Australian Airline Pilots' Association
Member of IFALPA

Suite 6.01, Level 6
243-249 Coward Street
Mascot NSW 2010

T. +61 2 8307 7777
F. +61 2 8307 7799
E. office@ausalpa.org.au

02 September 2018

Jason McHeyzer
Manager Regulation Development and Implementation Branch
Aviation Group
Civil Aviation Safety Authority
GPO Box 2005
CANBERRA ACT 2601

Email: regulatoryconsultation@casa.gov.au

Dear Jason,

AusALPA SUBMISSION ON CASA PARTS 121 AND 119 PUBLIC CONSULTATION DRAFTS

The Australian Airline Pilots' Association (AusALPA) represents more than 7,500 professional pilots within Australia on safety and technical matters. We are the Member Association for Australia and a key member of the International Federation of Airline Pilot Associations (IFALPA) which represents over 100,000 pilots in 100 countries. Our membership places a very strong expectation of rational, risk and evidence-based safety behaviour on our government agencies and processes and we regard our participation in the work of the Australia's safety-related agencies as essential to ensuring that our policy makers get the best of independent safety and technical advice.

GENERAL COMMENTS

Supporting Documents

Despite the best efforts of Scott Watson and his team, for which we are most appreciative and applaud, we find it to be a somewhat unnecessary struggle to properly consider proposed legislation that relies heavily on secondary documents that are not complete or consistent across the operational parts. To that extent, we must qualify our comments on the basis that they are made according to the material before us, knowing full well that the documents and some policy matters are not in their final form or are yet to be developed.

Drafting Style

We have made the point previously that the legal drafting, while perhaps satisfying for lawyers, is not assisting the industry's understanding of the legal framework under which they operate. It is difficult to see how much of the proposed legislation satisfies any common or ordinary meaning of "plain English" and AusALPA would be very disappointed if the end result of the regulatory development is an increase in industry non-compliance through lack of clarity.

Strict Liability

AusALPA views the Government's approach to strict liability in civil aviation law to be an unrealistic and unhelpful use of this type of provision. It represents an overly simplistic approach to compliance that focuses on pilots without sufficient, if any, regard to operational circumstance or safety outcomes. A recent example of this type of unfairness was CASA's pursuit of the pilot involved in the Westwind ditching off Norfolk Island as distinct from the neutral approach that CASA adopted towards the operator, as revealed by the Senate Inquiry.

We recognise that there is a place for strict liability offences and that the unusually high level of regulation in aviation will likely result in a higher than normal number of such offences.

However, there seems to us to be an increasing propensity to deliberately reduce complex systems to a series of simple isolated factors whose purpose is primarily to support strict liability penalty provisions, rather than to address the real safety outcomes when those factors are part of a dynamic and interactive operational environment. This "tail wagging the dog" approach to compliance and enforcement often means that few organisational malaises are redressed or even mitigated and those who have the greatest influence and control over corporate culture inevitably escape attention, let alone sanction.

AusALPA has no evidence to date that suggests in any discernible way that CASA, DIRDC or any of the Attorney-General's portfolio agencies have done any review or reconsideration of the wholesale application of strict liability provision to civil aviation offences.

That situation was, and remains, unacceptable to us.

We have been told that a review has been planned at some future date. We have also been told that the review will be conducted separately from the operational teams developing the rule sets and, most likely, exclusively by legal practitioners from the various Government entities involved in producing civil aviation legislation. AusALPA is strongly opposed to this approach.

Any review of strict liability provisions in civil aviation law must be conducted primarily as an operational activity in the first instance. Secondly, any relevant legal advice should preferably come from external sources such as the Australian Law Reform Commission rather than from the people who may well be motivated to minimise change and to preserve the status quo. In any event, such a review is essential and urgent.

Penalty Provisions

In 1990, when the CAA licensing rules were rewritten to become Part 5 of the CARs, the operational drafters reviewed each provision and applied maximum penalties drawn from the range of 5, 10, 15, 25 and 50 penalty units. Judgement on proportionality was applied very carefully, both to reflect the balance between administrative and safety outcomes as well as to provide guidance to the courts on the relative severity of the offence.

Today, we find that what were once considered to be minor offences, indicated by low range penalties, have morphed into major offences attracting the maximum allowable penalties of 50 penalty units. There are very few, if any, offences that vary from this apparently default level of maximum penalty.

AusALPA can find no public evidence of a formal process that changed the original risk and preservation of evidence assessments to a penalty scheme for which virtually every offence attracts the allowable maximum. The complete lack of transparency of such deliberations can only create distrust among those most affected. This is particularly so when the regulations appear to have adopted a much narrower class of persons committing offences, in many cases removing operators from the spotlight. It is far from clear to us why CASA has chosen to resile from adopting the broadest range of potential offenders, reflective of a true safety systems focus.

Has CASA withdrawn from providing guidance to the Courts on relative severity of offences, leaving the Courts to determine proportionality simply on the basis of the arguments presented in each case? Has the concept of system safety fallen out of favour within CASA in preference to targeting only pilots, many of whom have no real or effective protections whatsoever in preserving their livelihoods when faced with conflict between safety and commercial outcomes?

AusALPA strongly asserts that there must be a transparent process that re-examines all of the penalty provisions in accordance with a publicly available doctrine and that includes relevant stakeholders. Once again, this review process must be an operational review rather than a legal practitioner's review in the same vein as we set out above for the review of strict liability provisions.

Strict Liability and Penalty Review Timing

AusALPA considers both these reviews to be urgent.

Part of the development of any new rules must be demonstrations of good faith by the regulator that the imposition of penalties, both administrative and criminal, are the outcome of well-considered, systematic and proportionate assessments of the gravity of each offence. It is critical that the reviews are not seen to be self-serving internal processes, since the required collateral outcome is the building of trust in the way that the regulator meets its duty to the Australian public, rather than to itself.

PART 121 REGULATIONS COMMENTS

Readability of the Documents

AusALPA has engaged many of our representatives and staff to review the various CASR Flight Operations Parts. A recurring theme of comment is regarding the difficulty with reading the documents and understanding the linkages and interrelationship with other sections in either the relevant associated MOS, or to the other CASR Parts. One means of improving this would be to apply a consistent method of indexation and subpart division across all these, and other, CASR Parts.

When solely considering the indexation of the draft documents, AusALPA finds that the draft documents for Part 121 to be the closest to a good example of readability, with improvements still possible. Within the draft Part 121 documents, the subpart in the regulations (the Part) corresponds to the subpart within the MOS. For example, subpart N within the Part is for Flight Crew and this is provided in almost the same manner within the MOS where there is at least an annotation in parentheses as such "CHAPTER 6: (SUBPART 121.N – Flight crew)".

We believe that it would be quite beneficial to the user of the documents if the MOS subparts were annotated as they are in the CASR Parts. This should also be applied to all other CASR Parts and associated MOSs. Continuing the example, subpart N –

Flight Crew, should be annotated the same across all the flight operations CASR draft documents, rather than the current situation:

Flight Ops CASRs: Useful Subpart Indexation Consistently Applied					
CASR Part #	91	119	121	133	135
Part	Yes	Yes	Yes	Yes	Yes
MOS	No	Nil MOS	Partially	No	No

With the exception of Part 119, all the other four Parts have subpart linkages to and from Part 91. There exists some consistency across the regulatory Parts but it is within the MOSs that there is considerable inconsistency. AusALPA believes that this is an area of amendment that must be addressed prior to the final rulemaking.

AusALPA would like to acknowledge the presence of some useful linkages provided in the draft documents. Within CASR 121.005, paragraph (2) provides a useful table to outline which Part 121 regulations supersede those in Part 91. However, beyond those regulations that supersede others, there are many other regulations where Part 91 requirements continue to apply and in some instances, this has been annotated with a very useful note. For example, within CASR 121.025:

> **121.025 Compliance with flight manual**
>
> (1) The operator of an aeroplane for a flight contravenes this subregulation if the aeroplane is operated in a way during the flight that does not meet a requirement or limitation that:
>
> (a) is set out in the aeroplane's flight manual; and
>
> (b) relates to the operation of the aeroplane.
>
> Note: The pilot in command of the aeroplane must also ensure the aeroplane is operated in accordance with the aircraft flight manual instructions: see regulation 91.100.

AusALPA finds that this is a most useful note and we firmly encourage the provision of this type of note as much as possible. Unfortunately, we find that this is currently a limited example. For instance, a similar note linking CASR 121.055(2) and (3) to the CASR 91.115(2) would be equally useful and there are most likely other opportunities to replicate this method and in turn, improve the readability, comprehension and compliance of the CASRs by users

AusALPA notes that the Draft AMC/GM includes some (but not all) cross-references, which we presume will migrate to the MOS, however it is our preference for the linkage-note to be in the primary legislation.

Flight Planning Requirements and CASR linkages

CASR 121.165 outlines flight planning requirements including the flight preparation weather assessment requirements. We note that the MOS doesn't provide further guidance on this point but the Part 121 AMC does. Within the AMC, there is mention that the requirements for weather assessments are set out in the Part 91 MOS. The AMC does not specifically point to the relevant section of the Part 91 MOS to be referenced. It is not until a path of enquiry locates Part 91 MOS section 7.03, that it becomes clear that it is permissible for flights, unable to obtain an authorised weather forecast before departure, to depart and subsequently obtain the weather assessment (pursuant to certain conditions).

AusALPA believes that the absence of a note cross-referencing the Part 91 MOS makes the pathway to enlightenment unnecessarily difficult, particularly if you are expecting more stringent Part 121 requirements in this context. There needs to be a consistent approach to alerting a reader to another documented process such as this, if not in the parent regulation, then certainly in the appropriate MOS entry.

Compliance with Exposition

AusALPA considers that CASR 121.035 (and the similar requirements in other operational parts) would be better placed in Part 119.

Cockpit Authorisation and Briefing

AusALPA notes that CASR 121.110(3) is not exactly the same as ATSR 4.67(4). CASR 121.110(3)(b) requires dual permission whereas ATSR 4.67(4)(a) requires "either/or". CASR 121.110(3)(d)(i) creates 'exposition procedures' and a potentially circular argument, since it seems to us that it could be construed that an authorisation in the exposition is an authorisation under the CASRs.

AusALPA finds that it isn't entirely clear what CASA has intended in this regard we believe further clarification is essential.

IFR and VFR Operations within Part 121

AusALPA believes that CASR 121.120, which states that Part 121 operations must be conducted only under the IFR, requires an amendment so to address its inconsistency with Part 121 Subpart Z. Part 121 Subpart Z permits certain operations under the VFR. AusALPA believes that CASR 121.120 should include a note acknowledging the exception available under Subpart Z.

Adequacy of Aerodromes to Provide Facilities so to Actually be an Adequate Alternate

CASRs 121.130 *Flights further than the 60 minute distance* and 121.135 *Flights further than the threshold distance* rely on the concept of an "adequate aerodrome". None of the various definitions precisely set out what an adequate aerodrome's "services and facilities" must include.

AusALPA is concerned by the practice of nominated particular aerodromes as planning alternates where the available services and facilities are totally inadequate to deal with a diverted aircraft with lots of passengers. We therefore request clarification of CASA's regulatory intention - does an adequate aerodrome used for EDTO and non-EDTO planning have to satisfy the same requirements in regard to ground and passenger handling as a normal destination aerodrome would under current CASA AOCM inspection and approval procedures?

Suitability of Aerodromes - VASIS and Aircraft Engine Types

AusALPA acknowledges the importance of Visual Approach Slope Indicator Systems (VASIS) in maintaining stabilised approaches and believes that the conditions listed in CASR 121.205 *Aerodrome requirements* should be amended to include the following concepts:

121.205

(3) The operator and the pilot in command of an aeroplane for a flight each contravene this subregulation if:

(b) the aeroplane is of Performance Category B or greater (PANS Doc 8168 Sec 1.3 Categories of Aircraft) and/ or .

(c).

(i) the pilot of any type of aeroplane may have difficulty in judging the approach due to—

(a) inadequate visual guidance such as is experienced during an approach over water or featureless terrain by day or in the absence of sufficient extraneous lights in the approach area by night; or

(b) misleading information such as is produced by deceptive surrounding terrain or runway slopes:

(ii) the presence of objects in the approach area may involve serious hazard if an aeroplane descends below the normal approach path, particularly if there are no non-visual or other visual aids to give warning of such objects:

(iii) physical conditions at either end of the runway present a serious hazard in the event of an aeroplane undershooting or overrunning the runway:

(iv) terrain or prevalent meteorological conditions are such that the aeroplane may be subjected to unusual turbulence during approach.

(4) The requirement is that:

(a) the runway is equipped with an approved visual approach slope indicator system in accordance with Part 139

We provide the above suggested amendments based on the following rationale:

1. AusALPA advocates that any requirement for Visual Approach Slope Guidance (VASG) should be separate from the type of propulsion system the operating aircraft uses. This current methodology of discriminating between requirements can be largely considered outdated and no longer applicable, particularly considering the size and performance characteristics of many turboprop aircraft in comparison to jet aircraft of similar size.
2. Turboprop and turbofan aircraft of similar sizes are operated by airlines which have stringent stable approach policy criteria. These policies focus on nominal approach profile management, promoting the safe operation of an aircraft during the approach and landing phases of flight. These policies have been introduced to prevent runway excursions, whilst vertical guidance also provides an element of risk mitigation to Controlled Flight into Terrain (CFIT). AusALPA, like the many airlines, recognises the importance of stable approach policies and the essential application of such a policy irrespective of the aircraft engine propulsion type.
3. There are other factors, irrespective of the type of aeroplane (as recommended in Annex 14 Section 5.3.5.1), where it is appropriate for safety reasons for VASIS to be available.

AusALPA recognises that there will be instances of inoperability of VASIS and we therefore support the inclusion of provisions for these instances in the regulations.

However, we caution against the use of the exception clauses to provide a permanent abrogation of the safety purposes behind the provision of VASIS.

Apron Lighting for RPT

In tracking the transfer of existing requirements across to Part 121, AusALPA notes that the apron lighting requirements for RPT operations published in AIP ENR 11.8.1 have not found a home in Part 121. While that may be because an appropriate instrument does not exist to justify the AIP "rules", the requirements seem eminently suitable and we recommend that they should be brought into the new regulations.

Stabilised Approach Requirements

CASR 121.195 now makes a specific offence of failing to comply with stabilised approach procedures in the exposition. It is not clear why the general requirement to comply with exposition procedures in CASR 121.035 is insufficient or why the specific regulation of stabilised approach procedures needs to be separated from the list of things that otherwise must be included in an exposition. The appropriateness of making this an operator offence is also unclear. This appears to be an unnecessary regulatory addition that should be removed.

Aerodrome Requirements

AusALPA notes that sub regulation 121.205 (2) (a) requires that the aerodrome must be suitable for the aeroplane to take-off and land. "Suitable" is used frequently throughout the regulations but it is rarely defined. The Macquarie Dictionary (the standard for the 'ordinary' meaning) only says "such as to suit; appropriate; fitting; becoming" which could never be held to be an **objective** standard. AIP ENR 11.8.1 partially addresses suitability but not completely. We believe that this should be specifically defined in the MOS, both for primary and alternate purposes. Some aspects related to 'suitable' are picked up elsewhere, such as for EDTO, but there is no single compendium of what constitutes 'suitable' from an overall compliance perspective.

Fuel Requirements

AusALPA maintains our concerns that the unwavering focus of ICAO Doc 9976 Flight Planning and Fuel Management (FPFM) Manual on enroute alternates has resulted in inadequate consideration on planning for alternates that are "beyond" the destination aerodrome. It is abundantly clear that CASA's attitude and the MOS are based on the same enroute alternate myopia. CASA reiterated at the Part 121 TWG that CASA views requiring depressurised additional fuel to a beyond alternate was "double jeopardy", regardless of the destination forecast and likelihood of diversion. AusALPA believes this analysis to be flawed and results in an unnecessary level of risk when no additional fuel is carried to cater for depressurised diversion to a 'beyond' alternate.

Furthermore, AusALPA is concerned that the destination alternate fuel option for isolated aerodromes is only likely to provide an equivalent level of safety if the local topography is such that adverse weather will clear relatively quickly. There does not appear to be any mention of the special cases of Christmas and Norfolk Islands, where it is not unusual to have unforecast adverse weather that remains for several days rather than less than 90 minutes.

Cosmic Radiation Limits

AusALPA notes that the CASR 135.375 partially reflects single dose limits in accordance with ICAO Annex 6 para 4.2.11.2 based on Concorde operational advice from the early 1970s. The referenced ICAO Circular 127 was produced in 1975 and is based on ICRP Publication 9. The latest relevant ICRP document is Publication 132 Radiological Protection from Cosmic Radiation in Aviation and the latest Australian document is ARPANSA RPS-G2 Guide for Radiation Protection in Existing Exposure Situations. While CASA at the Part 121 TWG flatly rejected updating this series of regulations on the basis that none of those documents were standards, we are compelled to make the point that Australia need not hide behind the ICAO standards development 'tortoise' to adopt a modern approach that protects aircrew against potential long-term health consequences for which we require lifetime public health records to provide the statistical data. Operations above 26,000ft can result in significant doses and we strongly recommend that flight crew radiation exposure doses should be individually monitored and optimised to ALARA levels unless competent analysis shows that no flight crew member will be exposed to in-flight radiation of 1 or more mSv per year.

ARPANSA RPS-G2 includes the following:

> **4.3 Aircrew exposure to cosmic rays**
>
> Aircrew are exposed to elevated levels of cosmic radiation while flying at high altitude. In Australia, it is expected that an assessment of exposure for aircrew of all domestic and long-haul crews would be warranted. The ICRP, in Publication 132 (ICRP 2016), recommends that a reference level in the 5-10 mSv y-1 range is selected by employers. The selected reference value is not a dose limit, but represents the level of dose below which exposure should be maintained and reduced as low as reasonably achievable, taking into account economic and societal factors. For Australia, a reference level of 6 mSv y-1 (see Annex A), is considered appropriate. Where the doses of aircrew are likely to exceed this reference level, and it is not possible to reduce exposure below this reference level, then the relevant clauses for occupational exposure in planned exposure situations as described in the Code for Radiation Protection in Planned Exposure Situations, RPS C-1 (ARPANSA 2016) apply.
>
> For pregnant aircrew, additional protection of the embryo/foetus must be considered. The working conditions of a pregnant worker, after declaration of pregnancy, must ensure that the additional dose to the embryo/foetus would not exceed about 1 mSv y-1 during the remainder of the pregnancy. If a reference level is in use by employers, dose records or other pertinent assessment are to be kept to enable the optimisation of the reference level.
>
> Radiation doses from cosmic radiation received by occasional flyers is sufficiently low that there is no need to warrant the introduction of protection measures. However, the ICRP recommends that general information about cosmic radiation associated with aviation be available for all passengers (ICRP 2016). Frequent flyers are considered as public exposure and are treated in the same way as occasional flyers (ICRP 2016).
>
> The ICRP, in Publication 132 (ICRP 2016), recommends that, frequent flyers who have exposures comparable to aircrew should be managed as occupationally exposed on a case-by-case basis according to prevailing circumstances. This may result in individuals assessing their own exposure using freely available dose calculators in order to be aware of their exposure and adapt their flight frequency if they feel the need and therefore use this information to engage with their employer, if appropriate.

CASA approvals relating to Take-offs and Landings - OEI

CASR 121.450(2)(b) requires CASA approval to conduct a OEI ferry. AusALPA noted within the Part 121 TWG that, in the case of the BAe 146/RJ, and probably others, OEI ferries were not that unusual and were conducted as and when required in accordance with the AFM. If it's an AFM procedure, CASA approval should not be required. The regulation should provide for that specific provision.

First Aid Oxygen Definition

CASR 121.590 addresses first aid oxygen for pressurised aeroplanes. As was provided in relation to the Part 91 consultation, AusALPA recommends that CASA properly define "first aid oxygen", along the lines of either FAR 121.333(e)(3) or EU CAT.IDE.A.230 that makes it clear that first-aid oxygen is solely for "passengers who, for physiological reasons, might require oxygen following a cabin depressurisation" or "those passengers who still need to breathe oxygen when the amount of supplemental oxygen required under CAT.IDE.A.235 or CAT.IDE.A.240 has been exhausted". It should be preserved and not used for passengers or cabin crew who are feeling the need for a little non-operational oxygen therapy.

Given that the dictionary includes a definition of supplemental oxygen, AusALPA believes that it is entirely logical to define first aid oxygen and recognises that this would be consistent with other jurisdictions.

Flight Above Flight Level 200 - Relief of Pilot in Command

AusALPA notes that CASA has advised that FL200 is a fixed level provided in CASRs 121.740(3), 121.745(3) and 121.750(4), for the purposes of a harmonisation measure. However we recognise that this is not the only method of dealing with this issue and it appears that EASA may be the only agency that uses this specific altitude for cruise relief. AusALPA would like to suggest that instead of a fixed altitude, operators should be allowed to determine in their exposition the safe altitude to allow cruise relief pilot rotation.

Qualifications of Pilots – Part 121 PICs must hold an ATPL

AusALPA believes that the qualification aspects of CASR 121.715 requires a review and amendment so to address its inconsistency with Part 121 Subpart Z operations, as these operations may be conducted in non-transport category aircraft and are possibly single pilot operations. Para (2)(c) of CASR 121.715 provides that the pilot in command must hold an air transport pilot licence. It is unclear if this sub regulation is intended to apply to single pilot operations, which would mean that the pilot is required to hold an ATPL when a CPL would normally suffice.

Qualifications of Pilots – Ratings and Endorsements

AusALPA finds that the references to Part 61 qualifications found within Part 135 are inconsistent and currently insufficient. AusALPA believes that it is correct to clearly provide an obligation on operators that they must ensure that crew operating their aircraft are authorised and qualified to do so, as per Part 61. Currently though, the draft operational Parts (Parts 121, 133 and 135) provide differing and inconsistent obligations for this responsibility both within and between Parts.

The following table outlines and displays the inconsistencies found in the draft CASRs on the matter of an operator's obligations to ensure that a pilot assigned to duty for the flight is authorised under Part 61 to pilot the aeroplane or rotorcraft for the flight:

Operator's Obligations to ensure that a Pilot is qualified as per Part 61			
	Part 121	**Part 133**	**Part 135**
Flight Crew Rank:	Sub Reg Reference	Sub Reg Reference	Sub Reg Reference
PIC	NIL Exists	Yes, 133. 685 (2) (d)	Yes, 135.760 (2) (d)
Co-pilots	Yes, 121.720 (2) (b)	NIL Exists	NIL Exists

As we can see here, there even exists inconsistency in the operational Parts between whether it is the PIC or Co-pilot (including Cruise relief co-pilots) regarding the Part 61 qualifications obligations on operators.

We propose that the Part 61 requirement is necessary and should be added to the sub regulations where it is currently absent.

Qualifications of Pilots - NTS/HF

AusALPA finds that there are inconsistencies in the draft CASR Flight Operations Parts in relation to an operator's responsibilities to ensure that flight crew have completed the required Human Factors (HF) and Non-Technical Skills (NTS) training as per the draft Part 119 (Division E.2—Training and assessment in human factors principles and non-technical skills).

For example, in the current draft Part 121, CASR 121.715(2) includes this requirement:

> (d) the pilot has successfully completed the aeroplane operator's training in human factors principles and non-technical skills relevant to the duties of a pilot in command

We believe that this Part 121 HF/NTS requirement on operators regarding pilots in command is wholly consistent with Division E.2 of CASR 119 but note that for other Part 121 crew, there isn't a corresponding regulation to address this operator obligation. Co-pilots, Cruise relief co-pilots and indeed, Cabin Crew must all receive the type of training outlined by the mentioned Part 119 sub regulation and thus, there should be a corresponding and consistent sub regulation provision applied to all the crew qualifications sections. Thus we make specific note that these HF/NTS training and qualification obligations for operators should also be reflected in subpart 121.P—Cabin crew as well as the relevant Co-pilot and Cruise relief co-pilot qualifications.

Initial and Conversion Training Requirements

Subsequent to CASRs 121.790 *Meeting initial training requirements* and 121.795 *Meeting conversion training requirements*, AusALPA notes the inclusion in the draft Part 121 AMC/GM of the discussion on the terminology "initial" and "conversion" training, including CASA's post-consultation intentions. We suggest that the explanatory descriptions "induction training" and "transition training" used in that discussion are suitable replacements - they will achieve the aim of preventing confusion with historical terms and are already contextually correct in the industry vernacular.

Cabin Crew Ratios, Numbers and Ambiguous Terms

AusALPA believes that the role of Cabin Crew in ensuring safety and security is essential and that a reduction in Cabin Crew numbers on board Australian aircraft

diminishes this safety and security role and unnecessarily increases risks for passengers and other crew members. As the safety voice of Australian pilots, AusALPA believes that there has to be a more holistic approach taken to the question of cabin crew ratios. These ratios must be determined by all the relevant factors - evacuation capability requirements of the manufacturer, the human factors effects of fatigue on crews as well as the implications on aircraft security.

With regard to the matter of fatigue management for Cabin Crew, AusALPA notes the House of Representatives Standing Committee on Infrastructure and Communications Inquiry report: *Finding the Right Balance: Cabin Crew Ratios on Australian Aircraft (March 2017)* included a recommendation (5) from the committee that "the Civil Aviation Safety Authority ensure that Australia becomes compliant with the International Civil Aviation Organization's Standards and Recommended Practices (ICAO SARPs) relating to Cabin Crew flight and duty time limitations as a matter of priority".

ICAO Annex 6 Part 1(Tenth Edition, July 2016) at section 4.10 *Fatigue Management* says:

> 4.10.1 The State of the Operator shall establish regulations for the purpose of managing fatigue. These regulations shall be based upon scientific principles, knowledge and operational experience with the aim of ensuring that flight and **cabin crew** members are performing at an adequate level of alertness. Accordingly, the State of the Operator shall establish:
>
> a) regulations for flight time, flight duty period, duty period and rest period limitations; and
>
> b) where authorizing the operator to use a Fatigue Risk Management System (FRMS) to manage fatigue, FRMS regulations. [emphasis added]

The March 2017 document outlines reasons provided by CASA to defer acting upon the recommendation from the Government committee and the above mentioned ICAO SARP. However, AusALPA notes that there isn't a corresponding delay to the widespread introduction of an increase to Cabin Crew ratios as there is with the establishment and introduction of fatigue and duty limits for Australian Cabin Crew. We also note that the Government committee provided that the recommendation be acted upon "as a matter of priority" and that the related ICAO SARPS on this matter have been in existence for a considerable amount of time. Furthermore, CASA's own guidance material (CAAP 208-1(0): Cabin Crew Ratios) speaks positively about an initiative "to reduce the number of current differences between ICAO Annex 6, Part I and Australia's CARs and CAOs..

AusALPA believes that Cabin Crew ratios should not be unilaterally increased but if such an increase is unavoidable, then it is of heightened importance that it be recognised, and acted upon, that a reduced number of Cabin Crew in Australian aircraft will have an adverse effect on Cabin Crew fatigue and therefore safety and security related risks. An increase in ratios for all operators certainly won't help improve the situation. In any event, it should be recognised that CASA has delayed and deferred the establishment of fatigue management rules for Cabin Crew for far too long and that this is unacceptable regardless of an increase of Cabin Crew ratios or otherwise.

We recognise that lobbying for this ratio change has not been a new initiative and we are also aware that there are already many operators that have an exemption to the 1:36 ratio. AusALPA maintains an in principle objection to these exemptions and the recent proposal for the adoption of the increased ratio as a standard. However we note that these exemptions have occurred and currently occur with the use and requirement

of a Safety Risk Management Plan (SRMP). The draft regulations within Part 121 and those found within Part 91 (91.1465 Cabin crew — number) are void of this risk assessment and management plan requirement. AusALPA finds this to be an additional regression for the management of safety and security in Australia's aircraft cabins. This regression is further amplified by the provisions within CASR 121.915.

The draft regulations allow for a reduced number of Cabin Crew but only in "unforeseen circumstances".

> **121.915 Operating with a reduced number of cabin crew**
>
> (1) An aeroplane operator's exposition must include:
>
> (a) the circumstances in which the aeroplane may be operated for a flight with a number (a reduced number) of cabin crew members that is fewer than the number of cabin crew members required for the flight by subregulation 121.880(2) or (3) (as the case requires); and
>
> (b) procedures for operating the aeroplane for the flight with a reduced number of cabin crew members; and
>
> (c) procedures for notifying CASA of the reduced number of cabin crew members carried on the flight.
>
> (2) Circumstances may only be included in the operator's exposition in accordance with paragraph (1)(a) if the circumstances are unforeseen and beyond the operator's control.
>
> …

AusALPA recognises that CASR 121.915(3) provides that the potential reduced number must not be reduced below the proposed 1:50 ratio, however we believe that the terms "unforeseen circumstances" and "out of the operator's control" are very subjective terms quite open to potential misuse and misinterpretation. If an operator hasn't rostered enough reserve Cabin Crew and a scenario arises to enact CASR 121.915, is it really "beyond the operator's control" to not have provided an adequate number of reserve Cabin Crew?

AusALPA finds the use of highly subjective clauses to be problematic and moreover, the inclusion of an example, of what may be just one of many possible examples, is both potentially misleading and constitutes the provision of pseudo guidance material within regulation. Guidance material is more properly provided through other publications such as AIMs, AMCs a CAAP or even through the associated MOS. This will allow for a much more thorough provision of guidance of how and when the regulation is actually applicable and useable. The example provided within CASR 121.915, should be removed. AusALPA believes that this should also occur for CASR 121.910, noting that there the same highly subjective terms used.

AusALPA believes that the important and necessary role of Cabin Crew is being undermined by many aspects of the draft Subpart 121.P and by the absence of Cabin Crew Fatigue Rules. The role of Cabin Crew in ensuring safety and security is essential and allowing for reduced Cabin Crew numbers and lose excuses for circumstances where reductions are further allowed, is contrary to good safety and risk management. This is especially so in the absence of any Cabin Crew fatigue management rules to assist in mitigating safety and security risks in the cabin. It must not be forgotten that Cabin Crew are responsible for safely evacuating passengers in an emergency, protecting the cabin and the passengers against any security threat and, cabin crew are the first responders to on-board medical emergencies.

Subpart 121.Z - Application in Practice

CASR 121.1015 refers to the application of Part 135 to certain Part 121 operations.

In the absence of any further advice in the draft Part 121 AMC/GM or the so-called Technical Draft of a Part 121 MOS, AusALPA is not entirely clear how Subpart Z is intended to apply in practice. Is it all or part of Part 135 that applies? Clearly, the Part 121 restrictions on IFR don't fully apply but does this particular type of operation require an ATPL rather than a CPL? The current draft documents suggest that this is required however, these particular issues and the general applicability of this subpart suggests to us that a more general review of the practical functionality of subpart Z to Part 121 is required.

PART 119 REGULATIONS COMMENTS

Definition of Australian Air Transport Operation

We note that CASR 119.010 (1) (d) (iii) refers to flights conducted by a foreign operator within Australia that are "not undertaken as part of a flight into or out of Australian territory". Our questions are, when does a so-called 'tag' flight stop being part of an international flight and become a domestic flight? And, who decides - CASA or DIRDC?

Definitions for Part 119 - Officer

AusALPA notes that both sub-paras of CASR 119.030 use the term "executive officer". However, the definition of "executive officer" in the Corporations Act was repealed in Act No 103 of 2004 and replaced by the "officer" definition. The CASR 119.003 definition certainly does not reflect the current Corporations Act definition, thus we believe it to be essential that CASA clarifies to whom does they intend this to apply?

Definitions for Part 119 - Significant Change

Given the existence of the definition in CASR 119.025, AusALPA finds the CASR 119.030 reference to be an unnecessary provision.

Australian Air Transport AOC Required

With reference to CASR 119.060, AusALPA is unsure why this is only a 50 PU offence in comparison with the s20AA and 20AB offences under the *Civil Aviation Act 1988*?

AOC Conditions for Issue - Fit and Proper Test

CASR 119.080(1)(d) extends the "fit and proper" test to "each officer of the corporation". AusALPA finds it unclear what the test is that CASA applies, how far down the organisation's tree does "each officer" reach and how does this juxtapose with the requirements of officers under the Corporations Law?

Conditions of an Australian air transport AOC

CASR 119.090(1)(c) makes it a condition that "each of the positions of the operator's key personnel must be filled". AusALPA is curious as to how this is intended to play out in real life. Nonetheless, CASR 119.100 (3) allows an unapproved person to be permanently appointed to a vacant key position without CASA approval being

requested for a further 3 days. We are immediately curious as to what authority can that unapproved person exercise and how valid are their decisions, as well as to how long that this situation might persist.

Part 119 Consultation – Absence of a TWG and a MOS

AusALPA believes that the current consultation process for Part 119 to be somewhat deficient. Part 119 was "consulted" as an add-on to Part 135 and other flight operations Parts. In all cases, AusALPA understands that there was insufficient time, both in preparation and during the TWGs, to properly consider Part 119. We are aware that the Part 121/119 TWG process unequivocally identified that Part 119 was not ready for public consultation and that considerable further work was necessary. The report of the Part 121 TWG to the ASAP is potentially misleading in that Part 119 was only briefly and incompletely examined. The collective expectation of the 121 TWG was that Part 119 needed to have another TWG to properly complete the process and a dedicated TWG for Part 119 is a position that AusALPA supports as appropriate. This would allow for a more thorough review and discussion than what is the current process for reviewing Part 119.

AusALPA believes that the citing of historic consultations to Part 119 in the summary of proposed changes is a misleading inference to support that Part 119 is being adequately consulted. When it is properly considered that alterations and additions have been made to Part 119 since those consultations, for example the CASRs relating to the FDAP changes, then this inference becomes questionable.

Additionally, a Manual of Standards (MOS) for Part 119 is currently not in existence, in spite of the draft Part 119 regulations providing references to a 119 MOS. This fact also provides weight to the position that Part 119 is being prematurely consulted.

We propose that there be a TWG convened for the review of Part 119 (and the 119 MOS). This would allow for a meaningful consultation on the Part, instead of the current partial consultation with industry. It would make most sense for a Part 119 TWG to be convened after the public consultation for Parts 121, 133 and 135 has been collated and discussed in TWGs for these Parts.

Head of Flying Operations - Qualifications and Experience

CASR 119.145(6)(b) provides an option for an "assessment in an aeroplane, rotorcraft or flight simulation training device". AusALPA is curious about what specific management qualities CASA plans to assess and to what objective standard.

Key Personnel - Additional Qualification and Experience Requirements

AusALPA notes that CASR 119.175(2) provides an opportunity for CASA to "direct that any of the key personnel of the applicant or operator must have stated additional qualifications or experience to those otherwise required under this Subpart".

We find this whole regulation to be problematic, particularly for a regulator who uses "in the interests of aviation safety" as a convenient reason for activities that have far more repressive and punitive characteristics than preserving the safety status quo. If the standing requirements are sensible and appropriate, why is it necessary to create extra avenues for further requirements and what additional requirements should CASA be reasonably contemplating?

Furthermore, given that the CASRs are disallowable instruments, will these written notices exceeding the standing requirements also be disallowable instruments? Will

they be reviewable under CASR 201.004? We believe that CASR 119.175 creates more questions than it resolves.

Familiarisation Training for Key Personnel

CASR 119.130 addresses the need for familiarisation training for key personnel: "An Australian air transport operator must ensure that, before a person appointed as any of the operator's key personnel begins to carry out the responsibilities of the position, the person has completed any training that is necessary to familiarise the person with the responsibilities."

We believe that this regulation should also specify the requirements for this training. Such training should include HF/NTS awareness training (similar to that found in Division 119 E.2) and to SMS induction training (of the nature referred to in CASR 119.220(3)(f) for these key personnel. The SMS training should include components of fatigue management awareness training.

As outlined in the Part 119 summary of changes, AusALPA understands that the draft 119 Part will introduce some relaxation of requirements associated with key personnel qualifications, experience and responsibilities for the CEO, the Head of Flying Operations, the Head of Training and Checking, and the Safety manager". We believe that in isolation, the relaxation of these requirements is unacceptable. However, when paired with an increased obligation for an operator's key personnel to undertake specific SMS, HF/NTS and fatigue management awareness training, there could be an acceptable means created to offset this degradation of the key personnel's required aviation expertise and qualifications.

AusALPA recognises and supports the standard safety management philosophy that, for an SMS to function properly and adequately, safety management needs to be embodied from the top down. For this to occur, it is essential that the accountable key managers receive training with how their SMS works, are cognisant of the essentials of HF/NTS training and understand the essentials of fatigue management.

Operator to Conduct Checking for Flight Crew

It is not clear to AusALPA what specific purpose CASR 119.195 serves or why training has been deleted from the application of the regulation.

Safety Management Systems - Flight Data Analysis Program (FDAP) Protections

AusALPA recognises that CASR 119.220(7) and (8), as well as CASR 119.225, introduce approaches to FDAP that are inconsistent with the current framework under Part 82 of the CAOs. A lack of targeted stakeholder engagement meant that we were not aware of the July 2012 consultation (simply titled NPRM 0903OS) and consequently did not participate, but we do not believe that the existence of that consultation changes the current situation. In any event, AusALPA unreservedly rejects those changes.

We have separately engaged with the Director of Aviation Safety (see Attachment 1) and the Executive Manager Legal & Regulatory Affairs and noted that the proposed regulations are unacceptable to us. We state the following:

Conclusions

It appears that CASA intends to subvert a multi-partisan safety-related process in order to create a workplace surveillance scheme which will be totally rejected by the pilot community.

Without substantial review by CASA and relevant stakeholders of the objectives and appropriate balances in safety data collection, particularly in regard to transparency and review provisions, the current proposals will severely damage the level of trust upon which our safety data collection systems rely.

Recommendations

Part 119 should be consulted separately in its own right, as has been the case for the other Parts, and the agreed TWG should be held prior to any further public consultation and certainly before the regulations are made.

The proposed CASRs 119.220 and 119.225 must be withdrawn and not replaced until review and adequate consultation has occurred and suitable alternative provisions have been agreed upon.

In preparation for the implementation of Amendment 40-B to Annex 6 Part 1 Edition 10 and Edition 2 of Annex 19 on 07 November 2019, AusALPA is most willing to assist in the development of more appropriate means of identifying and resolving violations while providing balanced constraints on the behaviour of all stakeholders in safety data collection and utilisation.

Compliance with Exposition by an Operator - and Others

Given that Part 119 is applicable for all persons operating within an organisation, not just AOC holders, AusALPA finds CASR 119.280 limited in scope. It is not clear to us why there is only a provision for the operator. We believe that a more generalised provision, such as that found in CASR 121.035, would be more fitting, since this currently proposed provision would appear to make it an offence to not meet a non-safety related requirement in the exposition.

Flight Crew Licences and Medical Certificates vs Competency to Perform Tasks

AusALPA recognises the valid reasons for CASR 119.300. However, this led us to consider what might be the greater benefit to aviation safety. Having a copy of the licences and medicals is important but, in the greater and practical scheme of things, is this the most important focus for an operator or is it more properly on taking all reasonable steps to ensure that a person is qualified to conduct a task assigned to them by the operator? AusALPA has been unable to locate a regulation that addresses this latter issue within the draft Part 119 - there are other provisions scattered throughout the operational parts, but we consider that to be a more piecemeal option than a single provision in Part 119 and/or in Part 91. Perhaps a cross-reference to CASR 119.320 may assist, although not as a direct substitute for a specific duty.

Retention Periods for Personnel Records

With a mindfulness of consistency with our other submission comments in relation to cosmic radiation exposure, we provide that CASR 119.305 also address the retention of records for radiation dose. In the broader picture of radiation dose records for flights above 26000ft, which exceed 1 mSV per year, AusALPA urges CASA to adopt this approach:

Radiation Dose Records

- Operators should produce individual annual dosage records to which air crew members should have regular access on a permanent basis.
- To allow a better comparison with cancer statistics and facilitate epidemiological studies in the future, dose and medical records should be kept until the greater of:
  - the crew member reaches or would have reached the age of 75, or
  - at least 30 years after retiring from flying.
- In order to provide appropriate protection for individual dosage records, they should be stored in national radiation registers rather than in company records.

Dealings in relation to cancelled, suspended, varied, pending or refused civil aviation authorisations

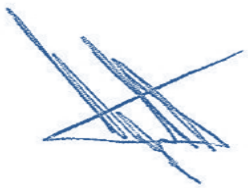
AusALPA finds that the CASR 119.320 appears to exist in order to provide a head of power for CASR 119.035 approvals to apply to each of the circumstances outlined within the sub regulations of CASR 119.320. We ask if this particular artifice also applies to authorisations that have unintentionally lapsed through the effluxion of time or is the intention that such situations would be treated as "pending" authorisations? Perhaps sub regulation (10) should set out a definition of "pending" to assist pilots and operators alike.

CONCLUDING REMARKS

AusALPA recognises that considerable progress has been made toward finalising Part 121. However, there remain some contentious issues and we are cautious about how much traction the TWG feedback has gained in refining these operational parts.

We remain concerned that the supporting documentation is still incomplete. We have highlighted the need for CASA to ensure that it is abundantly clear whether a Part 91 or Part 91 MOS process is the default process or whether it is superseded by a provision in another Part. Currently, it is most difficult to clearly determine CASA's intentions in those situations, notwithstanding the issues of drafting style. AusALPA believes that the uncertainty can only have an adverse effect on compliance and understanding as well.

Yours sincerely,



Captain David Booth
President AusALPA
President AFAP

Captain Murray Butt
President AIPA

Tel: 61 – 2 – 8307 7777
Fax: 61 – 2 – 8307 7799

Email: office@ausalpa.org.au
government.regulatory@aipa.org.au

Attachment: 1. AusALPA Letter to CEO CASA on FDAP Changes in Part 119

Attachment 1 to AusALPA Submission on Parts 121/119 dated 02 Sep 18

Australian Airline Pilots' Association
Member of IFALPA

Suite 6.01, Level 6
243-249 Coward Street
Mascot NSW 2010

T. +61 2 8307 7777
F. +61 2 8307 7799
E. office@ausalpa.org.au

By Email

27 August 2018

Mr Shane Carmody
Director of Aviation Safety
Civil Aviation Safety Authority
GPO Box 2005
CANBERRA ACT 2601

Email: ceo@casa.gov.au

Dear Mr Carmody,

UNHERALDED CHANGES TO THE FDAP SAFETY DATA PROTECTION ARRANGEMENTS IN DRAFT CASR PART 119

As you are aware, AusALPA represents more than 7,100 professional pilots within Australia on safety and technical matters. We are the Member Association for Australia and a key member of the International Federation of Airline Pilot Associations (IFALPA) which represents over 100,000 pilots in 100 countries. Our membership places a very strong expectation of rational, risk and evidence-based safety behaviour on our government agencies and processes.

In general, AusALPA is very concerned with the substantial data generated, stored and transmitted from modern aircraft. While this technical data provides significant operational benefit to operators, it has potential to place pilots at ever increasing risk from inappropriate use of that data and with negative consequences to pilots personally. On the other hand, misapplication of the data may well induce behavioural reactions that reduce safety. We therefore take very seriously any regulatory changes which reduce rather than enhance protection of data.

In particular, AusALPA expects complete transparency when CASA unilaterally decides to abandon the status quo on regulatory arrangements that are designed to ensure the unimpeded flow of safety data, particularly in the context of safety management systems.

Regardless of the implementation in November 2019 of revised ICAO guidance on data protection, in drafting the proposed regulations 119.220 and 119.225 of CASR Part 119, CASA has made significant but completely unacceptable changes to the FDAP data protection arrangements while failing to identify in any of the consultation documents those changes or to provide any rationale for the specific changes.

AusALPA considers CASA's approach to this issue as most objectionable and directly contrary to the interests of flight safety.

The Existing Arangements

CAO 82.3 and 82.5 contain the identical provision, introduced in January 2009 and republished without amendment since:

2A.3 For subparagraph 2A.2 (e), a FDAP must:

(a) regularly record and analyse the operational flight data of individual and aggregated operations **to improve the safety of flight operations**; and

(b) be integrated into the safety assurance system mentioned in subparagraph 2A.2 (c); and

(c) be supplied by:

(i) the operator; or

(ii) without in any way compromising the operator's responsibility for the existence and effectiveness of the FDAP — another appropriate person; and

(d) ensure that:

(i) **except with the person's written consent or by a court order** — the identity of a person who reports data to the program is protected from disclosure to anyone other than a person whose duty requires him or her to analyse operational flight data and who, therefore, has access to identity information solely for that purpose; and

(ii) no punitive action may be taken by the operator against a person who reports data. [emphasis added]

AusALPA's understanding of those provisions is that they bind CASA as well as the operator.

For the complete absence of doubt, AusALPA, consistent with the principles of Just Culture, has no desire to shield violators from appropriate action. We do not see the CAO 82.3 and 82.5 provisions acting as a shield, since they provide an appropriate pathway to disclosure when circumstances dictate. When personal consent is not forthcoming, the independent test of the veracity of those circumstances is satisfying a court that disclosure is warranted. Importantly, all relevant legal processes attach to the court's decision.

Perhaps equally significantly, the extant provisions reflect that the operator is not considered to be the appropriate entity to utilise data collected for safety-related purposes for punitive action. While sub-subparagraph 2A.3 (d)(ii) appears, *prima facie*, to be too broadly cast for the case of violations, the practical reality is that violations are an extreme rarity in circumstances otherwise intended to prevent data-mining as an industrial "fishing expedition". In any event, that provision only would act to shield a violator if no other evidence was available, noting that FDAP data cannot impute intent – the "fault element" essential to operational justice.

The Part 119 Proposal

None of the Summary of Change documents supporting the untidy parallel consultation of Part 119 with other operational Parts identifies any change to the existing FDAP arrangements. However, Part 119 includes the following regulations which authorise disclosure and punitive action by the operator:

119.220 Safety management system requirements

…

(7) For paragraphs (5)(c) and (d), the identity of a person who is the source of data may be disclosed:

(a) with the written consent of the person; or

(b) **in accordance with a direction given by CASA under regulation 119.225**; or

(c) as otherwise required or authorised by law.

(8) For paragraphs (5)(c) and (d), the identity of a person who is the source of data **may be disclosed**, and t**he operator may take punitive action against the person**, if, on the basis of evidence available to the operator:

(a) the operator is satisfied that the person intentionally contravened the civil aviation legislation or the operator's exposition; or

(b) the operator is satisfied that:

(i) the person did an act, or omitted to do an act; and

(ii) the act or omission contravened the civil aviation legislation or the operator's exposition; and

(iii) the person was reckless about whether the act or omission contravened the civil aviation legislation or the operator's exposition; or

(c) the operator is satisfied that the person persistently acted in an unsafe way without appropriate safety reasons; or

(d) the operator is satisfied that the person persistently contravened the civil aviation legislation or the operator's exposition. [emphasis added]

119.225 Flight data analysis program—disclosure of source of operational flight data

(1) If satisfied that it is necessary in the interests of aviation safety, CASA may, by written notice given to the provider of a flight data analysis program required under paragraph 119.220(3)(e), direct the provider to disclose to CASA the source of stated operational flight data recorded by the program.

(2) A notice under this regulation must state the time within which the direction must be complied with.

(3) A person contravenes this subregulation if:

(a) CASA gives the person a direction under this regulation; and

(b) the person does not comply with the direction within the time stated in the notice.

(4) A person commits an offence of strict liability if the person contravenes subregulation (3).

Penalty: 50 penalty units.

As stated previously, AusALPA considers that CASA has by stealth and without justification made significant but completely unacceptable changes to the FDAP data protection arrangements. To the best of our knowledge, there has been no discussion about these changes with the affected Australian pilot community, the vast majority of whom we represent. We are certainly unaware of any circumstances where FDAP data was pivotal to enforcement action by CASA or punitive action by an operator yet remained unattainable under the existing arrangements.

Withdrawing from Independent Review

The proposed regulations remove a significant protection, the need for a court order, and instead create a process ripe for abuse by CASA and operators alike with no obvious independent review, no penalties for misfeasance and no redress for the potential victims.

In a belief about integrity and procedural fairness remarkably similar to that demonstrated by APRA supervising Australia's bank and finance industry, CASA has opened the door to operators being judge, jury and executioner based on the notion that operators' satisfaction will meet some unspecified standard of proof, sustained entirely by their corporate conscience and likely only to be tested in Fair Work tribunals remote from CASA interest or participation. AusALPA believes that determinations about breaches of the law are quite properly the role of the DPP and the courts, independent of commercial and industrial considerations. Dressing up the language in regulation 119.220(8) as if it were a criminal provision will not circumscribe operator behaviour in any event, but especially when there are no consequences.

One of the unfortunate but greatest weaknesses of SMSs (and FRMSs) is that they are operator processes run by employees of the operator first and foremost in the interests of the operators' corporate objectives. For that reason alone, the operator could never be considered as an Annex 19 "competent authority" to determine exceptions to a proper safety data protection scheme.

Nonetheless, while the operator's response to any particular issue is inherently biased, for the most part the current outcomes satisfy all the relevant stakeholders, at least to the extent that they are aware of all of the issues and all of the potential consequences. In the particular case of FDAP, the Safety Manager's resolve to protect the data is currently strengthened by the existing privilege, without carve-outs, accorded to the data source. In the proposed arrangements, that privilege is significantly weakened. In fact, the Safety Manager may not even be part of the operator's determination of criminality and may just be told that "satisfaction" has been achieved, either in a specific event or perhaps generally, thereby waiving any privilege.

Critically, the provisions fail to embed any procedural fairness arrangements at all. This failure alone acts to industrialise a safety process, which AusALPA cannot reconcile with CASA's remit under the *Civil Aviation Act 1988*.

The CASA Direction

The proposed regulation 119.225 provides no hurdle for CASA to leap before deciding to issue a direction to disclose under CASR 119.225. The contrast between the fetters proposed for operators in CASR 119.220(8) and for CASA in CASR 119.225 couldn't be starker – particularly in the latter case as "in the interests of aviation safety" has been shown over time to be no more stringent a test than whatever suits a CASA delegate at the time. Importantly, there is no transparency over how such decisions are made or the level to which the power will be delegated. While internal process manuals may be indicative of corporate intent, they are not legally binding.

Moreover, AusALPA is concerned that CASA has no real incentive to diligently uphold the broad purpose of safety data collection, particularly when there is nothing in the consultation documents to indicate that a CASR 119.225 direction will be reviewable in the Administrative Appeals Tribunal. Given the largely unfettered scope of "in the interests of aviation safety", it seems highly unlikely that a CASR 119.225 direction could trigger an action under the Administrative Decisions (Judicial Review) provisions, thus leaving CASA unrestrained as to which safety data waters, to what depth and how often it may choose to fish.

Strict Liability

AusALPA notes that both CASR 11.225 and CASR 119.225 (perhaps redundantly) make contravention of the direction/regulation an offence of strict liability. While we note that strict liability is CASA's default position, we note that there are no constraints on CASA to set a reasonable time to comply and no provision to allow the affected pilot(s) to seek review of the direction before the privilege attached to the data is irreparably breached.

AusALPA considers that the safety data protection framework is too important to be trivialised as proposed. CASA must be more transparent in this particular regard and must provide for review, if not automatic stay for review, of a decision to issue a CASR 119.225 direction. Consequently, we assert that the offence should more properly be cast as a "without reasonable excuse" offence, reinstating a "fault" element.

The Part 121/119 TWG

In many respects, the consultation process for Part 119 is problematic.

AusALPA believes that the citing of historic consultations to Part 119 in the Summary of Proposed Change is intended to induce an inappropriate inference that Part 119 is being adequately consulted. As is the case with many of the current consultations, the documents are significantly different from previous versions and significantly different from existing rules. When the alterations and additions that have been made to Part 119 since those consultations are properly considered, for example the subregulations relating to these FDAP changes, such an inference is decidedly questionable.

This latest Part 119 was "consulted" as an add-on to the Part 121 and other operational Parts TWGs. In all cases, AusALPA understands that there was insufficient time, both in preparation and during the TWGs, to properly consider Part 119. The Part 121/119 TWG process unequivocally identified that Part 119 was not ready for public consultation and that considerable further work was necessary.

Importantly, the subsequent report of the Part 121 TWG to the ASAP is potentially misleading in that Part 119 was only briefly and incompletely examined - the collective expectation of the TWG was that Part 119 needed to have another TWG to properly complete the process. The reported disposition of regulations 119.220 and 119.225 in that report to the ASAP reflects the views of those CASA attendees who dominated much of the meeting, rather than the considered views of the industry participants. In gaining consensus for the report from industry attendees, the particular matter of CASRs 119.220 and 119.225 was not pursued with any vigour by our representatives, given the now obviously mistaken expectation that Part 119 would not go to public consultation.

The reported recommendation to remove the two FDAP provisions, although not debated in the TWG, was informative if only because the CASA attendees specific to Part 121 were strongly of the view that CASA and the operators already had the relevant powers and thus the provisions were redundant. AusALPA considers that view to be extremely problematic, both in regard to the existing scheme and the inspectors' approach to the protection of safety data.

Conclusions

It appears that CASA intends to subvert a multi-partisan safety-related process in order to create a workplace surveillance scheme which will be totally rejected by the pilot community.

Without substantial review by CASA and relevant stakeholders of the objectives and appropriate balances in safety data collection, particularly in regard to transparency and review provisions, the current proposals will severely damage the level of trust upon which our safety data collection systems rely.

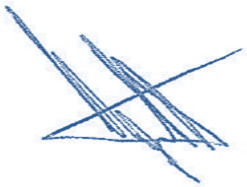
Recommendations

Part 119 should be consulted separately in its own right, as has been the case for the other Parts, and the agreed TWG should be held prior to any further public consultation and certainly before the regulations are made.

The proposed CASRs 119.220 and 119.225 must be withdrawn.

In preparation for the implementation of Amendment 40-B to Annex 6 Part 1 Edition 10 and Edition 2 of Annex 19 on 07 November 2019, AusALPA is most willing to assist in the development of more appropriate means of identifying and resolving violations while providing balanced constraints on the behaviour of all stakeholders in safety data collection and utilisation.

Yours sincerely,



Captain David Booth
President AusALPA
President AFAP

Captain Murray Butt
President AIPA

Tel: 61 – 2 – 8307 7777
Fax: 61 – 2 – 8307 7799

Email: office@ausalpa.org.au
government.regulatory@aipa.org.au