

28 January 2014

The Hon. Warren Truss MP
Deputy Prime Minister,
Minister for Infrastructure and Regional Development
Aviation Safety Regulation Review
Department of Infrastructure &
Regional Development
ASRR@infrastructure.gov.au
PO Box 6100
Parliament House
CANBERRA ACT 2600

Filed electronically

Dear Mr Truss,

**Submission by Spencer Ferrier, Lawyer, Sydney, to the Aviation Safety Regulation
Review Committee**

This submission may be published in whole or in part provided acknowledgement is made and the purpose of publication is to further the interests of Australian aviation. It is limited and deliberately brief. Each of the subjects can be elaborated if required.

Central proposition

The overarching mistrust of the CASA and its reciprocal industry mistrust must be recognised and reformed.

Background of personal experience

Aviation

I am a lawyer in private practice. I hold a private pilot licence which is used in the conduct of my practice. I have about two thousand hours of flight time. I hold a multi-engine instrument rating, not now current. I have owned (and sold) many General Aviation aircraft. I was for some years the co-Distributor in Australia for the Piper Aircraft Corporation of the USA.

I was President of the Royal Aero Club of NSW for eight years, during which

time my team and I rescued it from bankruptcy. I am currently a Board member of AOPA Australia, a liveried member of the Guild of Air Pilots and am a member of the Lawyer-pilots Bar Association of the United States of America.

Legal

My practice in law is extensively connected with aviation issues of all kinds. These include legal and commercial advice concerning facilitation of aircraft import, export, mortgage, sale and purchase.

I have dealt with Airport issues in many States of Australia, including to do with construction and leasing of hangars, other leasing issues and matters to do with airport authorities.

I have acted in aircraft crash investigations, where I have isolated the cause of the crash. I have represented victims and families of victims of airline air crashes in claims for compensation and just recompense.

I am engaged in business and commercial advice on a continuous basis to the General Aviation industry in all its styles, both in Australia and elsewhere.

CASA

I engage in advice and representation in compliance matters concerning the CASA as well as other non-CASA related compliance matters involving the Criminal laws of, variously, the Commonwealth and States of Australia and other countries. I have given much advice to clients and fellow aviators concerning their dealings of all kinds with the CASA and its previous and parallel organisations.

Requirements for reform and change

- 1. The primacy of CASA ensuring ‘air safety’ must be balanced with a positive obligation to encourage aviation.**

CASA’s structure of aviation management is deficient in law and in fact. That must change. Its fundamental precept states the problem directly. The primary directive to the CASA is as set out in section 9A of the *Civil Aviation Act 1988* (Cth) and states ‘... **CASA must regard the safety of air navigation as the most important consideration.**’

On any proper construction of law, jurisprudence and fact, this statement is meaningless. What results is that different standards of what is safe arise in each party’s interpretation of events. Practical knowledge is then fought out in the Courts before decision makers who have no direct and continuous contact with the industry.

There must be a positive duty to encourage aviation. With that as its obligation, the stage can be set for positive and collaborative association with those engaged in the business of aviation.

The present unspecific task of ensuring 'air safety' is logically meaningless. It is vague and high-sounding, but in fact can only be activated subjectively. There is no process presently in place to resolve who shall exercise that subjective view and how it may be reviewed, other than by executive fiat and later, expensively and slowly, by the legal process.

The question of 'air safety' in any context should be settled not by the adversarial system of the law, but by a proper group decision of those capable of assessing the issue in question.

That will vary continuously and must accommodate the risk of the new, the risk of the old and the discarding of unnecessary limits and prohibitions which no longer have value. Aviation is not the place for the slow arguments of legal technique. It is too technically complex and changing too constantly for that process to do justice.

The current law is that the CASA need take no account of commercial issues. That is patently in need of reform. Aviation does not operate in a vacuum regardless of costs and the cost/benefit/safety issue is a continuing balance process for industry.

Even the expression 'primary interest being air safety' has no meaning unless it is balanced against something. The law must acknowledge the reality of the expense and cost of aviation when assessing 'safety' issues.

**2. Constitutional Reform:
Aviation law should be the exclusive province of Commonwealth Law.**

Aviation requires a centralised legislator with aviation power over all matters to do with flying. The air system including its airports, should be seen as part of the National Estate. It is complex enough without the unbearable tangle of jurisdictional gaps and arguments that still abound.

This reform must include the issue of access to and management of airports, including ground management to be answerable to Commonwealth laws regardless of the local law.

The legal precedent to do so is apparent from review of the Corporations Law. (Indeed most Australians are surprised to discover that this is not the case).

This historical appendix arises from aviation being non-existent at the time of the creation of the Commonwealth, yet in the same manner as Corporations law, it is a matter of national interest and should be managed in that way. In short it is almost certain that all political parties and all Governments would

have this done; indeed most Australians would probably be surprised to find that national aviation is fragmented by constitutional issues.

3. Air Crash Compensation:

All air crash compensation should be subject to the cap of compensation payment placed on personal injury compensation where injury and death arise.

The brevity of discussion below concerning this proposition should not mask the urgency and significance of this proposed reform.

The no-fault compensation cap in the Civil Aviation (Carriers' Liability) Act which now applies to all passengers on commercial airliners should be extended to all personal injury arising from all air crash events.

Insurance in respect of the (current) \$750,000 cap should be part of a compulsory third party insurance scheme.

This reform would be possible if there were a unified Commonwealth related law.

4. Air Crash Compensation Payment:

Payment for injury and death in the current no-fault system should be required to be completed within two years of claim.

The whole of the face value of a claim under this law should be paid into court upon the initiation of a claim. The amount to be paid to the claimants should be paid from that sum and the balance should be returned to the appropriate insurer. The law should be changed to incorporate this much needed reform.

This critical issue is mostly hidden from public view, but is a source of unnecessary pain to the families of victims and a constant cost burden for little or no benefit to anyone.

Too many years go by in valueless, legalistic, jurisdictional arguments about a payment the legislature has promised on a fault-free basis.

5. Management of an Air Operation under Attack by CASA:

Operational Receivers: Where an enterprise is seen to be at risk an operating Receiver should be appointed.

At present, it is open to the CASA, on its own initiative, without warning, to shut down any air permission, licence or certificate. This has caused great personal, financial and consequential harm. The fact of this power is known and has frequently deterred investment in aviation.

Where concerns exist in the CASA about the risk to passengers because of operating style or techniques, the CASA can at present embark on a set of

court-based actions which in practice can shut down and damage industry, despite the existence of legal safeguards. This can amount to an ambush. Safeguard exist but those safeguards work too slowly and too expensively for business when it has been shut down and deprived of income, whilst exposed to ongoing costs.

Before any precipitate action is taken by the CASA it should give fair warning including where appropriate the proposed appointment of an Operational Receiver (as per this proposition).

A separate intervener, invigilator or authority in the nature of a commercial Receiver should allow real-time management of an enterprise under threat from the CASA. Such a person would be required actively to investigate issues whilst managing operations. That Receiver would inform the parties and/or the Court in the event of disagreement of his opinion of the worth of continuation of operations, whether in the short term or otherwise.

Such 'Receiver' would not be answerable to the CASA but to an appropriate authority. The Receiver would have appropriate indemnity. Such a process would offer protection at all levels, including major airlines, shareholders, financiers and indeed, passengers.

Protection of an invested asset base will generate confidence in the relationship of the CASA and industry. Legitimate business should not be destroyed by legal costs carried on when the operator is denied income. That denial of income is tantamount to suffocating the industry and of itself achieving a result which legislation has taken care to preserve.

**6. Criminal Prosecutions:
The reversal of onus of proof should be extensively reviewed**

The general process of imposing strict liability should be reversed. Offences of strict liability imply that the person charged with the offence must, in general terms, disprove guilt.

This is not just an issue of aviation, it is an issue of the fundamental rights of the Australian people when attacked by Government.

I have frequently seen the repressive nature of air laws deter involvement and investment in aviation. They must prove innocence when in fact they may well be innocent. Innocent infractions, if worthy of legal reprisals at all, should be dealt with for what they are worth, not as the basis of gaining convictions, well known as existing for many years in the offender's CASA dossier for crimes, which may be no more than trivial but glorified by prosecution which was not defended to the last.

That said, the major crimes in the criminal law will generally suffice.

7. The Absence of Trust between Industry and the CASA must be cured: Trust must be established in the professionalism of the CASA and its actions must be relied on for probity.

The CASA must be seen to act fairly and with respect to rights. The laws which enable unilateral, destructive action should be altered.

Building trust in the CASA by industry and vice versa, will address CASA's central present flaw.

Aviation is, in the end, controlled by the Parliament according to law. The nature of politics leads to a come and go management.

Management and discretionary decisions being left to the CASA has led to a state of mind that it is an overall overseer of the industry as a whole. The paternalism is all pervading, often not noticed by the aviation industry itself.

General aviation, as widely described in the AOPA submission to this Review, thus sees itself under the direction only of the CASA which appears not to be answerable to any authority. This leads to doubt and mistrust. The paternalism commences with initial licencing, medical matters, the layout of offices and classrooms, even to stitching on seats in aircraft. It is all pervading.

No capital investment: Clear evidence of this distrust can be seen by looking at the General Aviation infrastructure. Airports, such as Bankstown airport at Sydney, are a ramshackle bunch of buildings, all built on temporary deals and niggardly investment because there is no faith in the system.

After a brush with the CASA, it is frequently the case that the person concerned will leave the industry: lack of trust in a system which turns on the participant is the constant root cause. Once trust has been lost by the behaviour of the CASA that participant will leave, even when a successful outcome has occurred.

8. The United States of America Federal Aviation Authority ('FAA') system of laws including the FAA future policy should be adapted to Australia as a working, acceptable, less argumentative system.


This has been widely shown to be effective and positive by reference to the New Zealand model. Australia will be well served if it accepts that such a process both works well and is consonant with the environment in which the aircraft actually in use have been constructed.

The air fleet and its operation in Australia is essentially built on the American model.

Australia should adopt the American processes for its General Aviation ahead of the threatened European rules and in particular, should closely follow the

American FAA proposals for the future of aviation, presently being promoted
in the USA.

Yours truly, 


Spencer Ferrier
Lawyer
Sydney NSW 2000

