



SUBMISSION

Regulatory Requirements that Impact on the Safe Use of Remotely Piloted Aircraft Systems, Unmanned Aerial Systems and Associated Systems

To: Committee Secretary, Senate Standing Committees on Rural & Regional Affairs and Transport

From: James Lawrence, Partner

Date: 22 December 2016

A BACKGROUND

1. Our team specialises in intellectual property and privacy law and has advised retailers, wholesalers, consumers and operators of remotely piloted aircraft (**RPA**) across a range of legal issues facing those varied industry participants.
2. RPAs have an exciting role to play in civil and commercial applications and will be the most dynamic growth sector within aviation for years to come. They offer economic benefits and significant safety improvements to a diverse range of organisations and without question have a key role to play in Australia's future.
3. However, our experience indicates that the current regulatory scheme is not adequately adapted to meet the requirements of this emerging industry and, in particular, does not strike the preferable balance between fostering innovation on the one hand and ensuring public safety and privacy on the other hand.
4. This submission addresses the following matters referred to the Committee by the Senate as part of the inquiry:
 - 4.1 *Civil Aviation Safety Regulations 1998* (Cth) (**CASA Regulations**) Part 101 and state and local government regulation as relevant to the current and future regulatory requirements that impact on the safe commercial use of RPAS, UAS and associated systems (sub-paragraphs (a)(i) and (a) and (iv) respectively);
 - 4.2 current and future options for improving regulatory compliance, public safety and national security through education and enforcement (paragraph (d)); and
 - 4.3 the relationship between aviation safety and other regulation of RPAs for example, regulation by state and local government agencies on public safety, security and privacy grounds (paragraph (e)).

B ISSUES WITH CURRENT REGULATORY REQUIREMENTS

Part 101 of the CASA Regulations

5. As is the case in many areas, there are compelling reasons to balance legitimate safety concerns against unnecessary and restrictive regulation. The primary set of rules governing

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the use of RPAs - Part 101 of the CASA Regulations - has recently been amended to relax, to some degree, the use of smaller RPAs in limited commercial contexts.¹

6. A key change introduced by these amendments now allows for the use of RPAs between 2kg and 25kg in mass in a commercial setting without the need for regulatory (ie CASA) approval. While there are many reasons to support the view that this is a sensible change, the overly complex CASA Regulations mean that, even if a lay person was able to identify any relevant changes (which we consider to be unlikely), it would be hard for them to fully understand their meaning and effect.
7. In particular, the language used in the CASA Regulations is likely to be difficult for a lay person to navigate and interpret; for example, Reg 101.280 provides various strict liability offences in respect of the operation of RPAs in “populous areas” but the definition of “populous area” provided in Reg 101.025 is legalistic and not easily translated for real world application.
8. Further, in many cases, the information provided by CASA does not adequately assist RPA operators to interpret CASA Regulations. For example, the CASA website currently states in relation to recreational use “*If you want to fly your drone or model aircraft for fun in Australia, you can do so without our approval - providing you follow some simple safety rules. These rules are detailed in Civil Aviation Safety Regulations Part 101*”.² As noted above, it is hardly accurate to describe the CASA Regulations as “simple”.
9. CASA’s enforcement capability is also extremely limited and this is discussed further below.

Other miscellaneous legislation

10. In addition, certain RPA operations are subject to regulation under other – sometimes overlapping - pieces of Commonwealth, State and Territory legislation as well as local government regulations, making it difficult for RPA operators to identify, let alone interpret, all of the relevant requirements. Three NSW examples are set out below for illustrative purposes.
11. Example 1: Regulation 8.12 of the *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) provides that a person who operates an aircraft for whale watching³ must operate it in accordance with regulation⁴ whilst, in NSW, section 112G of the *National Parks and Wildlife Act 1974* (NSW) provides that a person must not approach a marine mammal any closer than the distance prescribed by regulations.⁵ In this instance the Commonwealth and State legislation is unhelpfully inconsistent which only further frustrates an RPA operator’s understanding of the applicable laws.
12. Example 2: Regulation 13 of the *National Parks and Wildlife Regulation 2009* (NSW) provides that it is an offence to operate an aircraft “in a manner likely to interfere with or cause a nuisance to any *person or animal*” in a national park without the consent of a park authority.

¹ “Excluded RPA” can be operated without a licence – see regulation 101.237. These amendments came into effect on 29 September 2016.

² CASA, ‘Flying drones or model aircraft recreationally’, <<https://www.casa.gov.au/modelaircraft>> Last accessed 17 November 2016

³ This legislation actually covers all cetaceans, including dolphins.

⁴ For example, a person must not operate an RPA at a height lower than 1 000 feet within a horizontal radius of 300 metres of a cetacean.

⁵ Regulation 61 of the NPW Regs states that the prescribed distance, for a person operating an aircraft (other than a helicopter or gyrocopter), is a height lower than 300 metres within a horizontal radius of 300 metres.

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This type of information is not presently part of CASA's consumer information package but is relevant for a variety of reasons, not least because an operator could feasibly fly a drone in a national park in compliance with the CASA Regulations, but in breach of the NSW law.

13. Example 3: Leichhardt Local Council in Sydney has prohibited RPA use in public parks within the local government area. This means that RPA use which may have been otherwise compliant with the CASA Regulations is nevertheless prohibited by operation of the local government ordinance.

C FUTURE REGULATORY OPTIONS

14. There will obviously always be some members of the public who will make no attempt to comply with the various regulatory requirements. However, we consider that the issues highlighted above at best make compliance difficult for those looking to do the right thing and at worst actively discourage compliance.
15. In our view, both an increased awareness and understanding of the applicable regulatory requirements amongst RPA operators and greater enforcement capabilities are needed if compliance is to be encouraged.

Public awareness and understanding

16. In our view, there would be significant legal difficulties in attempting to consolidate and simplify every piece of legislation, regulation and ordinance which may relate to the operation of an RPA.
17. However, we believe there should be at least some combined effort on the part of the Commonwealth, States and Territories to: (i) harmonise the various applicable regulations to the maximum extent possible and, at the very least, to the extent of any overlap; and (ii) prepare a comprehensive information package to be provided with every RPA sale (**Information Package**).
18. We envisage that such an Information Package would effectively be a set of "Road Rules" for RPA operators and, with this in mind, it should cover off all of the regulatory requirements that may apply to RPA operators in different situations (including in different States and Territories), or at least alert operators to the fact that additional regulations exist and point them in the direction of further information, not just the CASA Regulations.⁶ Statutory language should be avoided so as to facilitate understanding. In this regard, we are of the view that it would be helpful for the Information Package to provide practical guidance as to how the various regulatory authorities (particularly CASA) interpret and enforce the key regulatory requirements.
19. In addition, the CASA website should contain an interactive version of the Information Package containing links to additional information where required.

Enforcement

20. In our experience, there is a general view in the industry that CASA's enforcement capabilities are limited due to lack of resources and the practicalities of monitoring RPA use. We would

⁶ By comparison, the CASA-sponsored "Flying With Control" brochure included in the retail sale of RPAs up until 2016 was very simplistic and only covered, very generally, some of the standard operating conditions from the CASA Regulations.

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therefore welcome an increase in CASA funding for compliance purposes or, alternatively, encourage CASA to consider delegating enforcement power to local law enforcement officers.

21. At a practical level, we consider that the introduction of the following two mandatory requirements should be strongly considered:
- 21.1 every person operating an RPA (whether recreationally or commercially) carry legal identification; and
- 21.2 all RPAs larger than Micro RPAs:⁷
- (a) be registered with CASA and following registration be assigned a unique identifier;⁸ and
 - (b) be fitted with that unique identifier (or have the unique identifier permanently applied) to enable it to be traced in the event of a crash.⁹
22. It is difficult to support the contention that a registration system is overly onerous.

D PRIVACY

23. Personal privacy is a growing concern in circumstances where RPAs are now routinely armed with sophisticated optical technology including 4K cameras and an array of sensors of varying technology. In Australia, we do not have any general privacy torts nor do we have any specific legislative protection for invasion of personal privacy.
24. At a Commonwealth level, the *Privacy Act 1988* (Cth) – which establishes the Australian Privacy Principles (**APPs**) – is primarily concerned with data protection and personal information. It is not concerned with invasion of personal privacy. The relatively recent House of Representatives Standing Committee on Social Policy and Legal Affairs report on RPA use demonstrates the relative inapplicability of the APPs to privacy concerns associated with RPA use.¹⁰
25. The capturing of images (taken by RPAs or otherwise) is not generally protected under *Privacy Act 1988* (Cth), because:
- 25.1 images are unlikely to constitute personal information; and
- 25.2 most people operating RPAs will not be required to comply with the APPs because they are not “APP entities” within the meaning of the *Privacy Act 1988* (Cth).¹¹
26. Most States and Territories have surveillance laws governing the use of optical surveillance devices, however they are inconsistent in their treatment of such devices. In any event, it is

⁷ A “micro RPA” is defined in the CASA Regulations as an RPA with a gross weight of 100 g or less.

⁸ Note the position in the United States - all RPAs with a mass greater than 0.55lbs must be registered with the Federal Aviation Administration (FAA).

⁹ The CASA Regulation should be amended to include this requirement and accommodate an offence for removal of the unique identifier.

¹⁰ Report entitled “*Eyes in the Sky: Inquiry into drones and regulation of air safety and privacy*” dated 14 July 2014 – see Chapter 4.

¹¹ Only APPs Entities are required to comply with the APPs. An entity which has an annual turnover in excess of \$3M is regarded as an APP Entity for APP compliance purposes.

unlikely that use of a camera-equipped RPA would constitute an offence unless the use involved unauthorised entry onto the premises. In other words, if an RPA operator was operating remotely but flew an RPA above a particular premises, then that would most likely not constitute an offence.¹²

27. Unlike, for example, the United States which has a series of well-developed privacy torts, Australian common law does not recognise any general or specific right to privacy. The existing common law torts of nuisance and trespass may have some applicability to over-zealous RPA use, however they are relatively confined; it is quite possible that certain conduct could constitute an invasion of privacy, but might not be sufficiently egregious to trigger a nuisance or trespass claim.
28. The Australian Law Reform Commission (**ALRC**) has called for Commonwealth legislative intervention in the privacy space. In its *Serious Invasions of Privacy in the Digital Era Report* (ALRC Report 123), tabled in Parliament on 3 September 2014, the ALRC recommended the introduction of Commonwealth legislation creating a tort of invasion of privacy.
29. We think that the Committee should re-enliven, and give further consideration to, the ALRC's recommendation for Commonwealth legislative action. Of course, this issue has ramifications well beyond RPA use. As the ALRC has itself noted, it is not a simple consideration and further public and industry consultation, along with Government consideration, is certainly warranted. Perhaps the ever-increasing use of RPAs might act as a catalyst for this discussion.

E CLOSING REMARKS

30. We are of the view that the Committee should consider at least the following key recommendations:
 - 30.1 Commonwealth, State and Territory co-operation to prepare a comprehensive Information Package to be provided with every RPA sale in Australia.
 - 30.2 Implementation of a mandatory registration system for RPAs greater in size than Micro RPAs together with a requirement for the placement of a unique identifier within those RPAs.
 - 30.3 Re-enliven the ALRC's call for the introduction of a Commonwealth legislative invasion of privacy tort.
31. Should the opportunity arise, we would be interested in participating in any hearing of the inquiry proposed in early 2017.
32. Our team will be joining Mills Oakley on 6 February 2017. If the Committee has any questions please do not hesitate to contact James Lawrence, Partner on jlawrence@piperalderman.com.au or, from Monday 6 February 2016, on jlawrence@millsosakley.com.au.

¹² See, for example, s 8 of the *Surveillance Devices Act 2007* (NSW) which creates an offence for the use of an optical surveillance device on a premises if that use involves entry onto the premises without the express or implied consent of the owner of the premises.