



Australian Government

Civil Aviation Safety Authority

INDUSTRY COMPLAINTS COMMISSIONER

12 April 2019

Mr Glen Buckley
glen.b@auspta.com.au

Dear Glen

Preliminary review outcome

In my letter dated 19 March 2019, I set out how I proposed to respond to the 28 separate complaints made to the Industry Complaints Commission ('ICC') by the Australian Pilot Training Alliance ('APTA') between October 2018 and January 2019.

My preferred approach was to review the central theme I distilled from the 28 complaints: APTA's dissatisfaction with its oversight by CASA's Southern Region following a change of Certificate Team (from that led by John Costa to Will Nuttall's team) in 2018. APTA's view was that CASA's actions following the change breached its legislative and administrative law obligations, as well as internal CASA policies and procedures (such as its Regulatory Philosophy). In addition, APTA complained CASA had failed to properly engage with multiple requests for clarification or more information, and had unreasonably delayed the processing of regulatory service tasks. APTA's position is CASA's actions have jeopardized its commercial viability.

For those issues that were within the jurisdiction conferred on the ICC by its Governance Arrangements, in my letter of 19 March I explained that I felt it would be more helpful to address these in one response, rather than the 28 you'd initially requested. After our meeting at APTA's premises in March 2019, you agreed a single response would be the best approach. In this preliminary outcome, I set out my provisional conclusions as to whether CASA has treated APTA unfairly, unreasonably or unlawfully¹ in its regulatory oversight since 2018.

While you're aware the ICC isn't empowered to recommend the compensation you seek in resolution of APTA's complaints, you've stressed the importance of having an ICC review so as to inform other avenues APTA intends to pursue.

The genesis of APTA's concerns

It appears to me that any recent deterioration in the relationship between APTA and CASA had its roots in correspondence to APTA Head of Operation Ermin Javier from then acting Southern Regional

¹ Paragraph 2.1 of the ICC Governance Arrangements defines the ICC's primary role as considering '*complaints ... about the decisions, administrative actions or services provided by CASA staff... to determine if they are wrong, unjust, unlawful, discriminatory or unfair.*'

Manager David Jones on 23 October 2018. Based on legal advice Mr Jones had received, his letter informed APTA CASA proposed to refuse an application for approval of significant changes to its Exposition and Operations Manual. APTA had requested the changes (the addition of operating and ancillary bases) on 21 June and 31 August 2018. The 23 October Notice advised:

- APTA's arrangements with Alliance members were perceived by CASA as potentially being in breach of a CASA Aviation Ruling: *Franchise AOC arrangements*.
- APTA Alliance members may be conducting unauthorised operations, and if APTA had facilitated their regulatory breaches it may be the subject of enforcement action.
- CASA proposed to decline APTA's significant changes applications because operations at Alliance members' bases weren't temporary locations and couldn't be authorised by APTA's Part 141 and 142 certificates.

The Notice sought APTA's comments and other information (contracts and other agreements) on the above issues '*within 7 days, whereupon CASA will provide a final determination on them.*'

You've commented this letter came out of the blue and has caused considerable damage to APTA.

Was the letter a change in CASA's approach to APTA?

Reviewing available records, I agree the letter of 23 October marked a significant divergence in CASA's attitude towards APTA, both in tone and regulatory approach.

Whereas CASA had worked collaboratively with APTA at the time it sought to transition to Parts 141 and 142, the correspondence of 23 October was direct and unequivocal. With the fresh eyes that came about as a result of new oversight arrangements and legal advice, it presented a new interpretation as to the nature of APTA's arrangements with Alliance members. The letter imposed a short deadline, and as far as I'm aware nobody within APTA had been given an indication prior to dispatch its significant change applications were likely to be considered differently.

In terms of the ICC's mandate to consider whether CASA's actions were wrong, unjust, unlawful or unfair, I don't at this stage propose to find the actions were wrong or unlawful. It's any decision maker's prerogative (and obligation) to consider an application on its merits. Just because a different interpretation was reached to a previous decision maker on substantively the same question, it doesn't mean it was unlawful.

In terms of the other assessments the ICC can make, I don't consider CASA treated APTA fairly when its approach changed on 23 October. That's because collectively as an organisation, CASA had an awareness of the APTA business model for a significant period of time prior to its compliance with regulation being called into question. In changing its position so drastically, the circumstances were such that CASA's actions weren't fair, given APTA's likely to have relied on CASA's failure to highlight any concerns when conducting its operations and planning.

I've reached the conclusion CASA didn't treat you fairly collectively, rather than it being an outcome 'against' Mr Jones or Mr Nuttall's CMT. One reason for the broad conclusion is your specific request that I not review the actions or decisions of the CMT APTA was previously oversighted by, who you commended for their professionalism. Respecting that request means it's impossible for me to draw any conclusions about which approach to the APTA business model is more likely to be legally correct.

At this stage, I also propose to conclude that as well as being unfair, having two opposing regulatory interpretations about the APTA business model meant CASA didn't meet the principles it aspires to meet in its Regulatory Philosophy. In addition to APTA's complaint the different approaches meant

CASA didn't maintain its trust and respect (Principle 1), I also agree the divergence in the positions CASA took is also unlikely to conform with Principle 7.

Principle 7 provides '*CASA will consistently employ the same processes criteria and have regard to the same criteria for the purposes of determining whether, and if so how, a regulatory requirement should be interpreted or applied in any given situation.*' There's limited available information to conclude the Aviation Ruling's applicability was considered when first assessing APTA's business model; nor was there consistency about whether the model met regulatory requirements.

Failure to provide information: audit findings

APTA highlights it has made repeated requests for the findings of CASA's Level 2 audit of its La Trobe Valley base on 3 September 2018. APTA considers CASA's failure to provide the information a timely manner represents a failure to comply with its administrative law obligations. APTA stresses CASA had an obligation to provide procedural fairness given the findings of this audit were the basis of significant action being taken against it.

CASA's position is that while a Level 2 audit had been scoped, it was never commenced and its visit to La Trobe Valley was for the purpose of assessing a regulatory services task (APTA's significant change applications). APTA doesn't accept this position, noting Mr Jones referred to the visit in the presence of CASA's Executive Manager of Regulatory Services and Surveillance Peter White as a Level 2 audit.

Reviewing all of the available information, at this stage I have insufficient basis to conclude the visit was a Level 2 audit as APTA allege, and instead conclude it was to assess a regulatory service task. In reaching that position, I note:

- There's no record of the documents I would expect to see if a Level 2 had been commenced in CASA's Sky Sentinel surveillance database. If the visit had been an audit, a number of mandatory documents and records are required to be produced.
- Mr Nuttall's email of 27 August organising the visit was titled: '*Confirmed Dates - Regulatory Service Tasks AOC2018-2148 and AOC2018-2149*' and specified CASA would be visiting La Trobe Valley on 3 and 4 September.

That means there are no audit findings to provide. At this stage I'm satisfied CASA's correspondence of 23 October and 20 November provides sufficient details of the reasons APTA's application to make significant changes wasn't approved at that point.

APTA's position is the results of Southern Region's visit to La Trobe Valley led to 'significant action' against it, given it was the basis for seeking internal legal advice. In my view, seeking internal legal advice can't be considered as commencing action against APTA, but is instead part of a prudent decision-making process. In any event, I note no changes to APTA's existing operations have eventuated from the visit of 3 September; CASA's assessment of the significant change application; or the 23 October letter. A notice that CASA intends or proposes not to approve something is not an action in of itself.

Failure to provide information: Flight and duty exceedances

APTA complains Mr Jones wrote in an email dated 28 November '*these anomalies should be known by Ermin (as the APTA HOO) as there were problems identified with the FSM system and Flight and Duty (F&D) management, in particular associated with the F&D exceedances.*'

APTA continues that CASA later clarified there weren't any identified flight and duty exceedances, but that it has failed to provide details of what had originally led to this comment.

Noting your statement CASA doesn't consider there to have been any exceedances, I've attached the information from the La Trobe Valley visit that led to the initial comment as Appendix A in resolution of your complaint.

Failure to provide information: website

APTA highlights that despite multiple requests, CASA has never identified the webpages it extracted the information reproduced in Mr Jones' letter dated 23 October. I can advise that as at 20 September 2018, the information in Mr Jones' letter could be found at www.auspta.com/our-vision and www.auspta.com.au. I've reproduced the pages as they were at that date in Appendix B.

While I acknowledge it would have been helpful if CASA had provided links to the source of that information in its letter of 23 October, I don't consider it acted inappropriately in not doing so. That's because it wasn't unreasonable for CASA to assume APTA would be aware of the information contained on its own website.

Delays in the completion of regulatory service tasks

APTA has been engaging with a number of different people within CASA on a range of issues, including delays in CASA processing regulatory service task. I note Southern Regional Manager Jason McHeyzer's email of 2 April, which I reproduce below, addresses the background to this complaint:

I acknowledge your requests for information in relation to a 'freeze' of APTA regulatory tasks.

I have reviewed CASA records and can report the following:

On 23 Oct 2018, CASA issued you with a Notice of proposal [sic] refusal to approve significant changes to exposition and operations manual (CASA ref F14/9540) in relation to your applications for additional bases at Ballarat Aero Club, Latrobe Valley Aero Club and White Star Aviation.

The 23 Oct 2018 notice is an important part of CASA's decision making process as it provides an opportunity for authorisation holders to respond with evidence for CASA to consider prior to making a final decision.

On 2 Nov 2018, you provided a letter response to then Acting Regional Manager, Southern Region, Mr David Jones, providing your views on the issues raised in CASA's proposed refusal and requesting a meeting to resolve the identified issues.

Shortly after your 2 Nov 2018 letter, Executive Manager of Regulatory Services and Surveillance, Peter White, met with you and has since been working with you to resolve the contractual arrangement issues raised in CASA's letter of 23 Oct 2018.

CASA issued you with a letter on 12 Feb 2019 confirming interim operational arrangement for APTA until 13 May 2019.

I understand that CASA and APTA are very close to resolving the contractual arrangements. Once these arrangements have been satisfactorily resolved then the key issue identified in the 23 Oct 2018 letter will be removed as a consideration in CASA decision making.

In anticipation of successful resolution of the contractual arrangement I have instructed my team to provide you with fee estimates for outstanding regulatory service tasks. On receipt of payment for these fees, CASA will commence assessment of the regulatory services.

I note that CASA commenced assessment of your applications for the additions of Ballarat Aero Club and Latrobe Valley Aero Club as operating bases prior to receipt of the fees for these tasks. To date, the fees have not been paid.

CASA has not made a final decision in relation to your applications for additional bases at Ballarat Aero Club, Latrobe Valley Aero Club and White Star Aviation.

I look forward to working with you to finalise the outstanding regulatory service tasks.

I don't consider Mr McHeyzer's position unreasonable. Until there was a level of certainty about whether APTA's model could meet regulatory requirements (following the change in approach taken by the new CMT), it would have been premature to assess regulatory services tasks. I appreciate the disruption you say this has caused APTA, but at this stage I don't propose to conclude it was unreasonable or inappropriate in the circumstances.

Next steps

Please provide any additional information you'd like me to consider by **26 April 2019**. I'll then consider that information before finalising my review of your complaint.

Referral rights

If at any stage in the complaints process you are unhappy with my investigation or response, you're able to ask the Commonwealth Ombudsman to review the ICC's consideration of your concerns.

Information about how to make a complaint can be found at www.ombudsman.gov.au. Alternatively, you can contact the Ombudsman on 1300 362 072.

In the event you wish to make a complaint about me, the ICC Governance Arrangements provide this should be addressed at first instance to the [Director of Aviation Safety](#).

Yours sincerely



Jonathan Hanton
Industry Complaints Commission

Appendix A – La Trobe Valley Flight and Duty comments

FDL

OM 2 1.1.6 Rostering in Accordance with Flight and Duty Time Policy

The Company recognises that on occasion a Pilot may be operating for more than one organisation. The FSM programme must reflect all Flying activities carried out for any organisation PRIOR to re-commencing any flying activity for APTA so that the APTA regime is compliant. – this does not occur. Gerard demonstrated he was running a separate FDL program (used also by Bairnsdale Flying school) and not updating the APTA FSM....

FSM

***HOO Ermin Javier** demonstrated Flight and Duty time limit monitoring system. Candidate used was Derek Ng - GD 3. On reviewing Derek's duty the system clearly indicated Derek had exceeded a flight duty limit daily flight limit. The HOO was unaware of the breach, indicating he was neither monitoring the limits and the alert system (automated email) did not provide an alert. HOO was unable to find the email when requested.*

When HOO was requested to provide the names of the SBP, the HOO noted he did not know who they were and indicated the list was kept by Internal Coordinator Lavenya Ruthralingam. After some deliberation he accessed his email and opened an email titled to the SBP and found their names.

*Ermin Javier - **SBP are not known by HOO.** HOO accessed names by opening email sent to SBP by admin staff. As the SBP's are not known by Ermin it stands to reason that APTA reporting system is not functioning as OM 1 0.5.6 Group Head of Operations (HOO) Direct reports – SBP's are noted as a direct report...*

Senior Base Pilot: Repeat finding

David has been designated by Ermin as the Senior base Pilot for Latrobe valley. It was noted by David that he has:

- *David is present at BLT on (an) ad hoc basis*
- *Between Monday and Thursday, review Base Flight and Duty for all personnel with particular attention paid to the timely completion, compliance and accuracy. Initiate any required action. Present any anomalies for the attention of the HOO as soon as practicable but no later than the next Wednesday Management Meeting. – The SBP sets a phantom roster in Flight Safety manager (FSM). Actual pilot duty is expected to be updated by the pilot in a separate sign on sign off system. Gerard was observed running a personnel FDL program due to his other flying employment. SBP was unaware of these duties and hence was unaware of the impact on the pilots total flight duty limits. This is in contravention to APTA OM 2 1.1.6 Rostering in Accordance with Flight and Duty Time Policy*

Pilot Derek Ng operates a Shrike Commander as a secondary employment. Derek had not entered any flight details in the flight and duty system. HOO reported each pilot is required to sign on and off at arrival and departure from base. However, the day of site inspection, the pilot had not signed on as was evident by his flight and duty system and print out.

OUR VISION

To enhance your profitability, and the profitability of other APTA member's, by creating an innovative new training "Alliance" based on integrity, genuine collaboration and lateral thinking within a practical framework whilst retaining your current ownership structure and autonomy in operating your business.

Accordingly, we would like the opportunity to put to you, and other invited Flight School Owner in Australia to a compelling new Industry proposition to consider joining this new Alliance. It is effectively a very simple but cost effective idea, that we share the Operations Manuals, share our capabilities and share the cost burden of an Industry Leading Team of Key Personnel.

Importantly, you retain complete control over your own business. Your business maintains its identity and individuality. Your administration function and procedures remain completely your own, independent of the Alliance. There is a pooled system of manuals and procedures, directed by a shared high-powered team that will take on the responsibility for the Key Personnel requirements.

It is a challenge operating in today's environment; as collectively we need to have a Leadership Team of highly capable and well-supported Key Personnel continuously overseeing and directing our collaborative effort. Effectively CASA will provide the oversight of an Alliance of Flight Schools headed by a shared "A" team of Key Personnel and shared Compliance Procedures.

The costs savings will be very substantial; importantly your time will be considerably freed up by releasing you from much aviation red-tape thereby empowering you to concentrate on driving your Business.

APTA provides a time and cost efficient system specifically designed to let the business owners get on with running their respective businesses.

Firstly, it frees up your capacity by providing a shared alliance of Industry Leading Key Personnel, an Operation Manual suite written to the new Regulations. Secondly, it potentially offers the ability to be an RTO and deliver training to Overseas Student by the way of CRICOS Approval. Thirdly, it offers a new level of flexibility in deployment of Personnel and Aircraft. Lastly, and most importantly, it will protect you and your Business by providing higher levels of safety and compliance.

