, but **one of the airworthiness officers from Darwin made the remark to XXX in the hangar, that a company like Ord Air shouldn't be run by a woman.** I've always suspected that because of their attitude, but I don't believe in running round using that as an excuse. There's nothing else.

Q. I raise that because of a reference to criminal charges or other actions in Cridland's letter.

M.R. Yes, it was a condition of him signing the counselling letter that we wouldn't be charged with anything. That was on the advice of our solicitor that he put that in. They wouldn't agree to it and it had to be taken out. The solicitor said well it's probably not too bad because it's only CASA's opinion that that has happened. They're entitled to their opinion, John signing the counselling letter doesn't mean we agree with that opinion. They asked him to sign a whole lot of things of which he had no knowledge, no input, some of it was 15 years ago for goodness sake, I wasn't even managing director. That I think is another thing where it's very personal, because 15 years ago my husband was killed in an aircraft accident, they know

that, and In think they have brought it up personally in this counselling letter, I think pur posely to be hurtful, because I can think of no other reason, it has no bearing on what's going on today. They just don't like me, and from what I can see – they've admitted that on every visit we've been totally honest, totally truthful, told them everything they've asked. **I think it's just because I'm a woman. These dinosaurs in Darwin still have that attitude.**

Q. When did it switch from Darwin to Adelaide handling the case?

M.R. Riceman came into it fairly early in the piece, as soon as they issued the s how cause letter. He became involved then. After the show cause I was given the option of an informal conference very quickly or not at all, it was so quick that I had no chance of organising any legal representation.

Q. Are you supposed to have legal repr esentation at an informal conference?

M.R. At an informal conference they say they will take down anything you say and it may be used in evidence, almost like a police warning, so therefore you should have legal counsel to represent you. I went ahead because unless your legal counsel is very experienced with CASA, they're battling too.

Q. Any communications about maintenance?

M.R. There's a statement from the airworthiness man in Darwin that they have not any problem with the actual maintenance, but they had a problem with Joe's [maintenance controller] paperwork, but they never had any doubts about the actual maintenance so safety is not an issue. I'll send that as well as the show cause and our response.

Q. No criticism of your flight operations procedures , your appointment of a chief pilot, safety systems, anything like that?

M.R. No, they told John when he applied for the job that he needn't take it, and one of my previous chief pilots, it must have been Christmas '98, they said to him, **'I think you should go and find a job somewhere else.' I think at that stage they were planning to try and do something, but there was still somebody decent in Darwin who'd do the AOC, but nothing was written to me, the chief pilot just came back and asked me 'What's happening because I've just been told by Buggerlugs I should go and look for another job.' John was (given similar advice)**

Note: At the time of writing Ord Air was awaiting a decision on an Administrative Decisions Judicial Review application to have the CASA decision ruled illegal because it was a denial of natural justice. If that ruling is obtained, Ord Air intends to sue CASA for substantial damages.

B4 CASE STUDY - SUSPENSION OF AQUAFLIGHT AIRWAYS' AIR OPERATOR CERTIFICATE

B4.1: This example is a complex one which details more than one apparent abuse.

A Cairns based seaplane company, Aquaflight Airways, was shut down by the Civil Aviation Safety Authority's suspension of its Air Operator Certificate on 17 August 2000 under Section 28BA(3) for 28 days to permit the Civil Aviation Safety Authority to investigate "alleged safety breaches." For the first time, the Civil Aviation Safety Authority published the suspension on its web site, along with details of the unsubstantiated allegations as to the alleged offences under investigation. The suspension is stated on the web site to have been made to permit the Civil Aviation Safety Authority to investigate "alleged breaches" This is a clear admission that the allegations, because they are still under investigation, are still not substantiated. The following is the text of the entry published on CASA's web site. The underlining is by the writer:

Web site announcement

Regulatory action

Where CASA has reasonable grounds to believe there has been a serious breach of the Civil Aviation Act or the Civil Aviation Regulations by an aviation organisation, CASA is required to take appropriate regulatory action.

For regular public transport, charter and aerial work aviation operators this may involve varying, suspending or cancelling their Air Operator's Certificate.

For aviation maintenance organisations this may involve varying, suspending or cancelling their Certificate of Approval.

Before taking action to vary, suspend or cancel a certificate, CASA provides operators and organisations with written details of the facts and circumstances that CASA believes warrant the proposed action and, except in a case involving an immediate safety threat, provides them with a reasonable opportunity to show cause why the action should not be taken.

CASA's decisions to vary, suspend or cancel a certificate are reviewable by the Administrative Appeals Tribunal. CASA advises all operators and organisations of their right to have CASA's decision reviewed.

Action has been taken against the following organisations:

Aquaflight Airways Pty Ltd Cairns Queensland: Suspension of Air Operators Certificate for 28 days from 17.8.00, pending investigation of alleged breaches of the Act, regulations and Orders.

Notes:

1. When the above material was published on the web site, CASA did ***not*** provide the operator with written details of the facts and circumstances that it believed warranted the proposed action. Instead it provided Aquaflight only with the allegations listed on its web site. Being deprived of the detail of the allegations, Aquaflight was therefore placed in a position from which it could not prepare a proper response.

2. The implication from this action must therefore be that CASA believed this was "a case involving an immediate safety threat."

3. At that point therefore, CASA did not provide the certificate holder with a reasonable opportunity to show cause why the action should not be taken.

4. There is no apparent mechanism which provides a certificate holder with the opportunity to put to legal test the assessment that 'an immediate safety threat exists.' In fact, CASA does not even identify the individual officer who makes the assessment. This places operators and other certificate holders in a position from which **there is no defence against arbitrary suspension**.

5. At 5 pm on the last day of the 28-day suspension, Aquaflight received a faxed letter from CASA's Area Manager North Queensland, George Ivory, detailing the alleged facts and circumstances and offering the company: (a) a further 28 days in which to show cause "why I should not recommend to a delegate that the AOC issued to Aquaflight be cancelled on the basis of the facts and circumstances set out above." and (b) "an informal conference to discuss the facts and circumstances raised in this notice."

6. By separate letter from CASA the delegate, Laurie Foley, almost immediately afterwards, the operator was advised of the further suspension for a second 28-day period "to enable the conclusion of the investigation."

Comment:

The tactic of advising the additional 28-day suspension can only be described as that of the storm trooper mentality. A business which has been left without cash flow for 28 days, and has been given no indication of the direction CASA intends to take at the expiry of the 28 day period, cannot plan, recruit, borrow money or engage in marketing activity unless its future is clear. The penalties inflicted by two successive suspensions are therefore several magnitudes more severe than those ever able to be obtained as a result of adherence to due legal process; and they are inflicted by an individual without legal training or validated evidence.

Additionally, CASA Director Mick Toller has said: "The decision to suspend Aquaflight's AOC was made on the basis of evidence in CASA's possession that strongly suggests that Aquaflight poses a serious air safety risk."

Mr. Toller offered no evidence or analysis to support that assertion; and there is no evidence that the decision maker is technically and legally qualified to make that assessment and to provide data to support it.

On the contrary, Aquaflight Airways had been operating for many years without an air safety incident of any sort.

Also the majority of "incidents" referred to in the letter of suspension were matters that were pilot responsibility rather than operator responsibility.

B4.2: Section 28BA of the Civil Aviation Act makes no reference to " immediate safety threat." Those words are the words of the Civil Aviation Safety Authority in the attached document, and no doubt they are drawn from the version of the Civil Aviation Safety Authority "Enforcement Manual, " which was in force at that time. CAR 268 uses similar words when it considers suspending a pilot licence. The words are reasonable only if there is "an immediate safety threat".

B4.3: While it is not contested that CASA should be able to take positive action, if the regulator was concerned over public perceptions of procedural fairness, a fairer application of justice would be apparent if any such action was taken under a court order.

B4.4: The questionable issue is how, and by whom, the genuine issue of what constitutes a "serious safety threat" can be evaluated with due regard to public safety, natural justice, the rules of procedural fairness, and impartiality

B4.5: In this context there is also a huge question over the apparent emotive misuse of the word "SAFETY", which is further evaluated in this Section.

B4.6: The operator is now out of business. Following the series of suspensions there was no cash flow to sustain property rent, staff wages, aircraft financial payments, let alone to mount a legal defence. Yet this operator had not injured any person or had an accident.

Analysis of the Civil Aviation Safety Authority's actions in relation to Aquaflight Airways.

B4.7: Without examining whether the unsubstantiated allegations even merited investigation, this analysis of the ten allegations against the operator demonstrates that the suspension of the air

operator certificate was not necessary "in the immediate interests of safety." In other words, had it been motivated to assure the operator was a compliant operator rather than a discredited former operator, initiatives were available to the Civil Aviation Safety Authority to achieve that assurance without exercising sanctions which had the inevitable outcome of closing down an operation at the peak of its business season. An analysis of the allegations, their validity, and other enforcement options open to CASA, prepared by a former CASA district flight operations manager, are detailed below:

1. **Subsection 20AB (2) of the Civil Aviation Act** (carrying out maintenance without an appropriate licence) *"a person must not carry out maintenance unless licensed:" Imprisonment 2 years*

   If the Civil Aviation Safety Authority believed an unlicensed person carried out maintenance on an aircraft, the Authority could have grounded that aircraft immediately by use of a Code 'A' Aircraft Survey Report (ASR).

   It was also open to the Civil Aviation Safety Authority to institute a prosecution against the alleged offender.

   Comment: Had these options been exercised there would have then been no immediate safety threat and therefore no valid reason for suspending the certificate. If the Civil Aviation Safety Authority was convinced of the accuracy of the allegation and did not ground that aircraft or institute a prosecution, someone in the Civil Aviation Safety Authority should have been suspended. No maintenance was carried out by the operator in other than approved and supervised conditions.

2. **Subsection 23 (2) of the Civil Aviation Act:** (carriage of dangerous goods other than in accordance with the regulations *Imprisonment 2 years.*

   If the operator did carry the alleged dangerous goods, then there can be no reason not to prosecute. While under the threat of prosecution, it is very unlikely the operator would continue to carry more dangerous goods..

   Comment: Had these options been exercised there would have then been no immediate safety threat and therefore no valid reason for suspending the certificate. If CASA did not ground that aircraft, someone in CASA should be suspended

3. **Civil Aviation Regulation 43B** (failure to record total time-in-service of aircraft on maintenance release) *"At the end of the days flying the time in service must be recorded on the maintenance release"* Penalty 25 units ($2500). The operator is accused by unidentified individuals as having breached that requirement.

   If the Civil Aviation Safety Authority believed that time in service has not been recorded the Civil Aviation Safety Authority should issue a Code 'A' ASR grounding the aircraft until the time in service has been corrected and if required any maintenance then due would have to be done before the aircraft could fly.

   Comment: Had that option been exercised, there would have then been no immediate safety threat and therefore no valid reason for suspending the certificate. If the Civil Aviation Safety Authority was convinced of the accuracy of the allegation and did not ground that aircraft or institute a prosecution, someone in the Civil Aviation Safety Authority should have been suspended. Safety would not be an issue if there were only a few flight hours not recorded as we all know the aircraft will not fall out of the sky for the sake of a few flight hours. There is now no immediate safety threat and the suspension of the certificate is not warranted in the interests of "immediate safety concerns." The failure of pilots to comply with requirements to note should not be used to the detriment of the operator.

4. **Civil Aviation Regulation 47 (1)** (failure to record major defects in aircraft in maintenance release): **"***If the holder of the CoR, operator or pilot becomes aware of a major defect (and other things) an entry must be made on the maintenance release"*

   If CASA became aware of a "major defect" not being entered on a MR then CASA should have issued a Code 'A' ASR grounding the aircraft immediately. If CASA did not do that then CASA is at fault and the staff member should be suspended.

   If CASA did issue a Code 'A' ASR grounding the aircraft until the "major defect" (if it was in fact a major defect) then that defect would have been rectified before the aircraft flew.

   Comment: There would then have been no immediate safety threat. Safety would no longer be an issue and there would be no warrantable grounds for the suspension of the certificate.

5. **Civil Aviation Regulation 5.55** (breach of directions in relation to flight time limits by pilots as set out in Civil Aviation Order 48.1) (failure to record major defects in aircraft in maintenance release): **"***If the holder of the CoR, operator or pilot becomes aware of a major defect (and other things) an entry must be made on the maintenance release"*

   CAR 5.55 is the head of power for flight and duty limitations. This CAR would probably be the most breached CAR of all the regulations. Experienc e shows when an Operator is caught out breaching this regulation the Operator will desist immediately, in some cases minor re-offences will occur after a period of time. It is extremely difficult to imagine this regulation standing alone being a "serious threat to safety"

   Comment: Had these matters been acknowledged and appropriately addressed, there would then have been no immediate safety threat. Safety would no longer be an issue and there could be no warrantable grounds for the suspension of the certificate on the grounds of 'immediate safety concerns.'.

6. **Civil Aviation Regulation Civil Aviation Regulation 120** (using meteorological forecasts and reports made without authority of Bureau of Meteorology or CASA)

   The Author has never heard of any person or operator being charged under this CAR dealing with the "authority" of a weather forecast. A pilot has a weather forecast which indicates areas of rain, showers and low cloud. The overseas or long-distance domestic customer has pre-paid to visit the "world renowned" Great Barrier Reef. Using normal intelligence, the pilot or company telephones or radios people at the destination seeking their "opinion" of the local weather (how bad it is, what is the visibility like, is the weather set-in or passing and so on). Armed with this "local knowledge" and the forecast the pilot or operator makes a decision to "go and have a look".

   In the background of this process is the commercial awareness that it is a counter-productive process to fly international tourists to a location they will not enjoy because of bad weather. However, Obtaining that "local knowledge weather information" and acting on it is held to be illegal under CAR 120.

   Note: in the case of a Seaplane operation with tourists out of Cairns, the distances being flown are usually within 30 nautical miles.

   Comment: There is no immediate safety threat arising from the alleged practice. In fact, it could be expected to enhance the pilot's situational awareness. If the pilot operates the aircraft with additional and extra information than that which is required by the law it hardly makes the action of the operator unsafe.

7. **Civil Aviation Regulation 133 (1) (d)** (commencing flight without all required maintenance on the aircraft having been carried out)

   If the Civil Aviation Safety Authority found the operator "commencing a flight without required maintenance being carried out," it should have issued a Code 'A' ASR on the aircraft concerned grounding that aircraft until the required maintenance is carried out.

If the Civil Aviation Safety Authority believes the operator has a "habit" of commencing flights without required maintenance being carried out the operator should be prosecuted.

Comment: However if the aircraft has been grounded, the perceived risk no longer exists and there is now no immediate safety threat.

8. **Civil Aviation Regulation 172 (1)** (flight under the visual flight rules below 2000 ft when unable to navigate by reference to the ground or water)

Two significant points are relevant.

- First, this is an area of the regulations where it is almost impossible to prosecute due the inability to prove actual heights of cloud and visibility, and even then there would need to be a qualified witness next to the pilot. This is why the Civil Aviation Safety Authority endeav ours to take administrative action rather than attempting to prosecute.
- Secondly, like most other items in this paper, once the "rules" have been highlighted to the operator the operator will invariably desist.

Comment: In either case, there is no immediate safety threat and the responsibility of such operations rests with the pilot, not the operator.

9. **Civil Aviation regulation 233 (1) (b)** (commencing a flight where aircraft exceeds gross weight limitations)

Two significant points are relevant:

CAR 233(1)

- If the Civil Aviation Safety Authority was aware this was about to occur it should have stopped the flight at that point.
- If it is not about to occur then there is not an immediate problem.

Once again this is an area of the regulations where is very difficult to prove in a court unless there was major overload as the record of actual passenger weights is not readily available, carry on baggage likewise, and the specific gravity of the fuel on board at the time would also need to be established.

Comment: If the Civil Aviation Safety Authority knows an overweight operation took place, then it is derelict in its duty if it has not prosecuted the operator. If it is acting on the basis of a suspicion as advised by an unchecked source, it is falling seriously short of its claimed commitments to natural justice.

10. **Civil Aviation Regulation 283** (making false statements on documents furnished in accordance with the regulations)

In a Court, an accused individual or entity has to prove a defence beyond a reasonable doubt. However in an Administrative Appeals Tribunal hearing, the accuser simply uses the word "safety" with sufficient frequency and emphasis to circumvent due process. Administrative action is thus a far easier instrument for the Civil Aviation Safety Authority to be seen to enforcing the regulations without its actions being exposed to public or political scrutiny.

Comment: If an accident is not about to occur there is no risk. There is therefore no immediate safety threat.

At the time off preparing this analysis, the operator had foreshadowed defamation action against CASA. The cost of proceedings will be a serious impediment to such proceedings. Given the often stated fact that CASA has plenty of money and lawyers to defend such actions.

At the expiry of the 28 day period, CASA simply announced to the operator that it was suspending the AOC for a further 28 days to complete its investigation; and placed the same advice on its web site.

Sequel

COMMENT :

These charges were finally brought into court . Only one witness gave evidence, the other two having gained employment elsewhere. The company was found guilty on one minor charge, that of carrying dangerous goods other than in accordance with the regulations, and ordered to pay a small fine. The "dangerous goods" was a jerrycan of two-stroke outboard motor fuel carried in a locker in one of the aircraft floats. Virtually all seaplane operators follow this practice, and the actual offence was a technical one, because operators are required to have an entry in their operations manual detailing the procedure for carrying fuel in this way, and Aquaflight did not have such a procedure in its operations manual.

The fine was a fraction of the specified maximum and obviously reflects the judge's views on the quality of CASA's case.

B5 CASE STUDY - SUSPENSION OF UZU AIR'S AIR OPERATOR CERTIFICATE

B5.1: The following is a closely researched account of the processes surrounding the above matter. The Civil Aviation Safety Authority was provided with an opportunity to comment on a draft of this chronicle[3], and account has been taken of that input in this material, a shorter version of which appeared in *Australian Flying*, May/June 1999 under a different title. A large number of serious issues raised in this commentary drew a "no comment" from CASA.

Anatomy of a stuffup

Paul Phelan

"CASA will do all it can to ensure that a person whose licence, certificate or authority is suspended or cancelled has ready access to full external merits review in the AAT. Once before the AAT, CASA will conduct itself as a model litigant." CASA, in a document entitled: "A new approach to enforcement". March, 1989.

"Anyone other than Dick Smith who joins CASA, becomes 'infallible" - Dick Smith, August 1998.

"That's the way the system works. They think: "We are powerful and we are totally unaccountable." - Dick Smith, August 1998.

When he made those comments, Dick Smith had already found the battle against authoritarian, intransigent and what he has sometimes called 'incompetent' bureaucracy, tougher going than he had expected. Recent events in the Torres Strait show how much further there is to go. This incident is not the first in which CASA has used its administrative procedures to create a situation in which an operator has faced impossible financial burdens, while totally sidestepping the accountability Smith has fought for. The fatal crash of another Britten-Norman Islander in April 1996 resulted in the immediate suspension of another AOC and forced that operator out of business. The operator had not been negligent, nor had any of their aircraft had any significant mechanical problems. The final BASI finding was not one which supported that outcome. Anyone contemplating investment or a career in aviation, should read this and study its implications. There's still hope for the industry, but a lot of things have to be fixed first, and the industry is wondering whether the right people and motivations are in place to fix them.

Many of these documents would never have surfaced, had an operator not dug its heels in and fought for their release. Uzu's friends, as well as many of its commercial rivals, are united in their belief that these events represent an ongoing threat to the orderly conduct of aviation, and ultimately a negative impact on air safety. They also believe that CASA has developed a tactic to subvert the Administrative Appeals Tribunal process, by cynically sheltering behind Section 9A of the Civil Aviation Act.

A CASA public relations officer recently told *Australian Flying*, when we queried the fairness of the process by which an administrative decision of one individual can put a company out of business: "Well, that's the decision we have made. If (the victim) doesn't like it, he can appeal to the AAT, can't he?" When this went to press, another victim of this affair, the L.A.M.E licence of the chief engineer of Uzu's engineering company, had been cancelled. That engineer, one of the best-respected in the industry, simply cannot afford the AAT process, especially if the AAT is likely to accept a bald CASA statement that it is acting within its 'safety responsibility.'

What's on your file that you don't know about?

Jul 96 to Dec 98: Uzu Air's general manager wrote thirteen letters to CASA and its predecessors, seeking clarification of the anomalies surrounding the carriage of individual paying passengers at fixed fares on subsidised remote area mail service flights. None were answered, and a CASA officer later told Uzu: "Officially, they don't exist."

[3] *Draft faxed to CASA Public Affairs. Response received also by fax. Copies retained.*

14 Aug 96: A CASA safety systems assessment profile report on the company then employing Uzu's general manager noted: "The company management has spent a considerable time trying to clarify the status of its Australia Post mail services, which appear to have been in non-compliance since the repeal of CAR 203. …… CASA must address the operation of vital rural mail services to remote communities and draft appropriate legislation to allow their continued operation. …..[the company] endeavour to conduct their operation in accordance with regulatory requirements. However, they feel frustrated by the lack of appropriate legislation and CASA's reluctance or inability to allow regular passenger/mail services into non-surveyed landing strips or operation of single-engine IFR aircraft on such services."

Nov 4-6 97: A periodic inspection is conducted by an FOI from Cairns District.[4] The officer's report, subsequently obtained only at the direction of the Administrative Appeals Tribunal, crowed: "* 20 NCNs in total!" (underlining and exclamation marks as in the report.) The report added that: "This is no longer a complaint operator."

Nov 17-20, 97: Uzu is visited by an unannounced team headed by the Manager, Safety Audits, Southeast Region. The four-man team conduct a four-day audit over 52 man-hours, which results in the issue of four NCNs. Three of these detailed minor errors in maintenance documentation, and one questioned dangerous goods acceptance procedures. The report concluded: "Uzu Air are considered not to be an unsafe operator."

1-4 Dec 97: At the direction of CASA's Canberra office, two investigators and one Cairns FOI conduct an investigation with the following terms of reference: "Determine the extent of operations in the Torres Strait region which are being conducted for fare paying passengers that fall into the definition of RPT and which are currently being conducted as charter." The TOR directed that: "The differentiation between RPT and charter that is to be used for this investigation shall be drawn from the "draft" paper prepared by (a CASA lawyer) as attached."

The draft opinion, later obtained by Uzu, attempted to define the five elements which must exist to constitute RPT. However it provided no definitions of two of the critical elements: "Specific route" and "fixed terminal"

The investigators had thus been instructed to investigate whether operators were in breach not of a regulation or rule, but of a draft opinion, which failed to provide critical definitions.

Dec 23 97: A new FOI, whose training has not yet been completed, conducts a "risk observation report" inspection of Uzu. He comments: "Aviation manager (named) appeared to be consistently involved to the point of apparent interference with duties of operational staff – pilots and CP!." The report, the contents of which were never conveyed to the company, ended: "CASA should support the new CP to raise standards and resist (the manager's) commercial pressures."

Jan 7 99: CASA issues a notification of proposed action to suspend or cancel the AOCs of four operators including Uzu. The notification summarised the reasons CASA believed the companies were undertaking unauthorised RPT flights, contrary to the Civil Aviation Act.

Uzu's notification also resurrected a number of NCNs issued over the previous two years, all of which had previously been acquitted.

Jan 16 99: Uzu Air's Britten Norman Islander involved in a fatal accident at Coconut Island.

Jan 17 99: An "Immediate safety report" compiled by a Cairns FOI who had not visited the site or communicated with the operator, outlines the few known circumstances of the accident, and states under recommended action: "DFOM (District Flying Operations Manager) to now recommend 28 day suspension of AOC." The report, faxed to Canberra at 10.55 am, on that day (a Sunday), does not state any reason for the recommendation.

Jan 19 99: BASI, insurer and operator representatives fly to accident site. In a faxed message, CASA suspends Uzu Air's AOC for 28 days, with effect from 2359 that night.

[4] *Mr Neale Crawford, now at CASA's Head Office, Canberra*

Jan 20 99: Uzu files a notice of application for review of the CASA decision to suspend its AOC, claiming that the Authority had acted ultra vires (outside its legislated authority); breached rules of procedural fairness and natural justice; failed to provide adequate reasons for the decision; misapplied administrative principles, and "failed to correctly interpret and apply the law."

Jan 21 99: Uzu lodges a detailed 127-page response to CASA's notice of the show cause. The response was never acknowledged. At the same time, the operator attends the first hearing on the matter in the Administrative Appeals Tribunal, (AAT) seeking a stay of its AOC suspension. CASA is successful in having the stay denied. CASA's use in such stay proceedings of Section 9 of the Civil Aviation Act, appears to question the ability of any operator to gain a stay. (Look it up). The operator believes the AAT's effectiveness in reviewing administrative processes may be neutered by this tactic. Uzu would have to wait for the 28 day suspension to expire, before being able to proceed to a substantive hearing. Uzu seeks an order for the release of CASA documents related to its decision. CASA says it would take up to 30 days to produce the documents. AAT directs CASA to provide Uzu with all relevant documentation within 7 days. (The documents were made available about 10 days later. The 13 letters seeking clarification of RPT/charter status were not included in the documents.)

Jan 22 99: BASI investigators recover engines from the Islander and return to Cairns. BASI holds meeting at CASA Cairns with CASA AWI. BASI advises CASA the left engine did not appear to be developing power at impact and the fuel mixture control rod was found to be broken at the accident site, but advises the component will require metallurgical examination to determine cause and time of breakage.

Jan 26 99: Uzu Air lodges a 40-page response to CASA's AOC suspension.

Jan 27 99: BASI advises Uzu <u>and CASA</u> that laboratory analysis verifies the fuel mixture control rod failed <u>"...due to overload as a result on impact forces."</u>

Feb 2 99: BASI strips down left engine at Archerfield. Following day, BASI advises all interested parties of the outcome of the engine strip down.

Feb 4 99: CASA serves a Notice to Show Cause on Uzu Air's associated company, Tamco Engineering, and asserts that BASI investigations "resulted in a finding of a disconnected mixture control rod on the left engine, which was not delivering power prior to time of aircraft impact, and was considered by these BASI Investigators to be a contributing factor to the loss of control of the aircraft prior to that impact. The subject mixture control was found to have <u>suffered failure which exhibited severe corrosion of the mixture control ball end connection."</u>

BASI Investigator verbally denies the assertions were ever made and advises BASI was lodging a protest with CASA regarding the allegations.

Feb 8 99: Uzu Air holds an informal conference in Cairns with the CASA regional manager, the acting DFOM, and the assigned FOI. Uzu made a proposal that it implement check and training and Class A aircraft maintenance, immediately upon reinstatement of the AOC. The company believed this met with CASA approval.

Feb 12 99: Deputy Director, BASI, faxes BASI Preliminary Report to Uzu Air. Also faxes Preliminary Report to General Manager, Aviation Safety Branch, CASA, Canberra. Also telephoned CASA Canberra to confirm CASA's receipt of the Report. The report stated inter alia: "Examination of the left engine, while still in the wreckage at the accident site, revealed the linkage between the mixture control cable on the carburettor had failed. Subsequent metallurgical examination of these components confirmed that failure was due to overload as a result of impact forces, and that it had not contributed to the accident."

Feb 15 99: CASA suspends Uzu Air's AOC for a further 28 days and asserts *inter alia*: "The Bureau of Air Safety Investigation (BASI) has been investigating the crash but has not published a preliminary or final report on its causes."

Feb 17 99: The Cairns Post newspaper publishes an article headed "Crash report rocks CASA," (by this writer) detailing the conflict between CASA's allegations and those of the preliminary

BASI report. A fax letter is received on the same morning from Assistant Director, CASA, Canberra, saying: " I have now been made aware of the content of a preliminary report of the accident by BASI. Please note that neither the crash itself, nor the possible causes of the crash, were a decisive consideration in my decision to suspend your AOC. I would have suspended your AOC even if I had been aware of the content of the BASI preliminary report." The Assistant Director did not reveal his reasons for this assertion.

Feb 18 99: An AAT-directed teleconference is scheduled for 1700, between Uzu counsel, the AAT registrar, and CASA's office of legal counsel, to determine the process of an AAT hearing on the second suspension, and to enable Uzu's counsel to advise CASA of the witnesses Uzu required to examine. Uzu counsel and the AAT were connected. CASA's phone rings out without answering.

Feb 19 99: Uzu counsel telephones CASA office of legal counsel, who advise they had forgotten the teleconference set for the previous day. CASA advises the further "T" documents (documents which CASA relied on to make its decision to further suspend the AOC and which Uzu required under the AAT court order) would now be made available to Uzu. Uzu's counsel advised that he had the AAT booked in Sydney for Wednesday Feb 24. CASA advised they would be unavailable on that day but Thursday Feb 25 would be acceptable.

On the same day Uzu Air provides CASA with a detailed 50-page response to the further 28 day suspension of its AOC, detailing the foregoing events and again raising the question of RPT versus charter.

Feb 23 99 Uzu's lawyers request the AAT issue three subpoenas to involved CASA staff members. AAT declines due to inadequate time.

Feb 25 99 At a cost of about $6,000, Uzu attend AAT Sydney at 0915. At 0930, AAT Vice President's associates advise that CASA will not be attending, due to commitments in Brisbane, but CASA will not object to a telephone hearing. However CASA objects to any evidence being tendered or any witnesses being called, as it is 'not practical to cross examine by telephone.' Uzu, which has now not earned any revenue for 36 days, is therefore again denied an opportunity to confront its accusers, some of whom are on "stress leave," a luxury unavailable to Uzu's general manager or his staff, some of whom have been stood down. CASA however successfully objects to the lifting of the suspension on the grounds of "Air Safety," relying on Section 9 of the Civil Aviation Act.

Mar 2 99: Meeting in Canberra attended by Uzu's chief pilot, an Uzu consultant, a CASA lawyer, and CASA's public affairs manager. Uzu was told that CASA wouldn't extend the suspension, but would either lift it, or let it run its course until 16 Mar. The company was also told that CASA would not renew the suspension or cancel the AOC. No explanation was offered as to why, having made that decision, CASA would not lift the suspension immediately.

It was agreed that draft checking and training and maintenance procedures were required and had been submitted, and that checking and training and progressive maintenance would be progressively incorporated.

Mar 5 99: AAT teleconference between CASA office of legal counsel and Uzu confirms all required documents have been submitted and that the AOC will not be cancelled, no further suspension will be imposed, and the suspension will be lifted between March 10 and 12.

Mar 8 99: CASA acting DFOM Cairns advises he is satisfied with the draft manuals and will be making "unspecified recommendations" to CASA Canberra. Uzu's optimism is heightened.

Mar 9 99: CASA publishes an amended CAO 82.3 and three blanket exemptions, authorising air charter operators in the Torres Straits to operate RPT without meeting the aerodrome, maintenance, or training and checking requirements for RPT until June 9.

The principal expertise of the three CASA officers preparing the new rules lies in the respective areas of airworthiness, legal and navigation. Uzu was again told its AOC would be restored by the end of that week.

Mar 10 99: AM - CASA shifts the goalposts again. While its competitors, who have been operating for the two months Uzu has been grounded, are still in the air and have 90 days to comply with RPT rules, Uzu is told it must comply BEFORE its AOC is restored.

PM -Uzu's solicitor contacts CASA office of legal counsel and is told the manuals the company has submitted are only DRAFT and that Uzu has not nominated a maintenance controller or check and training captain.

Australian Flying faxes a draft of this chronology to CASA with an invitation to review it for accuracy.

Mar 11 99: CASA phones and indicates that a response, detailing some "errors and omissions" will be faxed "tomorrow." *Australian Flying* admits that because of space limitations it has omitted considerable material, much of it damaging to CASA. (Information provided in CASA's response is incorporated in this narrative.)

Mar 12 99: The CASA res ponse does not arrive. Or maybe, obliquely, it does. A faxed message from CASA to Uzu suspends the AOC for a *third* period, "pending an investigation by CASA into your company's operations, and the risk to the safety of air navigation in allowing the AOC to continue in force……… The reasons for this decision and the facts and circumstances on which I rely are set out below." The letter details thirty-eight points as "facts and circumstances,"

Mar 15 99: A fax to the Hon. Warren Entsch, Member for Leichhardt, in response to a phone call to CASA from Mr. Entsch, says that for Uzu to have its AOC reinstated, it must comply with three requirements – training and checking, Class A maintenance, and an approved maintenance controller, which Uzu has already addressed.

In a pre-hearing teleconference between Uzu, CASA and the AAT, the Tribunal indicates that it expects CASA to restore the AOC by close of business on Friday March 26, provided the three CASA conditions are met (which Uzu insists they already are.) The AAT official indicates that she will be in her office for a further half hour after close of business, and that if the AOC is not restored by that time she will arrange a "substantive" hearing on Monday 29.

In anticipation of a full AAT hearing of the case, Uzu has already obtained summonses requiring the assistant director of aviation safety compliance, the district flying operations manager, and the case FOI to be present at the hearing. This means they will almost certainly be called upon to give evidence, and to face cross-examination regarding what Uzu has already alleged to be inconsistent and discriminatory conduct.

Late on Friday afternoon, CASA blinks. In a faxed message, Uzu is advised its charter AOC is restored "subject to the company implementing Class A maintenance" - a unique requirement, but at least the company is back in business.

General aviation is not one big, happy family; but other operators watched the process with keen interest, and even Uzu's commercial rivals were horrified at its implications for the rest of the industry. CASA sources now acknowledge: "the matter could have been better handled."

Comment: The industry is increasingly perceiving that such events demonstrate there is inequity in the treatment individual operators receive, because of incidents such as:

a) QANTAS all but wrote off a B747-400 at Bangkok off with some 350 RPT passengers on board, but no similar action was taken by the Civil Aviation Safety Authority, nor is it suggested such action should have been taken.

b) Similarly ANSETT shut down an engine, later identified as due to a maintenance deficiency, overflew Brisbane (the nearest suitable airport), returned to Sydney and landed without lowering the nose-wheel, all with some 250 RPT passengers on board.

This is not to suggest that the major airlines should be treated in the same shameful way as general aviation and low capacity RPT operators are treated. What is suggested, is that if CASA used the apparently improper practices detailed throughout this analysis in an event involving a large airline, those practices would quickly be exposed for what they are.

Note:

Uzu Air, which was subsequently sold to a new owner and renamed, did not survive the financial stresses imposed upon it. At the time of writing, despite having undergone considerable restructure and the acquisition of new equipment, the airline had just gone into receivership.

B6 CASE STUDY - SUSPENSION OF HARDY AVIATION'S AIR OPERATOR CERTIFICATE

Summary:

B6.1: What should have been a normal administrative procedure to renew an AOC turned into a nightmare of administrative bungling, unfair practice and incompetence. As the deadline approached for the AOC to be renewed, several requests were ignored but a decision not to renew was not foreshadowed. After close of business on the last day, the operator received a hand-written fax from the Acting General Manager at CASA[5] stating that it "appears" there are outstanding non-compliance notices although he also acknowledged this may be because of a problem with CASA's system. The advice gave the benefit of the doubt and issued an AOC for two months.

B6.2: The NCNs were discovered never to have been issued to Hardy and there were NO outstanding issues.

B6.1: Further renewals beyond the 2 months were then made subject to further surveillance. This surveillance produced nothing new of a safety related nature, but the company was told CASA office would recommend its AOC should not be renewed and listed among its reasons the "outstanding" NCNs which had never been issued, and began to demand the company comply with various newly created "requirements," including a unique one that the chief pilot should not fly a full roster so as to give himself more time for administrative duties.

B6.2: As a result of the last-minute bungling and activity to prop up CASA's delay in issuing the AOC, the company was out of the air for about six weeks.

The company:

Hardy Aviation is based in Darwin with a base at Port Keats. The company held an Air Operator Certificate (AOC) authorising charter and Regular Public Transport (RPT), the AOC being "renewed" each year. The company has held the RPT authorisation since 1991.

The company's fleet includes a 19 passenger multi-engine turbine Metro II , multi-engine Cessna 404's, Cessna 402's, and single-engine Cessna C210's and Cessna 206 type aeroplanes. Fourteen pilots and 5 administrative staff are employed.

The company's operation generates a large volume of maintenance work that is a significant portion of a local workshop's annual business.

The company has not had any regulatory related aircraft accidents, the only two incidents being "wheels up" landings in Cessna 210's.

Hardy Aviation experienced typical "growing pains" with expansion of business and the aircraft fleet through 1996-7 resulting in less than the desired level of administrative control. Following an Audit by CASA the principal John Hardy stood down as the company chief pilot, employing a full time person to tidy up the irregularities. The above is not an unusual scenario in aviation, the effect of the "employed chief pilot " having the desired results.

B6.3: Hardy Aviation's AOC expired and became due for renewal on 31 May 2000. The following sequence of events is relevant to issues discussed in this account:

- June, 99: CASA Airworthiness issues NCN no 520680 regarding an "in-house requirement (over and above the regulatory requirement) to conduct internal audits.
- Sep 7, 99 Hardy's Maintenance Controller writes letter to CASA in response to the NCN.
- 30 Sep, 99 Hardy chief pilot writes to DNDO (CASA Darwin District Office) regarding the company's training and checking arrangements.

[5] *Flying Operations Inspector Stewart Macalister*

- 13 Oct, 99 FOI (Flying Operations Inspector) Beach DNDO responds to Hardy letter of 10 Sep regarding training and checking manual amongst other matters, stating the "new" manual had not arrived, the "old" version is held by CASA "***but that is unacceptable now".***

Important notes:

1. CASA did have the "old" Hardy training and checking manual.
2. CASA simply and arbitrarily decided an existing Manual is no longer acceptable.

- **21 Oct 99** A/DFOM (Acting District Flight Operations Manager) Beach approves Captain Telling into the Hardy checking and training system
- **21 Oct 99** A/DFOM Beach writes covering letter regarding the approval and exempts Telling from the Hardy Aviation proficiency checks
- **1 Nov 99** Hardy CP writes covering letter to DNDO with new Part C "training and checking" manual
- **3 Nov 99** A/DFOM Beach writes letter to Hardy withdrawing the 21 Oct exemption for Captain Telling
- **12 Nov 99** Hardy chief pilot writes to DNDO requesting progress on training and checking manual
- **29 Nov 99** Hardy chief pilot writes to DNDO about training and checking nominations and points out Telling is from Brisbane
- **14 Dec 99** Hardy chief pilot again writes to DNDO requesting progress on training and checking manual

2000

- **8 Feb, Tue** CASA writes to Hardy regarding AOC expiry and renewal
- **17 Feb, Fri** CASA writes to Hardy advising a new "AOC application instrument- **48/2000"** issued on 8 Feb replaced "AOC application instrument **413/98**"
- **23 Feb, Wed** Hardy applies for "renewal" of AOC No 507297-5 which is due to expire 31 March
- **23 Feb, Wed** CASA DNDO acknowledges receipt of application
- **29 Mar, Wed** Hardy writes URGENT letter to CASA requesting progress of AOC "renewal"
- **31 Mar, Fri** CASA Canberra (McAlister) writes to Hardy raising 'concerns' about outstanding NCNs and ASRs. This letter states NCN 520680, issued 22 Jun 99 has not been acquitted.
- **7 Sep 99** Maintenance Controller had responded by letter.
- CASA letter states "*there appears to be 5 unacquitted NCNs and several unacquitted ASRs",* but , also states *"CASA could not be certain they are outstanding"*

Comment: The assertion that there "appears" to a number of unacquitted NCNs cannot be a reason not to " renew" an existing AOC for the normal 12 month period

- CASA "Renews" (issues) AOC No 507297-6 for 2 months only, with no warning that the new AOC now due May 31 may not or will not be renewed.
- **14 Apr, Fri** CASA Darwin send out notice of AOC expiry date and that "AOC application instrument 112/2000" is now in place. There is a fee for "renewal"
- **2 May, Tue** Hardy applies for "renewal" of AOC number 507297-6

- **11 May, Thu** Hardy writes to CASA with amended Part A and Part B to operations manual. The areas covered: "over water", "STODA at Port Keats RWY 16 for the 404", "new user friendly check-list for Metro, 404, 402, B58, 206 and 210". NB: The validity and spirit of CAR 232 has been questioned of OLC and the base certification of aircraft.
- **18/19 May** Ramp checks x 2 of C404's VH-HMA.
- **22/23 May** CASA Darwin conducts on site audit of Hardy facilities. During this audit FOI Rees made the remark to Hardy **:** "*your Port Keats operations is charter under the interposed 3rd party principle", therefore a RPT AOC is not required.* (NB:- This appears to be a valid statement by Rees)
- **26 May, Fri** Rees **verbally advises** Hardy he w ill not recommend renewal of AOC
- **29 May, Mon** Rees advises in writing and encloses a 'notice" stating:-
  1. A number of deficiencies were found during ramp checks 19/19 May
  2. Rees is of the view that AOC application cannot be properly considered without another inspection
  3. "notice" is given - Rees now requires a further audit on Wed 31 May
  4. Rees also advises pursuant to Sect 27AF of the Act CASA will not further consider the Hardy "renewal" application until Hardy complies with the enclosed notice
- **30 May** Rees advises by letter result of C 404 "ramp checks" 18/18 May and the Audit 22/23 May In this letter (6 pages) Rees makes numerous references to NCNs issued against Hardy by 'number' and brief detail. **The NCNs were not handed to Hardy at the time of inspection and were not included with the letter** .
- **30 May,** Tue Rees **verbally** advises Hardy as another audit will now be necessary the AOC may not be renewed by 1 June. **This further audit will be conducted by a team from Adelaide.**
- **30 May**, Tue Hardy responds in writing to the CASA letter of 30 May
- **30 May**, Further audit carried out
- **6 Jun. Tue** Meeting at DNDO (CASA- Rees & Jones -&- Hardy Aviation – Hardy & Roddy). Rees suggested:
  1. "withdraw RPT renewal application, make it charter, it will be fast tracked
  2. Operations Manager to have duty statement in Ops Manual
  3. Reduce the annual amount of flying carried out by the chief pilot
  4. Re-organise management structure
- **2nd meeting:** Hardy presents letters, duty statement, new management structure. Also provides amended AOC application f or charter only. Advised to expect an answer soon re application.
- **6 Jun, Tue** Hardy chief pilot writes two (2) letters as a result of the duress placed on Hardy on 31 May.
  1. Advice a revised Operations Manual will be available by 30 Jun. NB The writing of an OM is not a simple overnight task
  2. Advice the Hardy OM will be amended to limit the chief pilot to 40 flying hours in 28 days
- **7 Jun, Wed** Hardy telephoned Rees who stated "*out of his hands, all documents now to Bill Riceman who will examine and send to Canberra, Rob*

Collins the delegate, the outcome would be uncertain, could be negative" Hardy is advised not to expect an answer before Friday 9 Jun

- **9 Jun, Fri** No communication from CASA
- **13 Jun, Tue** Hardy advises the NCNs have still not been presented. Hardy advises the AOC has not been renewed. Hardy telephones for Rees, advised Rees is out for the week. Hardy telephones Riceman who is 'tied up.'
- Riceman returns the telephone call, advises Hardy not to expect an answer until at least Friday 16 June as "*everybody is busy with the Whyalla situation and is very sorry for inconvenience to Hardy"* Riceman goes on to say he will be in Darwin next week and if AOC not processed he will do it himself.

Note: Does Riceman have the necessary Delegation?

- **16 Jun, Fri** Consultant (Rundle) sends electronic mail to Director Toller.

Note: Riceman has the paperwork provided by Rees, why make the above statement?

- **16 Jun, Fri** Toller responds stating he can't comment on the detail but Assistant Director Regulatory Services Rob Collins is 'looking at it.'
- **16 Jun, Fri** Rundle telephones Asst Dir Rob Collins in Canberra who indicates he is aware and is looking into the matter. Collins was not aware CASA DNDO had not provided the NCNs to Hardy. Collins made the remark "we may have a procedural fairness problem here". Collins indicates he will communicate with Hardy
- **20 Jun, Tue** Hardy receives short letter from Toller, undated.
- **22 Jun, Thu** Hardy advises NT Senator spoke with CASA and was advised Hardy was getting a detailed letter
- **30 Jun, Fri** NCNs still not provided, Still no communication from CASA. In particular Asst Dir Rob Collins had indicated on 16 Jun he would communicate (or possibly meant he would organise someone to communicate). The "report" from Rees required additional audit not provided
- **3 July, Mon** 3 Aircraft Survey Reports from May 18/19 "ramp checks" provided to Hardy.
- **4 July, Tue** Consultant Rundle now travels to Darwin, Inspects aircraft , facilities and records (sample which is usual CASA method) and is satisfied that "IF HE WAS STILL A DELEGATE HE WOULD ISSUE THE AOC"
- **7 July, Fri** Consultant Rundle endeavours to contact Assistant Director Collins, who is in Brisbane, left message with Tony Seibold, not returned. Consultant Rundle sends Email to AD Collins requesting advice "who is the Delegate". Bigpond have not advised the EM did not get through, Collins has not responded. Consultant Rundle meets with Townsville MHR Peter Lindsay. Lindsay endeavours to contact AD Collins who is "unavailable", but speaks with Rob Elder of CASA. Elder advises there is shortly to be a "telephone hook-up" between Elder, Collins and others who are working on the matter. Elder contacts Lindsay advising Hardy will get a letter on Monday and then there will be a meeting with Hardy. Riceman (CASA Adelaide, Area Manager for Central) calls Hardy to advise of the letter and that after Hardy reads the letter he can telephone and Riceman to organise a meeting. CASA will have Riceman, Arthur White and Steve Bennett.
- **10 Jul, Mon** Consultant Rundle spoke with John Hardy approx 3.30 pm EST, Hardy had still not received any letter from CASA. Rundle advised Hardy to telephone Riceman and request the "letter" be faxed, also for Hardy to Fax Riceman confirming the telephone conversation of Friday evening and requesting

the "letter". Rundle/Suthers advised John Hardy to contact his solicitor, and not to talk meet with CASA unless he had someone with him. Likewise his staff should refrain from discussing Hardy matters with CASA

- **10 July, Mon** Riceman telephones Hardy late to advise "letter" not finished, probably tomorrow afternoon.
- **11 Jul, Tue** 4.18 pm CST: White faxes 3 page letter with attached 6 page "deficiency list" to Hardy, now introducing:
  1. the 1995 and 1997 difficulties,
  2. a requirement for the current approved chief pilot to undergo another chief pilot interview with Rees,
  3. an apparent requirement for a "revised OM to be reviewed" White also suggests a meeting on Thursday 13 July at 10.00 CST.
- **12 Jul, Wed** Hardy advises CASA that Thursday is too early, requests meeting for Friday 14 Jul.

Comment: The reader is invited to review several elements in this case where CASA:

a.) made a decision based on allegedly un-acquitted non-compliance notices, copies of which it had never made available to Hardy Aviation;

b.) continually shifted the goalposts by setting new requirements during the process; and

c.) failed to have officers available for consultation at critical stages of the process during which the company faced the probability of a shutdown of its operation

B7 CASE STUDY - AIRLINE PILOT REQ UIRED TO "SHOW CAUSE"

B7.1: It is a frequent occurrence that a field officer visits a certificate holder in a friendly matter, stating the purpose of the visit as simply a need to establish the facts of a reported incident. The certificate holder interprets this as a non-threatening situation and willingly participates. Subsequent events however are open to the interpretation that CASA's intentions were less about enhancing safety and more about being seen to be accumulating victims of regulatory action. In many instances, the basis of the regulatory action is highly questionable. The following account provided by an Aeropelican pilot is an example

29/05/2000

- 8.30 am, a Twin Otter taxis at Sydney airport. Finds hydraulic leak. Twin Otter returns to the bay for mai ntenance.
- Pax put on later flight (different aeroplane).
- 3 pm, hydraulic leak repaired, Twin Otter is flown back to Newcastle (no passengers).
- 8 pm, General manager (Aeropelican –A. Burkett) rings me at home wanting the details. His concern is that one of the pax is going to the newspaper. Requests I fill in Incident Report although verbally agreeing that there was no incident as such.

01/06/2000

- fill in BASI report, 'everybody just wants to know what happened'.

09/06/2000

- 3 pm I attend a meeting with Aeropelican, (Gen manager - A. Burkett, & Chief Pilot - M. Read).
- We discuss the incident further finding: my conduct was satisfactory ; the complaining pax had no success with the newspaper (due lack of interest, no real incident) ; the complaining pax's statement was wildly incorrect ; the complaining pax had been to his local member; we would wait to see what CASA had to say.
- We close discussion about hydraulic incident.
- Burkett & Read present me with a letter to take to the aviation medical examiner, for the purpose of diagnosis of my alleged back injury. I am not to return to work until the doctor is convinced it is safe for me to do so. I am on full pay.

15/06/2000

- Attend a meeting with two CASA representatives (H. Macguilvray & B. Blaah) at Aeropelican.
- B. Blaah starts the meeting with an apology from CASA 'had we got onto this earlier it would never had gone this far'.
- B. Blaah then says 'in the light of the Whyalla accident, CASA needs to be seen as doing something about all reported incidents.
- 'we'd just like to know what happened'.
- We discussed the incident (although no notes were taken).
- I took them out to the aircraft.
- They were satisfied and the meeting was over.
- NB 'B. Blaah' is a substitute name. I cannot recall his name.

22/06/2000

- Dr. Arnold (aviation medical examiner) does not give me clearance to return to work due to results of CT scan.

O6/07/2000

- I am placed on sick leave.

09/08/2000

- I receive 'show cause' in relation to hydraulic incident.

Comment:

Sequel:

CASA finally suspended the pilot's licence for declining to submit to an interview over this matter. The pilot appealed to the Administrative Appeals Tribunal, who three days later ordered the restoration of his licence after a hearing lasting about half an hour.

The pilot's reasons for declining were that he was well aware that it is the function of the Australian Transport Safety Bureau, not CASA, to determine whether an incident has safety implications and if so, whether they warrant an investigation.

He was also aware that CASA's primary purpose in wishing to interview him was to seek evidence on which to take regulatory action. Anybody who is accused of an offence is entitled to decline to be interviewed, or to agree only on the condition that a lawyer representing him is present at the interview.

The CASA action of proceeding against the license holder in this way is totally outside all the established rules of air safety investigation.

Publications too numerous to mention, produced by the International Society of Air Accident Investigators, the Flight Safety Foundation, the Association of Aviation Psychologists, the International Civil Aviation Organisation and numerous other aviation safety bodies, prescribe a non-punitive approach to accident and incident investigation and resulting actions, in the interest of learning from safety events.

B8 CASE STUDY – CONFUSED AND INEQUITABLE APPLICATION OF "POLICY"

Summary:

1. This aircraft owner/operator, Mr. Richard Rudd, is a commercial photographer some of whose work is conducted from an aeroplane and CASA believes this is a commercial aviation activity because he acquires images from an aeroplane and sells them for publication. It therefore believes the individual should hold an air operator certificate and a commercial pilot licence
2. Former CASA chairman Dick Smith, a private pilot who does not hold an air operator certificate, has conducted numerous flights in Australia and overseas, and sold the images for publication.
3. CASA apparently believes there is a difference in law between the activities of Mr Smith and Mr Rudd, and has gone to extraordinary lengths to shut down Mr. Rudd's business.
4. Some of its activities in that respect appear to have been defamatory, improper, and redolent of selective victimisation.

B8.1: The following is a thoroughly researched magazine article, an edited version of which was published in *Australian Flying in May 2000.*

"This is an Act to establish a Civil Aviation Safety Authority with functions relating to civil aviation and in particular, the safety of aviation and for related purposes: (The Civil Aviation Act)

"We have to allocate our resources more intelligently, to focus on the protection of the fare paying public." (Dick Smith, throughout his term as CASA Chairman)

"There seems to be a perception in the industry that we're going after the soft targets – the small operators who can't defend themselves." (a CASA public affairs spokesperson, January 2000)

"CASA's policy in relation to enforcement will be uniform, consistent, fair, and appropriate." (CASA's Aiming Higher newsletter)

This is not about whether a court's findings were fair and reasonable, nor whether a sentence was a just one. It invites the reader however, to ponder on the motivations of the regulator, or at least of some of its employees, in applying huge resources to pursue a small operator to the brink of bankruptcy; about CASA's priorities in the deployment of resources it claims are under pressure; about its apparent confusion over its own published policies; about uniformity, consistency and fairness, and about the methods its officers employed to achieve an outcome.

1957

Mareeba resident Richard Rudd begins learning to fly in Adelaide, with the intention of making a career as a pilot. When he's issued with a student pilot licence, he finds that he cannot obtain a commercial pilot licence because of a mild hearing defect which does, however, not prevent him from holding a PPL.

1965

Rudd studies photography whilst overseas, with the revised intention of becoming a commercial photographer.

November 1967

Rudd, now a commercial photographer, obtains a private pilot licence, his intention being to use an aeroplane to extend his business into aerial photography.

1969

Rudd conducts a flight from England to Australia in an Auster with commemorative mail on the 50th anniversary of the first flight from England to Australia. Using his photography qualifications, he then begins working for various aerial survey companies as a photographer. An aviation enthusiast, over the following 25 years he acquires a Wilga aircraft, and becomes involved in the rebuilding of several other aircraft. He accumulates about 3,000 flying hours and about 10,000 hours flying as a photographer, as well as qualifying as a glider instructor and obtaining endorsements and approvals as a glider tug pilot.

1982

Having worked as a photographer with several companies in Australia and around the Pacific, Rudd takes over the company he has been working for, Beechtree Pty Ltd, trading as Northair Surveys, with the intention of carrying on business as a commercial aerial photographer. He acquires a turbocharged Piper Cherokee Lance and fits an aerial camera to it, and holds an AOC from 1982 to 1996. He does not set himself up as a full scale aerial survey and mapping operation; he does not sell photographic interpretation services; he limits his activity to exposing film, having it processed into print or transparency images, and selling the finished product to clients.

1992

Dick Smith, later to become CASA chairman, publishes a wholly admirable, informative and stimulating book called *Solo Around the World*, documenting his remarkable long-range helicopter flying and navigational exploits. The book, sold in 1993 for $40.00 by Dick's Australian Geographic Pty Ltd, containing over 450 wonderful photographic images, and all aerial pictures are obviously acquired by Mr. Smith personally, while he was flying his helicopter. The images are of highly professional quality, and sold commercially through Dick's publishing business, *Australian Geographic*. In the text of the book, Dick frequently acknowledges the demands this project placed on him as this one of many examples shows:

I was already tired, there were 220 km of sea ahead of me and I was desperate to depart, but I gritted my teeth. At last away and over the Adriatic, I could feel fatigue overwhelming me like a dark rising tide. I hadn't realised when I planned this adventure what enormous strain I would be subjecting myself to. The burden of flying, filming and narrating with my mounted camera and taking stills with my hand camera was crushing.

The themes of fatigue and other demands on the personal abilities of the solo photographic pilot are repeated throughout the book, although no measures to balance fatigue against air safety are described. At this time, six hours airborne would have been an unusually long day for Dick's fellow commercial photographer, Richard Rudd, who was flying 'in his own back yard,' obviously in VFR conditions, and totally free of the peripheral but worrying concerns detailed in Dick's book.

Feb 2, 1996

Beechtree designates a chief pilot who is approved by CASA.

15 May 1996

The chief pilot resigns.

May 21 1996

Rudd conducts a photographic flight to acquire images for a sugar mill. This will later be used in evidence.

June 28 1996

CASA issues Rudd's company with a new AOC superseding the previous certificate and valid until September 30. This AOC is issued without a new chief pilot being nominated.

At about the same time, under pressure from the then Minister, CASA establishes a Program Advisory Panel (PAP) to provide advice and guidance to CASA review programs which were revising the regulatory framework and conducting a review of CASA's regulatory role. One of the guidelines is that: "Safety of people is more important than safety of property," and the rhetoric of CASA chairman Dick Smith, and of the organisation, increasingly indicates CASA is adopting a philosophy under which aviation activities of an aerial work nature will not even require an AOC. An example is the sustained resistance to requiring large commercial parachuting operators to hold an AOC, or even to employ commercial pilots. Smith and CASA vocally support this philosophy, despite considerable unease within the industry over what it sees as a potential degradation of operational standards.

Sep 30 1996

Beechtree's AOC expires. Encouraged by CASA policy statements current at that time, Rudd forms the view that under current CASA policy, he is not required to hold an AOC or to nominate a chief pilot, to conduct his photography business.

Rudd however comes under investigation by CASA officers over the question of whether his activities are in breach of the regulations and the Act. The investigating officers visit various clients of Rudd including a Western Australian aerial survey firm and obtain evidence from that firm that it has purchased photographs from Rudd. During a telephone conversation with one of the investigating officers, according to evidence the client later gave in court, the investigator asked the client if he would fly "in an aeroplane that had been dragged off the tip" The client, who said he had "felt intimidated" by suggestions that he might be implicated in an offence unless he cooperated with the investigators, later also gave evidence that one of the investigators began talking to him about a charter aircraft that had crashed in Western Australia, and asked if he would do business with an operator like that. He says he didn't understand the relevance of an accident to an aircraft carrying fare-paying passengers, and that he derived from these remarks that the officers were seeking to insinuate that Rudd's activity was "some kind of shoddy operation."

The witness also gave evidence that he raised with investigating officers the question of Dick Smith's aerial photography for commercial purposes: "Because they were quizzing me about aerial photography and being paid for aerial photography, I said well, doesn't Dick Smith do the same sort of thing in essence? Does he or does he not take photographs? It was all a matter of trying to understand why they should be there, querying me about my business and aerial photography. So they then said, 'Well he's our boss. That's not the point, it's Northair Surveys [we are interested in].'"

Under pressure to provide information which the CASA officers could use as evidence, the witness says he sought the advice of a lawyer before providing the information and that following that advice he eventually provided invoices from Rudd and cheque butts which confirmed he had paid for the pictures.

Rudd claims that during the investigation:

- the investigators did not, as their enforcement manual at that time required, seek a conference with him to advise him that he was under investigation or counsel him before beginning the investigation. The manual which was current at the time has been withdrawn from circulation, and CASA says only that it is "under review" but cannot or will not say what current guidelines exist for the initiation and conduct of such investigations.
- while he was under investigation, another aircraft owner in his district, an electrician, was also being investigated, for using his aircraft to carry himself and a toolbox to locations where he was undertaking electrical contract work. That investigation appears to have been dropped, and CASA will only say that "There is no such investigation currently in progress."
- CASA used the services of the Western Australian police in a way that was outside their published procedures, which require that police resources should only be used when there is a direct and immediate threat to air safety. Rudd says one client was asked operational questions by the W.A. Police.
- when he raised the question of Dick Smith in discussions with investigating officers, he was told that they were aware of Mr. Smith's activities but that it was unlikely that he would be investigated or prosecuted "because he's our boss."

February 7 1997

CASA investigator visits Rudds lawyer's office and takes possession of his log book. Following a magistrate's order the log book was returned about a week later, after the investigator had copied some pages; and was eventually returned to the investigator on a court order.

April 15, 1997

The review programs office of CASA publishes an unsigned document called *Classification of Operations.*, which begins: "This document sets out CASA policy on the classification aircraft of

operations both as a matter of public policy and for the purpose of providing a framework for establishing aviation safety regulations under the Civil Aviation Act."

Got it? It was publishing **CASA POLICY.**

Like many such documents, its primary goal was obviously not the entertainment of the reader; however it's interesting to compare subsequent CASA practice with its stated policy.

The paper went on to explain that because CASA didn't have limited resources, it would have to meet its responsibilities in such a way as to minimise the risk of harm, injury or damage to persons or property to the greatest extent practicable. It aimed to achieve this by adopting a risk management approach which took into account any inherent riskiness in the operation; and the consequences of an accident related to it.

The document went on to explain that as CASA's mandate was limited to *safety* regulation, the question of whether an operator was making money from an operation had not been considered as a determinant of an operation's classification: "What (the policy) does mean is that not all operations which have a commercial character need necessarily attract the same safety standard. *The payment of monies to an aircraft pilot, owner or operator, either to reimburse him for his expenses or to allow him to make a profit is possible in all classes of operations*. (our italics)"

Under the policy, three classes of operation were to be established:

Passenger transport, a new category, amalgamated charter and regular public transport (RPT) and attract a common level of safety standards and regulation.

Aerial work encompassed a wide variety of operations. Its definition was: "Broadly means operations by persons in the business of operating aircraft (on a non-recreational basis)in which only persons essential to the flight are carried. It ranged from agricultural chemical application to air cargo operations, both scheduled and unscheduled.

General Aviation covered all aspects of aviation which had historically been considered as recreational, sport and other kinds of private flying, assuming that the participants were aware of any risk involved and accepted it, and applying the lowest level of regulation.

Despite some confusing aspects of the guidelines published with this policy, an operator who was not in the passenger transportation business, and could be described as "a pilot with a toolbox or a corporate aircraft," was among those who would come under the "General Aviation" category. As such, CASA said its role would be primarily to protect passengers and people on the ground, and to exercise surveillance over, and audit operators.

The policy was adopted by the CASA Board and the Minister in 1997. Rudd later circulated a letter to each Board member, inquiring why the policy which had been adopted by the Board and the Minister had not been followed by CASA and its employees in the field. He never received an answer. He was eventually informed by the Board secretary that CASA was "formulating a response which would be vetted by Mr. Laurie Foley." He never received the response.

November 1997

To warm up the oil for a 100-hourly on his Wilga which he intended to sell, Rudd conducts a brief flight in the aircraft, whose maintenance release was not current, and does not record the flight time or sign the maintenance release, which had in fact expired.

May 1999

Rudd appears in the Mareeba magistrate's court on a number of charges, some against himself and some his company, all but one of which related to the fact that he had conducted "aerial photography and surveying":

- in circumstances which required the pilot conducting those activities to hold a commercial pilot licence under CAR 206, or
- without being the holder of an air operator certificate; or
- whilst holding an AOC, carrying out the activities without having a currently approved chief pilot.

The other charge is flying an aircraft without a current maintenance release.

Rudd is fined $10,000 including costs, about $4000 for court costs, $2,500 for the company, and another $500 for conducting similar operations in PNG. An appeal against the sentence was heard recently, and Rudd was awaiting the outcome when we went to press.

A CASA spokesperson said: “He was a private operator, conducting commercial operations without an AOC. The fact that he’s a private individual is irrelevant to us; if we didn’t do something about him, what’s to stop any commercial photography operator with an AOC complaining to us: ‘We go to all the trouble of obtaining an AOC, we pay the money, and you allow this guy to operate?’ It is CASA’s function to pursue breaches of current regulations, not breaches which may or may not be about to stop being breaches because of an intended change of the rules. It’s not a question of whether the rule’s right or wrong; the rule’s on the books.”

That spokesman rejected the proposition that Dick Smith’s commercial publication of images he personally acquired, equates to the same offence. Somewhat confusingly however, CASA also affirms that if this aviation writer, while flying an aeroplane, were to photograph another aeroplane and earn money by publishing the pictures, that would “probably be an offence.” The CASA officer appears to be unable or unwilling, to explain how that ‘offence’ would differ from the activities of CASA’s former chairman, Dick Smith, but strongly promotes the proposition that prosecuting Rudd is an air safety imperative for CASA.

As well, the CASA spokesman trots out a proposition with which *Australian Flying* is becoming increasingly familiar. When confronted with evidence of apparent selective victimisation, discrimination and deliberate persecution apparently by CASA officers with an axe to grind, it now appears to be standard CASA practice to say words to the effect of: “We know a lot about this operator that we can’t tell you. If you knew what we know, you wouldn’t be defending him.” As supplement to this argument, the emotive possibility of an aircraft “falling on a school” is frequently invoked, even if the operator is flying over the Western Australian desert as Rudd was.

That appears to work with politicians; but it won’t work with media people who have an aviation background and know more about what’s going on in general aviation than CASA ever will if it keeps shedding competent and knowledgeable staff.

The yellow pages are full of advertisements for aerial photographers who do not hold AOCs and will take photographs from any available aircraft, whether or not it belongs to an AOC holder. Some photographers own and fly their own ultralights, and if CASA doesn’t know that, it’s in the minority.

We can only assume that even if the authority’s stated policy is to make an activity legal, it will still spend a great deal of money, time and effort pursuing, apparently selectively, a person or company who conducts that activity before the mess is sorted out.

Industry figures, increasingly concerned at the disorganisation, lack of guidelines, training and competent management direction within CASA, are now saying the administrative penalties process is being deliberately abused, with the goal of inflicting permanent financial damage on businesses which have offended the regulator or one of its marginally qualified employees. Recent and current CASA activity, they say, appears to confirm this is a deliberate abuse of process, and they are gearing up to fight the system that allows it.

Ultimately, they believe, the spirit that sustains Australian aviation will prevail.

B9 CASE STUDIES - APPARENT INTIMIDATION

B9.1: The authority to recommend or not to recommend an application, or 'acceptance' (in the case of operations manuals) is vested in a "delegate" who in most instances relies upon the recommendations of a field inspector. Typical of this process are the following examples. It is stressed that these are only a very few of what appear to be literally hundreds of examples:

"Bullying" by individual, inadequately trained and poorly managed officers.

Example 1

B9.2: The following is an account of an event in mid-2000 involving a Darwin based AOC holder

a) An operator's air operator certificate is due for renewal;

b) The flying operations inspector assessing the application personally believes the company's chief pilot is not setting aside sufficient non-flying time to provide for administrative duties.

c) Because the operator's operations manual has not been reviewed after the most recent changes in the Civil Aviation Safety Authority's "Compliance List", the flying operations inspector holding the responsibility for recommending the renewal to the delegate, is in a position to recommend the renewal on conditions recommended by the reviewing flying operations inspector;

d) The reviewing flying operations inspector indicates to the operator's chief pilot that in order to ensure the chief pilot is available for administrative duties for what he considers to be a sufficient proportion of the chief pilot's paid working time, the operations manual should contain a specification that the chief pilot be limited to flying only 400 hours per year; ie. only 40% of the flying time which the employer is required to pay the chief pilot under existing awards.

e) This requirement is made a condition of the flying operations inspector's recommendation to the delegate to approve the application.

f) This potentially places the operator in a commercially disadvantageous position in relation to competitors. It also completely overlooks the nature of the operator's flying activities. Under the proposed requirement (which was eventually withdrawn at the insistence of the operator) the chief pilot could have in any case been rostered to fly 400 hours a year but to expend all his available duty time away from base.

Comment:

This event illustrates the way in which an uninformed individual may impose a personal perception upon an operator as a condition of a recommendation, without any accountability. It is important to note that this kind of intimidation, intentional or otherwise, is one of the more odious outcomes of the current regulatory situation and is a frequent occurrence.

Example 2

B9.3: An Airworthiness Inspector (AWI) in the Archerfield office wrote to an Archerfield operator regarding the renewal of the AOC. The letter was dated 31 Jan 2000.

The letter states: *"where the AOC holder does not hold a Certificate of Approval for the maintenance of aircraft, CASA requires that all such AOC applicants have written contractual agreements with the maintenance organisations which specify the airworthiness control of each aircraft that are operated by that AOC.*"

Comment:

There is no regulatory head of power for an AWI to make this demand. The subject is raised in CASA's Air Operator Certification Manual, but that in itself does not provide a regulatory

head of power. The AWI brought this principle with him when he transferred from a NSW regional office.

The same letter requires the operator to provide a copy of a three page cross-hire agreement including registrations for every aircraft operated by the flying school.

Comment:

CASA does not place registrations on Charter and Aerial Work AOCs. The fact that an Assistant Director stands back and permits an AWI to make his own rules requiring a flying school to supply aircraft registrations, is reprehensible and indicative of a lack of concern for standardisation.

What this does to the operator is to cause him/her to believe he/she cannot change maintenance facilities without CASA approval, and also must confer with CASA before operating any extra aeroplanes of a type already authorised on the AOC.

This is a further example of an officer arbitrarily imposing a "requirement" on a certificate holder, which does not apply to the certificate holder's competitors or potential competitors. Individual officers with the power to recommend or not to recommend an approval or condition on a certificate, are than able to withhold that recommendation in order to force the certificate holder to comply with the requirement.

B10 CASE STUDY - MICRO-MANAGEMENT RUNS WILD

Bastardising Barney

"Two weeks of shame for the Australian Aviation Industry exposed internationally. Unnecessary and totally avoidable!'[6]

It would be impossible to identify a single individual who has contributed more to Australia's pilot training industry than Mr Barney Fernandes.

But in the view of some individuals, Mr Fernandes didn't fit the mould. Anglo-Indian by birth, he began his aviation career in the Royal Indian Air Force in 1944 as a flight mechanic, and progressed through an impressive list of assignments to Wing Commander rank in 1966. His Air Force career reflects a strong and almost continuous involvement in training.

In October 1966, he sought and received voluntary retirement from the IAF to migrate to Australia with his family. They became Australian Citizens in February 1970.

Mr Fernandes' work in Australia has been exclusively in the area of air pilot education and training. From 1967 to 1972 he was an instructor at the Qantas Cadet Pilot Training College in Sydney teaching aviation theory subjects up to Flight Navigator Licence level, training about 200 pilots for the airline. He was retrenched in March 1972 when Qantas closed its cadet pilot training scheme.

In 1973 he established the first ever "ground school" for pilot training at Sydney's "Bankstown Aviation College".

In 1974 he launched the Australian Flying Training School (AFTS) at Bankstown with a training syllabus based on the concepts of the Qantas Cadet Pilot Training Scheme. AFTS conducted formal CPL/IR courses for Australian student pilots and cadet pilots sponsored by overseas airlines. Its first customers were Malaysia Airlines, Garuda Indonesian Airlines and Zambia Airways.

In 1981 he established the Australian Aviation College (AAC) at Parafield. Both AFTS and AAC held the prestigious Integrated Commercial Pilot School Rating – Australia's highest flying school licence. In addition, both schools achieved the status of a "Malaysian DCA Approved Flying School"- the first flying schools in Australia to be approved for CPL/IR training by the Malaysian Government.

The ICS Rating did not limit "standards" set for graduation to aviation subjects alone. It enabled the schools to embark on expanding the course of education and flying training for professional air pilots that would keep abreast of modern technology, while also giving graduate commercial pilots a tertiary qualification. The rating took the school five years and at least half a million dollars to attain.

In 1987 – for the first time ever in Australia - nine cadet pilots of AAC graduated with a CPL/IR that was part of a two year Associate Diploma in Civil Aviation course given by the South Australian Institute of Technology. These eight young men and one woman received professional flying and tertiary qualifications at the same time.

In 1989 Hawker DeHavilland (Australia) purchased AAC Parafield. Mr Fernandes also sold AFTS and moved to Perth where he established Jandakot Flying College, which in 1991 became the Australian International Flying College (AIFC) conducting flying grading for Cathay Pacific Airways. This was the first time ever that flying grading was carried out in the airline pilot pre-selection process. JFC graded 91 HK Chinese candidates for Cathay Pacific.

[6] *Tony Mitchell, Aviator and director of China Southern West Australia Flying College*

In 1992 JFC became the Australian International Flying College (AIFC) and once again Mr Fernandes started training cadet pilots for Malaysia Airlines.

In October 1993 he signed a life long joint venture agreement with China Southern Airlines and became Founder Principal and Managing Director of the China Southern West Australian Flying College. This joint venture involved considerable personal investment in money, long hours of work, and a high degree of responsibility for graduation standards and safety: “It was the only way I could secure this prestigious business for Australia virtually on a permanent basis,” he recalls.

His Chinese partners were extremely pleased with the development of the technical and domestic facilities and the standard of the graduate pilots. His initiative to relocate *ab-initio* flying training away from the busy Jandakot general aviation aerodrome (mainly for safety reasons) received support from the Government of Western Australia. The Company purchased an aerodrome that was owned by Merriden, a small country town in the wheat belt, and on 15th August 95 the new facility was opened for flight training. Soon after this, Mr Fernandes received a written commitment from China Southern Airlines to spend US$250 million in Australia to train 3,000 pilots for the airline during the coming 20 years - another first in Australia, and yet another ground breaking achievement.

To this day the three flying colleges Mr Fernandes established across the continent are still providing employment, supporting the airline industry in pilot training, and earning substantial export income for Australia each year.

But Mr Fernandes believes that in events which occurred from 1996 and culminated in 2000, the China Southern College began to be subjected to “continuous harassment from CASA – all of it aimed at me personally.”

What happened to CSFCWA?

B10.1: At this time the college was undergoing rapid growth as well as coping with complex management issues related to the decision to move a large part of its operations to Merredin. Those issues include the fact that young pilots typically value their social lives and career opportunities as highly as they value their accumulation of flying hours and qualifications; and it is undeniable that more diverse social opportunities for young people exist in Perth than in Merredin. Such pilots, when employed as junior flying instructors, also value working in an aviation environment where they can closely watch for opportunities to further their careers – again more likely to exist in Perth than in Merredin.

B10.2: Nonetheless, a business decision was made to relocate a considerable part of the business, and to relocate (or employ) staff to meet its needs.

B10.3: The alleged harassment took most of the forms complained of by other operators apparently singled out by CASA or by individuals on its staff for special treatment. These include repeated random “audits” of company documentation; the canvassing of staff for complaints; subjective assessments of management issues by individuals with no background at all in the management of civil aviation organisations; and an almost constant flow of aggressively threatening correspondence and of the kind many other operators have become accustomed to. Characteristically the claims made against such operators short on fact, proof, or relevance to air safety, are consuming of time and energy, and the need to respond is likely to divert management focus from attention to safety-relevant issues.

B10.4: Examples of these activities were:

- Frequent allegations that the school was in breach of regulations because (for example) “the college has yet to demonstrate modification to the flying training management structure to fully comply (sic) with Civil Aviation Regulations and Civil Aviation Orders.”[7] In all the

[7] *Letter from FOI Winston James to Mr Fernandes 30 January 1996*

correspondence available, it is not possible to identify a single CASA communication which defines what it considers to be an appropriate management structure; nor is any such prescription contained anywhere in the Act,[8] the Regulations, or the Civil Aviation Orders.

- Intervention in management decisions of a non-safety related nature, an example of which are comments on staff morale and accommodation arrangements. A specific example is the comment:

  Staff morale appeared to be a major problem, causing high staff turnover and low staff numbers. The low morale could have an adverse effect on flight safety and the quality of the student graduates. The location of Merredin and the industry pattern for young instructors to move on to progress their careers are no doubt factors, but the major cause detected by the audit team was one of very poor man management by the college senior management. [9]

- Eventually a "Special Audit" was conducted at the instigation of CASA Aviation Safety Compliance Branch. (See details below headed *The Tizzard Report*).
- In an event which had a serious negative effect on staff and student morale, the "special audit" was announced to Mr Fernandes late on a Friday afternoon,[10] on a fax in the flight training area which was immediately available for staff and students to read, thus spreading concern and alarm among its readers.[11] Numerous operators have experienced the familiar tactic of transmitting bad news by fax at or after close of business on a Friday.
- Issuance of approvals for only an extremely limited period. This can have a grave effect on commercial and financial credibility and a thus direct negative bear ing on costs.
- In one extraordinary initiative, a "requirement" for the Chief Flying Instructor to prepare a written self-criticism (of the college) in the following terms:[12]

  "a written statement specifying: the particular organisational and structural problems he has identified in CSWAFC's operations, in so far as those issues may be seen to have significant safety-related implications of a kind contemplated by relevant provisions of the Civil Aviation Act, Regulations and Orders (and thus formed the basis of the subject NCNs).

  "With regard to the problems specified in the statement described immediately above, Mr Fyfe (the CFI) should also prepare an appropriately detailed action plan, indicating what steps have already been taken and what steps will be taken to remedy each of the problems identified. The action plan should specify the date by which, or the time frame within which, remedial action in respect of each item is expected to be completed.

  "Once the terms of the statement, action plan and time-table have been finalised, the document should be signed by the Chief Pilot and countersigned by you and Ms Wu Chang, on behalf of the Operator, attesting to your intention to employ your best efforts to achieve the specified results by the specified times or within the specified time frames.

  "It is expected that this document will be prepared and presented to the Jandakot District Flight Operations Manager, Winston James, within fourteen (14) days of the date of this

---

[8] Civil Aviation Act, Section 28BF Organisation, personnel etc.

(1) The holder of an AOC must at all times maintain an appropriate organisation, with a sufficient number of appropriately qualified personnel and a sound and effective management structure, having regard to the nature of the operations covered by the AOC.

(2) The holder must establish and maintain any supervisory positions in the organisation, or in any training and checking organisation established as part of it, that CASA directs, having regard to the nature of the operations covered by the AOC.

[9] This statement was made in a 6,700 word "Minute" subsequent to a "special audit", written by CASA's Acting General Manager, Aviation Safety Compliance Branch, Jonathan Aleck. Mr Aleck's qualifications to make such statements were not detailed. ("Man management" is a military term, although Mr Aleck's background is not a military one.)

[10] CASA has very frequently chosen that time of the week to send faxed advice of actual or proposed regulatory action. This is a similar tactic to one which was employed by the late Sir Peter Abeles, who employed minions to telephone debtors at 3am and advise them that time-critical consignments had been delayed because of unpaid accounts.

[11] In a letter to Mr Aleck on April 4, 1998, Mr Fernandes angrily denounced this tactic. Mr Aleck responded that his personal assistant had been given the number following a telephone inquiry as to the appropriate fax number. Mr Fernandes could not identify anybody at CSWAFC who had given the number.

[12] Letter from Jonathan Aleck to Mr Fernandes dated 26 Sept 1997

> *letter. In the meantime, any questions as to the form or substance of the document should be directed to Mr James."*

- Pressure by senior CASA executives on the CSWAFC Board to remove Mr Fernandes, a 35% shareholder, from the Board and management.[13] This as we will see was ultimately successful, at considerable financial and emotional damage to Mr Fernandes.
- Action to shut down flying operations, based on CASA's misunderstanding that the Chief Flying Instructor had resigned and therefore that CSWAFC was in breach of a condition of its AOC.[14]
- Subsequent criminal charges against Mr Fernandes on 28 (?) separate counts of conducting training flights without an AOC.

B10.5: Mr Fernandes and his associates became convinced that the activities they interpreted as harassment in the main, were initiated not in the local office, but at CASA headquarters. They became convinced that CASA had an agenda to drive Mr Fernandes out of the industry. In most of their dealings and despite considerable conflict, CSWAFC and the local (Jandakot) office took care to try to remain on terms which did not preclude their interaction.

B10.6: They remain convinced that the events which led up to Mr Fernandes' departure and the subsequent laying of criminal charges were engineered by senior CASA executives to justify their earlier actions.

The Tizzard Report

B10.7: The "Special inquiry" to be led by CASA FOI Steve Tizzard,[15] was announced (as above) by telex. The formal advice which caused such disruption arrived by Fax, but Mr Fernandes was put at ease when Mr Tizzard arrived. Mr Fernandes' account of these events, as related to Mr Mick Toller [16], is as follows:

> *The visit by Steve Tizzard and two other CASA officers (whom I did not know) on Monday 20th and Tuesday 21st April 1998 was conducted in a most informal and friendly manner. My first question to Steve when I met him was "I hope you are not here on behalf of Jonathan Aleck". He said "No mate, don't worry about those blokes in Canberra. I haven't seen you for nearly twenty years and would like to catch up".*
>
> *Steve was pleasantly surprised at seeing our facilities at Jandakot and the first thing he said to me was " Mate CASA should be supporting this college, not obstructing you".*
>
> *Most of Steve's day at Jandakot was spent discussing training concepts and listening to the difficulties we are having in trying to train pilots for an international airline using a CASA syllabus designed for aero clubs. Steve Tizzard said, I believe quite sincerely —" mate give me a wish list and I'll see what I can do when I get back to Canberra — but I can't promise".*
>
> *It is a three hour drive to Merredin, so the time that Steve and his team spent in Merredin the following day (21st April 98) was only about four or five hours at the most. Again, I must point out that everything was done on an informal basis. Our facility at Merredin was operating under its own AOC. There was no briefing given to my staff at Merredin and no debriefing prior to departure. The impression given to us was except for the usual minor shortcomings present in most flying schools, there were no major problems.*
>
> *On Wednesday (22nd April 98) morning Steve came to my office at Jandakot to pick up our "wish list" and the paper I had written for the re-introduction of the Integrated Commercial Pilot School Rating. He promised to do his best to help when he got back to Canberra.*
>
> *Two months later when the renewal of our AOC was threatened, purportedly as a result of Steve Tizzard's report, I phoned Steve at his home in Canberra to find out what exactly he had put in his report that was so bad. His exact words to me were "mate I really don't know*

[13] *Letter on 28 February 1999 from CASA General Manager, General Aviation Operations, Clinton McKenzie, and subsequent meeting of CASA Director Mick Toller with CSWAFC Board excluding Managing Director Fernandes.*
[14] *This was incorrect. The CFI had indicated his intention to resign but had not yet resigned and was still on the payroll.*
[15] *The announcement of the inquiry, its terms of reference, and a subsequent report in the form of an 8,700 word "minute" by Mr Aleck, are at Appendices 1/2 of this document.*
[16] *Letter from Mr Fernandes to CASA Director Mick Toller 12 Feb 1999*

> *what's going on, the blokes upstairs don't tell me anything — they are playing it close to their chest. There was nothing serious in my report —just the usual things we find wanting in most flying schools".*
>
> *I have every reason to believe that Steve Tizzard has been telling me the truth.*

B10.8: However Mr Fernandes insists that the "final report" prepared by Mr Aleck bears no resemblance to what he had been led by Mr Tizzard to expect.

Author's comment

The document at Appendix 2 has all the hallmarks of having been prepared as a means to an end for the following reasons:

1. If Mr Fernandes' account of events is accurate with respect to on-site comments by Steve Tizzard and the team's subsequent movements, it would have been physically impossible for the audit team to accumulate the volume of data set out in the report, within the time spent inspecting the college.

2. Again, if Mr Fernandes' account of events is accurate, one cannot ignore the possibility that the information set out in support of the proposed action was obtained from officers at the Jandakot or Perth offices subsequent to the special inquiry. The time lapse Apr 22 (when the special audit was completed) to June 9 (when Mr Aleck's Minute was circulated) is a period which would have provided ample time for the report to be prepared in concert with the local CASA offices.

3. Mr Aleck's account is also at considerable variance with the timings and staff movements quoted by Mr Fernandes. In particular, the team's movements as detailed by Mr Fernandes and other CSWAFC staff is completely inconsistent with the movements detailed in Mr Aleck's final report in his summary of staff costs and allowances.

4. Mr Tizzard should be asked by a completely independent investigator to illuminate the issue of the disparity between the conversation which Mr Fernandes recalls, and the content of the report which Mr Aleck described as being only "subject to certain minor (non-substantive) amendments." The investigator should not be from a law firm regularly used by CASA, and in fact if there is any reason to investigate whether criminality is involved in these processes, it should be conducted by the Australian Federal Police or the Independent Commission Against Corruption.

   It is also notable that CASA has consistently refused to respond to Mr Fernandes' repeated requests for a copy of Mr Tizzard's report as he wrote it, and he has also been unable to contact Mr Tizzard in any way. Mr Tizzard has certainly never publicly confirmed Mr Aleck's assertion that his report is substantially identical to his (Tizzard's) original report.

Chief Flying Instructor fiasco

B10.9: The next major issue affecting CSWAFC's fortunes was the aftermath of yet another "special audit," this time initiated by the (then) Acting General Manager, General Aviation Operations, Clinton McKenzie.

B10.10: The following (overleaf), in blue typeface and written by aviation consultant and former CSWAFC director Tony Mitchell is a detailed briefing for concerned parties following the shutdown of CSWAFC's training operations by CASA on the basis that it operated 27 training flights while (as CASA alleged) it did not have an approved chief pilot as required by the Civil Aviation Orders.

B11 CASE STUDY – APPARENT CRIMINAL MISCONDUCT

Dudding the Delegate

B11.1: Some CASA officials appear to have used distortions of published technical information and related law into selective disinformation, and to have deceptively used those distortions to secure decisions by their colleagues that have immensely damaged individuals and organisations without exposure to competent and critical review. The account below is an example.

B11.2: On 8 Feb 2004, Cape York Air pilot Max Davy was conducting conversion training for the purpose of endorsing another pilot on a Cessna Caravan turboprop aircraft, VHCYC. In the course of this training, near Green Island, Mr Davy simulated engine failure by retarding the power lever to flight idle. The three purposes of this exercise were to have the pilot under training conduct a simulated glide approach, to demonstrate the advantage of extending the distance of the glide by carrying out the forced landing approach with the propeller feathered to reduce drag, and to demonstrate the use of the emergency power lever. This action is in accordance with the purpose and intent of Civil Aviation Order 40.1.0.

Note: The propeller can be feathered and unfeathered in this aircraft type with the engine running, and is immediately unfeathered simply by operating the propeller condition lever. An appropriate comparison would be that of taking a car out of gear but leaving the engine running while coasting down a hill.

B11.3: Practice glide approaches are conducted to train pilots flying in typical operations, to respond to a sudden engine failure by selecting a suitable forced landing site and making a simulated forced landing approach. Before applying normal power and discontinuing the approach, the training pilot normally allows the approach to be flown down to a level from which it is possible to assess whether the aircraft has been adequately aligned so that a successful forced landing would have resulted.

B11.4: Mr. Davy's account of the incident to ATSB, apparently conveyed to CASA,was:[17]

> *"A flameout occurred approaching the cleared limit of the practice glide approach. At the time the aircraft was operating with the primary power lever set to "flight idle" and the propeller fully feathered. Power was to be restored using the EPL (Emergency power lever)". When the EPL was advanced out of its detent there was no corresponding increase in torque, and both ITT and Ng (*Inter-turbine temperature and turbine RPM) *were observed to be below normal during the approach. The primary power lever ~~was~~ had been retarded to the flight idle position with the intention of restoring power using the EPL lever. However when the emergency power lever was moved out of its detent, no corresponding increase in torque occurred, and the ITT) and Ng were below normal indications and decreasing. Ignition and Start were selected on and a strong fuel smell was noted. A relight did not occur. Fuel purging was then initiated followed by a starter assisted air start. Ng indications were such that the second attempt was discontinued, the propeller was reselected to feather and best glide performance established, a Mayday was broadcast with intentions and the aircraft manoeuvred for a beach landing. This was revised to a ditching after observing people at the far end of the beach landing area. After a successful ditching a call was made to the approach controller advising no injuries and assistance in attendance.*

B11.5: Because of the skill with which the forced landing was carried out, the aircraft was virtually undamaged by the landing but was later seriously damaged by salt water immersion as the tide rose.

Nine months later (Sep 17 2004), Mr Davy received a "Show Cause Notice" from CASA inviting him to show cause why:

(i) his appointment as a CASA approved person to conduct conversion training should not be revoked and

[17] *Only one change has been made to the text of Mr Davy's report, for the purpose of removing an ambiguity which is capable of two interpretations, one of them incorrect. The alterations show as an erasure and an underlined replacement. The significance of this is that the power lever was* already *retarded in accordance with the manufacturer's operating advices.*

(ii) his Grade 3 instructor rating should not be suspended, cancelled, or varied.

The subsequent decision letter (*inter alia*):

(iii) alleged that on December 28, 2003, in an event unrelated to the accident date, Mr Davy violated restricted area R766, an environmental bird protection zone around Michaelmas Cay; and

(iv) stated as the three factors in support of the cancellation decision that Mr Davy had demonstrated:

a) a lack of due care in the planning and conduct of flying training;

b) an unwillingness to comply with the requirements of Civil Aviation Regulations 1988, in particular CAR 100(2) and CAR 138(1);

c) an unwillingness to communicate fully and effectively with CASA in the course of his functions and duties;

"And that hence you are not a fit and proper person to hold (the approvals.)"

B11.6: Following the usual undisputed "facts and circumstances" regarding aircraft ownership, pilot qualifications etc, the delegate went on to make various allegations and assertions in support of his decisions, the more significant of which are summarised below. (Note that CASA refers to Controlled Airspace when in fact the area is a "bird sanctuary restricted area" in uncontrolled airspace, and not a flight safety issue):

*The **[show cause]** notice alleged a "violation of controlled airspace" as follows:*

ESIR 2003 03931 – Violation of Controlled Airspace

On the 28th day of December 2003 at 11.55 (UTC) the company operated aircraft VH-CYX via Green Island and the reefs to the east of Cairns;

CASA received advice from Airservices Australia that VH-CYX was observed on radar inside restricted area R766.

Flights below 3,000 feet in the area are prohibited without an ATC clearance. VH-CYX did not have a clearance and the company's flight with Max Davy in command was in breach of CAR 1988 100(2).

You, Max Davy in a written response to this ESIR denied any penetration of the restricted area despite being cautioned by the air traffic controller at the time, and afterwards being observed as penetrating the area on radar.

The response asserts that you were familiar with restricted zone R766 (Michaelmas Cay) and that you visually maintained clearance in excess of 1 nautical mile from the perimeter of R766.

The response asserts that CASA has not proved by radar, tapes of ATC transmissions, witness statements or other evidence that you penetrated R766.

I am satisfied that the evidence obtained from Airservices Australia shows conclusively that VH-CYX flown by you penetrated R766.

The notice alleges conduct by you concerning an accident near Green Island as follows:

"ESIR 2004 00433 VH-CYC Accident near Green Island

(i) (undisputed detail)

(ii) VH-CYC was on a glide decent[18] [sic] when you, Max Davy made a mayday call: "flameout" on your radio. You reported that there were 2 persons on board.

(iii) VH-CYC was then tracked by radar until it was observed to have ditched in the sea at a point in the northern side of Green Island.

(iv) At 16.10 VH-CYC was reported in the water floating towards shore with nil injuries to person on board.

[18] *"descent"*

(v) *In the company's written response to this incident you, Max Davy as pilot in command made reference to the emergency power level[19] [sic] (EPL) as the means to restore power following a practice glide approach. You stated:*

[See Mr Davy's account on previous page.]

(vi) *Page 7-37 of the Cessna 208 Pilot Operating Handbook contains the following caution concerning the emergency power lever:*

CAUTION:

The emergency power lever and its associated manual override system is considered to be an emergency system, and should be used in the event of a fuel control unit malfunction. When attempting a normal start, the pilot must ensure that the emergency power lever is in the NORMAL (full aft) position; otherwise an over-temperature condition may result.

(vii) *The Cessna 208 Flight Manual pilot's checklist in the event of an engine flameout in flight requires the emergency power lever to be in the NORMAL position during a starter assist airstart;*

(viii) *Your use of the emergency power lever to restore engine power was contrary to the manufacturer's instructions in the aircraft's flight manual and in breach of CAR 1988 138(1)*

(ix) *In the company's written response concerning this incident you, Max Davy stated:*

"Ignition and start were selected on and a strong fuel smell was noted. A relight did not occur, fuel purging was then initiated followed by a starter assisted air start."

(x) *As the emergency power lever had been operated contrary to the manufacturer's instructions it is likely that an overfuel resulted with fuel surges to the fuel nozzles.*

(xi) *When CASA Flying Operations Inspector Jason Clark wrote to the company's Chief Executive Officer Arthur Williams on 24 February seeking advice from the company about how the "fuel purging sequence was undertaken he received advice in writing dated 27 February that you Max Davy declined to answer further questions about your actions and that all further questions about your actions be referred to Mr Laurie Cox and his industrial organisation the Australian Federation of Air Pilots (AFAP)*

(xii) *In its response to the ESIR and CASA's enquiries concerning this accident the company advised that the pilot in command Max Davy was engaged in a "private" training flight.*

(xiii) *CAR 1988 258(1) states:*

258 Flights over water

(1) The pilot in command of the aircraft must not fly over water at a distance from land greater than the distance from which the aircraft could reach land if the engine, or, in the case of a multi-engined aircraft, the critical engine (being the engine the non-operation of which when the other engines are in operation gives the highest minimum speed at which the aircraft can be controlled) were inoperative.

(xiv) *On the available evidence I am inclined to the view, that by conducting a training fight with a student pilot who had never flown a Cessna Caravan aircraft before, including a simulated engine failure with the single engine of VH-CYC shut down, with the propeller feathered, at an altitude of approximately 2,000 feet, and using the emergency power lever to restart the aircraft's engine contrary to the manufacturer's instructions, and carrying out a flight at a distance from land greater than that which enabled the aircraft to glide and reach land safely you, Max Davy breached CAR 1988 258(1) and conducted a reckless operation of an aircraft contrary to Section 20A of the Civil Aviation Act.*

[19] "lever"

Later in the same document the following additional assertions relating to the engine handling issue were made:

(a) *Despite the disclosures made in* [Mr Davy's voluntary] *statements, you have not in these statements, or in the response, addressed the issues that gave rise to CASA's safety concerns, namely:*

(i) *Why did you conduct an emergency simulated engine failure procedure in the particular circumstances of the student pilot Matthew Radzyner who had not flown in that type of aircraft before, after only a few hours of ground training and*

(ii) *In that process, using the emergency power level [sic] to restore power to the aircraft's engine contrary to the manufacturer's instructions contained in the aircraft's flight manual, and in breach of CAR 1988 138(1); and*

(iii) *Why was such a procedure undertaken over water and not within gliding distance of a suitable landing area?.*

(b) *The response states that* "The exercise was conducted entirely within the provisions of the Regulations," *and that* "CAR 258(1) only requires that the aircraft be able to glide and 'reach land.' I met that requirement. The choice to ditch was made on the basis of that being the most suitable landing at that time."

(c) *I find that errors were made by you, not in the handling of the ditching, but in the planning of the flight, and in how the simulated engine failure procedure was conducted. The emergency power lever and its associated manual override system is an emergency system under which the Cessna 208's flight manual was required to be used only in the event of a fuel control unit malfunction. You also made an error of judgement in your choice of conducting this emergency procedure over sea, rather than land, and within gliding distance of an airfield.*

GROUNDS FOR REVOCATION OF YOUR INSTRUMENT OF APPOINTMENT AND CANCELLATION OF YOUR INSTRUCTOR RATING GRADE 3

(d) *Pursuant to Section 33 (3) of the Acts Interpretation Act 1901 CASA may in its discretion revoke any instrument of approval to give aeroplane conversion training under CAR 1988 5.21.*

(e) *Pursuant to 269(1)(d) of CAR 1988 CASA may cancel a license including a flight instructor (aeroplane) Grade 3 rating issued under CAR 1988 5.14 where the holder is not a fit and proper person to have the responsibilities and exercise and perform the functions and duties of that rating.*

(f) *I am satisfied that your conduct as set out above has demonstrated:*

(a) *a lack of due care in the planning and conduct of flying training;*

(b) *an unwillingness to comply with the requirements of Civil Aviation Regulations 1988, in particular CAR 100(2) and CAR 138(1);*

(c) *an unwillingness to communicate fully and effectively with CASA in the course of his functions and duties;*

And hence you are not a fit and proper person to hold (the approvals.)

Comment

1. **At all material times relating to the decision the delegate was John Flannery, CASA's Acting General manager, General Aviation Operations. In CASA's (then) policy, this appointment came with the position, regardless of the appointee's background, specialist technical or legal qualifications, or training. Mr Flannery's background was in airworthiness, not flight operations, and he therefore had to rely (as a decision-making delegate) on the assessment and advice of a person qualified in the flight operations area.**

2. **The CASA component of the above material is drawn from the "decision letter" sent to Mr Davy, which was signed by Mr Flannery. It is apparent from the correspondence that he made decisions based on advice from other individual/s with some flying background either with limited skills relevant to the competent assessment of these issues, or deliberate intent to deceive.**

3. **Decisions made by delegates without a relevant aviation background are necessarily based on direct technical input from field staff, or through their area managers. This raises the question of whether CASA had sufficient safeguards in place to ensure that its employment, training and ongoing performance monitoring of key field and management employees were adequate to ensure the integrity, competence, and motivation necessary to achieve CASA's published goals while also observing its commitments to:**
   - **Published compliance enforcement guidelines;**
   - **Procedural fairness;**
   - **natural justice; and**
   - **its legal obligations.**

4. **Facts surrounding the issue dealt with in this study, raise serious doubts in that regard and invite the conclusion that CASA has made grave errors in reaching the conclusions Mr Flannery has drawn on to cancel Mr Davy's approvals. These are dealt with in the summary at the end of this document.**

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5. **Allegation that the operation was in breach of Regulation 138(1) of CAR 1988**

> **138 Pilot to comply with requirements, etc of aircraft's flight manual, etc**
>
> (1) If a flight manual has been issued for an Australian aircraft, the pilot in command of the aircraft must comply with a requirement, instruction, procedure or limitation concerning the operation of the aircraft that is set out in the manual.
>
> Penalty: 50 penalty units.
>
> (2) If a flight manual has not been issued for an Australian aircraft and, under the relevant airworthiness standards for the aircraft, the information and instructions that would otherwise be contained in an aircraft's flight manual are to be displayed either wholly on a placard, or partly on a placard and partly in another document, the pilot in command of the aircraft must comply with a requirement, instruction, procedure or limitation concerning the operation of the aircraft that is set out:
>
> (a) on the placard; or
>
> (b) on the placard or in the other document.

(a) The decision letter negligently quotes a "Caution" from Page 7-37 of the Cessna 208 Pilot Operating Handbook regarding the use of the emergency power lever. The page references used by CASA ar e inaccurate and appear to be derived from a later model Cessna 208B Grand Caravan Manual. The model has a different fuselage, different flaps, different engine, different weights, and a different type certificate.

(b) The correct reference for VH-CYC's Aircraft Flight Manual is P/N [part no.] D1307-13,. revision level 32, 7th Sept 2001.

(c) The delegate and/or his advisor/s selectively used only sections of a document to support an agenda, either deliberately or negligently misleading the delegate and deliberately creating a mind-set in the reader of a non-compliant and reckless person.

(d) Mr Flannery's comment: *"On the available evidence I am inclined to the view that Max Davy breached CAR 1988 258(1) and conducted a reckless operation of an aircraft contrary to Section 20A of the Civil Aviation Act….."* invites the reader to consider whether he actually reviewed *all* the available evidence or whether he reviewed only the "evidence" that would support his incorrect assessment of the allegations. As a delegate Mr Flannery was required by CASA's legal awareness training to assess the specialist input, but not to merely mirror the recommendation.

(e) Even experienced judges rarely use the expression: "I am inclined to the view ," in part because it suggests a less than total confidence in the conclusion. The

decision maker is required to form an opinion based on a through evaluation of the available data.

(f) As any pilot knows, a CAUTION in a manual such as this is simply that – a caution, not a prohibition. CASA refused to listen to this argument; and worse, CASA fiddled around with the meaning of the word. CASA deliberately made no reference to the next full paragraph at page 7-35 immediately following the CAUTION, which would have absolutely supported the argument that "Caution" does not mean "Prohibited"; and that Max Davy complied with the Pilot Operating Handbook (CAR 138 aircraft flight manual). The omitted paragraph explains how engine response may be more rapid than with the primary power lever, and that additional care is needed.

(g) Mr Flannery stated that the EPL is "considered" to be an emergency system. The purpose of the "caution" is to prevent pilots continuing flight operations relying on the EPL, rather than landing as soon as possible and rectifying the FCU

(h) The next full paragraph in the POH on the same page (7-35) states: *Use of the emergency power lever with the primary power lever out of flight idle is prohibited.* That is a very clear instruction - do not use the EPL while the primary power lever is out of the flight idle position and the engine is running. Cessna thus clearly distinguishes between "caution" and "prohibited."

6. **Mr Davy was never prosecuted in a court for breaching Regulation 138(1), although that option was always open providing the Director of Public Prosecutions could be convinced that fighting cases based on incompetent investigation would not be a waste of public money.**

7. Allegations of a lack of due care in the planning and conduct of flying training

Para 7 (xiv) of the decision letter contains several errors:

"……… including a simulated engine failure with the single engine of VH-CYC shut down, with the propeller feathered, at an altitude of approximately 2,000 feet, and using the emergency power lever to restart the aircraft's engine contrary to the manufacturer's instructions, and carrying out a flight at a distance from land greater than that which enabled the aircraft to glide and reach land safely you, Max Davy breached CAR 1988 258(1) and conducted a reckless operation of an aircraft contrary to Section 20A of the Civil Aviation Act."

(a) Mr Flannery's allegation that the engine was "shut down" was incorrect and clearly represented an incompetent assessment. The power was reduced to flight idle and the propeller was feathered, which is a similar procedure to putting a car out of gear and coasting down a hill with the engine still running. A car can be put it back in gear any time, just as Max Davy could (and did) unfeather the propeller. In fact in some twin-engine types with similar engine/propeller combinations it's reasonably common practice to feather one propeller while taxying even at idle, to reduce thrust and save brake wear, and in some types to avoid excessive heating of windows by hot exhaust flow spiralling around the nacelle. The engine continues to operate normally during this process.

(b) The reason for the engine "roll-back" had not yet been explained by anybody– especially anyone from CASA, although ATSB said turbine blade erosion *may* have contributed. See http://www.atsb.gov.au/aviation/occurs/occurs_detail.cfm?ID=605

(a) To state that the emergency power lever was used to restart the engine contrary to the manufacturer's instructions is incorrect. The EPL was *not* used to restart the engine, and the statement reflects that the person making the assertion is not technically competent to assess the available information.

(b) It is also incompetent and negligent to state that the flight was carried out at a distance from land greater than that which enabled the aircraft to glide and reach land safely. At no time during the flight was the aircraft in a position where it would have been unable to reach land in a glide. Even at 2,000 ft, a Cessna Caravan can glide for four nautical miles, and the distance between Cape Grafton and Green Island is only 7 miles.

(c) But it gets worse. Mr Flannery, the delegate, clearly examined only *part* of the relevant regulatory material. The rule upon which he relied was:

The pilot in command of the aircraft must not fly over water at a distance from land greater than the distance from which the aircraft could reach land if the engine ………… were inoperative.

(d) Technical information either failed to make the delegate aware of other relevant regulatory material, or was ignored by the delegate. Although the above restriction was accepted by the delegate as the basis of a punitive regulatory decision, it is over-ridden by the following:

CAR 258

(3) It is a defence to a prosecution under subregulation (1) if the flight was:

(a) in accordance with directions issued by CASA

The delegate's flight operations advisors (as licensed pilots) were required to be aware of the ENR section of the Aeronautical Information Publication (AIP) which provides exemptions from CAR 258(1) as follows (relevant items underlined):

ENR 1.1 -98 27 Nov 03

76. FLIGHTS OVER WATER

76.1 Aircraft engaged in PVT, AWK, or CHTR [private, aerial work or charter] operations, and which are normally prohibited by CAR 258 from over-water flights because of their inability to reach land in the event of engine failure, may fly over water subject to compliance with the conditions in this section. These conditions are additional to the requirements for flight over land.

76.2 In the case of passenger-carrying CHTR operations, the distance from land areas suitable for an emergency landing must not exceed 25NM. In the case of helicopters, a fixed platform or a vessel suitable for an emergency landing, or for seaplanes an area of water suitable for an emergency landing and located adjacent to land may be considered acceptable for this requirement.

76.3 There is no limitation for PVT, AWK or freight-only CHTR operations.

76.4 Each occupant of the aircraft must wear a lifejacket during the flight over water unless exempted from doing so under the terms of CAO 20.11

76.5 A meteorological forecast must be obtained.

76.6 VFR flights are required to submit a SARTIME flight notification to ATS or leave a Flight Note with a responsible person.

A competent and properly briefed delegate would have formed the opinion that this pilot did not breach CAR 258(1), and that the flight conducted by Mr Davy was in full compliance with all of the relevant conditions set by ENR 1.1-98. It would therefore would be negligent and defamatory the delegate or his advisors to suggest otherwise.

8. **Mr Davy was not prosecuted in a court for a breach of CAR 258(1). This was an intelligent decision because under the circumstances, a false accusation made to support the cancellation of his approvals, appears to be culpable negligence. The only question that remains is whether this misconduct was deliberate and malicious, or simply negligent and incompetent. No other possible explanation can be identified.**

9. **Irrelevant and incompetent allegations**

(a) Mr Flamery's letter made other unsupported and apparently irrelevant allegations which seemed to constitute an attempt to support his portrayal of Mr Davy as not being a "fit and proper person" and guilty of "reckless operation of an aircraft."

(b) The incorrect allegations include: *The particular circumstances of the student pilot Matthew Radzyner who had not flown in that type of aircraft before, after only a few hours of ground training;*

(c) Mr Flannery based this accusation either on false advice or on false assumptions. The pilot under training, Matthew Radzyner, held a commercial pilot license, and was a qualified flying instructor and a former Cape York Air pilot who had already undergone "co-pilot" familiarisation in the same aircraft - VH-CYC - when previously employed. His relevant qualifications at or about the time of the event were:

BA (Hons) Applied Mathematics, University of Sydney.

Commercial Pilot's Licences (Australian and OECS)

Command Multi-engine Instrument Rating

Class 1 medical

Frozen Australian Airline Transport Pilot License .

Instructor Rating Grade III (Australian).

Night VFR Rating

SAR Training completed.

Flight crew dangerous goods course valid.

Cockpit resource management course completed.

Endorsements on Aero Commander 500 (50hrs), Britten-Norman Islander (800hrs), Beech 55/58 Baron, Partenavia P68(85hrs), Piper PA34 Seneca, and Beech 76 Duchess (27hrs)

EXPERIENCE

2100 hrs Total flight time

900 hrs multi-engine command

1900 hrs command (total).

400 hrs planned IFR (multi-engine command)

300 hrs instructing

78 hrs instrument flight

68 hrs night flying

Additionally, three years charter and RPT command experience including international, VIP and remote operations and four tropical wet seasons. Regions flown included Australia (remote and metropolitan), Papua New Guinea, and the Eastern Caribbean.

(d) Absolutely nothing in the training syllabus suggests that the forced landing training procedure was inappropriate at that particular stage of a conversion training program. A simulated forced landing is an event that is often repeated at various stages of a pilot's accrual of experience; and should come as no surprise; nor would it present any difficulty for any competent licensed pilot.

(e) It is understood that neither of the two CASA officials principally involved in these events, FOI Jason Clark and Townsville Team Leader Flying Operations Leon Kippin, was endorsed on the Cessna Caravan with its unique PWC PT6 engine. It is unique in that instead of the normal two exhaust ducts, it has a single duct with its attendant back pressure/gas flow characteristics, a design feature that may be a factor in the unexplained high incidence of compressor rollback. Research indicates that this undocumented feature, compressor rollback, is most likely to occur at low Ng settings, say 65% or less, as in a Honduras landing approach incident, as well as a Fedex event, both of which occurred soon after Mr Davy's incident.)

(f) There is also an undertone in the documents that inaccurately suggests that carrying out practice glide approaches anywhere but over terrain where a landing could be made if necessary, is irresponsible. This is absolute nonsense, and is so irrelevant to intelligent risk management in the GA training environment, (or to supporting regulation) that it really does not deserve a response. Single-engine

pilots in all walks of General Aviation from crop spraying to power line patrols to tourism island-hopping to long distance charter, wisely spend quite a lot of their time contemplating what actions they should take if their engine failed. Most of them therefore explore the possibility in intelligent ways, by simulating engine failures and glide approaches when they can sensibly do so (usually when not carrying passengers.) Making such intelligent risk management practices an offence would clearly be an incompetent decision.

The language of the letter which (apparently deliberately) portrayed this pilot as a student with low experience appears to have been reckless and irresponsible, and aimed at deceitfully promoting the view that Mr Davy was reckless and irresponsible because of the alleged inexperience of this pilot.

20A Reckless operation of aircraft

(1) A person must not operate an aircraft being reckless as to whether the manner of operation could endanger the life of another person.

(2) A person must not operate an aircraft being reckless as to whether the manner of operation could endanger the person or property of another person.

9. Mr Davy was not prosecuted for reckless operation of an aircraft in breach of Section 20A of the Civil Aviation Act, and the reasons are obvious. Such action would have been rejected by any competent court, even if it survived the scrutiny of the Director of Public Prosecutions. CASA officials appear to have adopted the alternative of assembling a handful of spurious allegations, presenting them to an individual without specialist knowledge, and achieving the goal of getting the delegate to make an uninformed decision that incompetently and illegally damages a pilot's career and reputation. And the decision was apparently not a reviewable one which could be referred to the Administrative Appeals Tribunal, so the regulator would have saved considerable expense on lawyers.

10. **Allegations of Mr Davy's "unwillingness to comply with CAR 100(2)**

100; Compliance with air traffic control clearances and air traffic control instructions

(2) The pilot in command of an aircraft must not allow the aircraft to:

(a) enter, operate in, or leave a control area;

(b) operate outside a control area as a result of a diversion out of that control area in accordance with air traffic control instructions; or

(c) enter, operate in, or leave a control zone or operate at a controlled aerodrome; if the movement or operation is not in accordance with an air traffic control clearance in respect of the aircraft.

(2A) Subregulation (2) does not apply if the movement or operation:

(a) is authorised by:

(i) air traffic control; or

(ii) a notification in Aeronautical Information Publications or

(iii) NOTAMS; or

(b) is made in an emergency in accordance with subregulation (3).

(3) If an emergency arises that, in the interests of safety, necessitates a deviation from the requirements of an air traffic control clearance or Air Traffic Control instructions, the pilot in command may make such deviation as is necessary but shall forthwith inform air traffic control of the deviation.

(a) The "decision letter" fails to explain the nature or legal breach of Mr Davy's alleged offence in being "unwilling to 'comply with CAR 100(2

First, the alleged penetration wrongly refers to "controlled airspace" and therefore appears to be a deceptive and deliberate embellishment. R766 is neither within a control area, nor within a control zone, and makes a nonsense of any claim that Mr Davy's alleged violation of the restricted area (had it occurred,) would have constituted a breach of CAR 100(2). Any advice to the contrary must be incompetent advice.

(b) Assuming Mr Flannery was referring to the alleged infringement of the restricted area R766, it is notable that:

(i) These allegations were never adequately or publicly investigated, nor were any charges laid at the time.

(ii) Mr Davy's response to the allegations, which asserted that he was familiar with R766 and that he visually maintained clearance in excess if 1 nautical mile from the perimeter of R766, was rejected without any comment in support of the rejection.

(iii) It is known that Airservices Australia provided CASA with a printout of radar-derived data relating to the alleged incident. This was not made available to Mr Davy for examination, nor were the qualifications of the official who examined them defined or challenged. Mr Davy was therefore never presented with an opportunity to sight or respond to the "evidence" on which the allegation is based.

(iv) The alleged "penetration" was a tangential approach towards the arc of a circle of one nautical mile radius, incorrectly depicted (Mr Davy states) on the graphical overlay on the ATC radar. That equipment was never designed to provide valid data on such incidents at low level and long distance, and is not calibrated to the degree that would be needed to provide the information which is the purported basis of the allegations. The scale on the air traffic control radar screen is nothing like sufficiently accurate to provide acceptable evidence in a court of law. Mr Davy's response to the ESIR is reproduced in full at Appendix A.

(v) The monitoring of aircraft movements outside controlled airspace is not a function of air traffic controllers, and Airservices Australia provides no specific training for it in terms of standards, tolerances, and procedures.

(i) It is also a matter of record that over-zealous CASA officials have in the past sought to launch immediate punitive action against pilots alleged by ESIRs to have violated controlled airspace, but have been restrained from doing so until ATC radar and voice tapes have been examined. These examinations confirmed that the ESIR was erroneous and no further action was taken.

(ii) The allegation is thus both technically and legally inaccurate, and therefore the result of an incompetent assessment of the available evidence.

10. **Mr Davy was not prosecuted in a court for a breach of CAR 100(2). That lonely flash of realism shines out from a wilderness of blunders.**

11. **Allegations of "an unwillingness to com municate fully and effectively with CASA in the course of your functions and duties."**

(a) Absolutely no regulatory requirements exist in relation to communications between individuals and the Civil Aviation Safety Authority, especially in situations when CASA has no other apparent purpose than to gather evidence to support regulatory action.

(b) The Australian Transportation Safety Board is the body with responsibility for the investigation of air safety accidents or incidents, the reporting of which is the regulated responsibility of individuals and organisations who are aware of events and are in a position to do so. Notably the ATSB and other air safety investigation bodies conduct their affairs around the concept of "no-blame reporting" in order to protect the air safety reporting and investigation process in such a way that air safety can benefit from lessons learned.

(c) In stark contrast, the involvement of CASA in post-accident/incident enquiries has been shown to be one of searching assiduously for any breach of the Act or Regulations, with a view to possible criminal prosecution or administrative action. In the events dealt with in this case study, and in other previous matters relating to Cape York Air, CASA had been particularly aggressive in seeking evidence to support various punitive actions (See separate article). It has also demonstrated a

high degree of determination to “manage” information in order to portray individuals and the organisation as non-compliant. Cape York Air and individuals associated with it would therefore have been extremely unwise to communicate unnecessarily with CASA employees whom they had come to distrust, and whose motivations and integrity they no longer had any reason to respect.

(d) For a considerable time, lawyers have been advising pilots not to discuss air safety incidents or accidents with enforcement officials. There is absolutely no reason why pilots should not adopt that advice, there is no justification for penalising pilots who follow it, and CASA has no authority to attach a penalty of any kind to that policy. In fact, it is understand it is the same advice given to pilots by the Australian Federation of Air Pilots, of which almost all CASA flying operations inspectors including (it is understand) Mr Kippin, were paid-up members

Summary:

12. Numerous grave errors appear to have been made by Mr Flannery as the delegate, and by CASA staff who have been his sources of technical aeronautical input. If Mr Flannery was duly qualified to make the decisions he had made, both he and his employer were responsible for the material errors which damaged the career, reputation, and financial circumstances of Mr Davy.

13. The “decision letter” contained several allegations of serious breaches of the Civil Aviation Act and Regulations. If the regulatory authority really believed such breaches had occurred it clearly had a duty to prosecute the alleged offender. The fact that no such prosecutions were ever launched, clearly indicated the lack of legal credibility that CASA ascribed to the allegations, and the poor quality of its sources of information.

14. In the recent past, especially following former Minister John Anderson’s initiatives to restore a measure of procedural fairness and natural justice to CASA enforcement processes, CASA had increasingly adopted a practice that is designed to circumvent those measures and target individuals and organisations for removal from the industry. A favourite tactic was the practice of withdrawing “approvals,” which CASA claimed were not subject to automatic stay, or to review by the Administrative Appeals Tribunal.

15. Another tactic was simply *not to renew* certificates or approvals, and then to claim that there was no reviewable decision because CASA didn’t actually do anything. This practice has resulted in the termination of air operator certificates, and of individual pilot approvals.

16. Any competent assessment of the allegations against Mr Davy thus invites the interpretation that Mr Flannery’s decision represented a gross miscarriage of justice, unsupported by credible evidence, and attributable to incompetently negligent or maliciously selective input from officers at field and/or at district level.

17. By its actions as we’ve discussed, individuals within CASA had either deliberately and maliciously, or negligently and incompetently, made and implemented decisions based on:

(iii) deliberately inaccurate statements; and/or

(iv) inaccurate and therefore incompetent analysis of technical material; and/or

(v) selective and incomplete applications of parts of the Act and Regulations; and/or

(vi) the subjective opinions of the delegate or other employees based on one or all of the above.

CASA should therefore have been obliged to:

(vii) immediately restore the approvals which it has illegally removed; and

(viii) compensate Mr Davy for loss of income and reputation;

(ix) review its processes for the appointment, training and tasking of delegates, ensuring that they have adequate technical and regulatory backgrounds and/or reliable and correctly motivated supporting staff, to help them make competent decisions in their areas of responsibility;

(x) establish a process of review under which any decision with far-reaching impact on the business or reputation of individuals or certificate holders will not be implemented without that review by responsible individuals;

(xi) submit to an external investigation of the activities of officials involved, and the extent to which that involvement constituted negligence (including negligent misstatement), breach of confidence, injurious falsehood, or misfeasance in public office. The question of criminal intent or conduct should also be investigated by an appropriate authority – but for the sake of credibility and probity, certainly not by a consultant engaged by CASA's Office of Legal Counsel. Among the officials whose activities in this context should be scrutinised are:

- John Flannery, Acting General Manager, General Aviation Operations;
- Leon Kippin, Team Leader Flying Operations, Townsville;
- Jason Clark, flying operations inspector.
- Alan Cooke, Area Manager, North Qld Office.
- Any other CASA employees, including officials of its Office of Legal Counsel, who were involved in, or endorsed, the deficient conduct identified in this case study.

Epilogue

CASA was appraised of much of the substance of these issues in a letter to Chief Operating Officer Bruce Gemmell from Mr Peter Rundle on April 6, 2005.

Subsequently on June 1, 2005, an earlier draft copy of this study was e-mailed to Mr Peter Gibson to provide CASA with an opportunity to comment.

CASA Acting Executive Manager of Corporate Affairs, Ms Nicola Hinder, advised by letter dated June 21 2005, that:

- Mr Gemmell had advised Mr Rundle that he had referred the complaint for preliminary review to a staff member within the office of CEO Mr Bruce Byron;
- That based on the preliminary findings, Mr Gemmell has decided that a formal inquiry would be held into the concerns raised;
- That the inquiry would be conducted by an appropriately skilled officer not associated with the original decision, or with any of the involved parties in North Queensland; and
- That the inquiry has now been tasked, with a report expected within one month.

The writer was subsequently made aware that there had been two previous enquiries into the matter, but was not advised of their outcomes.

It is the writer's understanding that the information in an earlier version of this document was the basis of the third enquiry.

Footnote

The above commentary is an update of an analysis published soon after the events recounted and at that time provided also to CASA. The intent of its publication and circulation was to illustrate ongoing problems within the corporate culture of the organisation. As a result of this and other input and following two inconclusive investigations into these events, a third investigation was launched, which resulted in the restoration of Mr Davy's training approvals but (as yet) without financial compensation.

Several CASA officials who were involved in these events are now no longer CASA employees. This is believed to be the result of the investigation and if so reflects favourably on current CASA management.

Subsequently a fourth and very comprehensive investigation by an independent external consultant with police internal affairs investigation experience was commissioned to investigate whether any misconduct of a criminal nature had occurred. CASA has declined to provide details of that investigation's terms of reference or of its findings, except to say that no criminal issues were identified. The investigations, and other (unrelated) departures of CASA employees appear to reflect the will of at least some senior CASA officials to set these matters straight, despite efforts on the part of some staff of which the writer is aware, to use whatever tactics are available to attempt to discredit those individuals.

It is believed the Committee would benefit from being aware of the content of that report.

Appendix A

Mr Davy's detailed response to the ESIR relating to an allegation of violation of controlled airspace.

Response:

1.Relevant Circumstances. Incident # 2003_03931.

This incident type was classified as a Violation of Controlled Airspace.

There was no violation of controlled airspace, the aircraft at the time specified was operating OCTA (**outside** controlled airspace), with an assigned transponder code, under radar identification and maintaining communications with the approach frequency. The aircraft was cleared out of Cairns via Green Island, not above 2,000'. The reef areas to the East of Cairns underlie CTA with various lower levels, from 2,500' at Green Island and 3,500' in the Arlington Reef and Michaelmas Reef areas. The aircraft was operating not above 2,000' and in fact in this area operated at or below 1,500'. At 12 nm Cairns there is a North East CTA sector with a lower limit of 1,000'. None of these control areas were entered at or above their lower limits without a clearance.

Navigation and navigation tolerances.

The aircraft, although IFR equipped and certified was flown in accordance with the visual flight rules, and tracked visually to Green Island, then to the pontoon at the Eastern end of Arlington Reef, then visually towards Michaelmas Reef to align with Oyster Reef through to Double Island. As I was approaching Michaelmas Cay approach contacted me and advised I was near the restricted area of Michaelmas Cay and was I aware of it. I replied in the affirmative and confirmed that I was tracking to remain clear. As I approached the Nth East Sector LL 1,000' I requested a clearance to enter and track via Double Island thence the Western VFR corridor. The c learance was received and read back.

Details of R766:

This restricted area was applied for by the Great Barrier Reef Marine Park Authority and is intended to accommodate the nesting activities of Noddy Terns and other birdlife. The restricted area is 1nm radius and 3,000' high from the surface. It is shown as administered by Air Services Australia. As an experienced pilot with over 30 yrs flying I estimated a distance that I believed to be at least 1 nm from the Cay and maintained at least that distance. Numerous tour boats and possibly 100 tourists appeared to be on the Cay and if interviewed, none would have recalled an aircraft in the vicinity of the Cay. The AIP specifies a navigation tolerance of +/- 1 nm below 2,000' when VFR in controlled airspace, that tolerance was met even though operations were OCTA. (the alignment of Oyster Reef to Double Island is one of the few visual cues for negotiating the CTA steps OCTA).

2. What have I learnt from this alleged incident?

No comment.

3. Steps to prevent a recurrence.

There was no violation of controlled airspace. Consider using Upolo Reef as a reference point instead of Oyster Reef but this requires an earlier request for clearance if at or 1,500'. If there are, as implied, frequent incursions into R766 then perhaps this matter needs to be raised at RAPAC for consideration.

This alleged incident has been presented as having safety implications. R766 is not one of the many ADF firing ranges in the area, it is an ecosensitive area with NO safety implications, instead there are environmental concerns. It has not been established whether an aircraft in the vicinity (500' agl/1nm) is as ecologically threatening as a hundred tourists on the surface walking through the nesting areas, but that is not our concern.

B12 OTHER MATTERS REQUIRING INVESTIGATION AND CLOSURE

The following are among matters of which I am aware and which represent apparent ongoing misconduct in various forms. While not yet all fully researched, these matters require investigation. They include, but are not necessarily limited to:

a) deliberately untruthful statements causing delegates to make incorrect decisions;

b) incompetence on the part of delegates in failing to assess the veracity, relevance and legality of internal advice;

c) breaches of confidentiality causing operators to lose business because clients are made aware of allegations being investigated;

d) negligent and incompetent assessment of matters under investigation;

e) avoidance of legal proceedings in favour of sanctions through administrative decision processes;

f) coercion on an operator to drop a matter in court by threatening administrative action against an AOC;

g) negligent or incompetent misstatement resulting in unwarranted regulatory action;

h) abuse of authority in many forms, including the improper withdrawal or threat of withdrawal of approvals;

i) negligent or deliberate misinterpretation of the Act, Civil Aviation Regulations and Orders, procedures manuals, policy documents and directives;

j) improper abuse of authority by limiting, without justification, the validity period of a certificate or approval;

k) incorrectly taking or threatening action against an Air Operator Certificate holder because of misconduct on the part of an employee;

l) listing, on a show cause notice, alleged breaches by a company dating back to previous ownership, or matters which have already been acquitted;

m) obstruction and incompetence in the process of assessment of applications for chief pilot approvals;

n) the common and apparently malicious practice of issuing show cause notices, suspensions or cancellations by fax after close of business on Friday;

o) corrupt coercion of a certificate holder in order to secure a personal advantage;

p) untruthful statements ing Parliament;

q) favouritism and victimisation in numerous forms.

The industry today

B13 THE AIRLINE INDUSTRY

B13.1: Australia's airline industry is not discussed in detail in this analysis except where it has a bearing on the subject matter. The airline industry has largely been obliged to become its own regulator. This sector of the industry enjoys the availability of internationally recognised standards and procedures, and significant manufacturer support, which have allowed the airlines to carry on their businesses virtually independently of Australia's regulators.

B14 RECENT RECOMMENDATIONS OF INQUIRIES

The recommendations of several reports over the past twenty years have apparently been set aside. The following is a summary of some of those recommendations. It is suggested that the implementation of the recommendations which are boxed is in queston.

1. Extract from an Air Safety Regulation Review Task Force report presented in 1988.

PRINCIPLES FOR AIR SAFETY REGULATION

In considering the legislative framework issues before us, the Task Force has found that certain fundamental principles have emerged and guided us in our considerations.

1. *There should be a clear philosophical framework for air safety regulation.*
2. *There should be a sensible legal structure of control in which requirements appear with a proper hierarchical sense of significance.*
3. *The rules should be valid and enforceable.*
4. *The rules should be simple and easy to read.*
5. *Advisory or information documents should not contain mandatory legal requirements.*
6. *The process of making or changing the rules should be expeditious and responsive to a rapidly changing environment, while allowing for a). appropriate consultation with industry and b). consideration of the public interest.*
7. *The cost impact of air safety rules needs to be taken into account.*
8. *The system must have legal certainty as well as administrative flexibility where necessary.*
9. *The rules should be enforced properly.*
10. *The regulatory system must be administered wisely with industry and the Authority enjoying a good working relationship.*
11. *The Authority should have the systems and people with the necessary knowledge, skill, experience and empathy to achieve these goals.*
12. *The Authority should be publicly accountable for its administration and rulemaking.*

Comment: The reader is invited to consider how many of the above principles have been brought to fruition by subsequent regulatory activity.

2. Extracts from the recommendations of the House of Representatives Standing Committee on Transport, Communications and Infrastructure, published in December 1995 as the "*Plane Safe*" report

Note: The committee made a number of recommendations, some of them not relevant to the theme of this study. Those which *are* relevant are detailed below with appropriate notes.
Recommendations which it is suggested have not been implemented, are boxed:

Improving safety

- the Civil Aviation Safety Authority publish serious deficiency reports on a monthly basis, initially for charter operators, commencing March 1996;

Comment: This initiative appears to have been disregarded on legal advice. However a similar initiative has reappeared in the form of the highly questionable publication of unsubstantiated allegations in support of AOC suspensions. (See F1)

- the Civil Aviation Safety Authority undertake special unplanned surveillance of charter operators in 1996;

Comment: enthusiastically implemented

- the Civil Aviation Safety Authority conduct randomly selected audits of aircraft maintenance organisations to check whether documentation for stores stocks comply with the regulations;

Comment: enthusiastically implemented

- the Civil Aviation Safety Authority and the Bureau of Air Safety Investigation prepare and publish aviation safety indicators;

Comment: not implemented

Improving the effectiveness of regulation

- the Civil Aviation Safety Authority appoint expert groups or panels to produce periodic reports on the adequacy of standards in the low capacity RPT and general aviation sectors;
- the Civil Aviation Safety Authority enlist the services of the Department of Finance or private sector consultants in evaluating the Australian Safety Surveillance Program;

Comment: apparently not implemented

Improving organisational performance

- the Civil Aviation Safety Authority examine the effectiveness of its processes for internal consultation and prepare an industrial democracy plan;
- the Australian National Audit Office undertake an efficiency audit of the Civil Aviation Safety Authority in 1998;

Comment: Readers of this study are invited to consider the degree to which those specifications are currently being met.

B15 GENERAL AVIATION, LOW CAPACITY AIRLINE, CHARTER AND AERIAL WORK OPERATIONS

B15.1: Australia's general aviation industry is an integral unit of the national economic and social structure. It provides a wide range of essential services, as well as being a considerable contributor to the national economy through several specific industries including:

a) Air taxi and scheduled feeder services, particularly in remote areas with inadequate surface transport infrastructure;

b) Flight training, which provides a vital source of pilots for Australian industry as well as training an increasingly large number of foreign pilots in a rapidly expanding market, particularly in Asia.

c) Government services including ambulance, on-site medical services, coastal surveillance for a range of government agencies, police aviation, and the transport of government officials.

B15.2: General aviation and LCRPT operations account for almost 1,000 air operator certificates; the majority of commercial and airline transport pilot licences; the majority of licensed aircraft maintenance engineers and approved workshops.

B15.3: It is important to note that general aviation by its nature is largely composed of small, widely scattered business units without sufficient inter-unit contact to provide ready communications or industry cohesion. A further factor to be taken into account is the keen competition between business units, which makes the forming of industry associations and other alliances less effective.

B16 THE NEED FOR EXTERNAL SCRUTINY

B16.1: There is a very considerable weight of industry opinion that past inquiries into aviation safety regulation have been hijacked or misled by the institutions they have set out to investigate. It is vital that parliamentarians and the wider public genuinely concerned for air safety accept that an increasingly critical situation continues to exist, with little evidence of stabilisation or reversal. In order that they fully understand the current situation, the starting point would be to test the validity of the following questions and answers:

Q Where does Government obtain its information on how the Regulator is performing?

A From the Regulator; and from nobody else except possibly and occasionally, an external consultant commissioned by the regulator.

Q Who answers the Minister's questions on behalf of the public when a complaint is made against the regulator?

A The Regulator provides the answers.

Q In reality, what avenues does the operator or the industry customer have available, to ensure that aviation industry regulation is achieving its stated goals?

A None, unless the responsible minister acknowledges that existing channels of communication tell him only what he wants to hear, and takes appropriate action to reverse this situation.

B16.2: For the above reasons, it is submitted that the Civil Aviation Safety Authority processes and practices dealt with in this analysis must be examined critically by a fully independent group, reporting to the Parliament through the responsible Minister. Its terms of reference could well be based upon the deficiencies identified in this study.

B17 THE NEED FOR EFFECTIVE INDEPENDENT GUIDANCE

B17.1: Some relatively recent major government inquiries have been initiated only as a reaction to specific air accidents. This process is absolutely contrary to the internationally adopted basic principles of developing 'safety systems' which the global air safety community advocates, as do well-respected industrial safety organisations for safety in any other industry.

B17.2: The basic principles by which air safety practitioners operate have thus been ignored by the regulatory authority, which has demonstrably failed to acknowledge and rectify identifiable systemic failures in its own processes. The Civil Aviation Safety Authority, as an essential component of the national air safety system, has thus been identified as a significant weak link in the safety chain.

B17.3: One significant aspect of this, is the Civil Aviation Safety Authority, itself a significant employer of pilots with a wide range of qualifications and experience and actively employed in various professional flying roles, (some of them the equivalent to senior training and checking roles within airlines and other operations), has:

a) no air operator certificate;

b) no chief pilot;

c) no quality assurance system, at least of the kind it expects other operators to put in place;

d) no safety system, again of the kind it expects other operators to put in place;

e) no manuals relevant to the flight operations inspection functions of the Civil Aviation Safety Authority.

B17.4: For the above reasons, it is demonstrably inappropriate that any government inquiry into the practice of air safety regulation, should rely on information supplied by any component of the regulatory authority unless that information is made fully open to examination by competent entities or individuals. In any inquiry that is conducted, the Civil Aviation Safety Authority should in fact be subjected to a scrutiny of exactly the same kind/s it applies to – or should be applying to - the organisations and individuals it regulates. This would include:

- Regular detailed reviews/audits of its safety performance and compliance;
- Regular reviews of the appropriateness of management appointments;
- Unannounced audits of its performance against identified goals.

B17.5: It is therefore recommended that a fully independent industry review of issues raised in this analysis be put in place, with terms of reference based on those detailed in A6 and expanded in consultation with interested parties.

C: THE LEGAL ENVIRONMENT

C1 EXISTING STRUCTURE

Civil Aviation Act 1988

C1.1: The Civil Aviation Act 1988, as amended by the Civil Aviation Amendment Act 2000, is the new basis for air safety requirements in this country. The Air Navigation Act 1920 remains substantially intact to govern matters of air navigation.

C1.2: The Civil Aviation Act established the Civil Aviation Authority, while the amendment established the Civil Aviation Safety Authority. It lists the functions of the Authority including the responsibility to conduct safety regulation of:

i. civil air operations in Australian territory; and
ii. Australian aircraft operating outside Australian territory.

The new Act reiterates requirements to have an Aeronautical Information Service with Aeronautical Information Publications and notices to be known as Notices to Airmen. (ss. 17 & 18).

The regulation making powers of the old Act are also repeated so that detailed air safety requirements can be made in Regulations and Orders. (s.98).

Civil Aviation Regulations (CARS)

C1.3: The Air Navigation Regulations which related to air safety have been repeated in the Civil Aviation Regulations. They include:

- Airworthiness requirements, including provision for Certificates of Airworthiness (Part IV);
- Licences and ratings of operating crew (Part V);
- Flying school licences (Part VI);
- Log book requirements (Part VII);
- Removal of obstructions or potential hazards to air navigation (Reg. 95);
- Air Traffic Control (Part IX Div. 3);
- Conditions of Flight (Part X, which Part X includes many requirements of relevance to air safety, including the carriage of dangerous goods, the dropping of articles and low flying;
- Rules of the Air, including rights of way, rules for prevention of collision, visual flight rules, instrument flight rules (Part XI);
- Air Service Operations including the requirement for an Operations Manual (Part XIII);
- Refusal to Grant, and Suspension and Cancellation of licences and certificates, (Part XIV).

Civil Aviation Orders (CA0s)

C1.4: Regulation 5 (1) of the Civil Aviation Regulations provides:

> *Wherever CASA is empowered or required under these Regulations to issue any direction, instruction or notification or to give any permission, approval or authority, CASA may, unless the contrary intention appears in the regulation conferring the power or function or imposing the obligation or duty, issue the direction or notification or give the permission, approval or authority in Civil Aviation Orders or otherwise in writing. Expressions used in Civil Aviation Orders shall, unless the contrary intention appears, have the same meanings as in these Regulations.*

C1.5: Air Navigation Orders and subsequently Civil Aviation Orders have been the method by which the Department and the successive Authorities have set many requirements. They have been described as the "working level legislation" and "the vehicle for the setting of Australian operational safety standards." They deal with matters such as:

- procedural requirements relating to air service operations and safety precautions;
- miscellaneous air service operational requirements eg. parachuting, night flying training;
- requirements for pilots and other flight crew;
- requirements for air service licences;
- airworthiness requirements.

Thus legal requirements for air safety have been set in the Act, Regulations and Orders. In turn, these requirements have been supported by an array of information documents:

Information Documents

C1.6: These documents can be summarised as follows:

Aeronautical Information Service (AIS)

Australia, as a contracting state to the Convention on International Civil Aviation (Chicago Convention) is obliged to provide an aeronautical information service.

This service collects, collates, edits and publishes aeronautical information, and

a) provides Aeronautical Information Publications (AIPs);

d) issues Notices to Airmen (NOTAMs);

e) issues Aeronautical Information Circulars (AICs).

Aeronautical Information Publications (AIPs)

C1.7: The AIPs are a mixture of rules and information (as are most information documents.) Aeronautical information and instructions which are of a lasting character essential to air navigation are published in AIPs, which contain information on matters such as airways and instrument approach procedures, operations under instrument flight rules, aerodromes, and meteorological services.

Visual Flight Guide

C1.8: The visual flight guide (VFG) is the parallel to the AIPs applicable to visual flight rules and contains a similar span of relevant information.

Notices to Airmen (NOTAMS)

C1.9: Information and instructions of a temporary character, or which cannot be promulgated quickly enough through AIPs, are published in NOTAMS.

Aeronautical Information Circulars (AICs)

C1.10: AICs are published whenever it is necessary to promulgate aeronautical information which does not qualify under the specifications for inclusion in the AIP or, under the specifications for the issue of a NOTAM.

AICs are generally published whenever it is desirable to promulgate:

- a long-term forecast of any major change in legislation, regulations, procedures or facilities;
- information of a purely explanatory or advisory nature liable to affect flight safety;
- information or notification of an explanatory or advisory natureconcerning technical, legislative or purely administrative matters.

Airways Operations Instructions (AOIs)

C1.11: AOIs supplement the Civil Aviation Act, CARS, CAOs and AIP. They are an 'in house' document designed for the use of Airservices Australia staff who are involved in the provision of air traffic and emergency services. The AOIs are in turn supplemented by Regional or Unit AOIs, covering local peculiarities. Although AOIs contain information on air traffic control procedures which it would be helpful to have available to pilots, they are not readily available to pilots.

Manual of Operational Standards

C1.12: The manual is compiled for the guidance of Civil Aviation Safety Authority officers whose duties entail advising on or implementing matters of an operational nature connected with Regular Public Transport operations.

Flying Operations Instructions (FOIs)

C1.13: These are internal directives to staff of the Authority and not for general publication, although they include requirements which amount to quasi orders (eg. Requirements relating to Off-Shore Seaplane Operations, and to the conduct of Flying Training at Places other than Normal Flying School Branches).

Airworthiness Instructions (AWIs)

C1.14: AWIs are also internal directives, but again they are of significance to the industry, setting out as they do, procedures for airworthiness certification and registration of aircraft, maintenance/modification inspections and surveys, issue of airworthiness licences and authorisations, and equipment and performance requirements (among others).

Airworthiness Advisory Circulars (AACs)

C1.15: AACs provide members of the aircraft industry with information regarding (non-mandatory) standardised applications of airworthiness requirements and items of general interest to the industry on airworthiness subjects. They are published when it is desirable to circulate information pertaining to aircraft maintenance matters which does not qualify for inclusion in CAO Parts 105 - 107.

AACs promulgate information of an explanatory or advisory nature on technical or maintenance topics, they alert the industry to amendments to Airworthiness Directives and include a summary of major defects.

AACs have now been replaced early by a comprehensive Airworthiness Advisory Circulation Publication.

Policy letters

C1.16: Policy letters are issued by the Flight Standards Division to prescribe administrative and operational standards, practices and procedures pending their incorporation in CARS, CAOs, AWIs or FOIs as appropriate.

Civil Aviation Advisory Publication

C1.17: The Civil Aviation Advisory Publication (CAAP) purports to contain guidelines by which operators and flight operations or airworthiness staff can comply with various selected regulatory requirements. Each issue is addressed under a separate CAAP number, and a typical introduction to one issue states:

> *This publication is advisory only. It gives the preferred method for complying with the Civil Aviation Regulations. It is not the only method, but experience has shown that if you follow this method you will comply with the CARs. Read this advice together with the appropriate regulation and Civil Aviation Order.*

Another stratum of rule making

C1.18: At a time when CASA's declared goal is a reduction in rule complexity and the orderly definition of rules, CASA is now using its auth ority to call up the contents of CAAPs (above) as regulatory definitions. There is no legal backing for such action.

Operations Manuals

C1.19: Regulation 215 of the Civil Aviation Regulations provides that an operator shall provide an operations manual for the use and guidance of the operations personnel of the operator.

The Operations Manual must contain such information, procedures and instructions with respect to the flight operations of the aircraft operated as are necessary to assure the safe conduct of the Flight operations.

The Secretary can direct the operator to include particular information in the operations manual or to revise or vary information. At Section A9 of this document is an example of a method the Civil Aviation Safety Authority has apparently devised to use this process to force an operator to include specific material in an operations manual which is outside the regulatory requirement, and would commercially disadvantage that operator. These requirements have no legal authority and are an abuse of the general authority contained in S28 of the Act.

The following is a commentary by a former flying operations inspector and district flight operations manager of considerable industry experience on the question of whether an operations manual should be required at all:

> *The area of the OM (and the now required compliance statement) has and still causes more angst in my view than any other single component of aviation (a very close second of course for the same reasons is the Maintenance Control Manual and SOM)*
>
> *I spoke with {A manual provider] the other day, he confirms the frustration felt by industry, especially by the OM providers.*
>
> *S 28(1) of the Act requires CASA to issue an AOC if (repeat if)*
>
> *(a) CASA is satisfied the applicant has complied with or is capable of complying with the Act, Regulations and Orders, that relate to safety, including provisions about the competence of persons to do anything that would be covered by the AOC, and*
>
> *(b) CASA is satisfied about the following matters in relation to the applicants organisation:*
>
> 1 *the organisation is suitable "to ensure the AOC operations will be safe" (not exact words)*
>
> 2 *the organisations chain of command is appropriate "to ensure the AOC operations will be safe" (not exact words)*
>
> 3 *sufficient number of suitably qualified and competent employees*
>
> 4 *key personnel have appropriate experience*
>
> 5 *the facilities are sufficient*
>
> 6 *the organisation has suitable procedures and practices*
>
> *The question is: Who should decide suitable, appropriate, competent, sufficient, and on what authority?*
>
> *Item (vi) is the only part of the Act where one could possibly interpret that an OM is required, and I suggest that would be drawing a long bow. Might make for an interesting argument in Court. However, procedures would be written, the OM would meet this requirement.*
>
> *CAR 215 very clearly requires an OM.*
>
> *CAR 215 (1) requires the OM CAR 215 (2) "an OM shall contain such information, procedures and instructions with respect to the flight operations of all types of aircraft operated by the oper ator (other than information, procedures or instructions that are set out in other documents required to be carried in the aircraft in pursuance of these Regulations) " CAR 215 (3) permits CASA to give a direction (the advice given to us by OLC in this regard is that any direction must be safety orientated and consistent with the Regulations) CAR 215(6) the operator will give a copy to CASA*

NOWHERE in CAR 215 is there any reference to "approval" of the OM

In defence of the FOIs, the Air Operator Certification Manual (AOCM), signed by the Director, requires CASA staff to complete and certify the various check sheets included in AOCM for the issue of an AOC. This why they go through the OM, why the OM ends up being their manual rather than that of the operator.

The OM belongs to the operator, not CASA, or any CASA staff who try and make the OM their manual.

Do not get confused with CAR 217 ' approved training and checking organisation's , which must be approved by CASA. The fact most operators, in line with the "guide to preparation of an OM" (or CAAP 215) will insert the "approved CAR 217 C&T organisation" into the OM as Part C does not make the OM itself an approved document.

Nor should the OM be approved.

If CASA notices a section of the OM that is not consistent with the Regs or affecting flight safety, then CASA can use CAR 215 (3) to 'direct'.

The operator can legally commence using any section of the OM as it is amended, but, must provide a copy of that amendment to CASA, who once again can use CAR 215 (3) if safety is adversely affected.

The culture of "controlling the operator" through the OM (and the chief pilot) by "over bearing" FOIs has gone on far too long.

C2 THE STRUCTURE OF CONTROL

C2.1: The following is a further extract from the Air Safety Regulation Review Task Force report presented in 1988

1. Introduction

As we have discussed, the Air Navigation Act, Air Navigation Regulations and Air Navigation Orders, have formed the legal base for Australian aviation regulations. A similar legal base now exists under the Civil Aviation Act.

In addition, many standards and requirements are also contained in a number of subsidiary information documents, such as the Aeronautical Information Publication (AIP), Flying Operations Instructions (FOIs), Airworthiness Instructions (AWIs), policy letters, and the Manual of operational Standards.

These information documents are discussed in further detail later, but at this stage, it can be said that some of these documents are not readily available to the aviation industry. Some, too, are effectively, but improperly, used as substitutes for Regulations or Orders.

The end result is a complex web of rules and regulations which is, at best, confusing to both regulators and those regulated and, at worst, contradictory and largely ignored.

Certainly, submissions to the Task Force have been scathing about this situation.

As one writer put it:

"The existing regulatory system is catastrophically flawed, and our relatively good accident rates are more a result of good weather and pilots who in general want to live than a result of the regulatory system. There currently is layer, after layer, after layer, after layer ... ANR's amplify the Act. ANOs amplify ANRs. AIP amplifies both. AOIs etc amplify various parts of them. And so on and so on ad nauseam, both purport to clarify and further explain the other, filling in the gaps. In truth, the stuff is circular, contradictory and ambiguous. Some, which we are required to conform with, is not available to pilots and is known by legend and fable only."

2. The Reasons for the Present Situation

The reasons for this situation are several.

(a) Historical constitutional Limitations

As already discussed, the constitutional base for federal aviation legislation has, at least until recently, been unclear. This has led to a stop-start development of controls and a tendency

to develop less visible Regulations and Orders, rather than the Act under which these controls are made.

The Act of the day has consequently said little about air safety. It has failed to provide a satisfactory framework or philosophy for controls.

The Act is rarely examined by aviators or officers of the Authority because, at this stage, it is largely irrelevant to them.

There is little or no tradition then of Parliamentary involvement in legislation in the area.

The Act is largely ignored while the real legislative (or regulatory) activity has traditionally occurred at subordinate levels, and particularly at the Authority level.

(b) The Mystique of Air Safety

There is little doubt that in the past air safety issues have been perceived as having a mystique. Just as flying is an expert skill which few have, air safety is seen as an expert matter, in which politicians and others should not meddle. That view has been expressed to the Task Force by officers of the Authority.

With most air safety controls being in the Authority's hands, and' not made by Parliament or until recently subject to Parliamentary scrutiny, it has been easy for officers to maintain a mystique which has been difficult to challenge. In turn, it has been alleged that this has led to an introspective and reactionary approach to rule making which is not healthy.

(c) Expediency

Accustomed to having the power to make the rules, and without a tradition of referring to higher authority, the Authority has preferred expediency in rule making to the need to ensure a proper, formal legal base for the rules. In fairness to the Authority, the process of change of the Act or Regulations has been inappropriately slow and needs to be expedited. However, by circumventing the proper formal processes for rulemaking, the Authority has contributed to the legal uncertainties that exist today.

C2.2: Readers of this analysis are invited to consider the degree to which the above observations and recommendations have been taken into account in subsequent regulatory activity.

C3 DECISION MAKING

C3.1: Recent changes in the Civil Aviation Safety Authority structure and procedures, aimed at standardisation of decision making and the implementation of policy and procedures, were made in response to an identified problem – that of an absence of uniformly defined and applied policy. The basis of that problem is easily identified as:

a) inadequately defined and disseminated policy in critical areas, particularly where individual officers were required to issue “approvals” and “acceptances.” The inevitable outcome has been that the conditions and requirements attached to virtually any application requiring such a decision vary widely according to the individual or office at which the application is made.

b) the consequent ability of district and regional offices to develop and implement their own disparate policies and practices in a wide range of regulatory areas, resulting in a situation in which various industry participants were frequently subjected to totally differing requirements in a wide range

Recent years has seen an increasing resort by CASA to the use of words and phrases contained in Section 28 of the Act such as:

- “CASA must be satisfied”;
- “The organisation is suitable”
- “The chain of command is appropriate”
- “CASA must have regard to”;

- “The relevant qualifications”
- “The facilities and equipment”
- “The applicants quality control”
- “If applicable the procedures manual “

Any study of CASA’s *Modus Operandi* should ask as to who decides:

- What is “suitable”
- What is “appropriate”
- What is “relevant”

In many cases the person making that assessment is either base line CASA inspector or a “career bureaucrat” in centralised Canberra, who have either never been in the Australian civil industry or were only in the industry for a short period. Such individuals certainly cannot match the experience of the operator, chief pilot or the chief engineer who has been involved in industry for many years.

Examples:

- **acceptance of manuals**

  The decision upon the acceptance or otherwise of a manual submitted either:

  1. with an application for a new AOC or
  2. continuing amendments to accommodate a new aircraft type or a change in the nature of the operation or
  3. as a result of an audit in which it is determined that the current operations manual no longer complies with the ever-changing requirements of CASA

  is made by the assigned field officer. It is almost unheard of for a manual accepted by one officer to be accepted by a different officer without that officer imposing a requirement for changes to the submitted manual as a condition of acceptance.

  It is also not uncommon at a subsequent audit, for another officer to issue a non-compliance notice requiring further changes to the manual.

- **chief pilot approvals**

  The assessment for the approval of a nominee for the function of chief pilot is one of the most abused processes in the industry. This is because the chief pilot is assigned the responsibility for ensuring regulatory compliance in all flying operations. Assessment is conducted in an ‘interview’ in which a CASA FOI examines the nominee in respect of his or her understanding of selected regulations, orders, and processes. It only requires the slightest disagreement between the interviewee and the interviewing FOI, to cause latter to decide that the nominee is not appropriately informed. In some of these situations, it has been the case that the nominee has been a lifetime general aviation pilot who has accumulated considerable understanding of the regulatory framework and expertise in interpreting its more convoluted and contentious aspects; while the FOI may be (and increasingly is) a less experienced individual without an adequate industry background or adequate training.

- **Implementation of new rules**[20]

  Individual District Offices appear still to be making their own decisions as to whether they will accept and implement new regulations. An example was the CASA Archerfield Office, which flatly refused to process applications for approval to establish courses for the Private Instrument Flight Rating (PIFR), and applicants were told there will be no PIFR in Queensland. Moorabbin office is the same - a little more subtle, but with the same end result; actions which are totally without legal justification.

[20] *This issue has since been largely resolved, but it stands as an excellent example of the way individuals or individual district offices continue to make and implement “policies” which have no legal heads of authority.*

In NSW, go slow is the order of the day, and operators may not yet advertise training for the PIFR courses until it is on their AOC. You can teach it, you can train pilots, you can examine them, but you cannot advertise until it is on your AOC, and because of the apparent attitude of some district offices, that will be a slow process. This situation clearly reflects that district officers in Brisbane have made a unilateral determination (which may or may not be reasonable) that the PIFR is not an appropriate qualification. The situation however reinforces the assertion that CASA has failed to achieve uniform interpretation and implementation of its own rules. These actions are an abuse of administrative authority.

C4 THE ROLE OF "POLICY"

C4.1: **Drifting from one policy to another**

1. For many years, the successive regulatory bodies had a policy of encouraging members of the public to inquire as to the credentials of any air operator offering to carry passengers for hire and reward. For this purpose a telephone hot line was established and the telephone number was publicised on signs prominently displayed at all licensed airports. The policy was established on the advice of the Office of Legal Counsel (or its predecessor)
2. At an undetermined time, CASA not only stopped advertising the availability of that information, but withdrew it. Anybody who inquired about an operator's credentials was told that CASA was unable to convey that advice because of privacy rules. The "policy" was established on the advice of the (then) Office of Legal Counsel.
3. In July 2000, CASA began publishing on its web site not only the fact that it had suspended air operator certificates, but also publishing unsubstantiated allegations which were the basis of the suspension. These actions may lead to CASA being sued for defamation if the allegations are subsequently shown to be false. Also actions may be taken for monetary compensation as a consequence of the abuse of administrative authority.

D: ADMINISTRATIVE PROCESSES AND (MIS)MANAGEMENT

D1 INCESSANT AND INEFFECTIVE CHANGE

D1.1: Events over the eighties and nineties were even more than usually turbulent. They included:

a) Four changes of the name and structure of the regulatory body;

b) Innumerable changes of Board and other governance structures since the establishment of the Civil Aviation Authority in the early nineties.

c) Countless changes of management structure within the regulatory body.

d) Incessant "restructure" without adequate and duly approved accompanying process. This has most recently included a re-centralisation of power in the Civil Aviation Safety Authority's Canberra office, with most delegations residing at that office and the delegates relying upon the input of individuals in district offices who would formerly have made the decision.

e) Major and ongoing public and political concerns over the process by which key management figures were appointed.

D2 THE PRIMARY SAFETY TASK

D2.1: The global air safety community comprises organisations representing regulators; air operators at all levels; accident investigation agencies; participant industry groups including pilots and airworthiness workers; insurers; and a wide range of industry associations dedicated to enhancing safety. At all levels that community is emphatic that an overwhelming percentage of air safety accidents – usually quoted in the order of 90 per cent – is attributable to human factors, which translates into human error. Air safety practitioners however universally concede that human error cannot be regulated against; and that its remedies lie in education and learning by mistakes, not in punishment. It is therefore wasteful of industry and CASA resources to pursue punitive options at the cost of servicing the primary task.

D3 DIVERSIONS FROM THE PRIMARY SAFETY TASK

D3.1: Nobody in the subject industry sector would dispute that there has been a culture of considerable non-compliance over the past many years. Industry and its analysts however say that this is because many of the rules are fuzzy, incapable of uniform interpretation, in come cases inappropriate to the particular sector, irrelevant to the enhancement of safety, demonstrably unenforceable, and impossible to prosecute adequately in the court system. It has been the regulator's most serious failure that rather than pursuing solutions to those self-imposed handicaps, successive mismanagements have led it to divert considerable of its limited resources to confrontation with industry over administrative decisions.

D3.2: diversion of limited resources into these processes and decisions are imposing intolerable burdens upon the industry without any positive safety outcome. While this study does not set out to examine the separately destructive administrative processes which CASA imposes upon itself and operators, it is pertinent to review the way this waste of resources impact on the Authority's capacity to deliver positive safety outcomes:

Example 1

Comment: In the time available I have been unable to research whether the following description of the process remains accurate.

D3.3: The following is put forward as a classic illustration of the way a poorly conceived and implemented bureaucratic process can waste serious amounts of the time of operators and Civil Aviation Safety Authority staff without any demonstrable positive impact on safety; and with the

potential for a negative impact through the diversion of resources in both organisations from more safety-positive activity. The reader is urged to follow this process closely, so as to provide an understanding of this serious waste of resources that continues to prevail.

D3.4: All commercial operators are required to have an operations manual, which in concept is intended to be a guide to operational staff on the conduct of various aspects of the operation, in the context of quality assurance. An operations manual for charter or low capacity regular public transport is required to include a "Compliance Statement." The process is as follows:

a) The Civil Aviation Safety Authority publishes a list of specific rules drawn from:

- The Civil Aviation Act;
- The Civil Aviation Regulations; and
- The Civil Aviation orders.

f) This list is called a "compliance list," is published on CASA's web sire, and is not infrequently amended as to which rules it specifies. The list is drawn up by a committee of CASA officials who also review and amend it.[21] Within the list, varying levels of importance are attached to individual rules which are coded according to that perceived level of importance. The list addresses only a small percentage of the totality of the regulations, rules and orders, and it is not understood either how the individual rules are chosen, nor how the decision is reached as to what level of importance is ascribed to them.

g) The operator is then required to publish in its operations manual a "compliance statement" in which it lists ALL the items in the compliance list, and responds to them according to the code. The items are specifically coded by CASA with a letter "A" or "C" in the category column as follows:

- Against the annotation "A": The required response is an acknowledgment of the requirement, eg. "Acknowledged."

> **Comment:** What possible legal meaning or safety outcome can this process have? Does the acknowledgment of the existence of an everyday rule in some way make an operator more compliant? Does the process imply that the existence of the thousands of rules not in this category is not acknowledged? How does the imposition of such terms make a compliance manual holder more safe?

- Against the annotation "C": The operator is required to provide a reference to the section of the operations manual which details how compliance will be achieved.
- If an asterisk* is beside an "A" or a "C", the operator is required in the manual to make a statement such as "Management accountability is acknowledged," and an accountable executive is required to sign the acknowledgment.

> **Comment:** The regulations *already* make the corporation accountable for compliance with *all* regulations and orders. This process is meaningless, time wasting, and an insult to the industry. It is not unlike making an schoolchild write "I must not talk in class 100 times. Any legal advice to the contrary is bad advice.

- If the item is not applicable to the particular operation, the letters "N/A" are written beside it

> **Comment:** Even this requirement gives rise to considerable disputation arising from the differing opinions of various FOIs as to what is and what is not applicable to a particular operation.

[21] *Advice from a CASA officer involved in the process.*

h) The manual containing the compliance statement is then submitted to CASA for "Acceptance." This almost inevitably results in the individual CASA officer who is reviewing it, preparing and returning a list of changes required before it is accepted. It is in this area that the industry observes an almost total lack of consistency between officers in the assessment and acceptance of manuals. A manual the relevant content of which has already been accepted in respect of a number of other operators, will commonly be returned in this way with the indication that a response to the compliance statement is not correct. The frustration of operators placed in this situation is not enhanced by the fact that they are typically paying $75 per hour for the services of the assessing officer.

i) The industry is at a loss to understand the perceived benefits of this process, particularly as every change in the "compliance list" results in a need to change the content of the operations manual in response. That requirement can be imposed on the operator by:

- A flying operations inspector in the course of an operational audit, issuing a non-compliance notice requiring amendment of the manual; or
- A flying operations inspector making amendment of the manual a condition of recommending renewal of the certificate.

j) The necessary process puts added unnecessary risk to quality assurance processes because of the need to amend the manual and ensure that all staff have amended their copies and signed the necessary confirmations.

Example 2: Barriers to entry

Current Air Operator Certificate application requirements are framed in such a way that it is necessary for an intending operator to commit funds to the lease or purchase of an aircraft, at the time of the initial application. This is because the applicant is required on a form provided by the Civil Aviation Safety Authority, to identify the individual aircraft to be operated. Because of the Civil Aviation Safety Authority's 'priorities' however, applicants are being told it may be up to six months before the applicant receives an AOC allowing him to operate it. In some recent experiences, applicants have been delayed for up to 6 months by this process, before the review of the application begins. the Civil Aviation Safety Authority staff then convey their requirements to the applicant, These requirements vary vastly between individual the Civil Aviation Safety Authority staff, so that an aspect of the application documentation which has already been approved by one or more officers is rejected by another. This is clearly indicative that the Civil Aviation Safety Authority's guidance material, although prolific, is inadequate in terms of achieving standardisation.

Example 3: Qualifications and competency of decision maker

CASA is not qualified to evaluate "business plans", nor does it have any real legislative backing for the process. It is acknowledged that the Civil Aviation Safety Authority is entitled to consider the viability of a proposed AOC holder as a risk indicator. However there is reliable information that the assessment of business plans is being conducted by individuals without adequate knowledge of the businesses they are assessing, and in fact are relying on the opinions of field staff. What are the qualifications in terms of industry experience, of the individuals assessing them? Has any business plan been rejected, is so on what grounds? What are the guidelines for examining a business plan?

Example 4: Random independent rule making

There has been a policy in at least some district offices, that all AOC renewal applications should be processed in June to coincide with the end of the financial year. This has the effect of creating an administrative bottleneck and limiting the availability of inspectors for routine services, to the extent that most processing of such applications virtually ceases for over a month. What on earth could be the reason for that policy; why was it not reviewed by the decision-maker's leadership, and when will the Civil Aviation Safety Authority review it, acknowledge that it was a bizarre and inappropriate decision by a local officer, and reverse it? If a multi-national or any significantly sized corporation ran its business this way it would be out of business in a week!

Example 5: Arbitrary rule making

Each AOC renewal is being treated as a re-application, and as such has the potential to require major changes in an operator's procedures. As a recent example, one operator has now been told a manufacturer-suppled pilot operating handbook must be provided for each aircraft, along with a copy for the Civil Aviation Safety Authority, at a price of US$190 per copy. Thus an operator flying (say) half a dozen Cessna 210s of various models may be required to acquire over $3,000 worth of pilot operating handbooks, half of which will sit on a shelf somewhere in the Civil Aviation Safety Authority until they are lost or go mouldy. the Civil Aviation Safety Authority will not accept photocopies because of copyright concerns. The concern is that this type of requirement can be imposed on the whole industry, virtually at the stroke of a pen, by a single individual. It is unclear what enhancements to safety this will provide. The question needs to be asked: Who made that decision, is it being universally enforced, what are that person's qualifications to make it, and in what way is it perceived to contribute to safety?

Example 6: Unnecessary waste of regulatory and operator resources

The policy that provides for an AOC renewal at various intervals imposed by CASA is the equivalent to any other participant in any other industry being required annually to negotiate similar regulatory authorisations. Examples would be:

- Taxi licenses;
- Tax accountant licenses;
- Liquor sale licences;
- Real estate licences;

And dozens of others. In most businesses, licences are issued either indefinitely or for sufficiently lengthy periods to provide security for commercial financing. The identity of the individual or group in CASA who/which created this requirement is unknown, but it does not appear to have a regulatory head of power. It is fortunate for the industry that at least at this point, that the investment community appears to be unaware of this seemingly ridiculous requirement; but it is imperative that this policy be reviewed because it represents a serious threat to the viability of a key industry and it is clearly an unwarrantable serious waste of industry and regulator time, particularly in a regulatory environment which lays claims to espouse the principles of self-regulation supplemented by regulatory audit..

Example 7: Apparent deliberate obstruction

A Mackay operator was advised of the need for a compliance statement, in December 1999. He went to a supplier for one, and was advised his Ops Manual was somewhat out of date (about a 1992 version) and that he really should up-date the OM by including a compliance statement. This he agreed to and then spoke to an FOI about the problems of not getting the compliance statement in time, as the supplier was overloaded. The FOI advised him he would recommend the renewal without the compliance statement, on the basis that:

- CASA had not had any trouble with the operator
- The FOI had checked with the supplier, and confirmed he was overloaded
- CASA did not have the resources to assess the compliance statement under the current requirements of the Air Operator Certification Manual even if it was sent in on time; and
- The FOI did not believe the compliance statement would add to the safety value

A Canberra based Acting Assistant Director rejected the application, on legal advice he that could not sign the AOC without the compliance statement as the compliance statement was a "requirement under the Act".

The "OLC advice" does not appear to be supported by a head of authority and appears to be a typical negative approach by the Civil Aviation Safety Authority.

NB: s27AA of the Act requires an application to be in a form approved by the Civil Aviation Safety Authority

The Director signs the Instrument making the "form" a requirement; Parliament does not. That "form" is the Civil Aviation Safety Authority Instrument 48/00, which replaces the Civil Aviation Safety Authority Instrument 413/98, both requiring amongst other things, a compliance statement.

48/00 was published at short notice to relieve the requirements of the "form" for operators requesting additional aircraft on their AOC as a result of the fuel crisis; in particular they do not have to submit a compliance statement. With the current staff shortage and backlog of work the Instrument could be changed at the stroke of a pen by Director Toller.

The "Form" is a requirement of the act. It might be playing semantics, but the legality of the Civil Aviation Safety Authority requir ing a compliance statement under S27AA as part of the "form" is at least questionable.

E: SURVEILLANCE AND ENFORCEMENT

E1 INSPECTOR QUALIFICATIONS

E1.1: There has been an attitude within the Civil Aviation Safety Authority that "we don't employ pilots, we employ auditors.[22] Therefore flying experience is irrelevant." This proposition ignores the fact that experience in all other aspects of aviation is accrued along with flying experience. The stupid mistakes made daily by young, inexperienced and inadequately trained flying operations inspectors, are illustrative of the need for a strong background of operational experience in a relevant civil aviation sector should be a prime qualification.

E2 PROCEDURAL GUIDANCE

E2.1: Guidance to Civil Aviation Safety Authority officials was until about mid-1999 provided by the Civil Aviation Safety Authority's *Compliance and Enforcement Manual*, the content of which was available to industry. The current comparable document appears to the *Enforcement Manual*, which from a quick perusal appears to be a considerable revision of the former document, containing information which appears to provide important and meaningful reforms in formerly flawed practices and procedures.

E3 SANCTIONS

COMMENT

The following analysis under this heading may be outdated, because the practices and procedures it details (and the acronyms) change continually. However it is asserted that the apparent misconduct it details continues to be a fact of life for license and certificate holders.

E3.1: Options available to the Civil Aviation Safety Authority for implementing sanctions vary considerably in severity and procedure, and include the issue of "Non-compliances notices" (NCNs.) The practice of issuing NCNs has been a considerable source of serious aggravation because of the grossly inadequate guidelines under which they are issued. This has resulted in so much industry protest that the non-compliance notice is about to be re-named as a "request for action." However it is unclear what procedural changes will be implemented to remove the industry concerns.

E3.2: In general, it has been open to a flying operations or airworthiness inspector to issue an NCN if, in the process of an audit or unscheduled inspection, when the inspector *perceives* that a certificate holder:

a) has breached any Civil Aviation Safety Regulation or Order;

b) has failed to comply with any administrative Civil Aviation Safety Authority direction or instruction;

c) has failed to comply with any procedure prescribed in an "accepted" operations or maintenance manual

d) has breached a condition of the certificate.

E3.3: As a result of highly questionable processes surrounding the issue of NCNs here has been almost universal industry disquiet at the level of aggravation this process has caused. Among the reasons for this concern are the fact that NCNs issued under this practice are:

a. not readily subject to an established process of challenge or review if the issue is contested;

[22] *Conveyed by telephone to the author by the Civil Aviation Safety Authority Public Affairs*

b. retained on the certificate holder's file in the event they are not challenged or reviewed;

c. frequently issued on the basis of inaccurate information or inaccurate rule interpretation;

d. apparently issued without adequate guidelines;

e. frequently issued by inexperienced and apparently inadequately trained officers.

f. Retained on an operators file and later used as a justification for further sanctions against that operator.

These concerns are best illustrated by the following examples:

E4 EXAMPLES OF INAPPROPRIATE OR NONSENSICAL SANCTIONS

E4.1: The following is a far from comprehensive list of non-compliance notices issued to operators in the current regulatory environment. They are recorded in no particular order and none have been checked with sources although there is no reason to believe any are fabricated:

Note: Some of the following text reflects the input of industry sources and in some instances cannot be substantiated by documentation:

a) **Not enough unserviceabilities recorded on maintenance release:** This NCN was apparently raised by an FOI who has a preconception that some unidentified number of aircraft unserviceabilities should occur in any 100 flight hours. It is obvious that the individual issuing the notice is unaware that a properly maintained aeroplane is perfectly capable of flying through a 100 hour maintenance cycle without experiencing a recordable unserviceability.

b) **Open to ridicule:** "The operations manual does not contain procedures for staff to read the operations manual."

c) **An NCN issued "*in anticipation*" of a pilot exceeding CAO 48 flight & duty times.** That NCN was easily acquitted, as no breach actually occurred. However, that same acquitted NCN subsequently featured in a "Show Cause" letter related to the suspension of the AOC.

d) **An NCN for not having the aircraft flight manual stowed in its bin**. The manual was sitting on top of the bin.

e) **Two FOIs debating whether to issue a company with an NCN** because the Captain and a First Officer had a one hour difference for the same flight in their documentation of the flight.(an obvious but innocent mistake in addition)

f) **Standby compass calibration card** "ink having faded so that legibility by night would be impaired..."

g) **Cobweb in the corner of the pilots briefing room**

h) **Bookbinding:** A Maintenance company in Darwin received an NCN for not using appropriate glue because a certificate glued inside a logbook had become dog-eared at the corners.

i) **Incorrect rule interpretation:** Two NCNs for 92 hrs duty in a fortnight. Later repealed after proving no flight occurred after the 90th hour. Many people get "unlawful" NCNs based on this issue. (not allowed to fly after the 90th hour, still able to work after the 90th.) This reveals inadequate training and guidelines.

j) **Bad spelling:** NCN for an operations manual spelling mistake of the word freight. Was spelt frieght in 5 places. (The amended version submitted to CASA omitted

the "e", (Fright) was quite acceptable to the officer concerned, and remains to this day.)

k) **Individual judgements:** NCN 523653 states "Unsatisfactory response to NCN 523583" This implies that it is a breach of civil aviation legislation to answer an NCN in a manner the FOI doesn't like.

l) **Inadvertent errors:** NCN 500729 advises that an aircraft overran its maintenance release time limits (by 5 hours) due to "error in addition" of hours on M/R. That was discovered quite by chance, by an FOI, some 250 hours later. CAR 47 (1) (a) (i) makes that breach illegal only if intentional and talks about "… operator or flight crew member becomes aware … etc"

m) **Pace of change:** An NCN for references to the CAA instead of the CASA in the ops manual, even though the Civil Aviation Safety Authority itself still refers to the ANOs (Air Navigation Orders) which have been replaced by the Civil Aviation Safety Orders..

n) **Lack of communication:** A company received an NCN for not following the company schedule of maintenance on company aircraft (RPT): "Unfortunately we had been given a direction by CASA to follow the manufacturers schedule, 5 days prior to this audit, and were following the said direction. The new paperwork to raise this "new" schedule was sitting on the airworthiness officers desk."

o) **Lack of proper investigation or communication:** "An NCN was issued for seatbelts 'not approved' whereas if the inspector had held the initiative to turn the seat belt over he would have see an approval tag!"

p) **Professional ignorance:** "Three times an NCN was issued for AD/ELECT/68 (Bendix Impulse Coupling Inspection). Three times the reply was: "Not applicable due to aircraft concerned fitted with 'shower of sparks' mags."

q) **Professional incompetence**: A flying operations inspector arrived at a country airstrip to inspect the operation and the aircraft for the issue of an AOC. He approached the other aircraft on the strip and began writing out NCNs regarding the condition of the aircraft, until the aircraft's owner asked him what he was doing. It eventuated that he had landed on the wrong airstrip and was therefore inspecting the wrong aeroplane.

E5 NOTICES TO SHOW CAUSE WHY A LICENCE OR CERTIFICATE SHOULD NOT BE SUSPENDED OR VARIED

E5.1: A "Notice to show cause" why a certificate should not be suspended or varied, is issued under the authority of CAR 269 (3) (b). The following closely paraphrases a commentary provided by an official of the Aircraft Owners' & Pilots' Association. The circumstances it describes accurately affect the current regulatory practice and attitudes in respect of "show cause notices."

> *CASA frequently sends out what are called "Show Cause" letters. These letters invite a certificate holder – an individual or a corporation - to show cause why a license or certificate should not be cancelled under CAR 269. They usually allege that the certificate holder has broken the law. The material below only applies to Show Cause letters which make that allegation.*
>
> *A "Show Cause" letter which alleges that you have violated the law is a trap. A certificate holder who responds to that letter is like a small dog which puts itself at the mercy of a big dog by rolling on its back and offering the big dog its neck. The small dog hopes that this act of submission will cause the big dog to act in a chivalrous fashion and walk off. For the small dog, that technique usually works. But if you are up against CASA, your chances are not nearly as good as the small dog's.*

If CASA alleges that you have broken the law, that allegation should be dealt with in a Court. Our Court systems have been developed over many centuries to guard us from unfair punishment.

If you engage in the Show Cause process you throw away all those very precious safeguards.

- *You throw away the right to require that the case against you be proven beyond a reasonable doubt;*
- *You throw away the right to know, and challenge, the evidence against you;*
- *You throw away the right to know the identities of your accusers;*
- *You throw away the right for you or your lawyer to cross-examine your accuser(s) and other witnesses;*

Should CASA ever send me a "Show Cause" notice alleging that I have violated a law I will respond with "I have not been convicted of any of the breaches of the law that you allege. That is the cause I show.". Not one word more.

Every month I receive letters from people whose licenses have been cancelled by CASA. The sequence of events is always the same:

- *The victim receives a "show cause" letter alleging that he/she has violated a whole lot of Regulations.*
- *The victim is invited to send a written response and to attend an "informal conference".*
- *Sometimes the victim attends the "informal conference", sometimes not. If he/she does, he always comes away saying "what a misnomer" after being grilled and tape-recorded.*
- *The victim then writes a response. In the course of the response he/she usually says things like "it was only a technical breach" or "I did not realise I was not allowed to change the main wheel tyres" or "there was no NEED for a forecast because I was only going 20 miles and I had rung the person at the other end".*
- *CASA then decides to cancel or suspend the victim's license, or to do nothing. Most often the decision goes against the victim. CASA then sends a letter cancelling or suspending his/her license. This letter points out that the victim has the right of appeal to the AAT.*

There is no effective right of appeal if CASA cancels your licence

The victim then wastes his time and money appealing to the AAT. Appeals to the AAT against license suspensions or cancellations never succeed. They are a pointless routine which occasionally makes a victim feel better, because he has had his day in Court, but that is all.

If you are going to go to Court against CASA in response to a "Show Cause" letter, I recommend that you make that decision at the outset when you still have all our hard-won safeguards on your side. It is silly to throw away all your safeguards and then look to a Tribunal for help. If you are going to fight, fight while you are strong - not after you have thrown away all your weapons.

If you decide to go down the "show cause" route, and CASA cancels your license, don't throw away your money going to the AAT. Just take up another occupation (if you rely on aviation for your living) or another hobby (if you are a private pilot) and get on with your life.

If you are going to fight, consult a lawyer immediately. Remember that you need a CRIMINAL LAWYER - the family solicit or, or the best commercial lawyer from the most expensive firm in the city, is not the right person for this job. Nor is an aviation lawyer. You have been accused of a crime and you need a criminal lawyer. Subject to your lawyer's advice, respond to the "Show Cause" notice by

simply saying that you have not been convicted of any of the alleged breaches of the law, and that is the cause you show. Do not enter into any verbal discussions or attend any meetings no matter how "informal" unless your lawyer advises you to. If your lawyer does advise you to roll over and show your neck, get a second opinion from another lawyer before you do. Once you have received a "show cause" letter from CASA, you are playing for keeps. If you roll over and show your neck, there is better than a 50-50 chance that CASA will cancel or suspend your license.

If CASA still goes ahead and cancels your license, do not appeal to the AAT unless you have huge amounts of spare money, lots of spare time, and nothing else in your life. If your lawyer cannot work out a way to get you into a real Court (such as the Federal Court, under the ADJR Act), don't waste your resources on the AAT. Just accept the fact you have lost your license and get on with your life.

A practical example of how this can go wrong

As an example, assume that you irritate a CASA officer, who then decides to show you who is boss. He demands that you produce your logbook for inspection, intending to go through it in the hope of finding evidence of breaches. You refuse to produce your logbook because you fear that it will indeed reveal some inadvertent breaches. CASA then says you have breached CAR 5.56 and cancels your license under CAR 269(1)(a). You have clearly breached CAR 1988 5.56 if you read the words of that regulation alone. But there is a legal principle that a person cannot be compelled to incriminate himself. Accordingly, if your logbook contains information which may tend to incriminate you, you may not have to produce it in spite of CAR 5.56.

If you make that argument in a Court before a judge, CASA will argue against it but you are likely to win. However if you make that argument in a 'Show Cause' procedure, where CASA is both prosecutor and judge, you are certain to lose.

Why CASA sometimes prosecutes and sometimes uses 'show cause'

It is always open to CASA to initiate a prosecution against a person whom CASA believes has broken the law. If the person is convicted, the Court can then impose an "exclusion period" which has the same effect as cancelling or suspending your license. That is the fair way of doing things. Our forefathers struggled for centuries to gain and retain genuine legal safeguards against heavy-handed treatment by too-powerful bureaucrats. Don't throw those safeguards away by allowing yourself to be tried, convicted, and sentenced by CASA's bureaucrats.

When CASA believes that a person has violated the law, CASA chooses whether to be fair and prosecute the person or be unfair and use the "show cause" procedure. You do not have to be Al Einstein to work out that the cases where the "show cause" procedure is used tend to be those where the evidence is not strong enough to get a conviction, or where a Court is unlikely to impose an "exclusion period" if the person is found guilty. What's more, CASA can do BOTH - cancel your license under the "Show Cause" procedure, and then prosecute you. If you engage in the "Show Cause" procedure, you will inevitably give CASA a whole lot of evidence it did not have beforehand!

IF EVER YOU GET A "SHOW CAUSE" LETTER, RECOGNISE THAT YOU ARE PLAYING FOR KEEPS! DON'T DO OR SAY ANYTHING UNTIL YOU HAVE WORKED OUT YOUR WHOLE PLAN.

KEEP THIS DOCUMENT IN A SAFE PLACE, eg. INSIDE YOUR AIRCRAFT FLIGHT MANUAL

E6 SUSPENSION OF CERTIFICATES

E6.1: This is one of the most serious issues presently confronting the industry. Details of several suspensions, to be found at Section B of this document, reveal the way this process is abused, apparently systematically, by the regulator.

E7 CANCELLATION OF LICENCES OR CERTIFICATES

The cancellation of a licence or certificate is implemented after CASA has assessed a certificate holder's response to a "show cause" as inadequate. It is subject to AAT review; however this process is so costly and time consuming to an already grounded operator, and CASA throws such considerable and expensive legal talent into the battle, reinforced with frequent use of the word "safety" that few operators in that situation have the resources to mount an effective challenge.

E8 CONTRACTORS

E8.1: It is of considerable concern to certificate holders that many individuals now responsible for making recommendations to delegates upon which delegates' decisions are based, are not permanent employees of the Civil Aviation Safety Authority, but contractors on fixed terms, the continuation of whose contract is dependent on the recommendation of the delegate.

E9 INSPECTION AND STANDARDS

E9.1: This aspect of regulatory activity is of critical importance in every aspect of the administration of air safety in airworthiness and flight operations standards. It is a primary function of the Civil Aviation Safety Authority to identify, oversee, and standardise flying and airworthiness standards.

E9.2: This requires the professional involvement of the most competent available pilots and engineers respectively, who are full time employees of the regulatory authority. To identify whether their goals are being achieved, the following questions need to be asked and answered:

a) What program if any is in place to standardise the definition, documentation and assessment of flying standards, checking procedures, and decision making amongst the Civil Aviation Safety Authority FOIs?

b) How will the success of this program be measured?

a) What is the average level of civil aviation flying experience in the checking and training area, of the current FOI body; and how does it relate to the same figure ten years ago?

E9.3: Recent incidents suggest that some the Civil Aviation Safety Authority officers are deliberately loading up pilots undergoing checks, until they find a reason to fail the pilot. Industry advice is that this predisposition is explained by the predominantly military origin of a large and apparently increasing number of FOIs in the organisation. As any competent senior pilot would know, that authoritarian practice vanished from airline training and checking procedures at least 30 years ago, and exists to a diminishing extent in the military. Its survival amongst some individual FOIs indicates a lack of guidance and training, in some cases incompetence, an outdated attitude on the part of those individuals, and a lack of leadership and standardisation on the part of the management to whom they report.

E10 ROLE OF THE CHIEF PILOT

E10.1: A designated chief pilot is responsible to the regulator for the oversight of compliance and standards. In the current aviation environment, a chief pilot is usually among the most tempting targets for Australian and international airline recruiters; yet the departure of a chief pilot can precipitate the suspension of an air operator certificate; as well as lengthy delays in identifying and recruiting a replacement, and having the nominee approved by the Civil Aviation Safety Authority.

E10.2: It is of considerable concern to industry that the requirement for a chief pilot to be interviewed and "approved" has the potential to place the operator in an untenable situation in the event that the chief pilot ceases to be a suitable employee.

E10.3: An example is the situation in which an operator discovers its chief pilot committing a breach of the Civil Aviation Regulations or Orders, the conditions of the AOC, or civil or criminal law. The

operator is at liberty to terminate the chief pilot, but would be commercially restrained from doing so by the CASA requirements that:

a) the chief pilot's continued tenure of the position is a condition of the AOC;

b) if the chief pilot is dismissed, the operation cannot continue until a replacement is approved; and

c) CASA may not (and usually does not) have FOI capacity available to complete the process.

E10.4: The operator is therefore faced with the option of overlooking the misdemeanour (or crime) or shutting down its operation. This is NOT an air safety positive scenario.

F: APPARENT REGULATORY MALPRACTICE

F1 A LEGAL OPINION

In December 1995, the House of Representatives Standing Committee on Transport, Communications and Infrastructure made numerous observations and recommendations. The catalyst for the inquiry was the report of the Bureau of Air Safety Investigation on the Monarch Airlines crash in June 1993.

Among its recommendations was:

> *The Civil Aviation Safety Authority publish serious deficiency reports on a monthly basis, initially for charter operators, commencing March 1996.*

Under that recommendation, CASA would publish serious deficiencies identified in inspections of operators, obviously only after they had been thoroughly investigated and proven.

CASA then sought legal advice as to whether and how it could publish these serious deficiency reports (SDRs).

The text of the resulting legal opinion in full below, is highly significant in the context of CASA's web site publication of the unsubstantiated allegations against Aquaflight Airways:

ATTORNEY GENERAL'S DEPARTMENT

General Counsel

Department of Transport and Regional Development

96099740

20 September 1996
Henry Lis
Director
Aviation Legal Section

I refer to your request of 26 August 1996. You have asked a series of questions relating to an option being considered as part of a response to the Parliament's 'Plane Safe' Report, That option would involve the Civil Aviation Safety Authority (CASA) publishing to the public at large the details of aircraft operators in respect of which serious deficiency reports (SDRs) have been issued, I understand that this may involve the creation of the concept of an SDR. I assume that SDRs would he created for safety-related purposes.

2. You should note that the answers to your questions do not alter the fact that the scope for Commonwealth liability (through the Indemnity provided to CASA) is potentially enormous. Unless tabled in Parliament under the protection of absolute parliamentary privilege (which could provoke considerable criticism as a means of achieving the Government's aims) there is a high risk of liability for defamation under current legislation. Even in jurisdictions where the risk of liability for defamation is lower, ensuring that such publications are protected from liability would depend on CASA paying the most scrupulous regard to its legal responsibilities, including under the *Civil Aviation Act 1988* (the Act).. The passage of specific legislation authorising such action, and setting out appropriate procedures, would be a much safer course.

Short Answers

3. Against that background, my short answers to your questions ar e as follows:

Q1. Is it within the functions of CASA to publish SDRs?

Answer: CASA does not have an express power to publish the results of its inspections. It would be necessary to rely on the incidental function to CASA's safety -related functions and powers to allow publication. CASA could not do so without complying with its obligations, including to regard the safety of air navigation as the most important consideration, to consult with industry and to comply with written Ministerial directions.

Q2. Would any liability in defamation attach to the publication of SDRs by CASA?

Publication of SDRs will almost always be a publication of defamatory material. There is a high risk of liability for such defamations, particularly in jurisdictions where truth alone is not a defence. Qualified privilege may he available as a defence in some circumstances. If it is considered that

greater protection from liability for defamation is appropriate (particularly for publication of incorrect material by honest mistake) it would be preferable to give CASA a specific statutory duty and indemnity in publishing SDRs.

Q3. If it is within the function of CASA to publish SDRs, is such a function covered by the scope of the current Deed of Agreement between the Commonwealth and CA SA ('the Indemnity') under which the Commonwealth indemnifies CASA against any liability that may arise out of the performance, by CASA of its safety regulatory functions?

Answer: Yes.

Q4. If it is not within the functions of CASA to publish SDRs, how would you suggest the relevant recommendation of the *Plane Safe* Report (noted below) be implemented?

Answer: ...Not necessary to answer, but see comments at paragraphs 36 to 40.

4. In summary, assuming SDRs are an appropriate safety tool and not merely a 'consumer protection' tool CASA could create and publish SDRs under its safety regulatory functions. This would give rise to considerable exposure to defamation actions, and to possible liability, particularly if the defence of qualified privilege is not available. CASA would be covered by the Indemnity in relation to defamation actions as with various other actions which may be brought (eg negligence, including negligent misstatement, breach of confidence, injurious falsehood, misfeasance in public office etc). How ever, the Indemnity will not apply in favour of a CASA officer, where the officer is guilty of serious or wilful misconduct. The likelihood that such actions would be brought, not only on the grounds of defamation, appears very high. The Commonwealth's exposure to damages in relation to CASA's liability for defamation or other tortious liability under the Indemnity and to costs for such proceedings, is considerable.

5. Very briefly, in relation to actions for defamation, 'truth' (or 'justification') may be, established as a complete defence to defamation actions in Victoria, South Australia, the Northern Territory and Western Australia. Legislation in New South Wales, Queensland, Tasmania and the ACT has requirements that statements be true and have an element of public interest. For honestly made, but false, publications the defence of 'qualified privilege' is unlikely to be available if the information is published too widely.

Reasons

Question 1 - Publication of SDRs by CASA

6. The main object of the Act as set out in Section 3A is "to establish a regulatory framework for maintaining, enhancing and promoting the safely of civil aviation, with particular emphasis on preventing aviation accidents and incidents".

7. CASA's safety-related functions under the Act include:

- conducting certain safety regulation, including by means of 'developing effective enforcement strategies to secure compliance with aviation safety standards' (s. 9(1)(d)) and 'conducting comprehensive aviation industry surveillance ….' (s. 9(1)(f));
- 'encouraging a greater acceptance by the aviation industry of its obligation to maintain_high standards of aviation safety through …… fostering an awareness in industry management, and within the community generally, of the importance of aviation safety and compliance with relevant legislation' (s. 9(2)(a)(iii));
- promoting full and effective consultation and communication with all interested parties on aviation safety issues' (s, 9(2)(b)); and
- functions incidental thereto (s. 9(3)(g)).

8. CASA also has the power, subject to the Act, 'to do all things necessary or convenient to be done for or in connection with the performance of its functions' (section 13). In performing its functions and exercising its powers, CASA's obligations include to 'regard the saf ety of air navigation as the most important consideration' (section 9A), perform its consistently with international safety-related agreements (section 11), comply with Ministerial directions given under section 12 and, 'where appropriate, consult with gov ernment, commercial, industrial, consumer and other relevant bodies and organisations (Including ICAO and bodies representing the aviation industry' (section 16).

9. As a general proposition, subject to any common law or statutory prohibition on releasing information, there is no requirement for a statutory authorisation to release information. Although there are standard secrecy provisions which are contained in many Commonwealth Acts, I note that

there is no secrecy provision in the Act. The question is then whether CASA's very broad powers and functions would extend to the publication of SDRs. There would seem to be little doubt that CASA could create SDRs internally for industry surveillance etc in the performance of its safety-related powers and functions. However, there is no requirement to do so. Clearly, then, there is no requirement to publish such reports, though there is no provision in the Act preventing publication of safety-related information. Although potentially applicable legal considerations are discussed in some detail below, the main issue appears to be, the extent to which (in the absence of express statutory authorisation or the protection of parliamentary privilege) such information could be published without attracting liability in defamation.

10. If a general policy of publication of SDRs was adopted (and could be demonstrated to be in the public interest. To establish a defamation in those jurisdictions requiring that element - see-below), this would become in effect a condition of participation in the aviation industry. However, 'reputation is an interest attracting the protection of the roles of natural justice' *(Ainsworth* v *Criminal Justice Commission (1992)* 175 CLR 564, 578). These would have to be observed so that CASA would be required to give operators an opportunity to comment before an SDR was brought into existence, before an SDR was published.

11. The rules of procedural fairness would normally require that an operator be informed that it is proposed to issue an SDR and that the operator be given a full and fair opportunity to be heard in relation to the SDR. Such an opportunity could be incorporated into the procedures. The rules of procedural fairness would not require that anything put forward by the operator in response to being given such an opportunity be included in the published information, except to the extent that a misleading impression of the operator's deficiency might be conveyed by publication without reference to the operator's response.

12. There may also be other issues such as compliance with Information Privacy Principles under the *Privacy Act 1988* if, broadly speaking, the information published concerns an individual's (rather than a company's) affairs. I do not address this aspect further in this advice but would be pleased to do so if you wish.

Question 2 - Defamation

13. A defamatory imputation is an imputation concerning a person by which the reputation of that person is likely to be injured or by which he or she is likely to be injured in his or her profession or trade or by which other persons are likely to be induced to shun or avoid or ridicule or despise him or her. To be a defamatory imputation the statement complained of must convey a personal imputation, either upon the person's character or upon the mode in which the person's business is carried on. There seems little doubt that publication of SDRs, whether to one person or the world at large, would be defamatory. The question then becomes whether, on the facts, one or more of a number of possible defences is available.

14. The main defence which could be relevant in the case of the publication of SDRs is qualified privilege. I discuss briefly a number of other defences, including statutory authorisation which you have raised, but do not discuss others such as fair comment which seem less applicable here. I refer to parliamentary privilege (an occasion of absolute privilege) in my comments in relation to Question 4. Based on the material clearly available, there is considerable risk of liability for defamation arising out of publication of SDRs to the public generally. Even if a defence is upheld, CASA could not be protected from the commencement of legal proceedings.

Statutory authorisation

15. You mention the principle of statutory authorisation as a possible basis for publication of SDRs. Statutory authorisation is a defence often made by public bodies when sued for trespass, nuisance or other torts (see Aronson and Whitmore, 'Public Torts and Contracts', 1982, p. 157) though there are some tortious actions which are less likely to attract a defence of statutory authorisation (eg it would be most unusual to find a statutory provision specifically authorising negligence, nor would this be readily implied).

16. If the duty is imposed by statute, the general defence of statutory authority is available *(Moore v Canadian Pacific SS Co Ltd* [1945] 1 All ER 128) though there is usually no such legally enforceable duty. In the absence of a specific statutory power or duty, the scope for a defence of statutory authorisation is reduced.

17. In the High Court in *Ainsworth*, Brennan J noted at 584:

"Liability in libel for publishing defamatory report in performance of a statutory function has been treated as dependent on common law doctrines of absolute or qualified privilege rather than on any protection conferred by a statute authorising the publication of a report containing defamatory

matter; the possibility of a defence of statutory authority does not appear to have been raised except by Gibbs C.J. in *NCSC v News Corporation Ltd* (1984), 156 CLR at 313. See *Addis v Crocker* [1961] 1 QB 11; In re *Pergamon Press Ltd* [1971] Ch. 388, at p 400; and cf. *Calvely v. Chief Constable of Merseyside* [1989] AC 1228, at pp 1240-1241.

18. In the absence of clear words authorising certain conduct (eg-trespass) the question becomes whether the particular Act must be read as impliedly authorising the relevant infringement of rights (Aronson and Whitmore, p 158) and 'if provision is made in the Act for the payment of compensation, then it is much easier to draw the inference that Parliament intended a such an abrogation of private rights' (see *London & North Western Railway Co. v. Evans [1893]* 1 Ch. 16, at 28-29; *Bell v. Dudley* [1895] 1 Ch. 182, at 186). There is no provision in the Act similar to, for example, Section 19HR of the *Air Navigation Act 1920,* which specifically provides for compensation on just terms if certain actions amount to an acquisition of property. Nor would I expect to find such a provision in relation to compensation for defamation,

Truth (and Public Benefit etc.)

19. At common law, truth is a complete answer to civil liability for defamation (Victoria, Western Australia, South Australia and the Northern Territory). However, in some Australian States the common law defence, of truth has been qualified by statute so as to require the additional element that the defamatory Statement be in the 'public benefit' (Queensland, Tasmania and the ACT) or the 'public interest' (NSW). This defence will not be available to protect a false defamatory publication, even where it is made inadvertently, though in New South Wales there is a further defence of 'contextual truth', under which, if related statements in the same publication are true, the untruth of the statement in question does not matter if the plaintiff's reputation is not further damaged.

20. When an operator is found to be unsafe, sanctions are ultimately available to close the operator, for example by cancellation of its Air Operator's Certificate, and this action effectively becomes known to the public at large. Less serious breaches of CASA's safety regulatory scheme attract criminal fines, for example, failure to comply with a condition of airworthiness certificate may attract a fine or may result in cancellation of the certificate. The publication of SDRs presumably envisages a situation short of this, in which operators are not considered unsafe but have exhibited serious deficiencies not justifying other action.

21. If SDRs are concerned with compliance with aviation safety standards and CASA forms the view that publication of SDRs would be an 'effective agreement strategy for ensuring compliance, 'this could constitute public benefit. In addition, if the rationale for publication is also to create an awareness in the travelling public (of different 'levels of safety') in order for the public to make informed decisions based on safety, this may also be for the public benefit/interest and within CASA's functions, including under section 9(2)(a)(iii) of the Act (ie 'encouraging a greater acceptance by the aviation industry of its obligation to maintain high standards of aviation safety through ... fostering an awareness in industry management, and within the community generally, of the importance of aviation safety and compliance with relevant legislation.)

22. However, the rationale for publication should be carefully considered. Public benefit of this kind might be achieved by other administrative means (eg communicating the fact of an SDR only to the operator concerned, indicating that if steps are not taken to remedy the deficiencies and further information comes to light, its operations may be at risk) or through the threat of publication or by a general policy of publication to a more limited group or through the knowledge that information about SDRs could come into the public domain through other means (eg- access to consumer groups through FOI requests, BASI reports, statements in Parliament etc.). Of course, CASA may prefer to have greater control over the publication of SDRs under specific statutory authority.

23. Even if public interest/benefit could be demonstrated, care should be taken to ensure that there is no countervailing public detriment which may outweigh the benefit. For example, in the absence of clear, statutory authority, operators may be less forthcoming with information about their operations and a climate for effective consultation and communication may be threatened, which would be inconsistent with some of CASA's other obligations under the Act,

Qualified Privilege

24. This defence is recognised in all jurisdictions but the precise circumstances in which it applies vary from jurisdiction to jurisdiction The common law defence of 'qualified privilege' applies in Victoria, Western Australia, South Australia, the ACT and the Northern Territory. In short, it is available in respect of defamatory statements made, without ill-will or improper motive, pursuant to an interest or to any legal, moral or social duty to a person with a corresponding duty to receive it or corresponding interest in receiving it *(Adam v. Ward* [1917] AC 309, 334, per Lord Atkinson). Li *Bellino v ABC* (1996) 135 ALR 368, the High Court, particularly Brennan CJ (dissenting), discussed

at length the principles underlying qualified privilege, His Honour referred to Walsh JA in *Justin v Associated Newspapers Ltd* (1966) 86 xx (Pt 1) (NSW) 17, 32:

> *"The broad principle underlying qualified privilege; at common law is that occasions exist in which it is desirable from the point of view of public policy that communications should be made freely. This freedom should be given priority over the right of an individual to be protected against the loss of his reputation." (at p 373)*

25. The categories of privileged occasions cannot be precisely determined and cannot be regarded as closed but generally exist for 'the common convenience and welfare of society' (see Australian and UK authorities cited in Balkin and Davis, The Law of Torts, 1991, pp 599ff). It is possible that the defence is easier to establish following the decision of the High Court in *Stephens & 0rs v. West Australian Newspapers Ltd* (1994) 124 ALR 80. Although the case concerned communication of information about the exercise of public functions or powers or the performance by public representatives or officials of their duties, McHugh J indicated that a narrow view should not be taken of the matters about which the general public has an interest in receiving information.

26. However, the protection may be lost if the privilege of the occasion is abused, such as knowledge of the falsity of the statement, malicious. or improper purpose, introduction of extraneous or irrelevant material into the statement or where the court concludes (as a question of law) that the defendant published the statement to an excessive range of people (*Adam v Ward* [1917] AC 3 09, HL). That may well be a narrow class of people in the present case, perhaps confined on a need-to-know basis to persons with the responsibilities which require that they know the contents of SDRs.

27. In some States (Queensland, Tasmania and New South Wales) the common law defence of qualified privilege has been superseded, wholly or partly, by statute, the general effect of which is to allow qualified privilege where the person making the statement believes on reasonable grounds that the recipient has an interest in receiving it. There is not the requirement for reciprocity in duty or interest between the parties concerned

28. In Queensland and Tasmania it is a defence if the publication concerned was made in good faith:

(a) for the public good; or

(b) for the purpose of giving information to the recipient with respect to some subject as to which the recipient has, or is believed on reasonable ground by the publisher to have such an interest in knowing the truth as to make the publication reasonable in the circumstances.

29. A number of criteria must be satisfied if good faith is to be found to exist. The matter published must be relevant to the matters the existence of which may excuse the publication in good faith of defamatory matter, for example, the public good. The manner and extent of the publication must not exceed what is reasonably sufficient for the occasion. The publisher must not be actuated by ill-will to the person defamed, or by any other improper motive, and must not believe the defamatory matter to be untrue. The burden of proof of the absence of good faith lies on the person claiming to have been defamed. Although NSW legislation does not provide for the 'public good' defence, it provides a defence under s. 22 of the *Defamation Act 1974 (NSW)* similar to the second arm of the Queensland and Tasmanian defence.

30. The defence of qualified privilege will be available even if the information is subsequently proved to be incorrect, provided that the mistake was an honest one. I note that, in New South Wales, honest belief is not a prerequisite but "Will often be a critical element in the proof of reasonableness" for the purposes of establishing a defence under s. 22 of the Defamation Act *(Barbaro v. Amalgamated Television Services Pty. Ltd (1990)* 20 NSxx-LR 493, 500).

31. It was held in *Barbaro* that the defendant must establish that:

(a) his or her conduct was reasonable in relation to each imputation actually conveyed by the matter in question;

(b) he or she believed in the truth of the imputation conveyed and intended to be conveyed;

(c) he or she exercised reasonable care to ensure he or she got his or her conclusions right, (where appropriate) by making proper inquiries and checking the accuracy of his or her sources;

(d) his or her conclusions followed logically, fairly and reasonably from the information it had obtained;

(c) the manner and extent of publication did not exceed what was reasonably required in the, circumstances, and

(f) each imputation intended to be conveyed was relevant to the subject about which the publisher was giving information to the recipients.

32. Although it appears from *Stephens* that there can be situations in which a defamatory statement an a matter of public interest may be protected by the common law of qualified. privilege, even if the defamatory statement. is communicated to the public generally, in my view, it would be difficult to establish that publication to the general public was not excessive in this case. As discussed, it may also be difficult to establish that publication is in the public interest. If publication results in a situation where the operator is encouraged to improve its safety standard but then goes out of business because of loss of market share resulting from the publication, the risk of costly litigation and large claims is high.

Question 3 - The Indemnity

33. No Indemnity clearly covers CASA's liabilities (except those referred to in Clause 3.7)in 'all proceedings and claims ... as a result of or arising out of the <u>performance or purported performance</u> by the Authority of its safety regulatory functions' (my emphasis see clauses 1.1, 2.5 and 3). Assuming that publication of SDRs is within CASA's safety regulatory functions under the, Act, the Indemnity would cover liabilities for defamation actions in relation to publication of SDRs in the purported performance of those functions.

34. CASA officers are not covered by the indemnity in relation to their personal liability where they are shown to be guilty of serious or wilful misconduct (see Clause 3.5). If publication of SDRs was directed to advancing a legitimate interest of the Commonwealth in relation to aviation safety, the scope for personal liability seems small. However, if there were circumstances to cause a defence to a defamation action to fail because of ill-will or other improper conduct, the Indemnity may not protect CASA officers involved.

35. Similarly, the Indemnity may not protect a CASA officer or officers if an ac tion for injurious falsehood, conspiracy to injure or interference with contractual relations was successful. Injurious falsehood consists of publications or a false statement concerning the plaintiff or his property calculated to induce others not to deal w ith him. It is essential to establish malice in the sense of some indirect, dishonest or improper motive or the wilful and intentional doing of damage without just cause or excuse. An agreement between two or more persons to injure another is prima facie actionable as a conspiracy to injure. In the absence of a contract, the issue of interference with contractual relations does not arise. However, if CASA published an SDR which is intended to or may have the effect of interfering with the contractual relations to which a person or body named in the SDR is a party, the issue would need to be reconsidered.

Question 4 - Implementation of the *Plane Safe* Report

36. Although it is not necessary to answer this question, an alternative to an express power to publish SDRs (with the intention of creating an occasion of qualified privilege) would be a requirement to table SDRs in Parliament. That action would protect CASA, CASA officers (and The Commonwealth through the Indemnity) from liability for defamation in publishing the document to the Minister for tabling *(see Parliamentary Act 1987,* s. 16(2) which extends the protection of absolute parliamentary privilege to acts that are incidental to, or for the purpose of, a proceeding in Parliament). Moreover, if a document was ordered by the House to be published, the document or a copy of it, could be published by CASA with impunity *(Parliamentary Privileges Act,* s- 16(2)(d)). This alternative may not be considered acceptable, however, due the political criticism it would be likely to attract,

37. If CASA simply volunteered the details to the Minister, or to another member of Parliament, with a request that they be tabled, there is a significant risk that the protection of parliamentary privilege would not extend to that volunteering. The defence, of qualified privilege may not be available either, particularly if details came into the public domain.

38. Alternatively, it may be possible, subject to CASA's responsibilities in relation to foreign aircraft AOCs and international agreements (eg see ss 11 and 28BC), to make it a standard condition of an AOC that operators display any SDRs in a prominent place (in aircraft, terminals etc). This would seem more directly consistent with CASA's functions under, for example, ss. 9(2)(a)(iii), 27(1) and 28BB of the Act. The Minister could similarly issue a direction to that effect under section 12 of the Act.

39. The Minister could also give a written direction to CASA to publish SDRs to the public generally or on a more limited basis in carrying out its safety -related functions. However, if the Minister was to consider taking such an approach, the Commonwealth would, under the Indemnity, carry the cost of meeting CASA's liabilities. This, or any decision by CASA to publish SDRs, may require renegotiating the terms of the Indemnity.

40. As indicated, a specific statutory duty and indemnity for the release of information in circumstances specified, would be the safest way to protect CASA (and, through the Indemnity, the Commonwealth) from liability for defamation. An amendment to the Act may take the form of an express regulation making power which permits the making of regulations allowing for the release of information. Alternatively it may take the form of a statutory prohibition on release of information except as specified in the regulations.

41. Finally, apart from potential liability for defamation (and more limited scope for liability for actions which may not be covered by the Indemnity- see, answer to Question 3), there may be some scope for liability on other grounds, for example breach of confidence (though this may be limited when information obtained is under compulsion) or negligence/negligent misstatement.

42. In relation to negligent misstatement, the general principle established in *Shaddock & Associates Pry Ltd v Parramatta City Council (No. 1) (1981) 150* CLR 255 is that where a person gives advice or information to another regarding serious or important subject matter, in circumstances where the person giving the information knows or ought to know that the person receiving the information will rely upon it, the person giving the advice owes a duty to the person receiving it to take reasonable care to ensure that the advice is accurate. It would be difficult to establish a duty of care in the case of a general publication. Recent court decisions in England have shown that the courts are increasingly reluctant to find 'liability in an indeterminate amount for an indeterminate time to an indeterminate class' (see Cardozo CJ in *Ultramares Corporation v Touche* 174 NE 441 (1931) relied on by the House of Lords in *Caparo Industries v Dickman* [1990] 2 AC 605, at 620). Moreover, CASA has no general duty under the common law to release the names of organisations (or individuals) the subject of SDRs. However, it is possible for CASA to act in such a way as to give rise to a common law duty of care.

43. That is, if general publication of SDRs is undertaken by CASA, the scope is increased for creating a range of situations arising from the publication (eg specific inquiries from aircraft suppliers, travel agents, passengers) in which it may be reasonably foreseeable that a person would rely on the information provided and where there was something in the conduct of CASA which created the requisite level of proximity with that person- There would be a potential for CASA (and thus the Commonwealth) to incur liability for any reasonably foreseeable and proximate damage or loss resulting if the person (or class of persons of which CASA had knowledge) acted upon that information to their detriment. According to some recent Australian decisions, even where a statement was not made directly to the person who suffers the loss or purposely through a third person to that person, liability may arise in relation to that statement if made negligently *(see Esanda Finance Corporation v Peat Marwick Hungerfords* (1994) 12 ACLC 199 at 202). The best way of avoiding, or at least reducing, the risk of liability for negligence would be to seek to exercise reasonable care. It would also be possible for CASA to limit its potential liability by an appropriately worded disclaimer.

44. If you are giving further consideration to implementation of a regime for creation and publication of SDRs, please contact me if you require further advice,

Keith Wilson

Counsel

Comment

The reader would reasonably assume that above advice above was related to the publication of proven allegations. The advice repeatedly raises matters of procedural fairness and natural justice, and of the potential liability of CASA and resultingly the Commonwealth, for defamation action as well as "negligence, including negligent misstatement, breach of confidence, injurious falsehood, and misfeasance in public office"

It is important to remind oneself that the CASA action in publishing unsubstantiated allegations against Aquaflight Airways, proposed a considerably more contentious action. This raises serious questions as to:

1. Whether the 1996 advice was valid;
2. If so, is it still valid?
3. If not, what significant changes have occurred in relation to defamation law in the interim; and
4. Whether the advice is applicable to a greater, equal or lesser extent, in respect of publication of unsubstantiated allegations against Aquaflight Airways.

It is understood that these questions will soon be tested; and that Aquaflight Airways has initiated action for defamation in respect of the allegations.

IMPORTANT NOTE:

The following information and comment is derived from:

a) observation of the industry in the successive roles of pilot, senior manager, and media commentator;

b) extensive discussions with a large number of industry and Civil Aviation Safety Authority identities;

c) reference to public documents.

F2 ROLE OF THE ABSENCE OF GUIDANCE AND TRAINING

F2.1: There is now a grave concern amongst industry figures and organisations that a lack of authoritative guidelines and of post-induction preparatory training has had the effect of loss of standardisation and decision making in key areas. It is incontestable that within the current management structure, lines of reporting, allocated responsibilities and regulatory environment, there is ample potential for individuals or groups within the Civil Aviation Safety Authority to abuse due process. The only question the reader of this analysis needs to consider, is the degree to which this is occurring:

a) among enforcement compliance officers generally;

b) between different district offices; and

c) and between officers at decision making level

This has observably led to an intolerable amount of industry time being wasted in preparing responses to the 'requirements' of individual regulatory employees, who make the meeting of these a condition of recommending or endorsing the application.

F3 QUESTIONS OF COMPETENCE AND OF INTEGRITY OF PROCESS

F3.1: Numerous serious errors of fact and inaccuracies appear in the documentation which CASA provides in justification of regulatory action. These can only be ascribed to

1. a lack of competence – possibly due to CASA selection and training processes – because of which inspectors are not equipped with adequate knowledge of their subject; and/or
2. unseemly haste by field staff, perhaps at the urging of the decision maker, to accumulate more material in justification of a decision which has been made and possibly challenged.

Example 1:

Following its action in suspending the AOC of Aquaflight Airways, (see B4) CASA, acting upon the information it was investigating, issued a number of airworthiness survey reports (ASRs) in which were included:

1. a requirement under ASR 101028 for an engineer to establish the correct installation of exhaust gaskets on one of the company's aeroplanes, when that aeroplane is not fitted with exhaust gaskets;
2. a requirement in ASR 101028 for the aircraft's flaps to be balanced in accordance with the manufacturer's data, when there is no requirement for any flaps on any aeroplanes to be balanced, and therefore no manufacturer's data to define the process. (Such a requirement can only ever exist in respect of primary flight control surfaces – ie, rudders, elevators, and ailerons.)
3. a requirement for all items described in ASR 101029 for all items described therein to be re-inspected, when they had in fact been inspected and duly certified in the course of a periodic inspection only eight days before the suspension of the AOC.

The above facts and circumstances would appear to give considerable weight to the following assertion to CASA of the operator's legal representatives:

> *We believe that there is no justification for the ASRs and that your attempt to further frustrate the operation of our client's business is unjustified."*

F4 APPARENT ABUSE OF PROCESS

F4.1: A large number of high-profile events now have the following characteristics in common:

1. The Civil Aviation Safety Authority in the course of scheduled and unscheduled audits accumulates a number of "non-compliance notices" against an operator.
2. An AOC is suspended on the recommendation of a flying operations or airworthiness inspector on the basis of alleged breaches of the CARs or Orders. In at least two cases, this action follows closely after a fatal accident.
3. There is no test of the proposition that an "immediate safety threat" exists.
4. The only recourse available to the operator is the Administrative Appeals Tribunal. Repeating the w ord "safety" as often as possible, CASA represents to the AAT that its safety obligations under 9A of the Act compel it to suspend the AOC; and that it would therefore be acting unlawfully if it did not. The AAT is in the process of being restructured. The limited number of members of the AAT now means that an urgent application is difficult if not impossible to obtain. In Brisbane it could be 3 to 4 months before a hearing. The Judicature Act requires that an application shall be made or at least an attempt to extract a remedy from that jurisdiction before making an application to the Federal Court.
5. In this process there is effectively no test of the basis of the CASA decision. The justification simply says: "We believe there is an immediate threat to air safety, therefore we are obliged to suspend the certificate."
6. The operator is thus put to heavy financial disadvantage by the loss of cash flow and ongoing financial commitments. In some cases the operator has survived this process (in at least two cases for three consecutive 28-day periods) and eventually had the AOC restored. In other cases the action has driven the operator out of business.
7. None of the allegations has ever been tested in court. The Civil Aviation Safety Authority has thus filled the roles of policeman, judge, jury and executioner without ever having brought its allegations to trial.

F5 NATURAL JUSTICE

F5.1: CASA field inspectors are given substantial induction training in the application of natural justice, procedural fairness and due process to their employment. There is or has been however a conviction among many of them, principally those who have left the organisation, that influences within the Office of Legal Counsel and the Compliance Department have not embraced those same principals and that they verbally direct officers to conduct themselves in ways inconsistent with those concepts; but are unprepared to confirm their instructions in writing. At least one former CASA FOI is willing to provide evidence in a duly established forum that this is the case.

F6 DEFAMATION ASPECTS

F6.1: The publication by of accusations against operators has taken several forms in the recent past. These include:

- Media briefings in which details are provided of the number and substance of past non-compliance notices issued against the operator and in some cases other verbal allegations, as in the cases of Ord Air Charter, Uzu Air and Whyalla Airlines. This information is also commonly conveyed to parliamentarians in support of administrative decisions;

- Publication on CASA's web site of
  a) a decision to suspend an operator's AOC; and
  b) unsubstantiated allegations under investigation in relation to the suspension.

F6.2: The CASA public affairs office has advised that the action of publishing the allegations in support of its decision to suspend Aquaflight Airways AOC (see B4) was endorsed by its Office of Legal Counsel, who had indicated that it was acceptable "on the basis that other regulators like the ACCC [Australian Consumer Protection Commission] do exactly the same thing."

That advice is completely inaccurate.

In response to a formal request for media information the ACCC has indicated as follows:

"We would normally not comment on an investigation until such time as it has been instituted in the courts, because we have to go through the courts. There is no parallel with CASA because they are responsible for issuing licences etc.

"We will occasionally comment on something that has been in the media, but rarely would we institute any publicity about an investigation on our own.

"From time to time some people will say they are being investigated by the ACCC or people will announce that they have reported somebody to the ACCC, then it's in the public domain. We will sometimes confirm or deny that."

Similar responses were elicited from the Australian Customs Service and the Australian Federal Police, the tenor of which was that the publication of unsubstantiated allegations against a person or corporation under investigation of those allegations, was not to be contemplated before of the defamation laws and those agencies commitment to natural justice, due process, and procedural fairness.

Other regulatory systems:

Enquiries were also made of the Civil Aviation Authority of New Zealand and Transport Canada.

Transport Canada, has recently revised its policy on the publication of the names of corporations violating its Aeronautics Act and the Canadian Aviation Regulations. However Transport Canada, which does not name individuals, says corporate offenders will only have their names published on its website along with a summary of the offence and resulting sanctions, in circumstances it sets out as:

- after the company has paid a monetary penalty; **or**
- has accepted the suspension of a document [such as an air operator certificate; **or**
- following a final decision of the Civil Aviation Tribunal or a court; **and**
- only after all appeals have been exhausted.

New Zealand's Civil Aviation Authority has the authority to suspend certificates but says it would only publicise regulatory action against companies if its investigations were well advanced: "We would have to have justification that would have to stand up in court, and we know that. There are safeguards in New Zealand law that if we were to suspend or revoke a certificate and we don't have the evidence, we will be in trouble in the courts; and if we are found to have made a mistake, we will be liable for substantial damages. That puts a certain discipline on us and we're quite happy with that."

Neither Canada nor New Zealand publishes unproven allegations.

In the past, the former Civil Aviation Authority placed public notices at aerodromes inviting intending passengers to seek confirmation that an operator held a current AOC. More recently however, CASA has declined to answer inquiries as to whether an individual operator holds a current AOC, on the basis of "commercial confidentiality," and its current policy appears to yet another policy switch, made without any explanation of changed circumstances.

These discrepancies were put to CASA's General Counsel, Mr Peter Ilyk. Without commenting on the comparison between CASA and other Australian enforcement agencies, Mr. Ilyk replied that the

US Federal Aviation Administration also publishes allegations against entities. A call to the FAA elicited the following points of clarification:

Phone call to Paul Takamoto, FAA public affairs, 22-Sep-00

- An investigation will take place if is an incident is referred to an FAA inspector, or an inspector may have discovered it by thems elves.
- There is then a lengthy and carefully defined process that closely follows rules of due process, whereby evidence is gathered.
- The inspector will make an initial recommendation for a fine if he feels that is warranted, and there are strict parameter s by which the amounts of the proposed fines are set according to the nature and seriousness of the violations.
- Then our legal people will weigh the evidence in terms of how strong the case is, and they may also readjust the initial proposed fine according ly. It's a lengthy process, but it's only at the point where the agency determines the proposed fine, that it becomes public. The investigation is never announced publicly until the proposed fine is determined. The processes before that are internal.
- The enforcement actions we take against organisations are then posted on our web site, where we publish proposed fines. The proposed fine is not published until the investigation has been concluded.
- We do not have a situation where a certificate is suspended to allow an investigation to proceed.
- Sometimes half of a fine is forgiven, as long as that party commits no further violations for a period of (say) a year.
- The entity can appeal, generally before an administrative law judge. There are different avenues of appeal depending on the situation, but there is an appeal process and there may be hearings if that is warranted. Frequently there are appeals before an administrative law judge at the National Transportation Safety Board, which is a separate entity.
- The purpose of publishing the proposed fine gives them their chance of due process, which has also already been observed during the investigation. The publication of the proposed fine gives the entity the opportunity to provide a formal response.
- At that stage the evidence has been gathered and the investigation is complete.
- We do not publish allegations which are still under investigation.
- We will ground an operator if they are not conducting their operations safely. We did that with an airline called Pro-air. However there has to be strong evidence of systemic failure to comply with rules, and that evidence has to be assessed by our legal people as to whether it would stand up in a court of law.
- We would not take steps like that on the basis of "reason to believe," we would require absolute proof.

Conclusion

If the Civil Aviation Safety Authority became aware of any safety-related allegations against operators, scrutinised and evaluated them as to whether they would be sustainable in a court of law, and did not ground the aircraft concerned until the alleged errors were rectified; or did not have the matters rectified immediately, then the Civil Aviation Safety Authority must itself be guilty of negligence.

The question of whether the publication of unsubstantiated allegations constitutes a defamation is now expected to come before a court.

G: WHY ARE NORMAL LEGAL PROCESSES FAILING?

G1 INTRODUCTION

G1.1: CASA is unable to perform its activities within a normal regulatory framework simply because its rules are in many cases un-decipherable, unintelligible, un-structured, irrelevant to current industry activity, and therefore unenforceable within normal legal procedures of the kind which (for example) apply within the various Acts and Regulations which regulate normal commercial road freight and passenger transport.

G2 INAPPROPRIATE PROSECUTIONS

G2.1: The above issue is best answered by taking as an example the material in the following article, written by Mr Paul Clough, a Queensland barrister with an extensive aviation background. It illustrates the serious state of disarray of the Civil Aviation Safety Authority's rule structure, investigation, evidence gathering, and briefing of the Directorate of Public Prosecutions' prosecutors. Because of failures such as those described below, it is asserted that CASA is resorting to:

- spurious procedures virtually amounting to the exploitation of loopholes in the Act and Regulations, which allow it to act on "reason to believe",
- the cynical abuse of the Administrative Appeals Tribunal processes; and
- misuse of its safety obligations to excuse its activities.

The CASA Files

Aerial Hi-jinks

The pilot owned a helicopter and had a private licence. A third party had a problem with flooding of paddocks containing valuable cattle. The third party needed a helicopter to fly a workman to a number of sites in a flooded valley to release the animals. The weather was bad. The pilot suggested to the third party that a commercial operator should do the work. The third party said he had approached two operators and they said it was too hard. After the weather cleared somewhat, the pilot agreed to help. A faxed mud map set the pick up point. The pilot picked up the workman and the problem was fixed. The pilot bought fuel to top up his aircraft. A couple of days later the third party suggested to the pilot that he, the pilot, send a bill for services. This was done and money changed hands to a company that was neither the pilot nor the owner of the helicopter.

The pilot was charged with two indictable offences: Aerial spotting without a Commercial Pilots Licence and without an AOC and a regulatory offence of aerial mustering without an approval. The matter was set down for committal leading to a judge and jury trial. It lasted about three hours before a magistrate. Again CASA was sent away with a flea in its ear. Why so easy you might ask? Leaving aside St Luke Chapter 10 verses 25 to 39:

See CAR 2(7)(d)(ii). This is a complete legal answer to the two indictable offences, because neither the pilot, the aircraft owner or the person for whom the work was done received any payment. That was the evidence adduced by the Directorate of Public Prosecutions.

Where was the intent to commit a crime? For the flight to be commercial, money needed to at least be an issue at the time of the flight. From the facts money reared its head two or three days later.

The pilot had an arrangement with an AOC holder to operate under that operator's AOC. This fact was recorded in the daily diary of the investigator at the relevant time.

Aerial spotting is mentioned in CAR 2(7)(d)(ii) and CAR 206 but nowhere else in any legislation. How can anyone be convicted of a particular offence if there is no definition of the facts constituting the offence?

Aerial mustering is defined in an ANO 29. 10. However, one obtains not an approval, that is for an instructor, but low flying permission. There are provisions for private aerial mustering on one's own property. However, the workman did the mustering not the pilot and that was the workman's evidence.

There were other minor matters of detail that will only bore the reader. Suffice to say CASA again was more interested in preserving its revenue base than seeking out the silly, wayward or negligent aviation operators. Before leaving this example, the magistrate's comments in judgement of a costs issue highlight the CASA emperor's lack of legal clothing.

"I must record that I am not without sympathy for the plight of this Defendant. He is faced with a significant impost in costs as a result of the proceedings which have faltered on the evidence brought by the prosecution. It seems to me that more in depth proofing of the prosecution witnesses should have exposed the flaws in the prosecution case at a much earlier stage and certainly before the Defendant had been placed in this invidious position. That the prosecutor has now quite properly decided not to proceed with the charges for the reasons that were outlined to me, does not excuse the fact that assessment of prospects of success, upon considered reflection of the evidence, might well have brought about a much earlier, and less expensive, strategic withdrawal than has occurred here." I am sure there are still some inmates of Malfunction Junction that breathe the words "I'm from the government and I'm here to help you".

G3 INEXPERT WITNESSES

G3.1: The following is a continuation of the above material, which recounts

1. the failure of a prosecution that should never have occurred, and
2. the lack of preparedness of the witnesses

Naked Eye

An engineer carried out an inspection of a rotor hub on a helicopter in December. The engineer signed the maintenance release in December certifying the aircraft serviceable for 100 hours. Part of the published procedure for certification is to inspect the rotor hub on the aircraft in the field by climbing up the aircraft structure and looking around the hub for cracks in the hub. Yes, that is the procedure. The engineer can use a torch but does not dismantle the aircraft. Naturally the hub is coated with dirt, grease and mud and all sorts of masking coatings accumulated during service. The aircraft came into another workshop in February requiring another 100 hourly. This engineer had to dismantle the mast for other time-specified work. During this work the rotor head had dye penetrant applied and sure enough two cracks were noted under magnifying glass. CASA leapt into action and charged the original LAME with two regulatory offences, based upon signing out an aircraft with unserviceabilities, ie. cracks in the rotor head.

Before a magistrate, three Airworthiness Inspectors gave evidence that they had considerable experience as LAMEs but not one of them had any recent experience of helicopter maintenance. The closest one got was 15 years before. Each had been tendered as experts in their field by the prosecution.

In cross examination, each of these worthies understood the inspection procedure carried out by the prisoner at the bar, and agreed that it would have been difficult to see a crack with the naked eye.

Placed next to each witness in the witness box was a complete rotor hub for the particular helicopter, together with five different magnifying glasses. As each one confirmed he was an expert he was asked to look at the rotor head sans transmissions and blades and tell the court if there was a crack in the head.

It was pretty to watch the various attempts to get out of answering the direct question upon which the prosecution case depended "How easy/difficult is it to see a crack in a rotor head without the dye penetrant test or magna flux testing."

One expert said it was impossible to see if there was a crack in a rotor head whilst in court with ample light, an unobstructed view of the rotor head and a choice of magnifying glass. Yet he had said that failure to observe a crack in the field amounted to criminal behaviour. After circling the

table containing the rotor head about twice this expert said it was impossible to see any crack. Another expert asked the writer if there really was a crack and where was it as it was not fair to him to be asked to look all over the place for what might not be there. The magistrate was visibly taken aback by this comment and asked if the expert could not comment one way or the other, how could the accused be expected to find the crack two months before it was exposed scientifically. There were other hilarious passages of prosecution evidence that are in like vein.

Naturally, the magistrate found that the LAME was not guilty as the prosecution had not proved guilt beyond a reasonable doubt. Costs were awarded against CASA.

Comment: That individual airworthiness officers should get themselves into such a ludicrous situation must reflect either incompetence and a lack of understanding of the area in which they purport to be expert witnesses; or that their actions are guided by incompetent individuals. It is unbelievable that the legal branch of a technical regulator would launch such a prosecution. It is more believable that senior individuals within CASA would adopt a philosophy similar to those embraced by some of the less effective generals of World War Two; that is, to commit inadequately trained troops to hopeless confrontations in the hope of gaining a tactical advantage.

G4 BOTCHED PROSECUTION, WRONG SUSPECT

G4.1: Continuing the article which was the subject of the previous two headings:

So much for the criminal pursuits of CASA. Administratively they fare no better.

Intrepid Birdman

A pilot owned a light twin aircraft. He lent his aircraft to a flying school/charter operation. This organisation provided a stick and rudder pilot and hired out the owner pilot's aircraft. Sadly, the charter operator chose a poor pilot to fly the charter. The pilot committed at least nine unforgivable sins before and during the flight.

He forgot to switch on his alternator switch and therefore failed to recharge the aircraft's batteries during a day/night flight of about four and a half hours.

He was unaware that there was a balancing locker in the front nose of the aircraft and packed all the baggage in the cabin. When the passengers boarded the aircraft the nose wheel lifted and the tail hit the tarmac with a resounding whack. The pilot did this trick not once but twice. He did not think to consult a LAME as to potential damage. Press on regardless was his motto.

Two of his passengers in the back told him they had no seat belts fitted. He confirmed this. He told them it was OK but to hang on tight during take-off and landing. He rationale was as they were female and light they would not tend to float about should he crash. He gave the three serviceable belts to the males. Chivalrous to the end.

He had filed a flight plan advising that he was landing at an intermediate airfield for fuel. He ignored this plan and overflew the fuel stop.

He did not understand GMT; as a result his SARTIME was out by days and hours.

His calculations of fuel consumption used a wrong usage rate. As a result his margin and reserve fuel was seriously in error. To the point that on landing he had about five minutes fuel left in this aircraft.

When over the fuelling stop he was prevailed upon by a passenger who had no flying experience to continue. He did not recalculate his fuel. He did not determine that he was departing from his planned flight path. He did not tell aeradio of his new route, which was different from the filed one.

About this rime our worthy pilot switched on his nav lights and cockpit lights and wondered why they were dim. He had been flying for about three hours on batteries. The red warning alternator light on the cockpit meant nothing to him.

Believe it or not, this intrepid birdman arrived in the circuit at an airfield with a front seat passenger using his own torch to illuminate the flight instruments, the battery having failed completely. Naturally, learns lowered the gear and swore in court he saw a glimmer of a green. He never wound

the gear down or inspected the undercarriage. He landed wheels up. There was no fire as there was very little fuel left in the tanks.

With that factual situation, most dispassionate observers would expect that the sword of Damocles would fall on the intrepid birdman. Not so. He was charged with a regulatory offence by CASA of flying without seat belts and pleaded guilty and fined $150 and no other penalty. CASA used this weak straw to give evidence against the owner. The owner was charged with one indictment of flying without an AOC (See 27(2)) and two regulatory offences. He faced the possibility of two years in jail. Before a judge and jury the owner was acquitted, as he should have been. One juryman commented that learns should be reported for his woeful performance. The owner commented "CASA are more interested in the revenue from AOCs than they are safety issues." You be the judge."

G5 CASE STUDY – VH-EMY

G5.1: A private buyer purchased a Maule M4 for which a maintenance release had been signed 50 minutes earlier. In his presence, an engineer working for him identifies serious airworthiness deficiencies which should have been identified at the periodical inspection. Details of the defects are conveyed to the CASA district office with a request for action against the maintenance organisation.

G5.2: CASA is subsequently provided with a report identifying 17 major deficiencies, and with material evidence of some of those deficiencies.

G5.3: Approximately 12 months later, CASA advise the owner that as "Schedule 5" was the basis of the periodical inspection, the engineer concerned could not be expected to detect defects which included:

- broken ribs in the horizontal stabiliser,
- rusted fuselage structure tubes,
- cables not on pulleys;
- cut and spliced cables;
- seriously deteriorated fuselage fabric;
- substituted automotive parts and hoses;
- substituted instruments which did not reflect the flight manual data;
- leaking fibreglass repairs to fuel tanks; and
- delaminated wings.

G5.4: CASA did however find the engineer has negligently overlooked four other defects including wing struts which were replaced at the periodical, and finger tight fuselage bolts. CASA however deemed these deficiencies to be insufficiently serious to take other than counselling action. CASA also declined to take action against the previous CofR holders;

G5.5: CASA's Office of Legal Counsel advised the owner that a precedent has been set for the action against the engineer, and that it would be 'inappropriate' to take stronger action against the previous owner.

G5.6: The new owner is left without legal recourse, because his claim is against the previous owners, who could maintain in court that they had commissioned an engineer to carry out the periodical inspection, and believed the aircraft was airworthy;

G5.7: There is no claim against the engineer, because he was not contracted to the new owner, who thus becomes a third party;

G5.8: CASA refuses to acknowledge to the new owner that a maintenance release should be an indication of an aircraft's airworthiness, and that a subsequent owner has a right to expect that an inspection duly signed off on a maintenance release should be valid for the period to the next inspection;

G5.9: CASA loses some of the material evidence provided by the owner, further weakening any case he may have for compensatory payment;

G5.10: At CASA's request, the Commonwealth Ombudsman conducts an inquiry into CASA's handling of the case. The Ombudsman is seriously critical of several aspects of CASA's handling of the affair, and recommends among other things that its Director convey an unequivocal apology to the owner.

G5.11: The owner receives what he describes as a "lame duck" letter from the Director, which he rejects by return mail.

G5.12: The subsequent letter from the Director is dismissive.

Summary: The above sequence of events is impossible to reconcile with the gung-ho approach of CASA as detailed in the various case studies in Section B of this study. Because of clear and proven deficiencies in maintenance and inspection, an aeroplane has been operated in condition where it represents a considerable danger to its pilot/s, any passengers, and the general public beneath its flight path; yet CASA considers "counselling" an adequate remedy.

It appears that CASA has differing agendas for different offenders. The two principals of the company whose engineer signed off the maintenance release are pilots with Cathay Pacific Airways, resident in Southeast Queensland.

The purchaser of the aeroplane believes the Director, a former Cathay Pacific pilot: "should have distanced himself from this matter and not taken the conflict of interest stance that he did."

G6 CASE STUDY – THE WORST CESSNA EV ER SOLD

G6.1: On the morning of 9 March 1998 during the takeoff roll from Archerfield Airport in a Cessna 170B, throttle control to the engine was lost and the manoeuvre was aborted as the tailwheel rose to the flying position. This required the submission to CASA of both *Incident* and *Major Defect* reports.

G6.2: It was established that the failure to install a split pin in the throttle linkage had caused this loss of engine control.

G6.3: With less than thirty hours flown since its total rebuild and acquisition by the pilot, nineteen maintenance items of significance required rectification. The pilot/owner's concerns in regard to this second-rate standard of workmanship prompted him to advise CASA of the facts and request it to inspect the aircraft in accordance with its regulatory obligations.

G6.4: During the afternoons of 9 and 19 March 1998, CASA assigned an Airworthiness Surveyor to inspect the aircraft. These inspections confirmed the findings of unsatisfactory workmanship carried out and signed as airworthy by a licensed aircraft maintenance engineer (LAME).

G6.5: Being the Certificate of Registration (C of R) holder of the aircraft the owner asked the obvious question of CASA. "What has been said to the LAME concerned, to ensure this LAME improves his standard of engineering practices?" He indicates that he had asked that question in regard to "duty of care" as the LAME operated a fleet of eight light aircraft for hire, specialising in hiring the aircraft to visiting foreign pilots for extended outback tours. Having a feeling that further faults would be found in the aircraft, he wondered what maintenance standard the charter fleet was maintained to.

G6.6: He reports that a blanket advice that "no information will be supplied to you from CASA" became the only response from the Authority. These replies kindled thoughts of something sinister about the situation. Seeking an answer from CASA, the owner approached various members of its command tree including eventually the Director of CASA. On 29 October 1998 CASA director Toller replied via e-mail with a dismissive "this is being looked into, but clearly we have to priorities our tasks. I have asked that progress on your case be checke d, however, regards".

G6.7: On 14 April of the following year (1999) the owner received a communication from CASA's Office of Legal Counsel. It advised him that answers to the questions being asked would not be made available as Section 43 of the Freedom of Information Act (FOI Act) thwarted this information being released.

G6.8: The Legal Counsel wrote: "Section 43 of the FOI Act relates to the business affairs of an organisation and the disclosure could be expected to unreasonably affect the business, commercial or financial affairs of that organisation."

G6.9: This application of the FOI Act being giving precedence to business, commercial and financial affairs appears to have come into conflict with the Civil Aviation Act. Section 9A. (1) states "In excising its powers and performance its functions, CASA must regard the safety of air navigation as the most important consideration."

G6.10: Before the end of 1999 major and life threatening practices conducted by the now protected LAME and his organisation became apparent. They included work done on the subject aircraft and no paperwork to account for:

1) Replacing the centre fuselage with that of another model Cessna. This alone voided the aircraft's Type Certification data Sheet.
2) Replacing the left hand wing with that of another model Cessna.

3) Installing the right hand wing with a known 2inch crack in the main spar at the wing/fuselage attachment point.
4) Removing the original Data Plate for that fuselage and replacing it with one from a different model Cessna, thus giving the rebuilt aircraft a false identity;
5) Non installation of correct engine cooling baffles causing one cylinder to fail in flight.
6) Spanners found remaining on the airframe fouling the movement of flying controls.
7) Fitment of an illegal firewall.
8) Incorrect fitment of a wing strut.

And so the list of 42 defects continues.

G6.11: CASA once more inspected the aircraft. Their findings were so numerous as not only to ground the aircraft, but also to strike it from the Australian register.

G6.12: The owner asserts that as no direct action appeared to be taken by CASA when this problem was first brought to their attention in 1998, the Statue of Limitation inhibits any further real penalties being enforced. Now the only action that can be taken against the LAME and his maintenance organisation by CASA is to apply for a punitive fine. This appears to be the only possible penalty being for not having any paperwork to show he had modified an aircraft knowing it did not comply with the original Cessna TCDS and without written authority to carry out other modifications. Another financial penalty is also sought after for the signing of the maintenance release stating the aircraft being airworthy when in fact it was not. At the time of this writing no penalties have been awarded or enforced.

G6.13: The person who purchased the defective aircraft asserts and asks:

> *This person operates a fleet of aircraft flown in Australia by visiting overseas pilots as a tourism activity. Do we have another fatality waiting to occur with the full blessing of Director Toller? CASA is fully aware of the poor standard of maintenance accounted for by the company. However it appears that Section 9 of the Civil Aviation Act is being overridden by the Freedom Of Information Act, which has sheltered a LAME and his organisation from punitive enforcement activity.*

G6.14: This clearly raises the question: What legislation is in place then to protect the unsuspecting public from being a possible fatality if CASA cannot provide that protection?

Comment: It is here asserted that CASA's lack of will to address its obligations in this instance is inconsistent with its seeming eagerness to launch administrative action against AOC holders as in the instances cited in section B of this document.

The Office of Legal Counsel's invocation of Section 43 of the Freedom Of Information Act which relates to the business affairs of an organisation where the disclosure could be expected unreasonably to affect the business, commercial or financial affairs of that organisation, is certainly inconsistent with CASA's practice of publishing apparently defamatory material against air operators under investigation.

G7 FURTHER ILLUMINATION OF CASA ATTITUDES FROM (THEN) DIRECTOR TOLLER

The following letter was written to Warren Entsch, MHR, in response to a letter expressing the member's concerns over the Aquaflight Airways matter. The letter contains the writer's commentary on the material offered by Mr. Toller:

Warren Entsch MP
Federal Member for Leichardt
Parliamentary Secretary to the Minister for Industry Science & Resources
PO Box 2797
CAIRNS QLD 4870

Dear Mr Entsch

CASA is only entitled to take action to suspend an operator's Air Operator's Certificate (AOC) if it is satisfied that the operator has breached a condition of its AOC. CASA conducted a Special audit of Aquaflight e arly in August 2000. That audit uncovered evidence of regulatory breaches. A CASA delegate relied upon the report of the audit when he decided to suspend Aquaflight's AOC on 17 August.

> **Comment:**
>
> **Aquaflight had responded in detail to the allegations, acknowledging a couple of minor breaches and denying the remainder, mostly on the basis that they were breaches of the responsibilities of the pilot in command and contrary to company instructions.**

It is true that CASA's investigation into Aquaflight is continuing. Nevertheless the decision to suspend Aquaflight's AOC was made on the basis of evidence in CASA's possession that strongly suggests that Aquaflight poses a serious air safety risk.

> **Comment:**
>
> **The evidence was in the main the un-tested statements of former employees. CASA's strategy was to see that it is never tested by cross-examination in a court.**
>
> **When the matters subsequently came before a court,**

As you will appreciate, the task of balancing the private right of operators to procedural fairness and the right of the public not to be exposed unnecessarily to unsafe operators is a difficult one. A decision to suspend an AOC is not taken lightly. It is a decision taken at Assistant Director level (or higher), in circumstances where the risk of allowing en operator to continue to undertake commercial operations while the normal decision making process unfolds is considered to be unacceptably high.

> **Comment:**
>
> **The decision maker must be put in a position of having this assertion examined externally. There is no supporting evidence that a significant and immediate air safety risk exists. The operator has delivered his service without a safety incident for about ten years.**

Operators who are suspended have access to the AAT (which has the power to stay CASA's decision) and have the opportunity to put their case to CASA before any long term decision is made.

> **Comments:**
>
> **At that point CASA normally hires a $3,000 a day QC to shore up its decision**
>
> **What is a long term decision? 28 days? 56 days? 84 days?**

I know this process may appear harsh from the operator's perspective, but I think the public expects CASA to act quickly and decisively in situations where It discovers that an operator may be placing the lives of fare paying passengers at risk.

Comment:

The key phase is "may be." It is equally true to say that at any given time Qantas or Virgin Blue "may be" placing the lives of fare paying passengers at risk.

The decision maker, whoever he or she is does not have the legal or technical background to make an adequate assessment of the safety significance of a particular act or alleged act.

The move to publicise cancellation and suspension decisions was taken after considerable thought on CASA's part. CASA only publicises the decisions it has made - it does not publicise the fact that it is investigating an operator or that it has issued an operator with a "show cause" notice Once CASA has acted administratively to suspend or cancel an AOC, it is a matter of record. It is not something that is, or should be, secret. CASA has exercised its statutory powers and the operator is no longer able to operate commercially. Other regulatory authorities (such as ASIC and ACCC) publicise their regulatory activities, often in circumstances where the regulatory action has less direct effect on members of the public, without apparent criticism.

Comment:

This claim is false. See F6 in the report. I have contacted the ACCC, the Federal Police, Australian Customs, the New Zealand Civil Aviation Authority, Transport Canada and the US Federal Aviation Administration. Each agency has differing guidelines, but each absolutely denies that it would publish any allegation against an industry entity or individual, unless investigations of the allegation had been conducted according to strict guidelines and concluded, and all the evidence examined as to whether it would stand up in a court of law. My investigations have failed to identify any agency, in Australia or overseas, which would publish material of the kind published regarding Aquaflight, or the various media and parliamentary briefings regarding allegations in other cases.

CASA was comprehensively briefed on the implications for itself and the Government through its indemnity commitments, of publishing defamatory material, in an Attorney-General's legal opinion obtained in 1996 (see F1 of the attached report.) Mr Ilyk's position, stated to me in a telephone call, is: "We operate in accordance with the legal process. If the Government wants to change that and say CASA's not going to have these powers, then CASA won't have the powers. But as it stands, the Parliament has given those powers and CASA is obliged to use them."

I assure you that CASA will carefully consider any submissions put to it by Aquaflight before making any decision about whether or not to continue the suspension of Aquaflight's AOC,

Comment:

At 5 pm on the 28th day, CASA suspended the AOC for a further 28 days. There is no obligation on CASA to share the deliberations which resulted in that decision. They only have to say "We are not satisfied."

or to cancel the AOC. CASA will make a decision based on the weight of all relevant available evidence. To the extent that Peter Gibson may have suggested in an interview that Aquaflight bore some kind of reverse onus of proof, he was in error.

Comment:

Utter nonsense. Aquaflight is now in a situation where it must convince CASA it has not committed any act which warrants the cancellation of the AOC. That amounts to a reverse onus of proof.

In my view, however, Mr Gibson was simply endeavouring to explain the normal show cause process in a way that would be readily understood by the public. His choice of language may not have been ideal in the circumstances but, as you and I both know, it is difficult to always ensure that every word uttered in the course of an interview is completely resistant to subsequent critical

analysis on transcript. So far as your other issues are concerned, CASA is absolutely committed to help small operators who genuinely want to be compliant to do what is necessary to become and remain compliant. In recent times, CASA has diverted more resources to safety education and promotion, and assistance with compliance activities is always available. There is no plan to drive a specified percentage of operators out of business.The reality is, however, that a small minority of operators (for reasons of cost containment, or otherwise) deliberately operate outside the law. I and my colleagues on the CASA Board are determined to prevent these operators from continuing on as they are. Every Australian who is a fare-paying passenger on an aircraft is entitled to enjoy a minimum level of safety, wherever they live and wherever they travel. Operators who choose to ignore regulatory safety requirements must, and will, be brought to account. I note your comments about the large airlines. Fortunately, Australia's major airlines are generally very safe, and do not consciously operate outside the law. However, if there were ever a circumstance where CASA became aware of a serious safety issue with a major airline, CASA would act as decisively against that airline to protect fare-paying passengers as it would in the case of any other operator.

Comment:

My contacts in senior operational and safety management in the major airlines are becoming seriously concerned over the increasingly confrontational approach of CASA inspectors, who have now begun seeking actions such as the suspension of their pilots for alleged breaches. I believe it is likely that some of these officers will soon feel the weight of the fact that the Commonwealth indemnity does not cover individuals against legal action for negligence, including negligent misstatement, breach of confidence, injurious falsehood, or misfeasance in public office

Yours sincerely

Mick Toller

Director

Summary:

Mr. Toller's response, which one can only assume (from all the familiar phrases) was drafted by the Office of Legal Counsel, can be expected to resemble closely the CASA response to any parliamentarian who seeks dialogue with CASA on matters in this study.