

By Email

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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 PART 91 NPRM CD 1511OS-2 PROPOSED CHANGES TO THE GENERAL OPERATING AND FLIGHT RULES

The Australian Airline Pilots' Association (AusALPA) represents more than 6,500 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.

AusALPA member association representatives participated in the Part 91 Technical Working Group (TWG) and have noted positively that many of the items identified for further work have indeed been addressed by CASA.

Unfortunately, not all items have or could have been addressed in the time between holding the TWG meeting and opening this public consultation. We recognise that the Part 91 drafting is not being conducted in isolation from other projects and that the inter-relationships are often complex. Nonetheless, we are concerned that CASA is not maintaining adequate corporate knowledge and not providing a sufficient level of technical oversight to ensure that all of the projects are structurally and philosophically aligned.

In the interests of stakeholder transparency and the corporate knowledge of this continuing regulatory reform process, AusALPA believes that further formal comment on the public record is necessary.

We also note that very little in terms of the very necessary supporting documentation has been published or offered up for consultation – consultation cannot be considered complete without consideration of all of the relevant material.

GENERAL COMMENTS

The Laziness of CASA Enforcement Provisions

Strict Liability

In 2011, AIPA provided CASA with detailed comments on the then draft Part 91 in regard to the determination of fault, strict and absolute liability in Civil Aviation law. Seven years later, AusALPA notes that CASA has been unresponsive and the points previously made remain valid today. The key issues raised were:

AIPA has long standing concerns about the processes within CASA specifically and the Executive in general about the determination of whether and to what extent normal legislative fault provisions should apply to the aviation law or whether the public interest is better served by the creation of strict or absolute liability offences.

...While AIPA has a clear understanding of the basis of creating strict liability offences, it is the transparency of the process that has created the lingering concerns of the aviation industry.

...It appears, prima facie, that making 170 of the 183 penalty provisions of the draft Part 91 into strict liability offences leans heavily (but not consistently) on the extant provisions of the Civil Aviation Regulations 1988 (CAR 1988).

and, perhaps most importantly

...AIPA concludes that the information process attached to the Civil Aviation Amendment Regulations 2003 failed to establish common ground both **on the justification for the current list of strict liability offences and on the guidelines that inform the determinations**. [emphasis added]

AIPA believes that proper consultation should include some basis for determining the inclusion or exclusion of fault elements in the CASR 1998, other than merely “grandfathering” provisions from the CAR 1988.

The latest consultation package contains a brief Strict Liability Information Sheet. The basic message seems to be that “it’s everywhere, everybody does it, get over it”. While the Information Sheet mentions the defence of “mistake of fact”, it fails to mention that there are a range of other defences that are also available under the *Criminal Code Act 1995*. Overall, the Sheet has minimal value in terms of transparency.

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, DIRD 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. While there are some offences attracting maximum penalties of 25 penalty unit, about six in the whole of Part 91 of which five are recent reductions from 50 to 25 following the TWG meeting, they are in a quite distinct minority. Part 61 presents an entirely different penalty regime from Part 5 of CAR 1988 upon which it was based.

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 chose 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 91 REGULATIONS COMMENTS

Retention of Documents/Evidence

Despite the Part 91 TWG raising the issue of an absence of advice on the retention period for Journey Logs, that still has not been addressed and it appears that there are no provisions in either Part 91 or the MOS that set out the retention periods for flight operations documents or other records that form part of normal evidence of compliance. It is unclear where CASA intends to spell out these requirements.

Fuel Requirements

Division vs Regulation Titles

Presently, CASR 91.320 is titled "Fuel Requirements" and relates only to the amounts of fuel that must be carried on board an aircraft for a flight. Division 91.D.8 is also titled "Fuel Requirements" but only relates to refuelling requirements. Far greater clarity would be achieved by retitling CASR 91.320 to "In-flight Fuel Requirements" and retitling Division 91.D.8 to "Refuelling Requirements".

91.650 Only turbine-engine aircraft to be hot fuelled

This regulation would be enhanced by a note stating that hot refuelling of non-turbine aircraft may be approved under other Parts.

91.520 Communicating at certified, registered, military or designated non-controlled aerodromes

The insertion of the new subparagraph 1(b) changes the whole nature of the regulation to apply only at the specified aerodromes when they are non-controlled. Presumably, CASR 91.525 provides for no-radio operations at controlled aerodromes. However, both the title of each of those regulations and their structure is quite different, yet it seems that they are intended to be alternative rules that cover the field". They should be drafted in a consistent way.

It is also not entirely clear how this regulation is intended to interact or juxtapose with the requirements set out in Division 91.D.13—Radio usage.

91.724 Flight recorders—preserving recordings of immediately reportable matters

It is not entirely clear to us that either the *Transport Safety Investigation Act 2003* or the regulations authorise the ATSB to demand the recorder itself. We believe that the inclusion of the recorder itself in this regulation is unjustified, if not *ultra vires*.

91.895 Use of radio—qualifications

It seems to be a backward step to retain the phrase “published in the AIP or NOTAMs” compared to the much more practical “published in the authorised aeronautical information for the flight”. It is, at best, inconsistent.

Division 91.Y.4 Extensions of rectification intervals

We welcome this change to clarify the process and accountability for extending rectification intervals. However, AusALPA remains concerned about CASA’s commitment and ability to monitor these extensions in order to detect operators placing their commercial interests over the safety outcomes of the continuing airworthiness regime.

PART 91 MOS COMMENTS

Structural Design of the MOS

AusALPA strongly prefers the MOS to be laid out with numbering consistent with the Part 91 regulations to which each section applies. Despite that fact that CASA argues that the legislation is written for the Courts, we believe that achieving the desired level of compliance must start with facilitating the understanding of those with potential to offend, since they are truly the “target audience”. The MOS should allow an ordinary person engaged in aviation activities to seek out the acceptable means of compliance or related guidance material by the relevant regulation without resort to manual or electronic searches.

AusALPA believes the current preference to employ number sequences unrelated to the parent regulation is detrimental to efficiency, understanding and compliance. That undesirable outcome is truly “red tape” that should be immediately redressed.

1.06 Definitions and abbreviations

flight commencement

AusALPA agrees with this approach to timing, but should there be a note to say that this differs from the definition of *flight* in the *Civil Aviation Act 1988*?”

Fuel Planning Definitions

Noting that there is a background project for the amendment of CAR 234, this particular topic emphasises the inappropriate consultation process upon which CASA regularly embarks where the various guidance material and acceptable means of compliance are not completed or often not even drafted.

Given that ICAO produced their Document 9976 *Flight Planning and Fuel Management Manual* (FPFMM) of some 222 pages as a consequence of a recognised need for significant guidance on international fuel planning (which still leaves a number of gaps when used as an exemplar for domestic operations), AusALPA asserts that it beggars

belief that CASA has provided so little information in Part 91, the cornerstone flight operations legislation, despite the spotlight shone on the subject by the Norfolk Island Westwind ditching.

additional fuel and alternate aerodrome and decision point

It remains unclear whether planning for alternate fuel, when the alternate is further away or beyond the destination, needs to take into account the possibility that the aircraft has suffered engine failure or loss of pressurisation prior to or during approach to the destination and consequently the diversion being conducted in an abnormal situation.

Clearly CASA has not considered the lessons from the leading edge device failure suffered by VH-OBN on 29 December 2007 at Norfolk Island following a go-around in bad weather and subsequent diversion to Noumea. The ATSB report contains many lessons but, operationally, one of the most relevant was that the operator immediately chose to review their flight planning system to ensure that alternate fuel planning must account for depressurised flight.

final reserve fuel

It should be clear that this definition relates to the final reserve fuel determined during certification, rather than any greater amount specified by the operator for operational rather than technical considerations.

isolated aerodrome

Given that this definition introduces a fundamental change in fuel planning policy, AusALPA finds the lack of detail frustrating. Who, and against what criteria, decides that “there is no suitable destination alternate”?

most critical point

Critical points vary with configuration and “most” refers to the most limiting of those critical points – to which CP (AEO, OEI or DPR) does CASA intend this definition to apply?

Table 9.04 Final reserve fuel and contingency fuel requirements

Given the definition of *trip fuel*, it appears that *contingency fuel* is no longer applied to *alternate fuel*, despite all of the factors that justify contingency fuel may well continue to apply in the event of a diversion to an alternate that is not enroute. It is not obvious why CASA has ignored this issue, particularly as Australian infrastructure is a far cry from the alternate-rich environments of the US and Europe, but AusALPA believes that it should be explicitly justified.

AusALPA also considers that the logic behind the general application of contingency fuel in the table is far from obvious. Why are some categories of aircraft treated differentially by size regardless of flight rules and what underlying presumption allows different flight rules to be treated as facing the same risks that contingency fuel is intended to mitigate? Presumably, air transport operations will attract different requirements under the relevant Parts – a note to that effect would be most helpful.

Nonetheless, we are concerned that IFR (and to a lesser extent NVFR) flights in rotorcraft are relieved from any requirement to carry contingency fuel. Given that the usual advantage of rotorcraft to land almost anywhere is compromised at night and in cloud, it seems to us that a mandatory contingency fuel requirement of 5% of trip fuel is justified for those operations given the final reserve is only 30 minutes.

9.05 Amount of fuel that must be carried for a flight

AusALPA considers the circumstances under which additional fuel is “applicable” are also not properly explained. If neither the regulations nor the MOS provide useful insight into the behaviours that regulatory intervention is intended to modify or curtail, where will stakeholders or the Courts find sensible guidance?

AusALPA is not convinced that the ICAO guidance in the ICAO FPFMM is necessarily appropriate in Australia due to its focus on enroute alternates for isolated aerodromes. At the TWG, CASA suggested that depressurisation inbound to a destination requiring a ‘beyond’ alternate due weather, even with a high probability of diversion, need not be catered for as “that would be like a double emergency”. We reject that proposition. We also suspect that the crew and passengers of VH-OBN mentioned earlier and, most recently, of Southwest Flight 1380 would also reject it.

Given that no changes have been made to the draft, we can only presume that CASA has conducted an appropriate risk analysis and determined a conditional probability of depressurised diversion that is of the same order as that required during certification for fuel system failures that compromise significant quantities of otherwise usable fuel.

CASA needs to resolve this issue in an open and transparent manner capable of peer review by risk management specialists, rather than merely to rely upon what may well turn out to be a flawed northern hemisphere-centric ICAO process.

9.06 Procedures for fuel monitoring during a flight

AusALPA considers that 9.06 would be enhanced if the proposed paragraph (5) was elevated to become (2), thus removing any doubt that the references to the “planned” flight refer to the evolving flight already commenced.

30.09 Aeroplane IFR flight — equipment to measure and record cosmic radiation

A search of both CASR Part 91 and the MOS failed to find a requirement to match the ICAO standard set out in Annex 6 Part 1:

4.2.11.2 For each flight of an aeroplane above 15 000 m (49 000 ft), the operator shall maintain records so that the total cosmic radiation dose received by each crew member over a period of 12 consecutive months can be determined.

AusALPA strongly recommends that this standard be immediately made into Australian aviation law, noting AusALPA’s preference for mandatory exposure records for all flights conducted above 25,000ft to support the processes outlined in the ARPANSA *Guide for Radiation Protection in Existing Exposure Situations* RPS G-2 published on 12 September 2017.

30.44 First aid oxygen equipment — pressurised aircraft

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 breath 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*, it is entirely logical to define *first aid oxygen* consistent with the other jurisdictions.

PART 91 DICTIONARY COMMENTS

Given that many of the entries relate to Parts other than Part 91, meaningful consultation is difficult. Nonetheless, AusALPA is curious why the entries for *runway strip* and *graded runway strip* are inconsistent with other entries in that they attempt to stand alone rather than refer back to the Part 139 definitions. Furthermore, the proposed definition of *graded runway strip* does not appear in Part 139 and we are not convinced that it is conclusive or appropriate.

CONCLUDING REMARKS

AusALPA recognises that considerable progress has been made toward finalising Part 91.

However, there remain some major contentious issues and we have yet to see the relevant guidance material, acceptable means of compliance and other supporting documentation.

We remain concerned that the structural design of the MOS is counter-intuitive and unnecessarily detrimental to improving the essential self-education of various stakeholders. It remains unclear whether CASA has settled on Part 91 and the Part 91 MOS as the core legislation with the other Parts being constructed as exceptions and variations from the core legislation or whether some other approach is being taken – that can only have an adverse effect on compliance and understanding as well.

Yours sincerely,

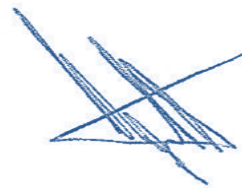


Captain David Booth
President AusALPA
President AFAP

Tel: 61 – 2 – 8307 7777

Fax: 61 – 2 – 8307 7799

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



Captain Murray Butt
President AIPA