

The Senate Standing Committee into CASA
Governance and ways to strengthen CASA's relations
with Industry – June 2008.

Submission by Christopher McKeown
Barrister
Blackburn Chambers
GPO Box 789
ACT 2601

1. My submission is based on experience gained from aviation legal work as a barrister. My work involves appearing for individuals and companies often with CASA on the other side. I appear for defendants in prosecutions and authority holders in administrative disputes with CASA. I also appear in aviation accident inquests. I am a member of the Chartered Institute of Logistics and Transport and a Board member of the Aviation Law Association of Australia and New Zealand.
2. My submission is in relation to the following term of the enquiry -

To consider ways to strengthen CASA's relations with industry and ensure CASA meets community expectations of a firm safety regulator.
3. I submit the principal issue for consideration is the fact that there is no separation of the function of administration from that of enforcement. I submit that while ever there is an enforcement function there will be a reluctance or reticence of industry to talk and deal with CASA. The above term of the enquiry, with respect, is not capable of satisfactory deliberation if the Committee proceeds on the premise that CASA must also be a “firm safety regulator” thereby implying a policing role.
4. I submit CASA's administrative function should be limited to just that, the designer and maintainer of appropriate regulations and the maintenance of records. For example, it issues licences to pilots at all levels, issues authorities to maintenance people, registers aircraft, and issues AOC's just to name a few of these administrative functions. A friendly relationship is more likely to be fostered if industry's dealings are limited to administrative transactions of this nature.

5. However, there needs to be a protection to the consumer/client from administrative delay and misfeasance. This is currently addressed by AAT proceedings to review administrative decisions of CASA. There is a catch; the playing ground is not level. An individual or company rarely has the resources of CASA. CASA can currently delay matters in the AAT by presenting dubious evidence to support their decision and thereby remove the applicant from the proceedings merely by attrition. I am not suggesting this always happens or happens intentionally, but it is a concern which I think is real. One way of levelling the playing field might be to award costs against CASA but not in the first instance to award costs against an applicant. Currently, CASA can administratively shut an industry participant down. I submit, this should not be possible and while it exists, industry and CASA will not have a good relationship. The question might be asked of CASA, how many cancellation or suspension notices has it served on a Friday afternoon?
6. Currently CASA can administratively remove an industry participant pursuant to Reg 269 -

Variation, suspension or cancellation of licence, certificate or Authority

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

- (a) that the holder of the licence, certificate or authority has contravened, a provision of the Act or these Regulations, including these Regulations as in force by virtue of a law of a State;
- (b) that the holder of the licence, certificate or authority fails to satisfy, or to continue to satisfy, any requirement prescribed by, or specified under, these Regulations in relation to the obtaining or holding of such a licence or certificate or an authority;
- (c) that the holder of the licence, certificate or authority has failed in his or her duty with respect to any matter affecting the safe navigation or operation of an aircraft;
- (d) that the holder of the licence, certificate or authority is not a fit and proper person to have the responsibilities and exercise and perform the functions and duties of a holder of such a licence or certificate or an authority; or
- (e) that the holder of the licence, certificate or authority has contravened, a direction or instruction with respect to a matter affecting the safe navigation and operation of an aircraft, being a direction or instruction that is contained in Civil Aviation Orders.

Reg 269 importantly goes on –

(1A) CASA must not cancel a licence, certificate or authority under subregulation (1) because of a contravention mentioned in paragraph (1)(a) unless:

(a) the holder of the licence, certificate or authority has been convicted by a court of an offence against a provision of the Act or these Regulations (including these Regulations as in force by virtue of a law of a State) in respect of the contravention; or

(b) the person was charged before a court with an offence against a provision of the Act or these Regulations (including these Regulations as in force by virtue of a law of a State) in respect of the contravention and was found by the court to have committed the offence, but the court did not proceed to convict the person of the offence.

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

7. It is seen above, that CASA has very wide powers to enforce against an individual or company. I submit there would be some considerable lessening of CASA's powers and thus acceptance of CASA by industry if 1(A) (1) above was amended to remove the reference to 269(1)(a) thereby making a conviction a prerequisite to any action under Reg 269 rather than being limited as it arguably is to 269 (1)(a) only.

8. I continue – Reg 269 has 5 possibilities under which it can take action. I comment in brackets.

(1) Breach of the legislation (on conviction in a Court)

(2) Failing to satisfy a requirement of an aviation authority. (This provision is simple enough. If the holder is no longer holding another authority as the condition of holding the affected authority, then it would lapse, but why suspend or cancel it when there might be a reinstatement of the pre-conditional requirement?)

(3) Failed in a duty with respect to any matter affecting the safe navigation or operation of an aircraft. (This is a good example of the type of power CASA has over industry participants. If there has been a failure there could presumably be a Regulation about which it is capable of proving a breach in a Court. Industry might be justifiably concerned when it is CASA alone who decides there has been a failure in a duty, whatever that duty might be as determined by CASA.)

- (4) The holder of the licence, certificate or authority is not a fit and proper person. (Again it is CASA alone who decides this. What happens if an individual has an argument with a CASA employee? Industry might justifiably be concerned if it is CASA alone who has the power to cancel someone's authority. I generalise. There is authority giving some assistance on this point, but how does an industry participant feel about it?)
- (5) The holder of the licence, certificate or authority has contravened a direction or instruction with respect to a matter affecting the safe navigation and operation of an aircraft, being a direction or instruction that is contained in Civil Aviation Order (If it is a failure to comply with an CAO (Order) it should be possible to convert this into a prosecution for the alleged breach. This would then give independence and objectivity to the assessment of whether there has been a breach.)
9. Regulation 269 is an example of how industry is concerned, I submit, about the power CASA holds over industry participants. CASA is effectively the judge, jury and executioner. Certainly there is a review facility in the AAT but there is no compensation (costs order) for an industry participant who is successful on review, and no compensation for the lost business a participant might have suffered when the AAT agrees with the applicant. CASA does not strengthen its relationship with industry when it publishes on its website or makes a media release (see <http://www.casa.gov.au/media/2008/08-06-28.htm>) that an operator has been suspended. The very fact that it is a suspension indicates there are review provisions open to the operator. CASA publishes these types of broadcasts before the operator has exhausted their rights of review. Thus the operator possibly suffers financial loss immediately rather than at the conclusion of their review rights. If the operator obtains a stay and continues their operations do CASA publish this fact?
10. Currently enforcement is divided into two categories. First, administrative enforcement and secondly punitive enforcement. CASA issues the regulatory permission mostly via an aviation authority, but it currently also takes them away administratively (as seen in Reg 269). Therefore how can industry feel comfortable dealing with CASA concerning operations or proposed operations? Why would industry feel comfortable when the material provided to CASA can be then, or later, used against it?
11. If the relationship between CASA and industry is to improve, CASA should not have the unilateral power to suspend or cancel an industry

participant. Currently CASA, under the guise of enforcement of air navigation standards, suspends or cancels authorities. This is based on what it has heard on the grapevine (perhaps from a competitor) and determined after its own investigation. Industry sees no objective standard of proof. This is a fundamental flaw in CASA's current functionality. Chinese walls do not counteract a perception of this internal conflict and perception of personalities driving the enforcement process.

12. A friendly CASA employee doing his/her tasks of approving applications and otherwise promoting aviation, is unlikely to overcome the hostility and suspicion felt by industry when another CASA employee goes looking for possible evidence to support a decision which may or may not have been announced. This is a perception and real fear held by industry. I suspect operators in this industry who put a submission to this Standing Committee will be few. I hope I am mistaken. If few, why so few? I submit that if there are few submissions it is because industry members are afraid of retribution.
13. CASA currently has the power to inflict horrible financial costs before the industry participant is given a hearing by an independent person. There is some amelioration of this concept by the fact that a stay might be obtained from the AAT. However, the automatic stay provision is only for 90 days and requires the individual to apply for a longer period of stay given that the AAT is unlikely to hear an aviation matter to a conclusion within 90 days. As mentioned, this financial loss is furthered by CASA publishing before conclusion of a hearing.
14. An example of a financial cost which CASA can currently inflict is when it decides to cancel an AOC. Certainly it issues a show cause notice. A notice I suspect industry believes is only done because the legislation requires it, when the reality is that CASA has made its mind up when it issued the show cause notice. The AOC holder seeks a stay in the AAT of the cancellation notice. This costs money which is not recoverable and importantly, the scuttlebutt which races through industry might virtually destroy a business well before a hearing of the victim's statutory rights of review. Remembering it was CASA and an individual therein, who made this initial decision not a tribunal. Industry can perceive that the CASA individual (delegate) who made the decision has prejudices and dispositions not declared or examinable. A panel made up of CASA and industry participants deciding cancellation and suspensions might help. CASA should not be appointing the non CASA component of the panel.

15. Imagine the AOC holder who for various reasons might have fallen out with a CASA employee in the field. For example, an AOC holder lets an aircraft to a CASA employee who then damages the aircraft, or worse is killed or injured. I know of an example of an AOC holder who suffered serious financial loss because he believes CASA took a fix against him following a tragic accident involving CASA personnel. The AOC holder believes it was CASA's retribution on him to cause his business to spend, he tells me, hundreds of thousands of dollars arguing in the AAT for survival. He believes CASA were not really concerned about the outcome but more to see him incur an expense of a lengthy hearing which for days involved weak evidence. This evidence was said to be relevant by CASA, but it was properly discredited by the AAT but only after the hearing of all the evidence. This expense to the AOC holder, he strongly believes, was brought on by personal dislike of him by an individual or individuals in CASA. Whether or not there were personal dislikes of the AOC holder is not as relevant as the fact that the scenario is possible under the current CASA administrative enforcement option.
16. CASA currently argues that the position of Chief Pilot is not reviewable like a cancellation of an AOC. Yet CASA suspends or cancels a Chief Pilot administratively, knowing that an AOC cannot operate without a Chief Pilot. So, instead of cancelling an AOC and their decision being reviewable, CASA cancels the Chief Pilot's authority. This is an example of an action by CASA which I suspect irritates the industry. The Chief Pilot's authority should have the same protection as other authorities. There is currently a matter on point in which I am not involved. CASA withdraws a Chief Pilot authority. The operator goes to the Federal Court and obtains a short stay thereby keeping that Chief Pilot active and the AOC operative. The AAT then grants a further stay of about two months. Three weeks after the AAT ordered the stay, CASA issues a s.30DC suspension against the AOC. When did CASA serve this s.30DC notice and what publicity did it get? I speak to s.30DC proceedings below.
17. It is this administrative enforcement, I submit, CASA should lose to have productive industry relations.
18. Currently CASA employees have the task of investigating breaches of the aviation rules, be they in an Act or Regulation. Having concluded this task, a decision is made by a senior CASA individual. This decision might be pre-empted by those investigating, the decision being a formality rather than an independent decision process by that senior individual (delegate). This administrative CASA decision might

effectively ruin a business or an individual's livelihood. I submit that CASA cannot be seen as being there to foster and develop industry, when individuals within CASA can singly destroy a person's participation in that industry. While there is no current statutory encumbrance on CASA to develop or foster the aviation industry, the mere fact that it is issuing aviation authorities implies that this is relevant. The alternative implication is not attractive but is one which I suspect the cynic within the industry dwells upon. I submit the *Civil Aviation Act 1988* (CAA) should be amended to require CASA to foster and develop aviation in Australia.

19. The enforcement of aviation regulations should, in my submission, be similar to that of a policeman on the roads, based on evidence of breach only. Without breach established by a Court of Law there should be no enforcement by suspension or cancellation.

Change the enforcement method

20. I suspect there are those in CASA who see this administrative enforcement power giving them a status which keeps them somewhat above industry. Naturally this status loss will be strongly resisted. Those individuals in CASA who currently investigate allegations might be transferred or offered positions in a new air wing of the Australian Federal Police or an independent agency altogether. I will refer to this body as Fedwings. Why could a specialist branch of the AFP not investigate allegations leading to a s.30DC (serious and imminent risk) suspension? Individuals qualified by aviation experience and/or the law could be employed by the Commonwealth AFP, enforcing Commonwealth laws. There might also be some favourable rub off in training from AFP officers in investigation techniques. If Fedwings acted with an even hand I see no reason why industry would not respect them rather than fear or even despise them, since they would be there for enforcement only. The establishment of Fedwings would free CASA to concentrate on administering and developing the industry.

21. CASA currently exempts bodies from some CAA requirements. These bodies self administer their members. Fedwings could also oversee compliance by these bodies to their conditions of exemption and avoid a conflict for CASA in their administration.

22. Like the traffic police, Fedwings would retain a discretion as to which type of enforcement action was appropriate. The existing penalty points scheme could continue. I suspect it would be seen as even more relevant if it was a person outside of CASA who makes the decision to proceed.

If an individual accrues enough penalty points to result in a suspension, then the suspension notice is issued by CASA because it is the administrative keeper of the records, the same way the Registrar or Commissioner of Roads proceeds today. Prosecutions would be available to Fedwings through the Commonwealth DPP, the same way CASA currently briefs that same DPP.

23. As part of the punitive process, a court hearing the allegations currently may, on concluding that there has been a breach, decide to suspend an authority. There should then be no power of cancellation in that criminal Court of Law, only suspension. Under s.30A of the CAA the euphemistic term "exclusion period" is used. This period can be indefinite! The period of suspension needs clarifying and should be changed from the current open ended arrangement which might effectively be a cancellation. Section 30B permits a later application to vary the imposed exclusion period. Here we see I submit, a mixing of the punitive function of the criminal courts and the question of whether a person is safe enough to continue to hold an authority. The question of deciding whether there would or would not be a prejudice to air navigation safety should be left to Fedwings and the AAT, not a criminal court which should be concerned with punishment only. (See s30A (1)(d) and s.30B(2) of CAA which specifically require the criminal court to determine this issue of safety of air navigation. This is plainly inappropriate and cannot be pleasing industry). Questions of double jeopardy are not irrelevant.
24. The power of cancellation should only be finally available to the AAT based upon an application of Fedwings. Naturally if Fedwings decided to cancel and the individual decided not to challenge it, that would be the end of it. The current suspension under Division 3A of the CAA should also be done on the application of Fedwings. The recipient of a s.30DC suspension should be entitled to one free attempt to fight the suspension continuing. If s.30DC was not used the person could get an automatic stay in the AAT, so it is not unreasonable that there be no costs if the challenge to the stay is unsuccessful (frivolous applications should have costs against them).
25. If the Federal Court determines that the 5 day stay should continue then, instead of it being a stay merely to the end of the investigation period, it might continue but only if a prosecution is served within say 14 days of the conclusion of the investigation period. In the event Fedwings wishes to cancel an aviation authority after a prosecution, it should have the

power to do so. This decision to cancel or suspend should be reviewable in the AAT.

26. Industry, I suspect is not happy with the existing s.30DC proceedings as they are, I submit, flawed. If CASA does use s.30DC to immediately suspend an authority, they merely have to file proceedings in the Federal Court within 5 days. If they do so the suspension continues until the Federal Court deals with it. When the Federal Court hears CASA's application, which theoretically might be anytime later, the Court in any event can then only impose a 40 day stay with a possible extension of another 28 days. This is a nonsense situation. If CASA has not concluded their investigation in those circumstances, what have they been doing? The stay is only to permit an investigation.
27. While the ability to immediately suspend is an important one to the body enforcing the Regulations, industry I submit has an expectation that there will be the protection of a speedy resolution to any stay in their operations. I submit that Fedwings should be required to obtain a ruling from a Judge within the five day period after serving the suspension notice, rather than merely walking down to the nearest Federal Court Registry to get a stay for an unknown time.
28. An interim ruling from the Federal Court would be acceptable providing the authority holder was given the opportunity to be heard. In any event, the suspension should only be for a realistic time required by Fedwings to conclude their investigation. I submit no longer than 21 days would be reasonable. If there has been conduct requiring an immediate suspension, this period of 21 days should be sufficient to gather enough evidence to decide on whether a brief to the DPP is warranted. The 21 days is from serving the suspension notice, not from the date of the Federal Court order. If the matter was serious enough to even consider immediate suspension, is it seriously suggested that they would not there and then investigate the relevant behaviour? I suspect industry has a distrust of CASA motives when CASA, under the current regime, do not really need to be concerned about the time it takes to investigate. Admittedly CASA has rarely used s.30DC. However, the procedure needs refinement to make it fair.
29. Under the now revoked Reg 268, CASA had only a month to investigate and that was from the time the authority holder was served with the suspension notice. The authority holder is now potentially worse off under these s.30DC proceedings.

30. In the interests of better relations I suggest that if after the Division 3A investigation is complete, action is deemed required, Fedwings should instruct the DPP immediately rather than go through the current business of issuing a show cause notice. Under the current procedures, the individual remains grounded if CASA issues a show cause notice and then determines a suspension or cancellation is warranted. No automatic stay is available if the circumstances of the suspension or cancellation relate to what brought on the s.30DC suspension. In my experience a show cause notice assists CASA more than the individual given that CASA has generally already decided the issue and hence the show cause notice.

31. I hope this submission provides the Committee with some assistance.

C.P. McKeown
30 June 2008