I have been a participant in recreational aviation activities since 1965. I am a member of the EAA Chapter 1308, RAAus and have been a member of the GFA. I own a self launching glider and two RAAus registered aircraft.

The principal reason for this submission is to draw your attention to a number of issues associated with CASA management of recreational aviation particularly as it relates to Part 149, but also to the nature of the organisations themselves as they related to RAAus and the GFA.

1. Facts, figures and damned lies

1.1 Flying hours

CASA's motto is "Safe skies for all". A principal measure of CASA's performance is the accident rate per 100,000 hours flown. It is also in the interests of the organisations to demonstrate their performance similarly which creates a symbiotic relationship of mutual advantage to report higher hours flown than was actually the case.
BITRE collects the information and presents reports annually.

In the case of the GFA, in 2007 they reported 343.4 thousand hours flown. In 2019 (the last pre-Covid year) 59.9 thousand hours were declared. Throughout this period the number of airworthy gliders was about 700 (determined from the revenue from the annual sale of Form 2 airworthiness packs as shown in their accounts).

From this average number of hours flown ranged from about 500 per aircraft in 2007 to 85 in 2019 (ie each and every aircraft).

The majority of the active fleet is privately owned. Discussions with commercial glider maintainers who undertake annual inspections of (mostly) privately owned gliders indicate the average number of hours flown per aircraft is in the range of 40 to 60 hours per annum.

Due to weather, operational restrictions and the fact that most clubs only operate at weekends (sometimes only one day per weekend) so it is most unlikely that club aircraft generally fly more than 150hrs per annum.

Consequently, it is very arguable that flying hours are over-reported and safety conclusions drawn from the statistic are bogus.

1.2 Membership numbers

In the final analysis, CASA is only concerned with members of GFA and RAAus that fly. However, membership numbers can be inflated by inclusion of non-flying membership categories. For example the GFA has:

- non-flying Active,
- non-flying Associate,
- Registered Operator and
- Tow Pilot categories, as well as some short term membership arrangements.

The actual membership situation is probably best summed up by the comment in the GFA's Board Report accompanying the 2021 Financial Report where it was stated:

> *"Membership numbers have continued a steady decline for the past years and a continuation of this trend would ultimately see the end of GFA. It's an existential issue for gliding."*

Further, the GFA Board minutes of 27 April 2021 observed:

> *"'Churn' (ie existing membership not renewed) is relatively high, with over 30% not renewing. Family membership has a high churn rate..... Of particular concern is that 63 instructors have left, with 28 of these being experienced instructors (the age of these, which is probably relevent, is not referenced)."*

Churn is probably a reflection of the way gliding has structured itself into a product that is not attractive to the modern lifestyle in that the club based model no longer matches the 24/7 service based economy. It contrasts the RAAus model which has demonstrably been more successful over the past 30 plus years. Interestingly many RAAus members are people who have abandoned gliding for a more "open" flying experience.

2. GFA - the unwieldy monster

The GFA is the administrative model that CASA adopted for recreational aviation that led to the AUF which ultimately became RAAus.

The devolution of its legislative responsibilities by CASA to private bodies run largely by volunteers is problematic in that these bodies inevitably become focused on their own existence rather than representing the interests of members who typically "just want to go flying" and have no interest in participating in the business of the organisation.

In the early 2000's GFA actively sought and achieved the abandonment of CASA's "parallel path" policy which permitted glider pilots to fly independent of membership of the GFA, resulting in the granting of a monopoly to GFA.

Membership of the GFA requires that you also be a member of a gliding club and pay capitation fees to their respective state gliding association (an association of clubs). This results in a hierarchical structure with 46 appointed members across 5 regions - all volunteers. There is no direct election of Board members of which there are 17.

Clubs are finding it difficult to find volunteers to fill the myriad of positions required by the GFA rules.

GFA has been known to take actions in respect of members that disregard its own constitution, regulations or policies. If a GFA member want to remedy this their only real option is to take court action within the terms of Victorian Associations Incorporation Reform Act 2012. (GFA is incorporated in Victoria)

3. CASA's remedy "for members" - Part 149

At the Senate RRAT Estimates hearing 20th October 2020, Dr Aleck for CASA said in response to questions from Senator Patrick said[1]:

> *"Under Part 149, if a person has one of their authorisations suspended or varied by RAAus they can challenge that. That decision can be referred to CASA, and CASA reviews that decision, and CASA's decision on that is reviewable in the AAT. Previously RAAus members did not have that option. If they lost their authorisation as a result of a decision of RAAus, they had no recourse through the tribunals; they would have to go to court and claim unfairness of some sort"*

However, in adoption of RAAus's Part 149 the principle of "justice delayed is justice denied" is realised as a person that is the subject of a suspension or variation of an authorisation will be put through a process that is considerably longer than the process a CASA licenced pilot without the protections afforded in the legislation or CASA's policies and procedures.

Discipline and Evidence
A concern is regime adopted by RAA in its policy document entitled "Complaint handling and disciplinary procedures".

These procedures are required by Part 149.290 and S.36 of the Part 149 Manual of Standards in particular:

36 (e) a process for notifying CASA, in writing, of:
(i) the exercise of the ASAO's enforcement powers; and
*(ii) preventative, corrective, remedial or disciplinary action undertaken by the ASAO that relates to the contravention o**r suspected contravention** by an authorisation holder of the ASAO's exposition.*
(Emphasis added)

As a matter of principle no person should ever lose a right or privilege on the grounds of suspicion alone. In fact, such an act would most certainly breach the "principles of procedural fairness and natural justice" laid down in CASA's own "Regulatory Philosophy":

> *9. CASA demonstrates proportionality and discretion in regulatory decision-making and exercises its powers in accordance with the principles of procedural fairness and natural justice.*

As many provisions of the Act and regulations create criminal offences, it is possible that the provisions of Part 149.630 may contravene Articles 14 (1) and (2) of the International Covenant on Civil and Political Rights which provides:

> *"All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." and further;*
> *"Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law."*

Further, no private body should ever be put in a position where it is adjudicating on the laws of the land when the

[1] Page 124 Hansard 20 October 2020

body under whose approval it is acting (CASA) has a much higher standard[2] to meet before it takes disciplinary action. CASA's own Enforcement Manual says (Page 13-4):

> *"The failure to be aware of the correct procedures when gathering evidence may seriously jeopardise any future enforcement action. Where an inspector suspects that a breach of relevant legislation may have occurred, any evidence identified should be collected in accordance with proper evidence gathering procedures. Investigations Branch or Legal Branch can assist with this advice."*

In other words, CASA's enforcement actions must be based on evidence, not merely suspicion.

So clearly the Manual of Standards for Part 149 does not meet CASA's own standards in this respect.
RAA's manual (Pages 11 & 33) adopts "balance of probabilities" standard of proof which is less than "beyond reasonable doubt" standard required by CASA's Enforcement Manual (Page 8-1).

Right to silence

Many offences against aviation law are criminal offences. As a result the rights of people are the same under aviation law as the criminal law. This detailed in CASA's Enforcement Manual (P15-3):

> *"Generally, a person cannot be compelled to talk to an Inspector or to answer any questions put to the person by an inspector. ..... Therefore, while every reasonable attempt should be made to conduct an interview in appropriate circumstances, inspectors should not press the matter if a person indicates that he or she does not want to be interviewed."*

However, RAA's manual runs counter to this and carries an implied threat:

> *"4.5.6 When a member does not cooperate with the inquiry*
> *Members are expected and required to cooperate with an inquiry. RAAus may direct a member to attend an interview, provide a statement or submission about an RAAus related matter or respond to any questions. Failure to comply with a direction of this kind may result in further misconduct allegations and compliance and/or enforcement action."*

The common law privilege of the right to silence is well established. The right to silence protects the right not to be made to testify against oneself (whether or not that testimony is incriminating).The privilege against self-incrimination is narrower, in that it protects the right not to be made to incriminate oneself[3].

The common law privilege is available not only to persons questioned in criminal proceedings, but to persons suspected of a crime, to persons questioned in civil proceedings and in non-curial contexts[4]. In the case of RAA exercising its powers, the actions are civil (not criminal).

The right to claim the privilege against self-incrimination is contained in art 14.3(g) of the International Covenant on Civil and Political Rights (ICCPR) which provides that, in the determination of any criminal charge, everyone shall be entitled not to be compelled to testify against himself or to confess guilt[5].

The right or privilege against self-incrimination is also protected in the Victorian Charter of Human Rights and Responsibilities and the ACT's Human Rights Act[6].
The explanatory statement in the original Part 149 regulation contains a "Statement of Compatibility with Human Rights"[7].

It is clear that the author of the statement did not understand the Part 149 and its relationship with the aviation law. For example, the statement says "A total of 15 offence provisions specified in the regulations are strict liability offences."

Whilst this is true of Part 149 where the offences apply to the subject organisations and its officers, the Part 149 organisation will administer activities carried out under the entire aviation law framework.
There are over 200 strict liability criminal offences in this suite, many of which carry potential penal sanctions. It is these offences that the Part 149 bodies will be investigating. It is those offences that are of concern to aviators.

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[2] The accepted administrative law principle is a delegate cannot do what the delegator cannot.RAAus is effectively CASA's delegate.

[3] ALRC Final Report on Traditional Rights and Freedoms - Encroachments by Commonwealth Laws (ALRC Final Report 129,2015) p312 para 11.13

[4] ALRC p311 para 11.11

[5] ALRC p317 para 11.37

[6] ALRC p317 para 11.42

[7] Appendix B https://www.legislation.gov.au/Details/F2018L01030/Explanatory%20Statement/Text

In fact, the Explanatory Statement only considers the implication of defining offences as "strict liability offences" in as much as those offences potentially limit the presumption of innocence. However as CASA's own information sheet states[8]:

> *"If you are charged with a strict liability offence, you aren't automatically guilty. It's not up to you to prove your innocence but up to a prosecutor to prove that you have broken the rules and prove it beyond a reasonable doubt."*

Accordingly, it follows that your right to silence (and consequently the right to claim the privilege against self-incrimination) must be observed by both RAA and CASA. RAA should be aware that the right silence applies in civil matters which any action they make take against a member will be. (Only police and similar government agencies can launch criminal prosecutions).

Control of members

This clause (4.5.6 above) of RAA's manual highlights an issue with the structure of the Part 149 arrangements. The regulation implicitly requires a person to be a member of an organisation in order to gain the privileges associated with membership. As is the case with most member based organisations, the organisations possess the power to expel members for breaches of the organisation's rules.

Regulators of such organisations do not get involved in membership disputes and the courts are loath to determine disputes.(for example, in the matter of John Setka and the ALP, the Victorian Supreme Court ruled it could not interfere with the ALP's internal processes).

However, in the case of a member of RAA, they are required by law to be a member of the organisation to obtain certain aviation related privileges. If a member breaches aviation law he should be afforded the same legal rights as any other person authorised under the aviation legislation, in this case the right to silence, without the coercive threat of punishment under the rules of the organisation.

Organisations authorised under Part 149 should not contain provisions in their rules for expulsion for anything other than meeting the requirements of Civil Aviation Regulation 269(1A)[9] for a breach of the aviation law.
This would provide consistency in treatment of all those (members or not of RAA) within the terms of the aviation law (after all, "we are all equal before the law").

Investigations

Part 149 requires that RAA will have "Aviation administration and enforcement rules" under Part 149.290.
A necessary part of enforcement is investigation and RAA's manual contains extensive text on investigations.
However, Parliament has empowered CASA to administer the aviation law and conduct investigations into breaches of that law. Part IIIA of the Civil Aviation Act deals with investigations.
Section 32AA of the Act says:

> *Appointment of investigators*
>
> *(1) CASA may, in writing, appoint an officer to be an investigator for the purposes of this Part.*
>
> *(2) CASA must not appoint an officer as an investigator unless CASA is satisfied that the officer has suitable qualifications and experience to properly exercise the powers of an investigator.*
>
> *(3) An investigator must, in exercising powers as an investigator, comply with any directions of CASA.*
>
> *(4) If a direction is given under subsection (3) in writing, the direction is not a legislative instrument.*

Clearly, an investigator must be a member of the staff of CASA (S.3 of the Act), so the investigatory powers under the Act cannot be delegated to a private body (such as RAA) or a private individual.
Any investigation carried out by a private party may hamper any subsequent action by CASA for a variety of reasons well founded in the common law relating to evidence and procedure.

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[8] https://consultation.casa.gov.au/regulatory-program/part-91-of-casr-and-associated-mos-for-general-ope/supporting_documents/Strict%20liability%20information%20sheet.PDF

[9] CAR 269 (1A) CASA must not cancel an authorisation under subregulation (1) because of a contravention mentioned in paragraph (1)(a) unless:
(a) the holder of the authorisation has been convicted by a court of an offence against a provision of the Act or these Regulations (including these Regulations as in force by virtue of a law of a State) in respect of the contravention; or
(b) the person was charged before a court with an offence against a provision of the Act or these Regulations (including these Regulations as in force by virtue of a law of a State) in respect of the contravention and was found by the court to have committed the offence, but the court did not proceed to convict the person of the offence.

Review by the Administrative Appeals Tribunal ("AAT")

In the event that AAT does hear an appeal, the provisions of Part 149.630 may incur the wrath of the tribunal:

149.630 (1) In conducting a review of an internal review decision of an ASAO:

(a) the procedures for conducting the review are within the discretion of CASA; and

(b) CASA is not bound by the rules of evidence; and

(c) CASA may inform itself in any way it thinks fit; and

(d) the review is to be conducted with as little technicality and formality, and as quickly and economically, as a proper consideration of the matters permit.

This approach is contrary to the legislated requirements (eg s37) of the Administrative Appeals Tribunal Act 1975 in regards to facts and evidence.

Part 149.630 is also contrary to its own enforcement manual (Appendix 2-7):

A Decision-Maker Must Not Act without Evidence

Enforcement related decision-making must be based on clear and plausible facts that are able to be articulated, not mere conjecture or speculation. These facts need not always be clear "beyond a reasonable doubt", nor need they necessarily be facts within the personal knowledge of the decision-maker. However, they must be sufficient to justify, on reasonable grounds the action being taken, and they must be articulated to the person in relation to whom that action is being taken. The evidence (facts and circumstances) on which a decision rests must be stated, or at least be capable of being stated, with a fair measure of specificity and particularity

Conclusion

Despite numerous claims by CASA that safety outcomes will be improved, there has been no evidence presented that this regulatory model will result in any improved safety outcomes. Part 149 is simply an administrative re-arrangement.
Further "The Australian Government Guide to Regulation" Edition 1 (p.4) observes:
"The Government has a clear approach to regulation: we will reduce the regulatory burden for individuals, businesses and community organisations.
From now on, cutting existing red tape and limiting the flow of new regulation is a high priority.
Every policy option must be carefully assessed, its likely impact costed and a range of viable alternatives considered in a transparent and accountable way against the default position of no new regulation."

This was amplified in the Statement of Expectations issued to the CASA Board by the Minister in 2017.
Obviously, this regulatory approach has an increased complexity and cost that can only been borne by the members of those organisations that choose to participate in the scheme.

Towards a simpler arrangement

The USA has the largest privately operated aircraft fleet in the world and yet does not have a system similar to our Part 149 approach. It is hard to compare safety statistics as data is not uniform across jurisdictions but it arguable that the US safety statistics for privately operated aircraft are at least as good as Australia's if not better. So CASA's totalitarian approach to regulation cannot be argued to be producing superior results.

A simpler approach could be:

1. Aircraft registration - Registration has nothing to do with airworthiness. Currently RAAus is required to maintain a register of aircraft for which it charges annual fees and allocate registrations like 24-9999. VH registered aircraft do not pay any fees once registered. In Germany, for example, ultralight aircraft registered as D-1234 are distinguished from other aircraft which registered as D-ABCD.
The solution - transfer the RAAus register to CASA and remove the costs associated with annual renewals from the owners and RAAus (ie collection costs)

2. Aircraft operations - all RAAus aircraft are operated under Visual Flight Rules (VFR) as are most privately operated VH aircraft. RAAus aircraft are currently limited to 600kg MTOW and have some operational limits placed on them. These is no reason that these cannot be codified or reviewed as required. In addition if these details were codified CASA would not be required to renew exemptions bi-annually. This also apples to gliders.

3. Pilot licencing - CASA already approves RAAus training material. CASA could adopt those sytems and issue delegations to individuals to oversee the training system and issue authorisations in a manner similar to the

delegations issued for CASR Part 21 authorisations for the issue of special airworthiness certificates (AKA "certificates for experimental category aircraft"). CASA already has systems in place for the auditing of delegations and audits the GFA and RAAus.

4. Maintenance and repair - private operations

CASR 201.003 provides:

> *Commonwealth and CASA not liable in certain cases*
>
> *(1) Neither the Commonwealth nor CASA is liable in negligence or otherwise for any loss or damage incurred by anyone because of, or arising out of, the design, construction, restoration, repair, maintenance or operation of a limited category aircraft or an **experimental aircraft**, or any act or omission of CASA done or made in good faith in relation to any of those things. (emphasis added)*

EASA has recently enacted Part ML which provides for owner maintenance for aircraft upto 2760kg MTOW in private operations. CASA is proposing to issue Part 43 arrangements that will provide less stringent maintenance arrangements for experimental and LSA category aircraft. Canada has had owner maintenace provisions for nearly two decades. The US FAA holds the Canadian model in high regard.

Proposal - make all RAAus and GFA privately operated "experimental aircraft" unless owners elect to have them maintained under the CASA managed Part 43 system (ie LAMEs) . Existing commercial RAAus and GFA maintainers can be "grandfathered' into the CASA system with restrictions.

5. Maintenance and repair - commercially operated aircraft (training and hire)

Existing commercial RAAus and GFA maintainers can be "grandfathered' into the CASA system with restrictions. Otherwise LAMEs will be required to undertake maintenance (as many already do for RAAus aircraft).

6. Outcome - GFA and RAAus become true advocates for their sectors of aviation without the fear of causing offence to CASA which may cause loss of priveleges. GFA would continue as a sporting body. All CASA has to do is register aircraft (once) and manage the delegations which is what they do now under Part 149. If pilots or owners commit offences they can be dealt with according to their policies and procedures in a manner which Parliament intended their role in aviation.

At the very least:

If we must have P149 organisations then the regulations should be amended to provide that:
1. Organisations must accept membership applications from any person **without restriction**.
2. Organisations **may not expel** any financial member
3. Organisations **may not require membership** of any other organisation as a condition of membership
4. Make provision in Part 149 covering the event where a Part 149 body becomes insolvent or legally incapable.

Organisations issue authorisations and the only way to lose an authorisation is by a breach of operational rules or breach of aviation law. The loss of an authorisation is appealable to CASA and AAT. Expulsion from organisations can only be challenged by court action which is Dr Aleck's claim that P149 avoids.

CASA must deal with all comers, irrespective of their personal qualities or views. The Part 149 organisations should mirror this position. Clearly if you lose an authorisation and can longer fly you won't renew membership

Jim McDowall