COMMONWEALTH OF AUSTRALIA

# Official Committee Hansard

# SENATE

## RURAL AND REGIONAL AFFAIRS AND TRANSPORT LEGISLATION COMMITTEE

**Reference: Aviation Legislation Amendment Bill (No. 1) 2001**

FRIDAY, 2 MARCH 2001

**CANBERRA**

BY AUTHORITY OF THE SENATE

## WITNESSES

**BEETHAM, Mrs Robyn Lynette, Assistant Secretary, Aviation Industry, Department of Transport and Regional Services .......... 3**

**Canberra .......... 2**

**CLEGG, Mr Simon, Principal Lawyer, Legal Group, and Director, Aviation Legal, Department of Transport and Regional Services .......... 3**

**ELDER, Mr Robert Stephen Toti, Executive Manager, Government Industry and International Relations, Civil Aviation Safety Authority .......... 13**

**FARQUHARSON, Mr Terence Lindsay, Acting Assistant Director, Aviation Safety Compliance Division, Civil Aviation Safety Authority .......... 13**

**FERRIER, Mr Spencer Lyons, Committee Member and Director, Aircraft Owners and Pilots Association .......... 46**

**FRAZER, Mr Michael Hugh, Acting Director, Safety and Regulatory Policy, Department of Transport and Regional Services .......... 3**

**HAMILTON, Captain William John Ray, President, Aircraft Owners and Pilots Association of Australia .......... 46**

**ILYK, Mr Peter, General Counsel, Office of Legal Counsel, Civil Aviation Safety Authority .......... 13**

**KIMBER, Mr Geoffrey, Senior Counsel, Office of Legal Counsel, Civil Aviation Safety Authority .......... 13**

**MUNRO, Mr Boyd (Private capacity) .......... 32**

**YATES, Mr Richard Godfrey, Assistant Director, Aviation Safety Standards, Civil Aviation Safety Authority .......... 13**

**SENATE**

**RURAL AND REGIONAL AFFAIRS AND TRANSPORT LEGISLATION COMMITTEE**

**Friday, 2 March 2001**

**Members:** Senator Crane *(Chair)*, Senator Forshaw *(Deputy Chair)*, Senators Ferris, McGauran, Mackay and Woodley

**Participating members:** Senators Abetz, Bartlett, Boswell, Brown, Buckland, Calvert, Chapman, Coonan, Crossin, Eggleston, Faulkner, Ferguson, Gibson, Harradine, Harris, Hutchins, Knowles, Lightfoot, Mason, McKiernan, McLucas, Sandy Macdonald, Murphy, O'Brien, Payne, Schacht, Tchen, Tierney and Watson

**Senators in attendance:** Senator Crane *(Chair)*, Senators Greig, O' Brien and Woodley

**Terms of reference for the inquiry:**

Aviaton Legislation Amendment Bill (No. 1) 2001

**Committee met at 9.03 a.m.**

**CHAIR**—Welcome. I declare open this public hearing. I say to all witnesses today that, if there is anything of particular contention or difference you may stay, but we may—and I emphasise the word may—call you back and have a group session at the end of the day or we may even call back some individuals if we want to get more information as the day goes on. I say to witnesses from the Department of Transport and Regional Services that as we have only just received your submission, we probably—and I emphasise the word probably— will defer calling you back today, because I think it is only fair to committee members that we have an opportunity to look at the submission a little more thoroughly than we have been able to do so far. I make those two observations at the start of the hearing.

The committee is meeting today to discuss the Aviation Legislation Amendment Bill (No. 1) 2001. On 7 February 2001 the Senate referred the bill to this committee for examination and report. I should point out at the outset that the bill originally referred to the committee was entitled the Aviation Legislation Amendment Bill (No. 2) 2000. After debate and amendment of the bill earlier this year in the other house, the bill is now in the legislation list as the Aviation Legislation Amendment Bill (No. 1) 2001. The bill provides for amendment of the Civil Aviation Act 1988 so as to allow Australia authorities to enter into agreements with other national air safety authorities; to harmonise some criminal offences under the Civil Aviation Act with principles in the Commonwealth Criminal Code; and to give the Civil Aviation Safety Authority, CASA, the power to accept written undertakings from people in relation to compliance with civil aviation safety legislation.

The committee has so far received seven written submissions. Is it the wish of the committee that these be published? There being no objection, it is so ordered. The committee has also received a large number—approximately 1,000 to date—of faxed form letters with identical wording sent to the committee secretariat at the request of a witness appearing during today's hearings, Mr Boyd Munro. These form letters appoint Mr Munro as a proxy for

the purposes of negotiations and discussions with the government on the bill. The committee does not consider these forms are submissions, as such, as they do not address the matters before the committee. A number, however, have addressed issues raised by the bill by way of short comment appearing on the form letter and will be classified as submissions. I should point out that the form letters will be considered as correspondence to the committee and constitute an indication from those persons who sent them to the committee of their support for Mr Munro's submission to the committee. They will remain part of the publicly available records of the committee and will be tabled in the Senate with the committee's report. I make the point that there is no provision for proxies in hearings before the Senate. As such, we do not consider them as proxies and we will deal with the issue on the merits of the information, the subject and, obviously, what our witnesses put before us.

The committee today will hear from representatives of the Commonwealth Department of Transport and Regional Services, CASA, and from representatives of pilots and operators affected by the provisions of the bill.

The hearings are public and open to all, and a *Hansard* transcript of the proceedings is being made. The *Hansard* will be available in hard copy from the committee secretariat on Monday or via the Parliament House Internet home page. It should be noted that the committee has authorised the recording, broadcasting and rebroadcasting of these proceedings in accordance with the rules contained in the order of the Senate on 23 August 1990 concerning the broadcasting of committee proceedings.

Before the committee commences taking evidence, I place on record that all witnesses are protected by parliamentary privilege with respect to submissions made to the committee and evidence given before it. Parliamentary privilege means special rights and immunities attached to parliament or its members and others necessary for discharge of functions of the parliament without obstruction and without fear of prosecution. Any act by any person which may operate to the disadvantage of a witness on account of evidence given by him or her before the Senate or any committee of the Senate is treated as a breach of privilege. While the committee prefers to hear all evidence in public, if the committee accedes such a request the committee will take evidence in camera and record that evidence. Should the committee take evidence in this manner, I remind the committee and those present that it is within the power of the committee at a later date to publish or present all or part of that evidence to the Senate. The Senate also has the power to order production and/or publication of such evidence. I should add that any decision regarding publication of in camera evidence or confidential submissions would not be taken by the committee without prior reference to the person whose evidence the committee may consider publishing.

**BEETHAM, Mrs Robyn Lynette, Assistant Secretary, Aviation Industry, Department of Transport and Regional Services**

**CLEGG, Mr Simon, Principal Lawyer, Legal Group, and Director, Aviation Legal, Department of Transport and Regional Services**

**FRAZER, Mr Michael Hugh, Acting Director, Safety and Regulatory Policy, Department of Transport and Regional Services**

**CHAIR**—I now invite you to make an opening statement.

**Mrs Beetham**—Thank you, Senator. During the debate in the House of Representatives on 7 February on the Aviation Legislation Amendment Bill (No. 1) 2001 concerns were raised about a number of matters. These related to the ability of the Civil Aviation Safety Authority to enter into article 83bis agreements on behalf Australia, maintenance definitions, consistency of offences with the criminal code, breaches of section 20AA of the Civil Aviation Act, enforceable voluntary undertakings and the Australian National Audit Office report into CASA. A joint submission is being prepared by the department and CASA on these matters and is being provided to the committee.

The committee will recall that, with regard to provisions in the bill that would give CASA the ability to enter into article 83bis agreements on behalf of Australia, the Minister for Veterans' Affairs and Minister Assisting the Minister for Defence undertook, on behalf of the government, to provide the committee with drafting instructions for proposed regulations which would provide administrative and technical provisions for the implementation of article 83bis agreements. In accordance with the minister's commitment, I would like—

**CHAIR**—I am having great difficulty hearing you. Would somebody please close the door.

**Mrs Beetham**—I was referring to the undertaking given that we would table drafting instructions. I would like to table those now. As part of the joint departmental and CASA submission, a detailed briefing note has also been provided to the committee on article 83bis, which covers those regulations and addresses issues and concerns that were raised during the House debate of 7 February.

While this information should assist the committee in its consideration of this matter, I would like to emphasise that the safety of civil aviation must and always will be the prime concern when entering into article 83bis agreements. This is consistent with the aims of the International Civil Aviation Organisation, which developed article 83bis in 1980 in response to concerns about the safety implications associated with the growing trend in aircraft leasing, charter activity and the movement of operational bases across national borders.

ICAO believes that article 83bis will ensure better regulation and oversight of aviation safety. Such agreements can result in a considerable reduction in regulatory workload and associated costs for the state in which the aircraft is registered as the state in which the aircraft is actually operated can more easily discharge regulatory responsibilities over the aircraft.

Also, from an Australian perspective, the Australian aviation industry could benefit from the conclusion of such agreements. Having said that, such agreements would never be entered into lightly by Australia, and the other country concerned would need to be capable of exercising appropriate regulatory control over the aircraft to an equivalent Australian standard. Safety remains the prime consideration, as I mentioned before.

The other issues raised during the 7 February debate on the bill will be discussed in further detail by CASA. The bill is a portfolio bill and is fully supported by the department. This

includes its provisions relating to the introduction of enforceable voluntary undertakings, which is seen as an effective way of providing CASA and the aviation industry with an option of a less rigorous enforcement for certain minor matters than prosecution and licence action, thus filling the current gap between relatively sanguine measures, such as counselling and training, and action such as cancellation of an air operators certificate. Having made those few remarks, my colleagues and I would be happy to answer any questions that the committee might have.

**CHAIR**—I will ask the first one. We have not had a chance to look at your submission. Can you take us to those parts of the legislation about which the most concerns have been raised with you, if there are any.

**Mrs Beetham**—The two that I understand are the most contentious are voluntary undertakings and the issue of 83bis agreements.

**CHAIR**—What has been the nature of the complaint or the concern about them?

**Mrs Beetham**—Primarily—

**CHAIR**—I am looking for some detail now.

**Mrs Beetham**—We have the comments as reflected in the address made by Mr Ferguson in the House. A number of submissions have been made, based on a circular prepared by Mr Munro, which make a number of claims about the propensity for CASA to misuse the new powers, additional risks to industry that might be involved with the granting of the proposed powers to CASA, both in relation to enforceable voluntary undertakings and also in relation to 83bis agreements. Beyond that, I believe that the other amendments that we are proposing in this bill are relatively technical and minor, and I am not conscious of any particular concerns about them.

**CHAIR**—I understand one of the concerns is the scope of the action that can be taken through the Federal Court, as far as those voluntary agreements are concerned. What would be the department's view if that were amended so that CASA could only use that course of action on safety matters? In other words, they could not use the Federal Court on non-safety issues.

**Mrs Beetham**—That would seem to be a very sensible sort of proposition, quite frankly, Senator. I think it would be consistent with CASA's safety role. Clearly, CASA has the function of protecting safety, so certainly we would be more than happy to consider such a proposal.

**CHAIR**—I am a bit perplexed by that answer. Why then was it put in this form in the bill when in fact you are quite happy to consider that proposal? I think your words were that it was 'quite sensible' to restrict that to safety matters?

**Mrs Beetham**—Senator, that was always the intention. CASA's role, as I mentioned, is to do with safety.

**CHAIR**—It is not the fact in terms of the amendment as it sits now.

**Mrs Beetham**—It was always the intent and it was implicit; what you are suggesting would be to make it explicit, and from that point of view, I could see some merits in that.

**CHAIR**—My final question is: would it also be possible to amend the bill to make it clear that CASA could not take more extreme action against a pilot or operator just because that person, operator or company declined to enter into an EVU?

**Mrs Beetham**—CASA is perhaps better qualified and equipped to answer that question, but my understanding of it is that it is a voluntary agreement. While there are other provisions that CASA may consider, the objective of CASA in seeking this power is to enable it to better fit the sanction to the actual offence or infringement. Consequently, I think there are sufficient protections there both because it is voluntary—you cannot be made to—and because CASA has to be able to defend its actions in a court of law if it becomes an issue about a voluntary undertaking and whether it was forced into it or not. It has to justify that it has entered into those undertakings for safety reasons, which is quite an onus on them to prove their case.

**CHAIR**—The basis of my question—and I recognise that they are voluntary undertakings—is that if a particular operator, for whatever reason, which could be quite legitimate, was not prepared to sign a voluntary agreement, there is nothing in terms of the legislation—this is a concern that has been expressed to me—that would protect them from being treated more harshly than would be the case had they signed an agreement. Do you think that is an unreasonable proposition?

**Mrs Beetham**—CASA always has to act within its current powers. Consequently, it would be exposed to those if it were to act improperly in forcing someone to sign an agreement or, alternatively, utilising some more stringent sanction, for which it can be challenged.

**CHAIR**—I have put that issue on the table. When we have heard the other witnesses, I could well come back to the issue.

**Senator O'BRIEN**—Could you, Mrs Beetham, or any of the other officers, identify the amendments in the bill which deal with the article 83bis agreements.

**Mr Clegg**—It is a new function for CASA. It appears on page 3 of the bill which was introduced in the Senate—new function (ca) after 9(3)(c).

**Senator O'BRIEN**—Is that the only amendment?

**Mr Clegg**—Yes. It is specifically to give authority to CASA to enter into those agreements.

**Senator O'BRIEN**—So the act must be read in consultation with the ICAO document; is that right?

**Mr Clegg**—The ICAO documents are guidelines advising member states as to how to conclude these agreements.

**Senator O'BRIEN**—I am just wondering about the terminology '83bis agreements' and understanding it in the context of law and interpretation.

**Mr Clegg**—An 83bis agreement is an agreement done underneath the Chicago convention, whereby responsibility is transferred from one state to another. This amendment authorises CASA to do those agreements on behalf of Australia.

**Senator O'BRIEN**—If someone wanted to examine a particular agreement, as courts are wont to do from time to time or as organisations which may wish to challenge a particular action are wont to do, I am seeking to establish whether they would need to refer to a particular document. So there is a particular document identifiable which sets out these terms. I take it that that is correct?

**Mr Clegg**—The terms of the agreement?

**Senator O'BRIEN**—Yes.

**Mr Clegg**—Some guidelines have been issued by ICAO as to what those agreements must contain. The regulations will actually spell out the criteria that CASA will need to include in those agreements to make sure that they meet those ICAO guidelines.

**Senator O'BRIEN**—So you will have to read the legislation with the regulations and the ICAO guidelines?

**Mr Clegg**—The actual effect of the article 83bis agreement is on the international plain, but the regulations are needed to implement its effect in the domestic sphere. What it effectively does is to make that aircraft not subject to particular provisions of the Civil Aviation Act, or makes them subject to it. So that is the actual legal effect in Australia that a court may then look at.

**Senator O'BRIEN**—Okay, in general terms I understand that. But what I am getting at is that, in terms of the application of the legislation and its interpretation in the courts, the court would need to have regard to another document. Is that a fair assessment of how this legislation would work in terms of any proceedings as to its correct application?

**Mr Clegg**—You mean another document apart from the 83bis agreement?

**Senator O'BRIEN**—No. The 83bis agreement is a document of an organisation. It is effectively an international treaty, isn't it?

**Mr Clegg**—It is not an international treaty; it's something done under the authority of an international treaty.

**Senator O'BRIEN**—Is that particular set of guidelines variable by agreement at international level?

**Mr Clegg**—The main idea behind 83bis agreements was to give flexibility to regulatory authorities as to which responsibilities they had to sign, so they could have signed everything authorised by that particular amendment or only some responsibilities. The actual document would spell out those responsibilities so if in any particular case you have to refer to that particular agreement there would be a separate agreement for each aircraft.

**Senator O'BRIEN**—Mr Clegg, what I am trying to establish is in the application of this legislation if this bill were to become legislation, the courts receive the rest of the papers on a proceeding and they say, 'Well, this is under the Civil Aviation Act of 1988, paragraph 9(3)(ca) and it says 83bis agreements.' What are 83bis agreements? You will then go to the regulations, which will, I think if I understand you correctly, define what an 83bis agreement is. Will you need to go to the international document in interpreting the law? That is the question I am asking you.

**Mr Clegg**—It really depends on what the question is before the court. To interpret the law as to what an 83bis agreement is, it is already defined in the Civil Aviation Act. And that actually refers to the actual amendment that inserts article 83bis. The actual agreement under the authority of that amendment is another document that I need to look at for each particular case.

**Senator O'BRIEN**—All I am trying to ascertain is that in passing a bill with this terminology, are we creating a problem down the track in terms of its interpretation? To determine what is an 83bis agreement, do you need to go beyond the regulations? Do you need to go to the international documents?

**Mr Clegg**—I'm still not quite sure I understand what the question is, but the regulations will say what an article 83bis agreement is.

**CHAIR**—You have to in every other court of law.

**Mr Clegg**—And the article 83bis agreement is the document that is done underneath the authority of a treaty, so in any particular instance they will need to look at the regulations and that particular document.

**Senator O'BRIEN**—So they will need to look at the particular agreement—

**Mr Clegg**—Yes.

**Senator O'BRIEN**—and they will need to look at the regulations and the act, but they will not need to go beyond that. Is that what you are telling the committee?

**Mr Clegg**—They would be the primary pieces of information. It is very hard to answer in the abstract without knowing the particular factual scenarios as to what other documents might be relevant.

**Senator O'BRIEN**—If you think you've got it hard, we have got to pass the bill and try to understand how it is going to work and that's the reason I am asking you this question.

**Mr Clegg**—The essential documents you would look at is the transfer agreement between the regulatory authorities, the domestic law, both this amendment and the regulations which implement that agreement. Then the actual agreement will have the commercial agreement attached to it, because this is designed to assist international leasing and international chartering to make sure the aircraft is as close to a regulator as possible. So they would be the four documents, I guess.

**CHAIR**—Can I ask you to take all the questions that Senator O'Brien has on notice. I am not saying you should not answer things now. Could the Attorney-General advise this committee on the status or the relationship between this legislation and what we are passing and international legal agreements we have with regard to flying, airlines, safety, et cetera. I think we should know the answer to that in terms of putting our recommendations. I do not know the status of the international rules. Are we signatories? Have they been ratified, et cetera? I think we should have that information for the committee.

**Senator O'BRIEN**—I think one aspect of my question is: how relevant would a change to the international documentation be to this legislation in terms of its interpretation? In locking in those words do we lock ourselves into whatever the terminology of the international documentation is? My point is that we can disallow regulations if there is a problem, but we cannot necessarily disallow the international instrument as the parliament can. By putting these words into the agreement, do we lock ourselves into aspects of the legislation which put part of this issue effectively beyond the power of parliament? Would you like to take that on notice.

**Mr Clegg**—We would be more than happy to take that on notice and give you an answer in due course.

**CHAIR**—Also, in the context of that does this legislation—I have not had a look at your submission—rely as its source of power or head of power on any international agreements?

**Mr Clegg**—The amendment that gives this power to the Civil Aviation Safety Authority implements an international agreement, so, yes, it relies on external affairs.

**CHAIR**—We should have that address by the Attorney, so that we know exactly what we are putting before the Senate.

**Mrs Beetham**—I might just make one additional point; I am not a lawyer. We have the power to enter into 83bis agreements; it is already in the Civil Aviation Act. I am just not sure about the merits of going down the path that we are going. We will certainly be happy to get further advice if you feel you need it. The power is there; Australia is already locked into it. We have already accepted.

**CHAIR**—That is the linkage we need explained.

**Mrs Beetham**—Yes, and we ratified the agreement or the protocol under which this is being adopted as a policy here in our country.

**Senator O'BRIEN**—That does not in any way detract from the issue. We are inserting a separate power and I am asking for detail on how we should understand it would be subject to consideration under the law. I notice that you have tabled the drafting instructions. Can you take me through the process the government normally follows in the development of legislation—just a general approach. For example, how would you go about consulting with sections of the community that would have a direct interest in a particular bill during its drafting.

**Mrs Beetham**—In terms of the actual bill itself, that falls into part of the processes that CASA runs through. When it first develops a proposal, it puts out a discussion paper.

**Senator O'BRIEN**—The department have not had a role in this at all?

**Mrs Beetham**—No, CASA undertakes that. As with some other elements of our comment so far, CASA are best placed to answer it. But they do run through a process of releasing a discussion paper for public comment. They then receive responses to that and consider them. Having considered that they put out a notice of proposed rule making, which goes a step further than a fairly plain English discussion of the general issues and the intent of CASA's actions to something getting closer to what would look like the legislation if CASA were to proceed to regulations and/or a change in the act if that was what was involved.

But once they have put out the NPRM and received the responses they prepare a summary of responses and how they propose to amend the draft legislation in response to those. Then they go to the Office of Legislative Drafting where they have their drafting instructions developed up and then they are submitted to us in the department for finalisation, approval by the minister and subsequent submission to the House.

**Senator O'BRIEN**—At the point of notice by this rule making, is there draft legislation?

**Mrs Beetham**—There is a plain English version usually included in that, but that does not have any legal status. It is an attempt by CASA to make clear to the audience what the intent is.

**Senator O'BRIEN**—Sorry, I have not time to assimilate the drafting instruction while we deal with this matter now. But essentially CASA have a plain English version of the legislation. They circulate it, they receive comments, they report, they somehow take it through to you as to what the responses are and—

**Mrs Beetham**—The summary of responses is made a public document.

**Senator O'BRIEN**—And, based on that, the department prepares the drafting instructions or does CASA?

**Mrs Beetham**—No, CASA prepares the drafting instructions and they arrange with the Office of Legislative Drafting for those to be drafted up. They submit them to us once they have been accepted by CASA and internally cleared by CASA and then they are submitted to the department to take forward to the parliament through the minister, because it is his legislation.

**Senator O'BRIEN**—So the department has no consultative process at all? That is left to CASA, is it?

**Mrs Beetham**—In terms of external consultation with the public, yes, that is a process CASA primarily conducts. We do see the discussion papers and other public material and we have the opportunity, like anyone else, to comment. We do seek briefing, particularly where we might have had representations from members of the public; for example, a letter writing campaign or sometimes a telephone conversation which raises a concern.

**Senator O'BRIEN**—But what about in this case? What is the department's role in that regard in this particular instance?

**Mrs Beetham**—In this particular instance we have sought clarification from CASA of elements that we had concerns about.

**Senator O'BRIEN**—Did you receive any correspondence? Particularly, did you receive a any significant amount of correspondence or representation about the legislation?

**Mrs Beetham**—There have been a number of—

**Senator O'BRIEN**—During CASA's consultation process, I take it?

**Mrs Beetham**—No, not that I have any knowledge of. I do not know of any.

**Senator O'BRIEN**—So, during CASA's consultation process, you are unaware of any approaches to the department?

**Mrs Beetham**—That is correct. I do not know of any particular ministerials or representations. I really became aware of them once the legislation became public.

**Senator O'BRIEN**—So early this year was the first the department became aware of concerns?

**Mrs Beetham**—It is just in recent weeks that attention has certainly increased. But in relation to the 83bis one, I am reminded that in fact that was a departmental initiative to simply be more efficient, I think, in the way that whole process runs. Given that CASA had the power, CASA would negotiate those agreements. We initiated that amendment. I was responding to you in more general terms.

**Senator O'BRIEN**—So it was these responses after the bill became public that led to the amendments, proposed by Mr Scott, to the bill. I did not note the date that he made those changes. There were amendments proposed to the original bill, weren't there?

**Mrs Beetham**—On 83bis?

**Senator O'BRIEN**—To the bill. Were they provoked by the approaches to the department following the publication of the first bill?

**Mrs Beetham**—I am trying to think of the specific amendment you might be referring to because there are a number of amendments being made to the bill. Some of them were to correct drafting errors and so on.

**Senator O'BRIEN**—I refer in particular to subsection 20AA(2). There were some amendments which were advised by Mr Scott with the supplementary explanatory memoranda.

**Mrs Beetham**—I have just been reminded that there are no amendments to 83bis on our part. The government amendments were spurred by—

**Senator O'BRIEN**—The question is about the bill, not 83bis. Do you want to take that on notice, given the time constraints today? I can supply the department with the date on which it was varied. I would like to know whether that was in response to the consultative process or to approaches to the department and the government, in response to the original bill.

**Mrs Beetham**—A number of them were spurred by Parliamentary Library observations about the legislation. They picked up areas for improvement. Others were spurred by Boyd Munro's comments. So we were being receptive to those concerns.

**Senator O'BRIEN**—Perhaps you could identify which are which. Take that on notice, if you would, given the time constraints. Who developed the government response to the 1999 ANAO report on aviation safety compliance? If it was the department, specifically, the passage on page 109 of the audit report states:

> the process of operators entering into voluntary undertakings at informal conferences, once a show cause action has been invoked, will require proper documentation. Also, for the undertakings to have any enduring significance they will need to be monitored by the responsible office. In the light of the ANAO's findings, cited earlier in this report, this will require improvement in the way CASA manages and prioritises tasks in its surveillance program; and
>
> an effective quality control system is in place to ensure that the evidence is reliable, and that the quality of the inspection and audits from which the evidence is derived is consistent with the standards set by CASA.

I wondered what comments the department has in relation to that ANAO finding in the context of the proposal and the legislation which will empower CASA to follow down the path of voluntary enforceable undertakings.

**Mrs Beetham**—I note that the ANAO report perceived that as a reasonable sanction for CASA to have. We agree that it is a reasonable sanction for CASA to have. I think one of the concerns is that there is a big gap between a relatively light penalty for—

**Senator O'BRIEN**—That is going to the issue rather than the resources and procedures that are needed to make this workable. That is the point of my question.

**Mrs Beetham**—Yes, certainly. I am sorry, I was going to answer that; that is, I think that they had a point. CASA itself, I think, acknowledges that when the report came out they had some improvements to make, and I believe they have worked very vigorously to make those. CASA can comment in more detail. But they certainly have, I think, got their act together a whole lot better than they had, both through experience and through the sorts of measures that the ANAO report pointed out to them they needed to address. I think they have been quite diligent in endeavouring to do that. They know that they are in the spotlight in that regard and they have, I think, worked successfully to address many of those concerns.

**CHAIR**—Attached to the draft there are two documents. One is a protocol relating to an amendment to the Convention on International Civil Aviation signed at Montreal on 6 October 1980, and then there is an opinion by the Attorney-General's Department as to the relationship between this legislation, article 83bis et cetera, and the Chicago convention in brackets. So you might well, in terms of answering the questions that we asked of the Attorney-General, take that into consideration. I think most of the questions are answered in there but I just bring that to your attention. Senator Woodley.

**Senator WOODLEY**—I want to ask a couple of more general questions than detailed ones because, like the rest of the committee, my confession is that I have not had time to read all the material which we have. In Mr Munro's submission, he makes the point:

> The criminal provisions should not provide custodial sentences in cases where a person endangers his own person or property but no-one else's. An example is the new 24(2). Note that Section 20A(2) of the Act was amended in 1995 to remove the criminal sanction where dangerous conduct does not endanger the person or property of another person. This is in line with provisions of the ICAO convention.

And there are other stories about custodial sentence for what is essentially a paperwork offence. I would certainly take seriously any extension of custodial sentences for a whole host of reasons, so could the department give us some idea of why you are extending penalties to custodial sentences? I guess your answer will be that this is then in line with the ICAO convention, but that really does not satisfy me.

**Mrs Beetham**—I think CASA is best placed to answer that question. Again, I am not a lawyer, but I would question whether or not the fact that there is a penalty there of two years is mandatory in the sense that a court would have discretion—

**Senator WOODLEY**—We had hoped that we had got rid of all the mandatory sentencing. But, anyway, keep going.

**Mrs Beetham**—That is about all I was going to say, unless Mr Clegg can add anything to that.

**Mr Clegg**—As you are probably all aware, all the sentences in all Commonwealth legislation are maximum sentences. The court have the discretion to award anything up to that amount but generally match the penalty to the actual infringement.

**Senator WOODLEY**—I hear what you are saying but I have got to say I am not satisfied. If we are entering the area of extending sentences, I really would like to hear some more justification for that. I am happy for you to take that on notice. I certainly would raise it further in the chamber to try to get answers, so if you took that on notice I would be happy for that to occur.

**Mr Clegg**—I certainly think that CASA can tell you a bit more about the previous provision. This provision replaces a previous provision and they will be able to tell you more about the history of prosecutions or lack thereof underneath that particular provision. They are in a better position to answer that question.

**Senator WOODLEY**—All right. We will ask CASA. We did receive a large number of form letters, and I might just comment rather than ask a question. If anyone wants us to take a form letter seriously—and we do, in the sense that it always gives us an idea of people complaining—to have certain types of comments at the top of a form letter really does destroy its credibility. This is an example:

You need to send at least 5 faxes to the 'list' with one or more signatures. Don't worry if you sign others! This one is 'Engineering'. The more the merrier! We need as many industry voters as possible to sign the FAX!

This is just a bit of gratuitous advice from me, I guess, but form letters that have that kind of comment on them really have to be discounted. But let me just indicate that the form letters are very strong on the issue of, as this one is headed 'Conviction without the inconvenience of evidence'. I presume we could make those form letters available, if you do not have them, as further evidence of the concern that people are expressing about the custodial sentences. Would you look at those as well, and take it on notice to give us some more justification for the whole issue of custodial sentences.

**Mrs Beetham**—Certainly, Senator, we'd be happy to do that, but I suspect that CASA may be able to throw further light on it. But custodial sentences generally is an issue for the Attorney-General.

**Senator WOODLEY**—It is a philosophical debate, I guess, but one that affects us. That's all, Chairman, I'm sorry.

**CHAIR**—Thank you, Senator. I made the comment about the form letters and the faxes we received during those last couple of days, and made the comment that they are listed and kept but not considered in the context of being an official part of the evidence because we don't have provision for proxies. But, if you or CASA want to look at them, they are there for the public record and copies will be kept of them.

**Mrs Beetham**—Thank you, Senator. I suspect that the kinds of form letters you have been receiving are very similar to the ones that have been forwarded to the minister. We too have received a number through him, so—

**CHAIR**—That goes for anyone else too. I'm not CASA; if anyone wants to look at them, they are on the public record. They are not confidential. That winds up this part of your evidence before us. As I said earlier, we will need to call you back. It may not be this afternoon, but I would not say it will not be. There might be some additional questions that arise today that we need to follow up with you.

**Mrs Beetham**—Certainly we would be happy to do anything we can to assist the committee, Senator.

**CHAIR**—Thank you.

[9.52 a.m.]

**ELDER, Mr Robert Stephen Toti, Executive Manager, Government Industry and International Relations, Civil Aviation Safety Authority**

**FARQUHARSON, Mr Terence Lindsay, Acting Assistant Director, Aviation Safety Compliance Division, Civil Aviation Safety Authority**

**ILYK, Mr Peter, General Counsel, Office of Legal Counsel, Civil Aviation Safety Authority**

**KIMBER, Mr Geoffrey, Senior Counsel, Office of Legal Counsel, Civil Aviation Safety Authority**

**YATES, Mr Richard Godfrey, Assistant Director, Aviation Safety Standards, Civil Aviation Safety Authority**

**CHAIR**—Welcome, gentlemen. I know you're all familiar with the format and the words, et cetera, so we will not be reading them out. I invite you to make an opening statement.

**Mr Ilyk**—We thought it might be useful if we provided the committee with a brief overview of at least that part of the bill before the committee that deals with enforceable voluntary undertakings and also briefly try to dispel some of the misconceptions that have risen about that proposed new system. Under section 91 of the Civil Aviation Act this parliament has decreed that CASA should 'develop effective enforcement strategies to ensure compliance with the aviation safety standards'. That same act also requires CASA to encourage a greater acceptance by industry of its obligations to maintain high standards of aviation safety. Parliament clearly recognised that industry itself had an obligation not just to comply with the letter of the law but to maintain high standards of aviation safety, which is simple beyond simple compliance with rules.

In discharge of these statutory functions, the CASA board, in March 1998, developed a discussion paper on a new approach to enforcement. That paper was distributed to members of the aviation community from the chairman for comment in March 1998. It was advertised in CASA's publication *Aiming higher*, it was placed on CASA's website and industry was encouraged to review the paper and provide comments to CASA. Copies were also made available at all CASA district offices so that industry could get hard copies of the paper and it was available throughout Australia. Included in that discussion paper was the proposal to recommend to the government that it introduce legislation to provide for an enforceable undertaking scheme.

What did the board hope to achieve by an enforceable voluntary undertaking scheme? Under the present law, where it detects concern for aviation safety, CASA does not have any significant capacity to choose between action from among a graduated range of response actions. Generally it may either take informal action, such as counselling, or it may take the ultimate action of prosecution, suspension or cancellation of certificates or licences. In many cases this represents a choice between using a feather duster and a sledgehammer to crack a nut.

The EVU proposal was intended to provide a mid-range option whereby an operator had an opportunity to remain in operation provided they addressed the underlying safety concerns by complying with specified conditions. In order to provide some public interest

assurance that the undertaking to comply was not just a wet sponge, those conditions were to be rendered enforceable.

After the close of the consultation period in April 1998, the board considered the responses from industry. There were no objections registered to the EVU scheme; in fact, there was a great deal of support for the whole of the board's proposal as outlined in the discussion paper.

**CHAIR**—How many is 'a great deal'? You said that there were no objections, then you said that there was a great deal of support.

**Mr Ilyk**—All of the responses we got basically supported the whole scheme.

**CHAIR**—Was that a couple of hundred or 10?

**Mr Ilyk**—We had about 30 or 40 responses from industry representing organisations and individuals plus internal people as well, and that was a separate comment.

For example, on 13 March 1998, Mr Spencer Ferrier, representing AOPA, wrote to CASA congratulating the chairman on the paper. He also congratulated the CASA individuals who prepared the reforms. In a short article he prepared for CASA's *Aiming higher*, Mr Ferrier said unequivocally 'AOPA welcomes the CASA reforms'. That obviously included EVUs.

Even some of CASA's harshest critics, such as Dr Broadbent, personally wrote to the chairman on 13 March congratulating him on 'producing what appears to be a balanced approach to enforcement'. He went on to say that he hoped the chairman 'can put it into effect'.

No doubt, later today you will hear lots of criticisms about the EVU system. You will probably hear that it is not voluntary at all, that CASA is such a vindictive organisation that, if you do not enter an undertaking, CASA will take some form of retaliatory action.

What are the facts? Firstly, there is no evidence to support such an allegation. The making of the allegation does not make it true. On this argument, presumably CASA even now can take legal retaliatory action against people it does not like. EVUs will not change the position. Taken to its logical conclusion, the proponents of this argument must surely be concerned that, if this legislation is defeated, CASA will take immediate retaliatory action against those sections of the industry that voiced criticism of the proposal. Such an argument, of course, is no more than scaremongering and there is no evidence of any systemic culture of vindictiveness in CASA.

What this committee should note, I believe, is that, for every allegation of harsh treatment by CASA, there are multiple allegations that CASA has not acted sternly enough. Indeed, recent history well documents multiple cases where the subsequent judgment has been that CASA should have acted against operators when it did not or should have acted earlier than it did—for example, see Seaview, Monarch, Aquatic Air reports and even this committee's report on ARCAS.

The public view is also that CASA should be a strong regulator. A public survey conducted by CASA indicates that the public does not support a disempowered regulator who cannot take effective enforcement action such as suspending and cancelling certificates. The public's view seems to be diametrically opposed to the sort of limp regulator proposed by AOPA and Mr Munro.

So what are the facts about the voluntary nature of EVUs? The fact is that they are entirely voluntary and that CASA cannot force someone into giving an undertaking. The important

point to remember is that CASA has no power of itself to enforce an undertaking. If the person later changes his mind and believes he was coerced into the undertaking they do not have to do anything. They do not have to comply with the undertaking; they can simply ignore it. If CASA then wants to enforce the undertaking it must take the matter to the Federal Court. It will be up to CASA to prove the case and the court will have an opportunity to weigh up all the evidence, including the evidence of the person giving the undertaking. Only after a judicial inquiry will it be possible to enforce an EVU. But now the argument by the opponents of EVUs seems to be, 'Not only can you not trust CASA, you can't even trust the courts.' If you can't trust CASA and you can't trust the courts, who can you trust?

The EVU system proposed by the legislation is not unique. This parliament has seen fit to enact identical legislation for other regulatory agencies such as ACCC and ASIC. As far as I am aware, there was no public outcry against such legislation. But no doubt you will hear arguments that the situation with CASA is different because you do not need the ACCC's permission to be a business person but you certainly need CASA's permission to fly. But is that correct? The ACCC and ASIC both have regulatory—that is, permission giving—roles both on a formal and an informal level. For example, undertakings are often given to the ACCC in the context of merger discussions and ACCC's informal agreement to mergers is often considered essential. In relation to ASIC, it incorporates companies, it approves prospectuses and it moves to prevent persons continuing to act as directors. It clearly has a capacity to act in accordance with a culture of systemic vindictiveness. But the existence of such a capacity does not mean that it will be exercised. So far as I am aware, no such allegations are made against ASIC. If it does not act in that way, why should the presumption arise that CASA will do so, especially in the light of the suggestion above that the balance of criticism is that CASA is not tough enough, and also in the light of all the legal protections against government abuse of power. The fact is that both ACCC and ASIC regard EVUs as a fundamentally important tool in their enforcement regimes and, as far as I am aware, there are no complaints about the way in which they have been administered in either case.

You may also hear criticism that there are limitless penalties for a breach of an EVU but, as explained earlier, CASA cannot impose any penalty whatsoever for a breach of an EVU. All it can do if it wants to enforce an EVU is refer the matter to the Federal Court which will then determine the appropriate penalty after a careful weighing of all the evidence in open court.

You may also hear criticism that CASA would be able to seek EVUs where there is no evidence whatsoever to mount a prosecution for a breach of the law. Strictly speaking, that is correct. It is also correct in the case of the ACCC and ASIC. But in practical terms it is hard to conceive of why CASA would act in that way, particularly as it could only enforce the EVU through the Federal Court. It is likely, however, that CASA could seek an EVU where there was some reasonable basis for suspicion of a breach but the evidence was not sufficient to allow CASA to prosecute. This may particularly be the case where evidence supports a finding on the balance of probabilities that a certain event had occurred, but the criminal law requires proof beyond reasonable doubt to sustain a prosecution. In these circumstances, it seems incongruous to argue that CASA should not be concerned and should be powerless to act against a threat to aviation safety where it is more likely than not to exist. This is particularly the case where the giving of the undertaking is voluntary—unless, of course, you subscribe to the vindictive regulator theory. The other area where CASA may

seek EVUs is where there is clear evidence to sustain a prosecution but that, in all the circumstances, may be an overreaction.

Finally, the committee may hear—Senator Woodley has already referred to this—that the overwhelming proportion of industry is violently opposed to EVUs, as evidenced by the numerous responses to Mr Munro's plea to some sections of the industry to allow him to represent them as their sole representative on this bill. But what is the reality of the situation? Mr Munro may well have a few thousand people sign up, but what does that mean? What percentage of industry is that? What would those people have said if they had a proper No case without all the misleading and emotional rhetoric, let alone a proper Yes case? Who gets to negotiate for the great mass of industry who may want this introduced? Does Mr Munro purport to speak for commercial operators and maintenance organisations? What about the general and the travelling public? Does Mr Munro purport to represent them, or are their views about wanting a tough regulator simply to be ignored as irrelevant?

The fact is that CASA is a regulator. It is a law enforcement body. It is charged by the Civil Aviation Act, an act passed by this parliament, to develop effective enforcement strategies to secure compliance, and it is required to regulate industry.

What should be noted about any industry opposition to this proposal, of the type being bandied around now, is that it is coming from a biased perspective. The opponents are not necessarily disinterested observers. They are the individuals who are being regulated, and it is entirely understandable that they would oppose any proposed law enforcement measure. The general public, however, and the travelling public has a different view and has, as mentioned in a recent survey, indicated that it wants a regulator that would take strong action.

It is this parliament that represents the broader community. It is this parliament that is there to protect their interests. It is this parliament that created CASA, and it is this parliament that gave it the responsibility to regulate aviation safety. And it is this parliament which must decide if the interests of the community are better served by having a strong and effective regulator with an appropriate range of enforcement tools, or by having a toothless regulator that, were the wishes of CASA's critics in the industry to be granted, would not even have the power to suspend or cancel licences in order to protect aviation safety, even in the most extreme circumstances. Thank you, Mr Chairman.

**CHAIR**—Thank you. I call Senator Woodley.

**Senator WOODLEY**—First of all, to go to the submission made by Mr Ilyk: the issue of a custodial sentence was what I raised, not EVUs. I am just reflecting on your opening remarks. I do not find it helpful to pose two extremes as the choice—in other words, a choice between a powerful regulator and a toothless regulator. I think what we are talking about is the appropriateness of custodial sentences. That is the question I have and I wondered if CASA would like to comment. A custodial sentence is not the only way to

have enforcement of CASA's obvious task to be an effective enforcer. As you have commented, this committee is certainly behind CASA in that. We have made those kinds of comments on a number of occasions. But it is the custodial sentence that I would like to hear some justification of. That is my main question.

**Mr Ilyk**—I might ask one of my colleagues to address that, but could I make some preliminary comments in relation to it. Firstly, I agree with you that you need have some median enforcement tool, and that is exactly what the EVU is. You were saying a bit earlier, as I understood it, that you were concerned about custodial sentences in cases where there is no evidence. You have a lot of faxes saying, 'CASA will be able to put you in prison, even though it has got no evidence.'

**Senator WOODLEY**—I was simply quoting a fax and asking if you could—

**Mr Ilyk**—The fact is that that is simply untrue. These are criminal offences. CASA will not be able to do anything about them. It is the responsibility of the Director of Public Prosecutions and it has to go to a court and the court certainly will not convict anyone where there is no evidence. In fact, the opposite will occur: the court will simply say 'no evidence, end of case, go away.' And there is absolutely no basis for saying that there is a custodial sentence for a breach of an EVU. The custodial sentences in the bill relate to breaches of criminal law and that criminal law can only be enforced through the courts, and that is the role of the DPP, not CASA.

**Senator WOODLEY**—I still need to hear some justification of a custodial sentence. That was really my question.

**Mr Ilyk**—At the end of the day, Senator, it is this parliament that decides what the appropriate penalty level is. At the moment, the penalty for those breaches is a custodial sentence. That is what the parliament decreed in 1995 and this provision is simply replicating the provision that is already there.

**Senator WOODLEY**—Parliament still needs to be convinced—or members of parliament; it comes down to numbers in the end of course—but unless CASA is convinced it has the numbers, then I would suggest that a justification of why it is a custodial sentence is still an important case to make.

**CHAIR**—Before Mr Kimber speaks, could I just ask you to clarify: the custodial sentence that is in the bill before us now is exactly the same as what exists at this point in time?.

**Mr Ilyk**—Indeed, Senator.

**CHAIR**—Or are there amendments or changes to that?

**Mr Ilyk**—There is no change to the custodial sentence.

**Mr Kimber**—Mr Chairman and other members, I was just obtaining some information in relation to section 24 which was raised by Senator Woodley. I understand from my colleagues in our enforcement area that since 1999, when they started keeping a database of the enforcement actions they have taken, that there have been two prosecutions for breach of section 24. One of those was handled by the South Australian state police and we do not have information quickly to hand on the outcome of that charge. In Western Australia last year, a man was charged with two offences against section 24 and was

imprisoned for a total of three years. That was an air rage incident where he attempted to open a door of the aircraft on two occasions, and apparently the offender in that case has quite a long history of air rage incidents.

**Senator WOODLEY**—Those illustrations are very helpful because they enable us to get a grasp of what we are talking about.

**CHAIR**—You gave us two instances of when—as I understand what you said—the case went through and they were found guilty.

**Mr Kimber**—In the second case, yes; in the first case, I am unaware of the result of that prosecution.

**CHAIR**—Can you find out the result of that for us?

**Mr Kimber**—Yes.

**CHAIR**—And also the number of cases that have gone before the courts?

**Mr Kimber**—Yes, those are the only two that have been recorded since January.

**CHAIR**—Only two, thank you. You may have said that; I did not pick it up.

**Senator WOODLEY**—Was CASA involved in the consultation processes, in relation to the bill?

**Mr Ilyk**—Certainly in relation to EVUs, yes, CASA went through a consultation process.

**Senator WOODLEY**—Could you give us some description of that, so that we can get a feel for what—

**Mr Ilyk**—As I mentioned earlier, the matter was the subject of a proposal by the CASA board in March 1998. After the board agreed to going ahead with a new enforcement policy, the chairman wrote to all members of the aviation industry setting out what the proposal was and providing a copy of the discussion paper. A copy of the discussion paper was put on CASA's web site. In CASA's aviation journal *Aiming Higher,* which goes to all members of the industry, there was a write-up about the new enforcement system. Readers were encouraged to read the document, comment upon it and send their comments in to CASA. Contact addresses were given. They could get it either by ringing up if they wanted to or they could access it through CASA's email or web site. Copies of the document were placed at all CASA's district offices throughout Australia. After a consultation period of a couple of months, there were a number of comment papers—I think there were 38 or so—from industry representing individuals and organisations who provided comment upon the proposals. The board considered all those proposals and, at the end, in relation to the new enforcement process, which included EVUs, there were no objections to the EVU process, and the board determined it would approach government to have legislation passed to enact the EVU scheme. That was in about October 1998. As a result of the normal bureaucratic process that goes on—how long it takes—it was not until about February 2000 when the bill was introduced into parliament. It has been in parliament since February 2000.

**Senator WOODLEY**—Thank you for that. I have no more questions at this time.

**Senator O'BRIEN**—Yes, I have got a number of questions. I take it, then, that there are two consultation processes that CASA have been involved relative to this bill: MPRM9901RP and the process you describe about the EVU; so they are the two processes and there were no other processes?

**Mr Ilyk**—Not as far as I'm aware.

**Senator O'BRIEN**—From the point where, if I understood it correctly, CASA prepared the drafting instruction for the legislation, did CASA have any input into further amendments to the bill that the Government laid down—I think it was in February.

**Mr Ilyk**—Geoff might like to answer that.

**Mr Kimber**—Yes, CASA was consulted on the amendments proposed by the government in the House following a *Bills Digest* from the Parliamentary Library which raised a number of issues. We were involved in assisting in the drafting of the instructions towards those amendments.

**Senator O'BRIEN**—It is almost self-evident that there was no consultation process that initiated that or in response to that. From what you are saying, whatever those amendments are, they were prompted by the *Bills Digest*—

**Mr Kimber**—That is right.

**Senator O'BRIEN**—Part 7 on page 6 of the explanatory memorandum says there is no proposed implementation date for these changes. Why is there no proposed implementation date? Have I read it wrongly?

**Mr Kimber**—I believe that relates to the maintenance amendments and perhaps I might pass to Mr Yates to comment.

**Mr Yates**—Senator, as far as the amendments related to maintenance are concerned, the amendments that are proposed are intended to configure the act such that when the new maintenance regulations that are currently being developed are finalised and come into the system—whenever that will be—it will enable the new regulations to function satisfactorily. Our advice from the people doing the initial legal drafting for the new regulations for maintenance was that changes would be required to be made to the act to enable the new maintenance regulations to function.

**Senator O'BRIEN**—So you say that that passage does not relate to the other amendments, to the EVU.

**Mr Yates**—I did not say that, Senator.

**Mr Ilyk**—As I understand it, the EVU proposal has a commencement date of proclamation in order to ensure that all the processes in terms of the documentation and the training will be able to put in place before the scheme actually comes into operation.

**Senator O'BRIEN**—I am just trying to understand those answers. I am a little confused. I am referring to the EM, which says:

There is no proposed implementation date for the changes to the Civil Aviation Act.

I thought they included the matters Mr Yates was referring to.

**Mr Ilyk**—Subsection 2 of the bill states:

Item 17 of Schedule 1 commences on a day to be fixed by Proclamation.

Item 17 is the enforceable voluntary undertaking amendment.

**Mr Kimber**—I might clarify.

**Senator O'BRIEN**—I think I understand. If you think I need further tutoring on it, I am happy to receive it.

**CHAIR**—Yes, he needs lots.

**Senator WOODLEY**—So do I.

**CHAIR**—So do I.

**Senator O'BRIEN**—I will wait for your questions, Mr Chairman. I will think of some commentary as well. In relation to the 83bis agreements, can you explain the process that CASA would follow in entering into those agreements?

**Mr Ilyk**—I will have Mr Kimber answer that, Senator, but at the outset I think it is important to note that at the moment the act provides for 83bis agreements to be entered into. The issue is that at the moment Australia is given that power, and that normally goes through the normal state process. So if there was an 83bis agreement to be entered into now, which Australia is entirely entitled to do under the legislation, it would normally go through the department, through the Department of Foreign Affairs, and it would be negotiated at that level.

The purpose of this amendment is to allow CASA to enter those agreements on behalf of Australia rather than going through the state process. The regulations that are being proposed are intended to ensure that CASA does not go off on a wild goose chase. There will be a list of countries whereby CASA will only be able to enter into 83bis agreements with First World countries, and they will be listed in the regulations. The matters that can be included in the 83bis agreements will be included in the regulations. That is there to ensure protection if CASA wants to enter into an 83bis agreement with some Third World country.

**Senator O'BRIEN**—Would it be fair for me to say that the actual power that we should look to in relation to this matter is the regulation when it is promulgated?

**Mr Ilyk**—No, the power is actually already there, Senator. It is not a question of giving power; the power is already there. If this amendment —

**Senator O'BRIEN**—This amendment gives the power to CASA.

**Mr Ilyk**—It gives the power to CASA, yes. If that amendment is rejected, the power is already there and CASA could negotiate through the department and the Department of Foreign Affairs to enter into an 83bis agreement. The parliament has already passed that legislation; that is already in force.

**Senator O'BRIEN**—And that is what has happened?

**Mr Ilyk**—We have entered into no 83bis agreements. There are very few 83bis agreements in the world.

**Senator O'BRIEN**—Theoretically that could have happened, but it has not.

**Mr Ilyk**—Yes.

**Senator O'BRIEN**—I take it that it is expected that you will be pursuing such agreements as a matter of course following the passage of this legislation?

**Mr Ilyk**—I am not sure that that is a correct assumption. I do not think CASA is going to start going willy-nilly into 83bis agreements. You have to remember that both parties have to agree. If an Australian aircraft is overseas, CASA has to convince one of those First World countries that it should have the responsibility for regulating that aircraft—taking all the liability, all the responsibility for it. There will not be a lot of countries, I suggest, that would be rushing to enter into those sorts of 83bis agreements. But there may be cases, because of

the sort of international nature of aviation and international leasing and so on, where that may be appropriate. Some foreign registered aircraft may operate in Australia for long periods of time, and CASA and, for example, the USA may want to have that sort of arrangement whereby they will look after an Australian aircraft overseas and Australia will look after an American aircraft in Australia. But I suggest that CASA will not be rushing to enter into these sorts of agreements.

**Senator O'BRIEN**—So what you were saying was that there would be very strict guidelines laid down in the regulations as to what would occur?

**Mr Ilyk**—Yes, Senator.

**Senator O'BRIEN**—What I am leading to is this: I take it that that is where we would better understand how CASA will be approaching these matters, what constraints will apply.

**Mr Ilyk**—Yes.

**Senator O'BRIEN**—If the parliament was not satisfied with those, we would disallow the regulations?

**Mr Ilyk**—Yes, Senator.

**Senator O'BRIEN**—It is vague, in a sense, at the moment. I understand what you are saying; it is vague, in a sense, in terms of the way the legislation is written.

**Mr Ilyk**—Yes. This simply empowers CASA to do it, but there will be regulations which will restrict that power by saying, 'CASA can only enter into 83bis agreements with this listed set of countries, and if does enter into an 83bis agreement, those agreements must deal with all of these sorts of matters.'

**Senator O'BRIEN**—And CASA could not commence discussions until those regulations were promulgated?

**Mr Ilyk**—No.

**Senator O'BRIEN**—In relation to section 20AA of the act, what happens if an aircraft is operated without a maintenance release, somehow, without that being a known or a reckless action, and this is discovered by CASA? I take it that it will not be a breach and no action would be taken, even though there is a non-compliance with the act. Is that right?

**Mr Kimber**—That very issue is dealt with in our briefing, at pages 4, 5 and 6 of the combined department-CASA submission. If I might just paraphrase that briefing—

**CHAIR**—Are these the submissions we received last time? I do not think too many of us have opened that.

**Senator O'BRIEN**—I have opened it; I could not say I have read or assimilated it all.

**Mr Kimber**—The short answer is that, where there is no knowing or reckless breach of section 20AA, and if there were no other possible breaches committed by the operator, then in those circumstances CASA would not be imposing rigorous sanctions. Obviously, where there is a knowing breach, there is ample opportunity to prosecute and to take licence action. However, I should point out that an operator has many obligations under the act and regulations. If there was, for example, a failure to comply with section 20AA, not knowingly

but through some failure in an organisational system, such that information did not get through to the directors of the organisation or the chief pilot or something, that would be an organisational problem within the organisation that we could take action against. The absence of knowledge or recklessness does not preclude CASA from taking action if the absence of knowledge is a problem with the organisation.

**Senator O'BRIEN**—But not under this provision, I take it.

**Mr Kimber**—Not under section 20AA. We could certainly take action under 28BA, which is the provision permitting CASA to suspend or cancel an AOC if the organisational deficiencies were so serious as to warrant that action.

**CHAIR**—Can you clarify for us: who makes the decision whether to do that or not? And is there an appeal?

**Mr Kimber**—The decision to suspend or cancel, or not to suspend or cancel, is made by—

**CHAIR**—Under 20AA?

**Mr Kimber**—No, it is under 28BA. It is made by CASA—that is, the director or one of the assistant directors of CASA—and there is an appeal to the Administrative Appeals Tribunal from that decision.

**Mr Ilyk**—Under section 20AA, it is the DPP that determines whether there is sufficient evidence to prosecute. I would like to make the point that, in relation to Senator O'Brien's question, that is exactly the situation today. It is an offence to fly without a valid maintenance release, but the offence is that you must do it knowingly or recklessly. That is exactly what the situation is today.

**CHAIR**—So can I just go back one step. I understand that it is the DPP, but who makes the decision to refer it to the DPP?

**Mr Ilyk**—CASA would make the decision.

**CHAIR**—But who in CASA—the director?

**Mr Ilyk**—The manager of enforcement.

**CHAIR**—CASA is a pretty big organisation.

**Mr Ilyk**—After an investigation, the manager of enforcement and investigations will determine whether there is sufficient evidence to show that there has been a breach of the legislation. If, in their view, there is and it is serious, it will be referred to the DPP. The DPP will make the ultimate decision, based on the evidence.

**Senator O'BRIEN**—In the summary of responses on page 6 it was indicated that AOPA and Qantas agreed. I understand there have been some changes since their agreement. Are they the changes that you described as having been initiated following the *Bills Digest*?

**Mr Ilyk**—I am not quite sure what the question is. If it is in relation to EVUs, there has certainly been no change to the legislation.

**Senator O'BRIEN**—The original question was about 20AA.

**Mr Ilyk**—That has arisen as a result of the circumstances that Mr Kimber described. There has not been consultation on those amendments.

**Senator O'BRIEN**—I just wanted to tie down that the amendments to 20AA are able to be described as amendments initiated in response to the Parliamentary Library *Bills Digest*.

**Mr Kimber**—Yes, there were government amendments to section 20AA in response to those observations of the Parliamentary Library.

**Senator O'BRIEN**—But were any of them not in addition to that? If you had the consultation and it was agreed to by AOPA and Qantas then there are changes. Are any of those changes not able to be categorised as those which were initiated following, and arising from, the Parliamentary Library *Bills Digest*?

**Mr Kimber**—No.

**Senator O'BRIEN**—Just give me an outline of how the compliance enforcement options would operate under the VEU.

**Mr Ilyk**—Perhaps it is best done with some examples, Senator. At the moment you have a situation where, for example, a pilot may fly into controlled airspace without ATC clearance. Clearly, that is an offence under the regulations. If that was deliberate, then CASA would take the normal action that it would take now. It would not concern itself with an EVU. But it may have occurred as a result of the individual not actually understanding the rules, not actually understanding details about controlled airspace. At the moment, CASA can do a number of things. It can simply counsel the person, but the person then goes off and flies and may undertake that activity again, because he still doesn't understand what the issues are. The person could enter into an involuntary undertaking with CASA to say, 'I will do this extra training to make sure that I know what I'm doing with controlled airspace.' CASA then accepts that and does not do anything; the person just ignores it, goes away and flies into controlled airspace again. CASA could, at the moment, in order to ensure that that sort of undertaking was complied with, suspend the licence pending examination. It could say, 'You really don't know what you're doing in relation to controlled airspace. You must sit this examination. When you pass it, you'll be able to fly. Until that time, your licence is suspended.' That may not be the best option, given that this was a genuine mistake. The purpose of an EVU would be to say, 'If you voluntarily undertake with CASA to undertake this sort of training by this time, then we won't suspend your licence.' But if the person fails to comply with that undertaking, CASA can then take the matter to the Federal Court. It needs some sort of sanction if the undertakings are not met. That is one example.

**Senator O'BRIEN**—These VEUs will not apply just to pilots licences, will they? They will apply right across the range of licences and authorisations?

**Mr Ilyk**—That is right. Another example may be where—and I do not think there is dispute in this—there are genuine differences of opinion about regulation 206, which is the classification of operations. So an operator may have a charter licence; he may unwittingly engage in conduct which CASA believes is RPT operations. The person may genuinely believe that he is undertaking charter operations by conducting business in those circumstances. CASA is entitled to form a view as to what the law is. Its view may be that, no, that is really an RPT operation. In those circumstances, CASA could suspend the AOC. If this was an operation in a remote area, that would clearly disadvantage the individuals in the remote area, because if CASA suspends, that operation ceases. Or CASA could say to the

individual, 'If you voluntarily cease to conduct those sorts of operations which CASA believes on reasonable grounds are RPT, then you retain your AOC. You can continue all those charter aspects of your AOC.'

**Senator O'BRIEN**—I understand that aspect of it. You touched on putting a requirement on a pilot to undergo further examination. That power exists under CAR33 in relation to aircraft maintenance, for example. How often has CAR33 been used?

**Mr Ilyk**—The AME licences?

**Senator O'BRIEN**—Yes. How often has it been used? That gives you the power, rather than to suspend a licence, to require them—

**Mr Ilyk**—I cannot tell you off the top of my head, Senator. I can certainly get the figures for that.

**Senator O'BRIEN**—Okay, if you can.

**Mr Ilyk**—We do have those figures.

**Senator O'BRIEN**—What about CAR5.38?

**Mr Ilyk**—It is the same sort of thing. We have used that on occasions, but I cannot give you the full details of that.

**Senator O'BRIEN**—And how often has 28BB, which talks about placing conditions on an AOC, been used?

**Mr Ilyk**—Conditions are quite often placed on AOCs.

**Senator O'BRIEN**—I understand that they have to relate to safety, and I take it that these are the sort of areas where you would see the VEUs operating.

**Mr Ilyk**—CASA would not require someone to enter in an undertaking to do something that had no relevance to safety. Firstly, that would be ultra vires under the act, because CASA's powers only relate to safety. So it could not require you to report to the police station two times a week or something.

**Senator O'BRIEN**—So, essentially, there are powers in existence now under which limitations or requirements can be placed on an AOC without the need to take the matter to the courts?

**Mr Ilyk**—Yes, in the sense that CASA can impose conditions. But if those conditions are breached, either CASA has then to suspend and go through that whole process, subject through the AAT, or, if the breach is a criminal offence and is serious enough, it can refer the matter to the DPP, after collecting the evidence, for prosecution. Those mechanisms are there right now, yes.

**Senator O'BRIEN**—I guess that is the point of my questions. Under CAR33, CAR5.38 and section 28BB of the act, there are already powers to impose conditions as an intermediate step between observing a breach and taking the ultimate action?

**Mr Ilyk**—Yes, there are. But, with a lot of those requirements, in order for CASA to be satisfied that some of those conditions will be met—for example, the undertaking of

additional training—CASA would generally suspend a licence in those circumstances to ensure that there was some guarantee that that would actually occur.

**Senator O'BRIEN**—So I suppose putting a condition on an AME's licence that they must undergo a certain test or complete a certain course would preclude them from performing their duty until they had done that.

**Mr Ilyk**—You could do that.

**Senator O'BRIEN**—Would that be the effect of saying, 'The condition of your licence is that you undertake this course or take this particular test'?

**Mr Ilyk**—Normally you would get a licence and it would be subject to conditions, in the sense that it would limit the type of work that you would be able to do. So, say, it is subject to the condition that you are only entitled to do work on a certain type or types of aircraft. Clearly, as you say, there are provisions which allow CASA to require a person to undertake an examination, but when CASA does that, that is normally when CAR265 comes in and the licence is suspended.

**Senator O'BRIEN**—But it does not have to be?

**Mr Ilyk**—It does not have to be, but at the end of the day the problem is that, if the person simply does not bother doing it, he still has his licence and there is no guarantee for CASA that that training will occur. In CASA's view, it is better, in genuine cases where there are no serious safety implications, for the parties to actually negotiate what the agreement would be.

**Senator O'BRIEN**—CAR33 says:

CASA may, at any time, require the holder of an aircraft maintenance engineer licence, an airworthiness authority or an aircraft welding authority to undergo an examination designed to test his or her competency as such a holder.

Are you saying that, if you require them to do that and they do not, you can do nothing?

**Mr Ilyk**—No. You can then go the next step and prosecute for a breach of that provision. You could certainly do that, and, in the case where there is a deliberate refusal to do that, clearly you may very well want to do it. But we are talking about situations where you do not want to go through the whole prosecution process. It is costly, it does not necessarily serve the ends: ensuring a safer, more knowledgeable operator or individual. So sometimes it is better to try and negotiate that agreement.

**Mr Kimber**—To add to what Mr Ilyk has said, I suggest that our powers to require examinations generally do not equate to powers to require training. Enforceable voluntary undertakings would be a useful tool too. Rather than saying, 'Sit an examination as required by CASA,' we could say, 'Undertake some training, because we feel that you don't have sufficient knowledge in a particular area.'

**Senator O'BRIEN**—In this area, then, what you are saying is that EVUs are a way of obviating the need to amend 33 so you could do that?

**Mr Ilyk**—It would not be just CAR33. It would be all breaches of the regulations.

**Senator O'BRIEN**—I used the example of CAR33. In this case, what you are saying is, 'Oh, yes, but we couldn't require them to undergo a course. We can only require them to undergo a test.' I am putting back to you the proposition that EVU is simply, in this case, obviating the need to amend CAR33 to give you the power to require them to undergo appropriate training.

**Mr Ilyk**—You could amend the CAR33 along those lines, yes.

**Senator O'BRIEN**—The limitations on powers under 28BB do not seem to be relevant to me, so you can place conditions on an AOC now which would be equivalent to requiring an enforceable voluntary undertaking.

**Mr Ilyk**—Yes, you could do that. That would have to be generally done through a compulsive process. It is not a negotiated settlement.

**Senator O'BRIEN**—No.

**Mr Ilyk**—And if CASA wanted to do that—

**Senator O'BRIEN**—You could negotiate that, though, couldn't you? Let us face facts. The formal and informal processes of discovery of a breach of an AOC or inappropriate action and the show cause process could just as easily tailor into a condition being placed on an AOC as could a suspension, couldn't they?

**Mr Ilyk**—You could, and certainly there is nothing in 28BB which would prevent CASA imposing that sort of condition. But, generally, if you impose a condition, you are doing it by compulsion. You are not doing it by agreement, and the idea of the voluntary undertakings is that both parties agree to a course of action. You do not have to go through any sort of acrimonious show cause and variation process.

**CHAIR**—Isn't what Senator O'Brien just raised what you do now?

**Senator O'BRIEN**—We are not sure.

**CHAIR**—That is true, but that is what you do now.

**Mr Ilyk**—They are the powers that CASA has now, yes.

**CHAIR**—So you are really saying that we are going to have an extension to that in a voluntary agreement.

**Mr Ilyk**—That is what the EVU is intended to do.

**Senator O'BRIEN**—We seem to be talking less about substance than perception in this. If you can do these things now, through the processes you have, and if you can even come to an agreement that a condition be placed on an AOC and place it on the AOC, how is that different—at least in these contexts—from what you are proposing with an EVU?

**Mr Ilyk**—This is the reality of it. If you place the condition on the AOC, if the individual says, 'Yes, I'll do that,' and if they refuse to then comply with a condition, the only thing that CASA can do is to suspend the AOC or to go through the litigation process. That then raises all the issues about the criminal—

**Senator O'BRIEN**—What is the difference with a VEU?

**Mr Ilyk**—The EVU—

**Senator O'BRIEN**—I am talking about the VEU.

**Mr Ilyk**—With the EVU, you would go to the Federal Court and prove a breach of the undertaking. That is what you have to prove. You have to prove that this person voluntarily agreed to take a certain course of action and then refused to comply with that action. To go the other way, you then say: ‘Yes, we put a condition on it. You failed to do it. We’re now going to suspend. We’ll now go to the AAT or we’ll go through the criminal law process.’ As you are probably aware, Senator, the criminal law process is an extremely long and complex process to go through. CASA’s time may be better served doing those sorts of things for the operators that it believes are committing deliberate safety breaches.

**Senator O’BRIEN**—Are the ANAO concerns—which I have already referred to this morning, as I am sure you heard—the concerns which have influenced the timing of the coming into effect of the amendments? Secondly, what processes and what resources will CASA put into place which will make VEUs an efficient use of resources and an effective way of dealing with the safety issues in the industry?

**Mr Ilyk**—In relation to the first question, Senator, yes, the ANAO audit was one of the considerations for deferring the commencement of the provision from immediately when the act was received or sent to proclamation. That certainly was one of the considerations. In relation to the second question, EVUs—the undertakings themselves—will be limited to the director/assistant director level. There will clearly be some sort of training provided to those individuals as they will be the people who will have to enter into the undertakings.

The undertakings themselves will be prepared and vetted by the Office of Legal Counsel. The Office of Legal Counsel will keep an eye out to make sure that any commitments that are given under those EVUs are complied with and, if necessary, take the matter to the Federal Court. I am not sure if you are aware of this, Senator, but at the last Senate estimates we were talking about the enforcement manual. That has now been formally released to staff and to the public. As part of the process, the Office of Legal Counsel will be undertaking training in relation to those issues in the enforcement manual that are new, which includes the enforceable voluntary undertaking scheme.

**Senator O’BRIEN**—Yes, I noticed that.

**CHAIR**—My question follows the previous question from Senator O’Brien. I will summarise it this way and you can tell me if I have got it right. Firstly, you have the compulsory powers now to do what you are trying to achieve through the voluntary agreements. Is that correct?

**Mr Ilyk**—Yes, Senator.

**CHAIR**—The purpose of the voluntary agreements is to try and have a much more harmonious relationship in terms of dealing with these things and working with them. Is that correct?

**Mr Ilyk**—Yes, Senator.

**CHAIR**—Let us say that CASA had five concerns and that the people you are dealing with are quite willing and ready to accept four of them in a voluntary agreement, but said, ‘We won’t sign off on the fifth one’—for whatever reason. They might claim that it did not exist or that you are being too heavy handed or what have you. In that case, you would be left with no other alternative but to enforce it, so the purpose of the voluntary agreement would be lost. How would you handle that?

**Mr Ilyk**—I think that is probably a correct assumption, Senator. If that fifth point was a matter that CASA believed was essential in order to give a proper effect to the undertaking and it was an essential term of the undertaking and the person refused, then clearly CASA would be unlikely to accept the undertaking and would then go through the other options it had available to it.

**CHAIR**—Let us say that two operators are in very similar situations. One agreed to four out of the five and the other one agreed to five out of the five, so one would come under a voluntary agreement and the other one would not. If either of them got to court would the penalty be the same or similar? You cannot say that they are the same because they are not.

**Mr Ilyk**—That is exactly the point, Senator. If you go to the person who gave the undertaking but then refused to abide by it, CASA would go to the Federal Court and it would really depend upon what the Federal Court determined. There is no criminal sanction. The court cannot impose any criminal penalty for breach of the undertaking. It could issue a court order to require the person to comply with the undertaking, and failure to do so would then amount to a contempt of court, so it is hard to know what sort of penalty a court would impose.

**Senator O'BRIEN**—Can I just come back to a point that you raised in answer to Senator Crane's first question. Isn't it possible that you could agree with four of the five conditions and then use, say, 33 or 28BB to impose the other?

**Mr Ilyk**—That is always an option, Senator, yes.

**Senator O'BRIEN**—But you were ruling that out, so I thought I would come back to that.

**Mr Ilyk**—There are a whole lot of permutations, yes. In relation to the individual who said, 'No, I'm not going to accept this voluntary undertaking. I do not want to enter into one' and then CASA was left with its normal processes, there could be, obviously, suspension or cancellation of the certificate. If there was evidence to support that, the person could then appeal against that to the AAT and, depending on what the AAT said, they may or may not get their certificate back. Or if it were a breach of the act, CASA could obviously take the matter to prosecution. And depending on what the breach was, the act itself sets out what the level of penalties is that a court may impose for a breach of a criminal provision.

**CHAIR**—I accept in terms of the voluntary agreement as it being reasonable that you are trying to establish this middle ground. Through hearings we have had before you have either been there or there and there was no way of managing things. My question is: if you did have to issue an order and some part of it was not complied with, either wittingly or unwittingly or by accident or whatever it might be—that does not matter—you really do not have much choice but to go further and go through the court process.

**Mr Ilyk**—That is right.

**CHAIR**—Right, you have answered that. Now, in terms of the voluntary agreement, if there were a breach wittingly or by chance or whatever, would you have more flexibility to go back to that operator and say, 'You know, you are out on the margin' or 'There's a major breach of your undertaking' and give them the opportunity to correct that and comply, or would you have no other choice but to go off to the court?

**Mr Ilyk**—You could do that if you believed there was a reasonable excuse why the thing had not been fulfilled or there were extenuating circumstances, but if it just appeared that the person deliberately did not want to comply, then the only way that CASA could enforce it would be by taking it to the court.

**CHAIR**—No, I'm not talking about deliberate—that is a different set of circumstances. But you would have more flexibility in terms of getting the result you need in terms of your responsibilities under law?

**Mr Ilyk**—Yes, Senator.

**CHAIR**—My next question also follows on from Senator O'Brien's questions. You mentioned the fact where somebody was operating in an area, and you particularly mentioned a remote area, where you have always got people who have difficulties getting their stores or whatever they want—and Mr Elder can probably guess the question I'm going to ask now—and the operators are doing more than what they should do in terms of it. I particularly refer to some of the Kimberley situations where passengers were being carried when they should not have been and that sort of thing. Would it have been helpful, in terms of the problems we had in the Kimberley over the last 18 months in resolving those particular issues, had you had a voluntary agreement system in place rather than a compulsory system?

**Mr Ilyk**—I think that is the sort of situation where it would be helpful, yes.

**CHAIR**—Can I ask Mr Elder a bit more directly? Would that have allowed us to resolve the issue and the problems up there more quickly?

**Mr Elder**—It is rather a hypothetical situation at this point, but I think that from a policy point of view it would have assisted CASA.

**CHAIR**—I do not want to mention names but you know exactly what I'm talking about.

**Mr Ilyk**—We all do.

**Mr Elder**—It could have been a way for us to bring the operator and CASA together to allow the operator to meet CASA safety requirements. Yes, it could have done that, but we will never know.

**CHAIR**—We do not know absolutely, but I am trying to target that problem because it is not the only place that it has happened.

**Mr Elder**—I think the whole essence of this approach, Senator, is that it is a voluntary provision so the operator would have to cooperate from the very start.

**CHAIR**—In this particular case, there was not really a mechanism by which you could have a voluntary system—it had to be based on compulsion. Can I now ask you the questions that I asked of the department. I particularly refer to 31A and the enforceable undertakings, et cetera, going onto page 9 of the bill. Given the concerns that have been expressed about this section of the bill, would it be possible to amend it so it is clear that CASA can only agree to an undertaking to comply with a provision of the aviation legislation? I guess the crunch point is: would such an amendment eliminate the fear that CASA could use EVUs to interfere in non-safety matters?

**Mr Ilyk**—As it stands, the act sets out what CASA's functions are. Those functions are restricted to safety. At the moment, if CASA tried to impose a non-safety condition, it

would be invalid and the Federal Court would so hold, but if the idea is to put that in writing, to put it beyond doubt, that would certainly be a helpful provision. It is ultimately a matter for government.

**CHAIR**—Yes, I understand that, but there is a perception out there that they can go beyond that. I am not disputing what you've said, but it has certainly been raised with me by a number of operators.

**Mr Ilyk**—If it is intended to make that express on the face of the legislation, that would certainly be helpful and CASA would not object to that sort of provision. That is what the law currently implies. If the government decides to go down that way then CASA would have no problems with that.

**CHAIR**—The purpose would be to make it beyond doubt.

**Mr Ilyk**—Yes.

**CHAIR**—Would it also be possible to amend the bill to make it clear that CASA could not take more extreme action against the pilot or operator just because that person or operator declined to enter into an EVU? Once again, the perception or fear is out there, rightly or wrongly—and I think you gave a very good explanation to us today, but not everybody here has had an explanation nor is the *Hansard* their favourite bedtime reading—that you would be harsher on somebody who, for whatever reason, said, 'We don't want to sign that,' than you would be on somebody for a similar situation who did sign it.

**Mr Ilyk**—Again, I do not think that amendment is necessary but in order to allay fears, having such a non-discrimination provision in the bill to make it abundantly clear would probably be very helpful.

**CHAIR**—During your presentation I asked for a clarification and you said that you had had 30 or 40 responses in terms of what you had out on the web and what have you. Or is there any reason why we could not get the list of those names?

**Mr Ilyk**—No, certainly not.

**CHAIR**—Who they represent and the organisations. Also, while you are doing that, are there any notable operators or organisations that you are aware of whom you may have thought would have responded but they did not, for whatever reason?

**Mr Ilyk**—Firstly, we can certainly give you the list—that is no problem—and we have a summary of the responses themselves. In terms of exceptions to people who may not have responded, I can't think off the top of my head. I thought we would have got a response from IAPRA and we did.

**CHAIR**—You told us that the chairman wrote to all major operators, major organisations and what have you, so you could compare the returns against that particular list of people. I think you can assume that if people are contacted and they do not respond that they are relatively satisfied—I would not think that there is that level of disinterest that they just ignore it, particularly if it affects their business operations. But we may decide that if there were a notable operator or organisation that did not respond to contact them just to seek their views.

**Mr Ilyk**—I cannot think of one off the top of my head, but certainly you can have the list.

**CHAIR**—I think that completes our questions now—but I am sure we will have you back. I thank you for your evidence.

**Proceedings suspended from 11.03 a.m. to 11.20 a.m.**

**MUNRO, Mr Boyd (Private capacity)**

**CHAIR**—Welcome, Mr Boyd. I know you were here when we started so I will not go through the statement again with regard to parliamentary privilege. I invite you to speak to your submission. We have only just received this submission so we have not had an opportunity to read it. It will be recorded in the *Hansard*, so you do not have to read it—that happens automatically. If you could talk to the points in it and any other matters you wish to raise, and then we will ask you questions. I invite you to make an opening statement.

**Mr Munro**—I appear here as an Australian citizen, a pilot and a person with interest, but no financial interest, in Australia's aviation legislation. I would like to waive my parliamentary privilege. I would like to be fully accountable for anything I say here. I do not wish to take advantage of any privilege.

**CHAIR**—You cannot actually do that.

**Mr Munro**—You can't do it? Will you go to jail if you do that?

**CHAIR**—We note your comment so we will advise you to come and have a chat to us afterwards.

**Mr Munro**—Perhaps I should have said that I am prepared to repeat outside anything I say inside.

**CHAIR**—That is fine.

**Mr Munro**—I am most uneasy about some aspects of this bill. I am particularly uneasy about the proposal for voluntary enforceable undertakings. I believe that heralds an era of designer law that will allow law to be tailored for each and every person, for every situation and for every operator. I am sorry to say that I think it represents the ultimate failure of the current government's aviation policy, as expressed in the lead-up to the election in 1996. It was expressed in the document *Soaring into tomorrow* and it committed this government to introducing a simpler, fairer system of aviation law. This is the very antithesis of that. Australia already has about 20 times as many words in its aviation legislation as the United States has, even though we only have one-thirtieth the number of planes. If there is anything we need in this country as aviation law, it is certainty and simplicity. I feel that this proposal represents the fact that this government has given up on any attempt to reform the aviation legislation.

The concept of a voluntary undertaking sits very uneasily with the concept that the person with whom you enter into it must exercise his discretion in your favour. CASA rightly has discretion. It has discretion about such things as whether a person has the necessary knowledge and skill to be a pilot; it has discretion about such things as whether a person is sufficiently medically fit to be a pilot. It is significant that the pilot community has no complaint about CASA's exercise of its discretions in those areas, but every pilot is highly conscious of them and it makes a nonsense of the English language to talk of entering into a voluntary agreement with someone who shortly afterwards must exercise his discretion in your favour.

As you know, I am speaking on behalf of a large number of Australian pilots here, including the operator you are talking about in the Kimberley, so I am empowered to represent that operator before you. There is no significant opposition to CASA's enforcement of the aviation law by the prosecution process. I personally believe CASA is falling down on

its job in mounting far too few prosecutions. Mick Toller told me that last year there were only 18 prosecutions. I think that is nonsensical. There are 20,000 active pilots in this country, and we all know that vastly more than 18 breaches of regulations occurred. It is appropriate that a breach of the regulations should be met with a prosecution. There is no complaint from the pilot community about CASA's exercise of its discretions in matters of skill, knowledge, medical fitness and so on. There is no complaint about its enforcement of the law through the courts. Where the pilot community is extremely concerned about the legislation in Australia is the legislation which empowers CASA to determine whether a person has breached the law and, if so, to impose a punishment. That power is used far more frequently—about five times more frequently—than prosecutions and it is not a transparent process in that it has given rise to enormous concern and great fear. The pilot community has very grave concerns about the extension of CASA's discretion to these voluntary enforceable undertakings.

I have set out some arguments about the undertakings in the paper which is before you—particularly I contrast the use of them by the ACCC. I have been in business in Australia for more than 30 years; I have never heard from the ACCC and it has never had to exercise its discretion in my favour. If it came and asked me for a voluntary undertaking, I would tell it to run off because it never has to give me any approval that I can continue in business. Of course, if it pointed out to me that I was breaking the law, it would not take an undertaking to cause me to abide by the law. I would only be breaking the law if I did not know, and if the ACCC pointed out to me that I was breaking the law I would cease doing so. But I would not enter into a voluntary undertaking, but nor would I feel pressured to enter into one whereas I would be genuinely fearful if CASA came to me.

I own and operate two aircraft. One is based in Sydney and the other one is currently in Nashville, Tennessee. I fly about equal amounts in the United States and Australia. I am very familiar with the utterly different aviation regimes of those two countries. Another point of difference between the Trade Practices Act and the Civil Aviation Act is that there are no custodial penalties in the Trade Practices Act. So a person could never be coerced into entering a trade practices voluntary undertaking by the threat of being prosecuted under a section which provides for a jail term. There are a number of sections of the Civil Aviation Act which provide for jail terms. Some of those provisions which provide for jail terms are being amended in this bill, and I appeal to the Senate to further amend them so that there is no provision for a custodial sentence where no personal property is harmed and nobody is endangered. So if nobody is endangered, no personal property is endangered or harmed and also that cases where the only person or property harmed is the person doing the act, I submit to you that those should not be enforced by means of jail terms. I offer to answer any questions you might have on what I have said or what appears in my written statement.

**CHAIR**—Thank you.

**Senator O'BRIEN**—We had evidence this morning that there had been very few prosecutions—in fact, two—under those other provisions. One had led to a jail sentence in circumstances which seemed very serious in the way they were reported to us. I take it you are not saying that there has been some arbitrary use of the power that the parliament has given CASA in that regard?

**Mr Munro**—No. I am certainly not saying there has been any arbitrary use and, of course, all of us who travel by airline want to see people jailed if they try to open airliner doors in flight. That is just commonsense. All of us want strong sanctions against that kind of

behaviour but, let me say, one of the provisions here is that if you fly an aircraft knowingly without a valid maintenance release you are liable to two years in jail.

**Senator O'BRIEN**—Up to.

**Mr Munro**—Yes. I would take a very sanguine approach to that. I will tell you here and now that in extreme circumstances, if the aircraft was in fact airworthy and if there was nothing wrong with it, I might knowingly fly it without a valid maintenance release because I would take a very sanguine approach to a prosecution. I would feel that, if prosecuted, the chance of a court imposing a jail term was so low as to be disregarded, but not everyone takes that sanguine approach. If you put a jail penalty in for these things then people will be threatened with it. They will be threatened with prosecution and they will be frightened by the possibility of a jail term, and they might do things that they otherwise would not do. Where you put a jail term into legislation, remember that it is not only the prosecutions, it is not only what the courts decide but it is also how that legislation can then be used as a threat.

**Senator O'BRIEN**—From your submission, and I have had limited opportunity to look at it, one point that I would like to raise with you is the proposal that perhaps lack of a public register of the undertakings, in contrast to the ACCC's situation, is a deficiency. Do you think that requiring a public register of enforceable voluntary undertakings would improve the situation in any respect?

**Mr Munro**—It would certainly improve it but I would still oppose the regime vigorously. Yes, most certainly if you did decide to bring in voluntary undertakings they most certainly should be public. One of the things which seriously undermines aviation safety in this country is that people are very suspicious of the secret arrangements which CASA has with other aviators. I know that I spend a large amount of my own money and a large amount of my own time trying to get CASA to disclose the beneficial arrangements it had with Ansett. I was never successful in getting those. CASA has some secret arrangements with Ansett and Ansett joined in the court action and admitted that these arrangements were of commercial benefit to it. I feel that we, as Australian citizens and people who fly round on Ansett planes, are entitled to be able to go somewhere and look at a register. I certainly feel that if we do go down the voluntary undertaking route they should be public.

**Senator O'BRIEN**—You would have heard me earlier this morning raise regulation 5.38, which relates to further examination of holders of flight crew licence. That is fairly relevant to your situation and other pilots that you have some support from. What is wrong with the provisions of 5.38, firstly, in terms of the powers of CASA?

**Mr Munro**—I am not familiar with 5.38 and, unfortunately, I do not have the regulations in front of me.

**Senator O'BRIEN**—Let me relate it as quickly as I can. It says:

5.38 Further examination of holders of flight crew licence etc.

(1) If a senior flying operations inspector considers it necessary in the interests of the safety of air navigation, the inspector may give the holder of a flight crew licence, a special pilot licence, a certificate of validation, a flight crew rating or an aircraft endorsement, notice in writing:

(a) requiring the holder to undertake an examination specified by the inspector to demonstrate that the holder continues to possess the aeronautical skills and aeronautical knowledge appropriate to the licence, certificate, rating or endorsement; and

(b) setting out the reasons for the inspector's decision; and

(c) setting out the time and place of the examination.

It has provisions for imposition of a fine for a person who refuses to undertake the examination or fails to attend at the set time and place. Do you have any experience with the operation of that provision, or do you know of the operation of that provision? Has anyone raised with you the concerns about the operation of that provision?

**Mr Munro**—No. I have no personal experience of that, and nobody has raised it.

**Senator O'BRIEN**—In the context that that is an alternative power—and is in existence now—to the power which you complain about, enforceable voluntary undertakings, what regard should we have to the existence of this apparently uncontroversial provision in the regulations, and what CASA describe as an intermediate means by which, by consultation, there can be an agreement to take certain action? I think we have already established that in the absence of the agreement they can take whatever action the act and the regulations empower. I just wanted to nail you down to that point which was raised this morning, and that is that CASA is suggesting that the enforceable voluntary undertaking is a means by which you can get, through discussion and consultation, an agreement by the party that CASA believes is offending in some respect, to do certain things rather than go through the process of requirement with the potential of prosecution and fine.

**Mr Munro**—Section 5.38, when it is used, no doubt is sometimes used in conjunction with an immediate suspension of the licence and maybe sometimes it is not, I do not know about that. Basically, if CASA were to require a licence holder to sit for an examination, and write him a letter saying, 'if you do not sit the examination, or you do not pass it, we are going to suspend your licence,' that, I suggest, would amount to precisely the same thing as the voluntary undertaking in that circumstance. The proposed 31A does not, in any way, limit the circumstances in which a voluntary undertaking may be sought. I think because of its breadth, 31A is a very potentially dangerous thing and it is not simply going to apply to the people who are in CASA today; it will probably be on foot 30 years from now. It will apply in different circumstances and with different people that we do not envisage. I suggest that it is a further extension of CASA's usurpation of the powers of the courts and of the parliament, but I appeal to you in the Senate to enact legislation that people can read and know what it is they cannot do, and can expect to be punished if they do not comply with it. But I appeal to you not to enact legislation which gives individuals the de facto power to impose their judgment on the judgment of other people.

**Senator O'BRIEN**—We have had some evidence about a consultation process on enforceable voluntary undertakings which commenced in 1998. What knowledge do you have of that process?

**Mr Munro**—I have the knowledge from having been here for the entire hearing this morning. Senator O'Brien, I could only repeat the words that you used in the chamber on 8 November describing the consultation process about the aircraft registration. You described it then as a complete failure, and that is what it has been. I am not saying that all of the actions described today were not taken, but what I am saying is that the people affected by this were not consulted. Apart from the form letters you have authorising me to represent people before you, I have another 1,500 faxes from active pilots saying they knew nothing about this legislation until they got a fax from me last week. One of those people owns and operates 33 aircraft. Many airline pilots are in that group, so there has been a complete failure of consultation at the coalface. Not only that, but the process that was described to us this morning revealed that people never get to see the actual legislation. The consultation is all

vague talk. Frankly, I ignore that. The consultation process surely should begin with the circulation of draft legislation to say ‘This is what we propose to put before the parliament.’

**Senator O’BRIEN**—Effectively, we were told that a plain English proposal was circulated, rather than a bill which would perhaps be less understandable. I have not seen the precise material that was circulated. Should we understand the lack of knowledge by these people as due to the fact that the consultation process was inadequate, or should we understand that perhaps the community does not understand the importance of a consultation process and the opportunity they have to participate early in it?

**Mr Munro**—There are elements of both of those in it, but it is not hard to have effective consultation. All you have to do is send out a fax letter and it will cost you $5,000 to inform the entire community in Australia, because there is hardly anyone who does not have a fax. The same techniques that I raise to use people’s awareness of this legislation could be used by CASA and would make me ineffective, because the reason I am effective is that I bring information to people they did not otherwise have.

**Senator WOODLEY**—Mr Munro, I want to quote some comments from your submission and I ask you to comment on them. You will have heard the discussion. this morning. There were some complete denials of some of the things you have said, so you may like to expand on what you are saying so that we can weigh up both sides of that debate. I am particularly interested in the whole issue of custodial sentences, and you argue that there should be no custodial sentence where no person or property is endangered. You will have heard the evidence this morning that, in fact, the safeguard is that there would be no custodial sentence unless there was a criminal offence and it was prosecuted through a court. Isn’t that sufficient safeguard?

***Mr Munro***—No, I can hear the judge’s words now: ‘If parliament did not mean me to jail you for this offence, they would not have given me the power to do so.’ Let us look at a hypothetical example. Joe Blow is flying from A to B, just him aboard his aircraft, and his maintenance release runs out at midnight. He encounters headwinds—and he knows his maintenance release runs out at midnight. He does not land somewhere else. He continues flying, even though he knows that by the time he lands at 10 past midnight his maintenance release will have expired. This bill, as it stands, does provide for a two-year sentence for that. I accept that it is most unlikely a court would impose it, but I say to you that you should require that somebody be harmed before you put a jail sentence into any legislation.

**Senator WOODLEY**—Right.

**Mr Munro**—So you should add an element of harm required to make out the offence to which a jail sentence applies.

**CHAIR**—To me that is a very extraordinary example. I have been on an aircraft where the pilot went over his time by half an hour, because we were going into such a headwind and the pilot could not land in the dark in a paddock. Is there any evidence of a circumstance like this where CASA, or any evidence that CASA, in view of the fact that you said in your submission that there were only 18 prosecutions last year, would be likely to prosecute a case like that?

**Mr Munro**—In looking at legislation we should look at how it could be used in all circumstances, and it may be that the very people who are running CASA today would not bring a prosecution. It may be that a particular judge in a particular court would give the person a 556 and tell him to go home. But I think we should also look at the other possibility

that there might be different leadership at CASA 10 years from now, and a person may come before a court where a judge takes a very dim view of what I think is just a paperwork offence, and does put somebody behind bars. We should not limit our examination of the legislation to the personalities and operators we see before us today, but should consider how the powers might be used, and if they are open to misuse, I implore you not to institute those powers.

**CHAIR**—I know what your opinion and view is. My question was about the likelihood. Can I use an example that is similar: the Western Australian road speed rules. I do not think the police ever prosecute, or very seldom prosecute, somebody who is driving up to 120 kilometres an hour in a 110-kilometre area, unless they are driving dangerously—I will make that one exception.

**Senator WOODLEY**—They do in Queensland.

**CHAIR**—But they would give you a warning.

**Mr Munro**—Yes, so what is the question?

**CHAIR**—I just do not understand how you are going to manage that. Are you going to write laws that are so prescriptive that they do not give the authority some discretion? I am talking about CASA. Can you give us an example where CASA has prosecuted in the type of example you have given, or the type of example I gave?

**Mr Munro**—No, I cannot give you an example of that. I do not know of anybody having been jailed for aviation offences, except where there was terrible harm done.

**CHAIR**—My question was not 'jailed'. My question was: have they instigated a prosecution and taken it to court?

**Mr Munro**—I do not understand the question, I am sorry.

**CHAIR**—For anything to go to court—and we were given this evidence this morning—CASA have to determine whether or not they are going to lodge evidence that a prosecution should proceed. They also made reference to the point, if I remember correctly, that in many instances they would just think it was a futile exercise to go through that particular process. They referred to that, or said that. In your evidence you said there were only 18 prosecutions last year. I would personally put your example and my example in the trivial prosecution can. I am just trying to establish whether or not the behavioural pattern of CASA is to lodge prosecutions for the type of example that you gave or I gave.

**Mr Munro**—No. Along with repeating the figure of 18 prosecutions, I said I think that is far too few. I do not think CASA prosecutes willy-nilly. As I said earlier, there is no resentment in the aviation community to CASA's use of its prosecution power. Where there is tremendous resentment is towards CASA's use of its arbitrary powers to take away licences on the grounds of a breach of law which has never been proven in a court. But there is no resentment to the prosecution process, and I personally think it is ridiculous that there are only 18 prosecutions in a year.

**CHAIR**—I have interrupted Senator Woodley, and I apologise for that. One of the points which you make, and I agree with you absolutely and totally, is that with most of our laws simplicity has to be the key and then people could understand them. But the more things we put in there, the more complicated the world becomes. If there is not some discretion in this process, whether it be for the police or CASA or some other regulatory body where they say, 'This is so trivial that it is not worth worrying about. There was a set of circumstances over

which the pilot had no control.' Both of the examples we have given were that. If we want to write the law that prescriptive, don't we destroy the object of simplicity?

**Mr Munro**—Not in this specific instance. I think the jail term can be simply omitted from the various points.

**CHAIR**—I do not disagree with that; I want to come to that particular point in a moment or two, but I am just talking about the case that you gave. It is not realistic that your hypothetical, like my example of what happened to me, would even remotely lead to a prosecution. I was trying to establish whether in fact CASA have done that, because if they have then that part of the law has to be much more prescriptive.

**Mr Munro**—No, not to my knowledge.

**Senator WOODLEY**—I am still just teasing out this custodial sentence issue a bit more. You say:

There should be no custodial sentence where no person or property is endangered. Examples are the new sections 20AA(1) and 20AA(3).

These are essentially paperwork offences. I have already admitted that I have not read all of this, I just have not been able to and obviously I will need to. In what sense are those paperwork offences? Could you just give us a bit more information on that? It may be better if you take that on notice.

**Mr Munro**—I can answer that. The proposed section 20AA(1) says that a person must not knowingly, in effect, fly an aircraft unless it is registered. I submit that that is purely a paperwork offence unless some harm is done, and that before threatening people with a two-year jail sentence we should say something about harm. There are other sections that cover that conduct if it does cause harm or it endangers people, and they rightly provide for jail sentences. But it seems to me that simply because an aircraft does not have a certificate of registration or a certificate of air worthiness, if it is in fact airworthy, there is no need for a two-year jail penalty to attach.

**Senator WOODLEY**—That is helpful, thanks. I will leave the custodial bit alone and I am obviously going to have to do a lot more reading to make sure I have it covered. On page 2 of your submission, however, the revised explanatory memorandum also defines a relevant breach as one where time and resources are insufficient to fully investigate the matter. Are you saying to us that a breach will be recorded simply because CASA does not have the time and resources to fully investigate the matter and so is taking a punt that if it breaches the person then it will have time to investigate the matter? Is that what that means?

**Mr Munro**—It is very muddled to me, Senator Woodley. CASA seems to have extended the concept of breach way beyond where somebody breaks a law to cases where there is a suspicion that somebody may have operated an aircraft differently from the way CASA would like it operated. I find that concept quite terrifying.

**Senator WOODLEY**—I am going to have to look at that a bit more. You are concerned about breaches which may be relevant breaches, including situations where the law itself is unclear—and that is an example of that, I suppose.

**Mr Munro**—Yes, that statement is made in the explanatory memorandum, and that is why I refer to this concept as an utter failure of the government's aviation policy, because if the law is unclear surely we should go about clarifying the law, not allowing people to enforce unclear law in a discretionary manner.

**Senator WOODLEY**—Thank you, I will leave it there for the time being.

**Senator GREIG**—Mr Munro, like my colleague Senator Woodley I have not had a opportunity to fully read your submission. You say in the opening preamble of your submission that consultation was minimal. Can you give me an idea as to the way in which consultation was undertaken? This happened last time a piece of aviation legislation was dealt with, and we seemed to go through a similar scenario in terms of what appeared to be, or what was, a lack of consultation. But I am surprised to learn, for example, that there are some 20,000 pilots in Australia. I would assume—correct me if I am wrong please—that there is some central database of who those people are and how to contact them. Given that that database must exist somewhere, why is it, do you think, that there is a failure to consult directly with those people? You said, for example, that most people these days have faxes. I would probably be inclined to disagree a little and would say that most people have email now that we are in the electronic age, or certainly have ready access to it, and faxes are on the wane. Why is it that there appears to be a reluctance or a difficulty in communicating simply and directly with the people most affected? This is probably a question that you may not be able to answer: where does this database exist? Is it with a government department, is there a central registry or is that the role of CASA?

**Mr Munro**—Most of those questions are within the knowledge of CASA, Senator Greig, who are on notice to be called back here, and they would be able to answer those. I sat open-mouthed during CASA's submission about the extensive consultation that had taken place in relation to this, and it brought to mind nothing so much as what my father used to say to me, 'Boyd, never confuse activity with achievement.' I wondered how on earth so much activity could have been undertaken and so little achieved, because the ignorance of this bill in the aviation community is almost complete.

**Senator GREIG**—Having come from a community activist background, I admire your success in having achieved a mandate from so many people who clearly entrust you to be their voice and their advocate. Why is it, do you think that the Australian sociopolitical dynamic has created the situation where commendable people such as you present themselves to speak on behalf of pilots? Is there no kind of formally organised voice for the flying community, and that is why you have stepped into the vacuum?

**Mr Munro**—It is clear that there is a communication bridge needed between Australia's pilots and the legislature. It is absolutely clear that there is no effective means of communication at the moment.

**Senator GREIG**—What would you see as the best way to resolve it?

**Mr Munro**—I do not know.

**Senator GREIG**—You must have given it some thought.

**Mr Munro**—I have given it a good deal of thought, Senator, in recent days but the thinking has not led me to a solution.

**Senator GREIG**—Yes, politicians understand that. You speak in your submission of the government's original policy intention of internationally harmonising aviation laws and regulations. Given that you have experienced flying, I assume, in the UK as well as in the US, which you spoke of, you would have some understanding of international flying regulations from three different countries, if not more. Can you give us a picture of the extent to which we would need to reform Australia's aviation laws to bring about some harmonisation? Are

we hugely out of step with the international community, or are we close to some kind of level playing field?

**Mr Munro**—We are far out of step with the rest of the world. We have developed an aviation legal system which is unique to Australia, and with this bill we propose to make it much more unique—I know something can't be more unique, but that is what we are proposing to do. We are proposing to make it substantially more different from that of the rest of the world. My own opinion is that we should simply shut down the existing Australian regulations and import the American ones. They are tiny in volume, they are comprehended by every pilot in the United States, everyone knows what to do and consequently you get high compliance rates—people know what the system is, it works much better. The British legislation is more complex than the US legislation, but does not come anywhere close to the complexity of Australia's. Every law you need to know as a pilot in the United States is contained in one very small book, which is written in plain language. It is actually the law, which is enforced by a court if you breach it, but it's plain language and people use that as a working document. Our aviation legislation requires a substantial reference library. No small plane could carry it all, no small plane has got the lifting capability to lift Australia's aviation legislation and we are proposing to make it more complex.

**Senator GREIG**—On that point, Mr Munro, I think you said that the Australian regulations are some 20 times more wordy than that in the US and yet as a nation we have 30 times fewer planes. I guess the question that many people would want to know is how we compare in terms of safety. Given that the regulations are so much more minimal in the US and there are so many more planes, how does Australia compare with the US in terms of accident and death in term of aviation?

**Mr Munro**—That is a subject of constant argument, but I believe the true and simple answer is that the figures are substantially the same for the accident rate in small aircraft and the large jet aircraft accident rate is so close to zero that there is no statistical significance. So both the United States and Australia enjoy a large aircraft accident rate which is practically zero and we both have substantial accident rates with small aircraft whether they are private or commercially operated and our accident rates are similar. Our accident rate should be much lower because our weather is nothing like as challenging as the weather in the United States. The factor which used to make Australia more demanding was the risk that people used to get lost in the outback, basically. With the advent of GPS that just does not happen any more, so that risk element has been taken out of Australia and we should be achieving much better safety outcomes than they do in the States, simply because of our natural circumstances.

**CHAIR**—I just want to follow up that question. My understanding is that per head per kilometre flown by passengers the number of deaths in the United States from large and small aircraft, particular large aircraft, is significantly higher than in Australia.

**Mr Munro**—Absolutely. I think Mr Hamilton is prepared to answer.

**CHAIR**—You can take it on notice. I am not challenging what you said; I am just raising the point.

**Mr Munro**—I think it comes down to lies, damn lies and statistics. The number of accidents is very small and the figures can be adjusted, but unadjusted figures do not support any notion that Australia is getting better outcomes than the United States is.

**CHAIR**—I had a quick glance at your submission and I have a couple of questions coming out of that. But during your presentation, I heard you say that Mick Toller said to you that there were only 18 prosecutions last year.

**Mr Munro**—Yes.

**CHAIR**—Could you tell me in what context that was said? Did you ask him a question about how many there were, or did he tell you with a suggestion that CASA should be prosecuting more? What was the context in which that took place?

**Mr Munro**—The context was preparation for this hearing—not specifically, but the context was to find out what enforcement tools CASA was using. I have very high regard for Mick Toller. I have never met him personally, but he does what nobody else at CASA has ever done: he answers questions. It's a wonderful tool.

**CHAIR**—Did you ask him the question and did he answer?

**Mr Munro**—Yes, he sent me back a spreadsheet.

**CHAIR**—There was no opinion from him in terms of that?

**Mr Munro**—No, I did not ask for an opinion. He sent me the answer by email in which he said there were 18 prosecutions and 90-odd licence suspensions.

**CHAIR**—I just did not want it left on the public record that he was passing an opinion or suggesting something that he was actually responding to.

**Mr Munro**—No, I asked him a question and he answered.

**CHAIR**—That's fine. On page 5 of your submission you say that the 'ACCC does not use enforceable undertakings to deter.' Can you expand on that?

**Mr Munro**—Yes. The source for that information is a very expensive lawyer from a prominent Sydney firm who I engaged to brief me on how the ACCC uses the similar undertakings. The person has recently left the ACCC and he said that that is the way the ACCC uses undertakings. There are many significant things that he pointed out to me, but one of them is that the ACCC tries to avoid circumstances where an undertaking will require continuous monitoring. The ACCC seeks to get a specific short-term result out of an undertaking. And I must say that the voluntary undertaking scheme I think is simply unnecessary and that we should not complicate our law with it. But if we are to have it and the undertakings were time limited they would be much less threatening.

**CHAIR**—They were what?

**Mr Munro**—If they were time limited. So, if the maximum time were to be three months and then CASA had to go to the person and get another one, that would make them much less threatening, but the way they are they are a life sentence—once you sign the thing you are stuck with it until you die. I don't like to think what might have happened to me if I had been asked to sign one of these undertakings when I first started to fly at the age of 18 when I was not very savvy. I would still be stuck with it.

**CHAIR**—Could you be a little bit more prescriptive about the type of amendment that you would like to overcome the particular problem?

**Mr Munro**—No, I do not want to see an amendment to that. I want to see the enforceable voluntary undertakings gone—I simply think they do not have a place in our law.

**CHAIR**—I understand that, but you did say that if they were to be there.

**Mr Munro**—They would be much less threatening if they were limited to a period of, say, three months.

**CHAIR**—Let us say that can be done—you could pass an amendment like that. If that were done and the company, for whatever the reason, had not complied with them or whatever, are you saying they should be cut off then and the only option then for CASA, if they were not satisfied the company was safe to fly, would be to seek to prosecute?

**Mr Munro**—No, or seek another undertaking.

**CHAIR**—So you would have three months then three months and three months, right.

**Mr Munro**—Yes.

**CHAIR**—I understand what you are saying now. In the next part of your submission under 'CASA as an Ineffective Regulatory Body', on the top of page 6 you say:

This is particularly concerning in light of the fact that CASA would use enforceable undertakings to dictate, in detail, on-going behaviour. Can you expand on that? I particularly ask that if you had this three-month limitation period, which could be rolled over if necessary, would that overcome your problem there?

**Mr Munro**—If this bill becomes law, and there is a different management and different people at CASA in 10 years time, somebody might get the bright idea that they would like everyone to sign a blanket undertaking to obey any direction given by CASA. What they might then do is approach everyone who applies for a pilot licence and say, 'We want to understand whether you are the kind of person who handles his legal responsibilities carefully, and so we would therefore like you to sign this voluntary undertaking.' You would of course get 100 per cent of people providing those undertakings, and after a period of time you would have a community which had all agreed to do exactly as you said. I think the potential for misuse is simply enormous. I am not saying it will be used, and I am certainly not saying anything about how particular people in CASA might conduct themselves.

**CHAIR**—I understand the point now, thanks. Can we go to the question of sentencing, which Senator Woodley raised, and the custodial sentence. Often, with legislation, we are not aware, unless somebody particularly points it out, that it represents just a continuation of what already exists. I think it was in relation to the legislation dealing with the ACCC and competition policy some time ago that this was discovered, and amendments were made to give discretion to the judge, and also to include a provision for a fine as opposed to a jail sentence. That was certainly subject to an inquiry by the Scrutiny of Bills Committee, which is another committee on which I sit.

If I have got it right, you said that you thought, with respect to the guy who tried to open the doors and put everybody's lives at risk, that a jail sentence was appropriate, in your view—and that is my view, too. But then you said that you have got these other things at the other end, and that a custodial sentence would be quite ludicrous. Judges always have discretion to dismiss a case if it is trivial, but if an amendment were made to the act which gave discretion to the judge to impose a jail sentence as an option rather than dismissing it, the judge at the bottom end is more likely to dismiss the case and impose no penalty. If the legislation were to say that the judge has the discretion, for example, to impose a maximum sentence of two years or a maximum fine of $10,000, would that clarify the situation or satisfy what you have raised?

**Mr Munro**—No, it would not, because I am saying that there simply should not be a jail sentence provided for in the legislation unless somebody is harmed or somebody other than the offender is endangered. It simply should not be there.

**CHAIR**—But it could be that the judge has to make that decision. I am trying to work out a practical way of dealing with this matter, because I take your point, and I think other members of the committee do as well. They could claim that this person had endangered somebody else's life. But when it went before the court, the judge could determine that in fact it did not; nonetheless, there was a breach.

**Mr Munro**—Yes.

**CHAIR**—In my view, at this point in time, there must be some way of dealing with one extreme as well as the other.

**Mr Munro**—There is a blanket provision in the act which captures all careless or reckless—I have forgotten the precise words—conduct which endangers people other than the offender. So there is a provision already there. I have no objection to it; in fact, the pilots that I represent were instrumental in getting that into the act some five years ago. What I am saying is that there is no need to add a two-year jail sentence for this quite separate paperwork offence which does not by any means necessarily lead to harm. If it leads to harm, that is a different matter, but it is caught by a different provision, anyway. I doubt whether any state has on its books a law providing a jail sentence for somebody who drives an unregistered but roadworthy car. I think that is most unlikely; likewise, there should not be a jail term for flying an aircraft with a paper defect if there is no harm done and no person is endangered.

**Senator O'BRIEN**—But the person who drives an unregistered but roadworthy car probably gets fined the first time, the second time and maybe even the third time, but the fourth time they are probably going to get a lot more than a fine, because they are flouting the law.

**Mr Munro**—Yes.

**Senator O'BRIEN**—The law may be more descriptive about the options, but in the end it probably provides the same sort of remedy.

**Mr Munro**—The road traffic enforcement system in Australia is very simple, very predictable; you know what is going to happen to you, and the compliance is colossal. There is tremendous compliance with the traffic rules.

**Senator O'BRIEN**—You know that if you have got a brief, you will probably get a lesser fine than if you do not. If you have got a lawyer and you spend your money on defending yourself—

**Mr Munro**—I reckon it is the other way.

**Senator O'BRIEN**—I do not think so.

**CHAIR**—I will check this, but I am absolutely certain that in Western Australia—I do not know about the laws in the other states—whether it be an unroadworthy car or a roadworthy car, there is a discretion for the judge in terms of fining and jailing, if it is a minor offence. I think Senator O'Brien put it very well, regarding the first or second offences. If that unregistered but roadworthy car, because of the recklessness of the driver, happens to wipe out a car on the other side of the road and kill a couple of people, the driver would be sent to jail. But if he is picked up the first time for travelling on the wrong side of the road, whether the car is roadworthy or unroadworthy, the penalty would be different. The breach regarding

roadworthy, as opposed to unroadworthy, cars involves a totally different area of the law. I am absolutely certain that there is that discretion for the judge. We will have to look at each one of these individually and, as a committee, we will make recommendations.

Bearing in mind your in-principle position, I will ask you the two questions that I asked CASA and the department. I am sure you remember what I said, but I will read them out quickly. I turn to page 8 of the legislation—proposed section 31A. My question is: given the concerns that have been expressed about this section of the bill, would it be possible to amend it so that it is clear that CASA can only agree to an undertaking to comply with the provision in the aviation legislation? Wouldn't such an amendment eliminate the fears that CASA could use EVUs to interfere in non-safety matters? Do you think we should pursue that amendment?

**Mr Munro**—I find myself in agreement with Mr Ilyk: it is already in there by implication, so it does not change things significantly.

**CHAIR**—It clarifies it.

**Mr Munro**—Yes, certainly, it would clarify it for some people, but I do not think it changes anything.

**CHAIR**—Let me ask it another way: if that amendment was put in the legislation, would you object to it?

**Mr Munro**—No. I would not object to it being amended in that way; I would still object—

**CHAIR**—Yes, I know; I have put that down. I know your in-principle position, there is no doubt about that.

**Senator O'BRIEN**—Can we accept it as your fallback position, if you are not successful with your primary position?

**Mr Munro**—No. I would be lynched!

**CHAIR**—The second questions is: once again, if it becomes law, accepting your in-principle position, if somebody did not sign an agreement should there be an amendment that makes it absolutely clear that they cannot be treated more harshly or differently from somebody who had signed an agreement?

**Mr Munro**—I think it is meaningless, Senator.

**CHAIR**—I would not see it as being meaningless. I think you raised the point when you said, 'Maybe somebody in 10 years time.' I think you have said that a couple of times. This would clarify for somebody in 10 years time—the people sitting here today certainly know what the intent is—that if the safety authority in 10 years time did treat somebody more harshly if they had not signed an agreement compared to somebody who had signed an agreement, that would be an illegal act?

**Mr Munro**—I think it is meaningless for this reason: in order to enter into one of those undertakings, somebody would necessarily perceive that he is getting an advantage out of it, and the advantage could only be more lenient treatment; otherwise somebody would not sign one. The reason he would sign one is that his perception would be that he was going to get off more easily, whatever the situation was, if he signed than if he did not. If that perception were destroyed—which it would not be—then nobody would sign the things.

**CHAIR**—That is all the questions I have, but I have to make it absolutely clear to you that there is not a proxy system that operates in this process; we treat things on merit. We are not a group to be lobbied by 1,000 faxes saying that we should appoint so-and-so. Obviously, we

would take note of them, and it will be recorded in our report that we received them. I want there to be no misunderstanding with regard to that position. We are not a corporate company; we do not have proxies.

The other point which I ought to make—Senator Greig was not here at the start of the proceedings—is in terms of the consultation. I have got to say, sadly, I have found the two easiest defences, when people appear before committees, is for one side to say, 'We consulted widely,' and the other side to say, 'We weren't consulted.' It has become an extreme defence, in my view. We are getting the information from CASA; we were told that the chairman wrote to people who appear on this list. We were told—and I can be corrected if I am wrong—that they wrote to every one. We will certainly be comparing that with the other arenas, and we would certainly like you to look at it when it is put on the table, because it is a public document. If you can see any areas in that where the pilot—what do you call them? Was it fraternity?

**Mr Munro**—Yes.

**CHAIR**—Pardon?

**Mr Munro**—I might have said 'fraternity'.

**CHAIR**—Yes, you said the pilot fraternity did not know what was going on, and we would certainly like to be made aware of it.

**Mr Munro**—Yes

**CHAIR**—Because I would be interested to have a look at that list and see who was written to and who was not written to. So I thank you very much for your contribution, and once again we may require additional evidence or information from you. If you have other information you would like to put before us, or any of the people who have sent in faxes want to send more information from your contact with them, , we would be delighted to receive it. So thank you very much.

**Mr Munro**—Senator Crane, thank you very much, and I note your remarks about the proxies.

[12.26 p.m.]

**FERRIER, Mr Spencer Lyons, Committee Member and Director, Aircraft Owners and Pilots Association**

**HAMILTON, Captain William John Ray, President, Aircraft Owners and Pilots Association of Australia**

**CHAIR**—Welcome, gentlemen. I invite you to make an opening submission.

**Mr Ferrier**—Right. I am a lawyer in practice in Sydney. I have an interest in an aviation aircraft distributorship, where I am a silent partner in a new aircraft sales business in Australia. My law practice is my principal activity. I am also a member of the committee of AOPA, and have been for now some five years. I have been a member of AOPA for over 30 years. The Aircraft Owners and Pilots Association has been in existence in this country for 50 years. We have just celebrated 50 years of continuous activity. We have in excess of 6,000 members who are paid up across Australia. Our constituency is therefore from the whole of the country. We operate a voluntary committee. Bill Hamilton and I and my fellow committee members provide our time at no cost to the organisation and we promote the interests of AOPA on a voluntary basis. We represent, in the aviation industry, about 2,000 businesses involved in aviation, and we have 180 affiliated organisations with aviation interests who are associated with us in a documentary way. I personally am a pilot and an aircraft owner; I have owned aircraft for 25 years. I have an American licence and an Australian licence. I am involved with aviation law, mostly in Australia, but I also have extensive interests in legal matters to do with aviation in the USA. I am the vice president for this region of the American Lawyer Pilots Bar Association, which reflects my interests as well.

Gentlemen, we oppose clause 17 of the bill, which is 31A of the proposed Civil Aviation Act. We agree with the rest of the act and we wish to comment on the Civil Aviation (Carriers' Liability) Act 1959, as it is before you and is worthy of a response from AOPA. I would like to deal with that third matter first, because it is a matter which can be raised and dealt with relatively quickly.

I presume that you are aware that the Civil Aviation (Carriers' Liability) Act is one of the great steps which has been taken by the Australian parliament to provide benefits to the travelling public. The recent amendments, whereby the limit was lifted from what was in fact a derisorily small amount to $500,000, with a mechanism to increase, has meant an enormous social change and benefit for the entire travelling pubic, and particularly those people who fly without any idea of the consequences of getting into an aircraft compared to, say, a motor car.

The deficiency remains—the deficiency prior to the recent amendments remains—as to private aircraft operations. A passenger in a private aircraft has no guarantee of any kind that in the event of a crash, and their injury, they will receive anything. Indeed the High Court has just recently ruled, in the case of Scott v. Davis, which was handed down by the court in the last quarter of the year 2000, that a young boy passenger who was injured in an aircraft during a social occasion in South Australia received nothing, because the owner of the aircraft had no liability to the injured passenger. The pilot, who had done the harm, negligently crashing the plane and indeed killing himself, was of no value so far as a payment was concerned, so that the child who was injured, quite seriously injured, received nothing. That is to be contrasted starkly with the position were that child to have been travelling in a motor car. The law was

plainly contentious up to this point, but the fact of the matter remains that that child got nothing.

Senators, our view is that the law requires immediate review and consideration to extend to the private operation some form of compulsory third party insurance, so as to bring Australia's private aircraft travelling public in to line with the standards of insurance and benefits that can be expected in almost every other form of transport.

**CHAIR**—Can you clarify a point for the committee there?

**Mr Ferrier**—Yes.

**CHAIR**—In terms of this case, was the reason for no benefit, or compensation—whatever word you want to use—because it was error fault and there was no fault in the plane?

**Mr Ferrier**—Thank you, Senator. The answer is that the pilot of the aircraft which crashed was found negligent and he had no insurance cover. The owner of the aircraft was found by the High Court not to have any responsibility towards the injured child, with the result—and the injured passenger—

**CHAIR**—That was my question. The pilot was found negligent, but he had no cover.

**Mr Ferrier**—That is right.

**CHAIR**—Had the plane been defective, what is the law there? Or is there no case that you can point to?

**Mr Ferrier**—I cannot point to a case on that, but the matter, generally, would be that an action would be brought against the owner of the aircraft for the defect. The owner, presumably, would then bring the most recent engineer into the case—because owners are not permitted to manage their own physical maintenance—and there would be a major argument amongst insurance companies as to which of the various insurers would be liable. These matters, in reality, become insurance company arguments, with the insurers standing behind the parties, and our law of torts, as senators are almost certainly aware, relies on fault, with an insurance cover for the person found at fault. It is a common reality in aviation, and in particular in private aviation, that insurers will immediately decline to insure, on the grounds that there has been a breach of Australia's air law and, as the previous submissions were made to you, our air law is labyrinthine at absolute best and affords ample reason for an insurer to find a reason for not insuring.

**CHAIR**—Thank you, you have answered my question.

**Mr Ferrier**—Our view about the matter is that there is an urgent need for compulsory third party insurance to be extended to passengers in aircraft engaged in private operations, that a ceiling is an appropriate way to stop that insurance getting out of hand and to provide some kind of surety, from a forward point of view, for people stepping into the aircraft. I would now like to turn to the matters—

**CHAIR**—Just before you leave that, I just asked the secretary about our terms of reference. We will obviously note what you have said, and it is on the public record. Is there anything in the bill itself that relates to the subject that you have just raised? You can take that on notice if you wish.

**Mr Ferrier**—I do take it on notice.

**CHAIR**—Yes.

**Mr Ferrier**—My inclination is no, but my understanding is—

**CHAIR**—Senator O'Brien says there is.

**Senator O'BRIEN**—One of the bills is the Carriers' Liability Bill.

**Mr Ferrier**—My understanding is that it is within the terms of reference. My understanding is that the committee is to examine the bill—

**CHAIR**—I am just wondering about the third-party aspect of it. Can you take that on notice and come back to us?

**Mr Ferrier**—Yes, thank you. I now would like to turn to a review of the proposed legislation. It is our submission to you that this legislation cannot stand because it is inherently defective. In addition to the view that the section is repugnant to the proper management of aviators and aviation in Australia, we believe that the section is not capable of having legal force. We refer to 31A(1). This section assumes the free will of the person giving the voluntary enforceable undertaking, which I presume we can call the VEU. In reality, the aviator is facing some form of threat of some kind, that the processes presently in existence will be worked against that person. Our submission is that there can be no voluntary enforceable submission on that basis.

Our view is that the Civil Aviation Safety Authority should not be able to permit that entitlement to be given to the Director of Air Safety. Our view is that the Director of Air Safety—with great respect to him personally—is defective and that the activities of CASA, in the management of air safety along these lines, are flawed. This regulation itself is fundamentally flawed because it returns to an administrator, and his subsequent delegates, the power to intervene at his own will in the affairs of citizens of this country.

As to subsection 2 our view is that, if the person may withdraw the undertaking at any time with the consent of CASA, the subsection is, in reality, meaningless. If the undertaking is withdrawn by consent, so it should be and, if it is not, how can it be withdrawn? When we come to the final provisions, particularly clause 4, we deal with the matter of the court being satisfied that a person has breached the term of an undertaking. We then go on with paragraph (c) to deal with any other order that the court considers appropriate.

In accordance with the rules of separation of powers, our view is that the Federal Court would not accept the right, or would not accept a delegation to it, of selecting a fine which it chose to impose at large. On that basis, the legislation could possible be cured by the imposition of a penalty. In the event of a penalty being imposed, the first thing that could be said, in the case of somebody wishing to respond, is that the undertaking was not given voluntarily. The issue would become circular because, if a person were charged with some kind of an offence of failing to honour a voluntary undertaking, they would attack the undertaking on the grounds that it was given under terms of coercion and, hence, it was not voluntary.

Senators, our experience—and we deal with substantial numbers of aviators on a continual basis—is that CASA exercises its powers by coercion most of the time. Whilst the material put to you this morning is correct as to the number of prosecutions, our experience is that CASA uses its power to withdraw licenses, or to threaten to withdraw licenses, to enforce compliance. Our view is that that is inappropriate and wrong. It is wrong in the Australian system. A person should, as has been said this morning, be aware of what his obligations are before he undertakes an activity and then have some kind of certainty in the law. In this case, there is no such certainty because the material is entirely in the hands of CASA, and CASA becomes investigator, prosecutor, judge and sentencer. It not only sentences but it chooses the

sentence that it chooses, regardless of whatever the operation of the law is. In that respect, it is micro-managing an individual in a manner which is not acceptable to the citizens of Australia. Therefore, on the basis that we believe that the legislation is flawed, we say that the Senate should consider not agreeing to the bill in its present form.

I would now like to make some comments dealing with the operation of CASA. It is the view of AOPA that this proposed legislation is no more than a recrudescence of an already flawed system. It is a system which is based on political patronage—that is, political patronage within the administration. That has resulted in a denial of rights to Australian pilots, engineers and maintenance organisations, whereby their right to livelihood and their right to income is at risk at the whim of an executive administration. The fiat of the Director of Air Safety is the means by which a person stays in business in this industry. In my experience as a member of AOPA and as a lawyer, I have come across businesses again and again that have been threatened with ruin and, indeed, put out of business in the course of a procedural argument about the issue or non-issue of a pilot licence, of a maintenance certificate, or of an air operator's certificate. As a result of that, our view is that there should be a systemic change to the law in Australia and that the Civil Aviation Act should be altered to provide rights to people who operate in this industry and not to provide them with an occasional right, subject to the threat of removal of their licence because of unilateral bureaucratic intervention.

In addition, the unilateral bureaucratic intervention, in reality, arises not just because of the actions of a particular administrator but because of various face-to-face operators on behalf of CASA throughout Australia, with their individual views on what is or is not compliant with the law. The result is that the aviation community has become silent, subversive, non-compliant and not at all anxious to assist in the proper administration of justice because of direct concern that, if they do so, there will be reprisals.

There is no ability in an aviator to rely on the legal system to support him. The legal system, as it exists, is that a pilot, an engineer or an air operator can have a licence removed on very short notice and is given the right to appeal to the Administrative Appeals Tribunal. In reality, that right is illusory. It takes months to bring cases to the Administrative Appeals Tribunal, and often operators are not in a financial position to undertake complete lack of income with their full expense profile running. What is needed is a major change, whereby the commercial operations of air operators can continue whilst the legal consequences of any perceived infraction can be argued out.

**Senator O'BRIEN**—They can argue for a stay, can't they? They can seek a stay of any suspension before AAT as a preliminary to the full proceedings?

**Mr Ferrier**—With respect, that is the documentary path that aviators in this country must follow. The problem is that it simply does not work, because the way that CASA proceeds, and the experience that we as AOPA see, is that matters are brought on very short notice requiring major overhauls of their administrative system with the risk of a certificate being removed. I can take you to a recent event where a charter operator was advised in a 24-page fax a few days before his AOC was to be issued that it 'would not issue on the basis of alleged breaches of regulations and orders'. There is another case of an operator who, at 2.30 p.m. on Friday, with his AOC due to expire on the following Monday, was given a 73-page fax and informed that his AOC would not be removed unless he had satisfactorily replied to those pages.

Senators, that is, in essence, ruling by terror and by ambush. Our view is that these proceedings and this manner of proceedings should not be permitted in the Australian

environment. We have put our case in the form of the article, which you have been given, entitled 'A civil aviation system must be built on rights and not favours'. Our concern is that the Civil Aviation Authority does not act properly—with respect—to protect air safety in this country, and the evidence is quite clear and it is quite recent. In recent days we have seen the events to do with the Ansett company, whereby, literally, in the days before Christmas at its peak income time, it self-confessed to a major technical problem with its aircraft. No CASA officer had anything to do with that. To our knowledge, the company itself brought forward that problem and made it public, notwithstanding that the documentary base to find out what the company had not done was in the hands of CASA.

CASA as recently as on a television show last night admitted that it was unaware of those changes. It further admitted that it had recently conducted an audit of Ansett, and yet it did not find this failure to comply. The response was that this major airline is one which essentially self-complies and with the utmost good reason, because Mr Toller himself has acknowledged that Ansett is regarded as the second most safe airline in the world. He said that in his statement to the National Press Club in Canberra recently. That demonstrates in the most stark form that minimalist intervention, but of a principled kind, will ensure compliance and in fact a safe operation.

The same thing applies to Qantas. In these areas there is nothing like the level of ferocious intervention in the behaviour of pilots, where the actions against pilots and the demand for these voluntary, unenforceable agreements is being promulgated. There is no suggestion that these will be promulgated against the major airlines and, indeed, it would appear that CASA is most successful when it does nothing, if you take that view. If I take you to the accident rate statistics which we have prepared, you will see that it is with the major airlines that Australia has in fact achieved its great successes. Nonetheless, there are some serious concerns there, including that in the area of highest intervention we find the highest crash rate. With this intervention the crash rate is dramatically worse than that of the USA. The proposals for further intervention involve use of the joint aviation regulations of Europe. Yet the figures in this report will demonstrate that at the general aviation level the European experience is something like 10 times worse than that in Australia.

Our view is that any proposed adoption of the European system is one that should be treated with the utmost caution. Our view is that the operations of air activity in Australia should follow closely the American system. The American system is fundamentally focused on operational skills and real time management of aircraft rather than documentary compliance. The focus in the United States is on the business of flying, not on the business of filling in bits of paper.

In this country, as the previous submissions said, there is something like 20 times more paper than is needed to fly equivalent aircraft in the United States. That leads to a pilot reaching for his law book in the event of some kind of difficulty rather than for a procedures manual. Our submission is that the reason that this is happening is that CASA has the right to intervene at any time in a pilot's life or in an engineer's life or in an air operator's life and to threaten to remove a certificate or threaten to conduct a major undertaking. Our experience is that threats to undertake major audits and threats to undertake a close examination of somebody's documentary history are used against small operators to enforce compliance. Notwithstanding this, the major airlines continue with minimal interference and proper procedural audits. Regrettably, CASA does not even do that right. Nonetheless, with the major airlines, on a minimalist basis, the unequivocal evidence is that we do enjoy one of the great success rates in world aviation.

**CHAIR**—We need to start winding up so that we have some time for questions.

**Mr Ferrier**—There is one further matter which I think demonstrates our serious concerns about CASA. There was a recent ICAO audit of the Civil Aviation Authority and the question was about the standard which the CASA applied to the management of air safety.

The ICAO itself has conducted an audit of CASA and it said in the finding:

> At the time of the audit, CASA was moving from an operations inspection surveillance system to an audit system based on operators' internal quality assurance system without having first established a regulatory basis and supporting guidance material.

This is the crucial bit:

> The only regulatory requirement was the statement contained in regulations to the effect that "CASA must be satisfied".

It is noted that this was not a satisfactory standard for the maintenance of air safety—that there should be an objective standard for air safety rather than the satisfaction of CASA. That leads into the fundamental flaw that gives rise to our call for a rights based aviation system, the reason being that, when aviation in Australia is based on CASA being satisfied, we have a safety outcomes result which is worse than that of the United States, where there are clear rules. There should be clear rules which can be understood in advance rather than rules which are fundamentally left to the satisfaction of CASA. Our experience at AOPA is that, when CASA must be satisfied, one finds oneself in the hands of different officers as time passes, and the level of satisfaction varies according to the officer in charge of the case. This can lead to serious financial embarrassment, which is not necessary, and the complete absence of objective standards for the management of air safety.

One of the great difficulties that exists in air safety is that we all wish to travel safely by air—there can be no question about that. Notwithstanding that, the word 'safety' is used more often in an emotive sense than it is in any kind of practical sense. In the recent High Court case of Jones v. Bartlett, the reference being [2000] HCA 56, the Chief Justice of the High Court said, in respect of an injury in a house:

> There is no such thing as absolute safety. All residential premises contain hazards to their occupants and to visitors ... Safety standards imposed by legislation or regulation recognise a need to balance safety with other factors, including cost, convenience, aesthetics and practicality.

That statement by our Chief Justice demonstrates that we need an objective standard for air safety and not just for CASA to be satisfied, because that invites the personal views and prejudices of the officer of the moment.

**CHAIR**—Can I just get you to clarify that last statement. You are really being critical of the legislation that the parliament has put down in terms of how CASA operates, not of CASA themselves. If the requirement of legislation is that CASA has to be satisfied, in my view, it is hardly fair to criticise them rather than the legislators who have put this legislation in place who have not done their job properly in terms of what you are saying.

**Mr Ferrier**—With respect, that is correct, but it is not entirely correct in the sense that what is left is that the administrator from time to time imposes rules as he sees fit and there is no doubt that he would impose those rules bona fide but, notwithstanding that, we face a variable set of rules. I comment in our submission:

The problem is that those who are used to entrenched powers have difficulty in giving them up, even for principled reasons. Those who have it do not see arbitrary power as unfair; they don't see the harm. This is the beguiling falsity of paternalistic power.

And we say that the director-general of aviation has paternalistic powers because he can make decisions upon his own satisfaction. I then say:

Those who have it believe they will wield it benignly and fairly. This is entirely proven wrong. A sophisticated society works better because of removal of such powers.

That is our case.

**Senator WOODLEY**—You heard me discussing earlier the whole issue of a custodial sentence. Do you have any comments to add to the comments which have already been made about that? It is an issue that I obviously want to pursue, so I would be interested in your opinion.

**Mr Ferrier**—In brief, our view is that a custodial sentence for an entirely documentary offence where there is no real risk to aircraft, property or people should not be imposed. We recognise the remarks of Senator Crane when he proposes that in an appropriate environment, a judge can decide that. That is certainly a judicial function, but our view is that it should not be imposed. Generally, there can be no question that the imposition of custodial sentences for any activity that exposes others to the risk of life and limb should be supported in an appropriate case in the ordinary way by custodial sentences.

The courts and the law are well trained over many years to impose sentences according to the nature and extent of the offence. As senators know, the imposition of a sentence is always a maximum sentence with a discretion in a judge to impose a lower sentence if appropriate, or even a fine. We see no reason for that not to apply; indeed, our case is that we should move Australian aviation law into a position where those are the consequences of an objectively determined standard, rather than a subjectively determined standard, by the existing director-general.

**CHAIR**—Can I just clarify that? Simply, you would agree to have an alternative for a judge to either apply the custodial sentence or apply a fine, according to the circumstances.

**Mr Ferrier**—In the event of a proper crime there is no question of that.

**CHAIR**—Thank you.

**Senator WOODLEY**—That is all my questions.

**Senator O'BRIEN**—The presentation was so comprehensive that they didn't leave me much to ask about. Certainly, it is a very clear submission. In terms of your submission that 31A not be passed when the bill is passed—you are essentially saying delete 31A—

**Mr Ferrier**—That is correct.

**Senator O'BRIEN**—Pass the rest?

**Mr Ferrier**—We have no objection to the rest.

**Senator O'BRIEN**—So, essentially, I think you heard me ask questions about existing regulations such as CAR33, CAR5.38, section 28BB of the act—

**Mr Ferrier**—Yes, but the numbers do not—

**Senator O'BRIEN**—Okay. CAR33 applies to aircraft maintenance engineers, and I think I read that out—CASA can require the maintenance engineer to undergo certain examinations.

**Mr Ferrier**—Yes.

**Senator O'BRIEN**—CAR 5.38 is the one I read out. It says that a senior flying operations inspector can require the holder to undertake examinations and penalise them if they refuse to undertake them or attend at the appropriate time or place—or they can be prosecuted. CASA cannot penalise them, but they can be prosecuted and penalised by the courts. And 28BB provides for the placing of conditions on an AOC—

**Mr Ferrier**—20A?

**Senator O'BRIEN**—The number 28—28BB. It seemed to me, in asking those questions, that there were specific provisions in existence which allowed CASA to require of licence authority holders in a general sense under the act and the regulations to undertake a certain number of actions. What CASA is saying is that they want the flexibility where, by agreement, they can do a whole range of things; that they get an agreement that the holder of the authority will do a range of things and that non-performance of that agreement will be actionable. So, if I understand what you are saying, you are saying (a) that the potential for duress is too great.

**Mr Ferrier**—That is correct—and it is outstandingly correct. That is a very serious problem in this industry.

**Senator O'BRIEN**—Essentially that is the nub of your problem. But you do not have a problem with the specifics of the regulations as they exist—or are you saying that we should not have the other powers either?

**Mr Ferrier**—With respect, our case is that this whole system is so completely flawed that it should be replaced. There should be an objective standard to which such people can work and, if they fail to reach the objective standard, then these things could be imposed. But our problem is that we are against a standard which is that CASA shall be satisfied. And that is itself a variable feast, not just at the hands of Mr Toller or whoever might be in that position from time to time, but also those who work for him. Our experience, as AOPA, is that is a serious and endemic problem in this industry. Indeed, our view is that when one looks—

**Senator O'BRIEN**—I understand your position. I have heard both sides. I have heard the suggestion that CASA has been too harsh and I have heard the suggestion that CASA has been too lenient; that CASA has turned a blind eye—that some inspectors are known to the industry as a soft touch. I have heard more of that than the other case. But isn't it the case that the parliament has said, "We are empowering a regulator to maintain, as far as is humanly possible, a safe aviation system, and this is the method we have chosen'? And you are suggesting that the standards, the objective tests, ought to be documented—I am not sure whether you mean in the act or in the regulations—that they should be the known tests and, within the parameters of the words 'there established' operators, authority holders, stand or fall?

**Mr Ferrier**—Yes, that is correct. And I would like to go on to say: if the standards are made so minute as to be micro-management then it must fail, because then you need a CASA for every operator; the most outstanding example of that being the dropping of objects from aircraft. In New Zealand law, the word 'safety' and the business of dropping objects from aircraft is settled in three lines of legislation. In Australia, without reference to the word 'safety', we have 11 pages on the same subject. Both are, in fact, effective; one is absurd. The fact of the matter is that a person in New Zealand dropping an object from an aircraft in a reckless or otherwise indifferent manner would be guilty of a crime, because the general laws

of crime would apply, let alone a specific law dealing with a breach of that act. Why do we have 11 pages? Because we micro-manage—and we are no better off. When we do not micro-manage, we have the world's best two airlines. When we do micro-manage, we have a general aviation crash record which these statistics demonstrate is worse than that of the USA.

**Senator O'BRIEN**—It seems there is a tension and there is a bit of a crossover in your arguments there, but we have a limited amount of time today to deal with that. What seems to me to be the case is that the more prescriptive and detailed the act is, the greater there is the potential for the powers of CASA to be challenged through the courts, with due respect to you, Mr Ferrier, as a lawyer.

**Mr Ferrier**—My experience as a lawyer is that—

**Senator O'BRIEN**—I am not asking for your experience, I am putting that to you with due respect to your position as a lawyer.

**Mr Ferrier**—Right. It is just not the case, because the average operator cannot afford the extraordinary cost and delay that can be visited on that operator by CASA and its legal system, which can proceed at its leisure through the court process. That is mentioned in the submission, that the civil aviation system must be based on rights, not favours.

**CHAIR**—I think Captain Hamilton is trying to say something.

**Capt. Hamilton**—If I could just inject a point here: our interest is air safety. There is one thing we do know, which is recognised by experts worldwide. That is, in all things there is a balance, but we can achieve the best air safety outcomes by education. You do not do it with a big stick. Sure, at the end of the day there is always a requirement for a policeman with a big stick, but aviation is no different to the rest of our society. We do not have a big stick over our head in our every waking moment. There is in fact, in the most recent issue of CASA's own flight safety magazine, an article by three of the world's most eminent air safety experts, and contained within that article in CASA's own magazines are the seeds of why our safety record is not as good as that of the US. We have got the balance all wrong. To a very large degree in this country, we try to rely on more regulations, more compliance and higher penalties. Every academic that has written about improving air safety outcomes has shown that to be a failed strategy for improving air safety outcomes. We have got it wrong: we have five times as many rules in the rule book, but we are not five times as safe as the USA. As I say, it is actually illustrated in the most recent flight safety magazine—CASA's own publication.

**Senator O'BRIEN**—If we move away from your position—unless you are asking us to use this bill as an omnibus bill to try to do what would really be the impossible and amend all of that system—when we get back to this bill, your essential position is: strike down 31A—

**Mr Ferrier**—Correct.

**Senator O'BRIEN**—and ask the government to return to the drawing board about what they see as a deficiency in—I am not sure if 'enforcement powers' is the correct way of putting it—their powers to regulate the industry.

**Mr Ferrier**—Their powers, in our submission, should be to set up an objective standard and to maintain it. This proposed regulation is no more than an outcropping of an effort to impose a subjective view. If there were to be objective standards, then the need for this kind of law change—because it is, in our submission, not law reform—would not be required.

**Senator O'BRIEN**—I understand your position very clearly.

**CHAIR**—I understand your position very clearly. People like me fly around the country. We do an enormous amount of charter flying and what have you. when you talk to companies about their position and their reaction to CASA, the vast majority of them say, 'CASA is there. If they raise an issue, we deal with it. We do not have a problem.' There are one or two more infamous cases, and we have been involved in one of them when we said that CASA was too soft in terms of dealing with a particular issue. I guess you are very familiar with that. I find it very hard to reconcile your evidence and what you have said about CASA—I am not talking about the system now, I am talking about CASA—with the feedback that I get as a senator who does a lot of flying in various parts of Australia, and particularly in Western Australia. We don't have much choice as we have such a long way to go. How do you reconcile that? I do not get masses of letters, for example, with regard to CASA. It is always individual complaints of a particular thing. How do you reconcile that? I am having great problems reconciling my own experience against the evidence you have just put before us.

**Mr Ferrier**—I am reminded that, last night, when the question of the Ansett problem was raised, the television people sought engineers to comment on deficiencies in the maintenance systems. They reported that there were many people who would speak to them, but no-one would go onto the television because they felt that, if they came public, they would never get a job in aviation again in their life. From the position of AOPA—and I speak as a director of this organisation with its enormous background infiltrating into the national aviation environment—that is entirely consonant with what we are told.

We do find that there is superficial compliance with CASA, but the danger of CASA being able to make its own rules is that it leaves people in the state of sleeping with a tiger or being with a sleeping tiger. Whilstever the one-on-one relationship of a particular operator with his particular supervisor is a good one, then there will be an extremely happy, safe and well-organised flying environment, but that supervisor can change, and with the change comes that supervisor's—the new supervisor's—change of views on how things are operating. The experience that we have is quite wide that such changes bring about real disruption and can often result in people going out of business.

**CHAIR**—I hear all that and I accept your in-principle position and I do not want to argue with that. But I am not asking people to go on television; I am not even declaring their names or anything. I am talking about the chat you might have over a beer, but you are not allowed to have a beer with pilots. I do not find this groundswell that you are pushing. I am quite happy to look at what you are saying, but if there is a better way of doing it, let us do it. I just do not find this groundswell in terms of the air operators. I am talking about going out on relatively large charters to mining fields, put together by the mining companies to ship their work force. I am talking about shifting myself around, sometimes with an organisation such as the Wheat Board, and talking to the companies. The groundswell just is not there in my experience.

**Mr Ferrier**—Our experiences must diverge. Quite plainly, I cannot support any response to that, because it is your personal experience. We speak from our own experience of our members making it entirely clear to us that there is no doubt that there is a high level of wish to comply and there is a high level of wish to have a well-organised, well-arranged, properly managed and, indeed, properly policed system. We seek no change to that. What we see as absolutely critical is that those who have an income or a financial investment involved in this industry find themselves at risk because of the fear of one-on-one reprisals because of a subjective safety based system. We say that it should be objective.

I would like to make this point: it does drive investment out of the industry. People will not invest the massive sums that are necessary to engage in re-equipping a fleet, particularly a fleet to serve a remote place with perhaps jet aircraft and the like, when their entire operation is subject to the personal view of an administrator. We seek an objective standard for that administration. Our case is that the crash statistics, when compared with those in the USA, support such a system.

**CHAIR**—I totally understand the commercial pressure of complying to make sure you stay in business. In real life, I am a farmer. I know what happens to you commercially if you do not keep control of your noxious weeds, for example, having regard to the regulations that are there. So you make damned sure that you do no have them in there. You can say there is a better way of doing it. You raised, quite correctly, economic considerations regarding investing in the airline system. There are a number of operators in Western Australia who service some ports at a commercial loss, which they cross-subsidise. But there does not appear to be any shortage of operators who are prepared to service our mines and our pastoral areas; in fact, they all tell me it is too competitive and they are running too much on the edge in terms of the economic position. So I do not follow that, either, having regard once again to my personal experience.

**Capt. Hamilton** —In this morning's *Australian*, in the aviation pages, there is an advertisement from a large group of maintenance organisations across Australia. It is directed exactly at the 31A amendment, voluntary enforceable agreements, and the advertisement is clearly very opposed to the idea of this amendment. If you read the whole advertisement, you can see the fear in it. The engineering and maintenance approvals, until recently, have been continuous—standards were being maintained by audit or inspection but the business licence was continuous. By administrative decision, CASA has arbitrarily reduced that to 12 months. In your home state, CASA recalled a large proportion of the engineering approvals of operators at Jandakot and reissued them with a 12 months limit. It was just done; all of a sudden, those businesses now have a 12-month cut-off date. We have no apprentices in the maintenance business, et cetera; we have no investment. Try to understand the level of fear in people's minds that caused them to get together and place that ad in the *Australian.*

**CHAIR**—What you are saying, in essence, is that there is a fear that has been created by what you would term the misuse of a CASA power, because it is not defined as to what they can do. Is that what you are saying?

**Mr Ferrier**—Yes, that is what we are saying. We say the lack of an objective standard means that individual prejudices are imposed on individual operators. The threat of a major upheaval, such as the removal of licence, is enough to force compliance to suit the whim of the individual, without any rights basis for the operator to argue back and say, 'Look, I disagree with that standard. You've raised that standard but it's not the standard which I believe is a proper standard.' There is no objective basis. The result is that one gets complaisant compliance: people are complying while barely knowing they are doing it, because they know that if they do argue, they will end up with a personal disagreement that could result in more problems.

**CHAIR**—Captain Hamilton, in terms of your organisation—and the hoary chestnut of consultation always comes up—how did you find out about this? Was it early enough in terms of dealing with the issue that is before us now, bearing in mind that this bill has already been withdrawn once and has come back in a slightly different form? How did you find out about what was happening and how did you consult with your membership?

**Capt. Hamilton**—In this particular instance the original consultation goes back to 1998-1999 and voluntary enforceable undertakings were part of what we regarded then as a fairly balanced package. If you look at the original documentation that went with that back in 1998-1999—in fact, it is reflected in the briefings to the Australian National Audit Office and, I understand, in briefings to other forums—we accepted it then as a balanced package as a principle. If you now look at the explanatory memorandum to the bill, the potential uses of voluntary enforceable undertakings have changed significantly. It was very clear to start with they would be something—if there had been some minor infraction, some technical breach—where you would have to go and do a training course.

Now in the explanatory memorandum we see that some of the uses are to include when there is no evidence of a breach. In the framework of law we work in, if there is no evidence of a breach there is not an offence. It might be an offence in some individual's mind, but that is the need for objective standards. What is even more extraordinary in the explanatory memorandum to the bill is the notion that laws that have been enacted by the Commonwealth Parliament of Australia, outcome based laws, might not be sufficiently prescriptive for CASA. In other words, a New Zealand-type dropping rule, dropping things from airplanes safely, is not good enough, because CASA prefers 11 pages. It starts off by saying, 'You can't drop anything at all,' and then gives you, effectively, a whole lot of exemptions for things that you can drop.

As you know, the bill was withdrawn last year. On reintroduction this year, to the best of my knowledge, there was no consultation whatsoever on the reintroduction of the bill. I was most surprised to find that it had been reintroduced into the parliament only a short time before it was in fact introduced.

**CHAIR**—So you are saying you did not receive a letter advising you of it?

**Capt. Hamilton**—Not of the reintroduction of the bill into the parliament in 2001, and certainly not any advice of the changes to the intended use of voluntary enforceable undertakings.

**CHAIR**—So how did you become aware of the fact that there was a new bill?

**Capt. Hamilton**—From a phone call from Canberra.

**Senator O'BRIEN**—Captain Hamilton, I do not think that it does say—referring to the revised explanatory memorandum—'where there is no evidence of a breach'. I think what you are referring to is the passage where it says 'it is difficult for CASA to prove the breach of law due to the lack of evidence'.

**Capt. Hamilton**—I stand corrected.

**Mr Ferrier**—We have heard CASA say it is difficult for the CASA to prove a breach, and we hear that CASA considers that any detected inadequacy might exist. We have made our point about objective standards but what we are dealing with is that voluntary enforceable agreement is being proposed in exchange for not proceeding with something else. Our proposition is: the Australian legal system works on the basis that you comply with the law or you have committed an offence. To have a halfway house under threat of prosecution is in fact no solution at all and it leads to micro-management of the individual involved, which is against CASA's interests.

**CHAIR**—We are going to have to wind up shortly, because we are well past our deadline. I just want to ask you the two questions that I have asked all the witnesses today with regard

to the matter of restricting. I refer to pages 8 and 9 of the bill, which I am sure you have heard me refer to, with regard to voluntary agreement. You have made your in-principle position absolutely clear: you want it out?

**Mr Ferrier**—Yes.

**CHAIR**—But in the event of it not being taken out, I am asking you: given the concerns that have been expressed about this section of the bill, would it be possible to amend it so that it is fair that CASA can only agree to an undertaking to comply with the provision of the aviation legislation? Wouldn't such an amendment eliminate the fears that CASA could use EVUs to interfere in non-safety matters?

**Mr Ferrier**—The answer, in brief, is: if this were to be placed in the law, then such a proviso would be crucial for the reason that people who read this law are pilots or engineers; they are not lawyers. They do not understand the subtlety and sophistication of the legal system that they believe is imposed on them. With those words added, one would allow a person with no legal sophistication the ability to understand what it is that he is facing.

**CHAIR**—Thank you. Would it also be possible to amend the bill to make it clear that CASA could not take more extreme action against the pilot or operator just because that person declined to enter into an EVU?

**Mr Ferrier**—For the same reasons, and with our background proviso of not agreeing with the proposal at all—

**CHAIR**—I understand that totally.

**Mr Ferrier**—We would say that, again, it is absolutely essential that that be written in for the reasons already given.

**CHAIR**—I think Mr Hamilton told us the improvements make it worse.

**Senator O'BRIEN**—I did say that I would like CASA back, but perhaps it is just as easy, given the time, if I ask: can we be given some interpretation of what 31A(4)(c) empowers the court to do?

**CHAIR**—We will put that on notice. Thank you to everyone appearing before us today.

**Committee adjourned at 5.32 p.m.**