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Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
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Dear Senator Fierravanti-Wells,

SUBMISSION TO THE SENATE STANDING COMMITTEE FOR THE SCRUTINY OF DELEGATED LEGISLATION INQUIRY INTO THE EXEMPTION OF DELEGATED LEGISLATION FROM PARLIAMENTARY OVERSIGHT

AusALPA is the umbrella organisation representing more than 7,100 professional pilots within Australia for aviation safety and technical matters. AusALPA consists of the Australian and International Pilots' Association (AIPA) and the Australian Federation of Air Pilots (AFAP) and is the Member Association for Australia within the International Federation of Airline Pilot Associations (IFALPA), which represents over 100,000 pilots in 100 countries.

AusALPA maintains a dedicated Safety and Technical organisation, committed to protecting and advancing aviation safety standards and operations. That commitment necessarily involves AusALPA in engaging with the Parliament and the Executive, for the most part with the Civil Aviation Safety Authority (CASA), as well as other aviation industry stakeholders.

Our interactions with CASA and other aviation-related agencies are invariably frustrated by a lack of transparent decision-making and many examples of what we see as active avoidance of public scrutiny, either under administrative law provisions or via this Committee. It is difficult to accept that this widespread and repetitive behaviour is accidental. We are therefore grateful for the opportunity to contribute to the essential work done by the Senate Standing Committee for the Scrutiny of Delegated Legislation.

Caveat

Although it would clearly be both desirable and appropriate, our submission does not have the benefit of competent administrative law advice. Due to the majority of our members being stood down as a consequence of the effects of COVID-19, most of our resources are devoted to protecting the physical and mental well-being of those members. Having only become aware very recently of this Inquiry, the tight timeframe effectively prevents us from seeking external legal advice.

Why is this Inquiry relevant to AusALPA?

AusALPA is concerned that the Commonwealth aviation-related agencies are using the framework of the *Legislation Act 2003* to frustrate rather than further the aims of that Act and of the administrative law framework.

In Parliamentary Research Paper 13 of 2000 (part of the Vision in Hindsight project), John McMillan wrote about *Parliament and Administrative Law*. He dealt with the Parliament's move towards more open government and the significant legislation that provided greater public scrutiny of executive actions, such as the *AAT Act 1975*, the *AD(JR) Act 1977*, the *Ombudsman Act 1976*, the *Freedom of Information Act 1982* and the *Privacy Act 1988*. He foreshadowed the passing of the Legislative Instruments Bill 1994 as part of the transparency movement.

He wrote that we had established a system underpinned by three broad principles:

- *administrative justice*, which at its core is a philosophy that in administrative decision-making the rights and interests of individuals should be properly safeguarded;
- *executive accountability*, which is the aim of ensuring that those who exercise the executive (and coercive) powers of the state can be called on to explain and to justify the way in which they have gone about that task; and
- *good administration*, which is the principle that administrative decision-making should conform to universally accepted standards, such as rationality, fairness, consistency, and transparency.

AusALPA, in exposing to the Committee just one of many examples, that of the development and approval of Fatigue Risk Management Systems (FRMS) in aviation, contends that CASA has misapplied or ignored all three of these broad principles. Furthermore, we believe that CASA has thwarted the spirit, if not the letter, of the *Legislation Act 2003* with the demonstrated lack of transparency and sufficient engagement, keeping stakeholders unaware of its activities in regard to the implementation of FRMS, one of the major planks of aviation safety.

While we understand that this Inquiry is focused on the currently permissible Exemptions under the Act, we cannot precisely sever the exemption provisions from the more general operation of the Act. Importantly, AusALPA faces the same dilemma as the Committee in that it is impossible to form a view or to adjudicate, as may be the case, on the mechanisms being employed to avoid scrutiny when the actions of the Executive are hidden from view and the very basis of that concealment is unstated or unknown.

The Terms of Reference

AusALPA is not able to directly address the policy perspectives of the Terms of Reference (ToR) for this Inquiry, other than to offer an example for the Committee to contemplate in regard to ToR (a)(iii) and (a)(iv).

We are thankful for the earlier submission of the Clerk of the Senate to this Inquiry for highlighting the broad relevance of our FRMS example.

What is an FRMS?

An FRMS is an entity-specific outcomes-based regulatory approach to aviation fatigue management that is an alternative to a generalised prescription of rules designed to

minimise the risk of an accident as a consequence of pilot[1] fatigue. Australia has had prescriptive legislation to manage fatigue risks in aviation since the early 1950s, but that approach necessarily involves compromises to capture the whole target audience, regardless of any particular circumstances that may otherwise distinguish a flight or series of flights from the one-size-fits-all prescription. The International Civil Aviation Organisation (ICAO) defines an FRMS as:

> A data-driven means of continuously monitoring and managing fatigue-related safety risks, based upon scientific principles and knowledge as well as operational experience that aims to ensure relevant personnel are performing at adequate levels of alertness.

AusALPA fully supports the FRMS model, the continuing international development and implementation of which we carefully note is a tripartite collaboration by ICAO as the international regulator, the International Air Transport Association (IATA) representing airlines and our umbrella organisation, the International Federation of Airline Pilots Associations (IFALPA). It should be uncontroversial that the scientific principles and knowledge as well as operational experience relied upon in predicting, measuring and mitigating fatigue risk should be open to independent expert assessment to ensure consistency and best practice in maintaining or improving aviation safety. That can only happen when the basis of the decision is transparent.

Who is affected by fatigue?

Fatigue directly affects people and, consequently, safety. It is the pilots who work under these FRMS limits and who are directly affected by them. The consequences of the pilots' work for the operator are fulfilling a duty of care to the operator's clients as a business or corporate outcome that is a secondary consideration to safety.

That distinction is critical in both law making and in executive action, particularly in recognising that the operator's commercial interest are not always aligned with those of the people in the front-line whose health and wellbeing is at risk, as is that of their passengers. If aviation law-making is to be properly informed, pilots and their representative bodies must be involved – particularly when it comes to the specifics of the FRMS imposed on them.

Why do we regulate for the fatigue management of pilots?

The combination of some pilots' heroic views of their own capacity and the commercial imperative for endless productivity will always require regulatory intervention to assure public safety. In limiting available hours of work and associated rest periods, the legislative prescriptions invariably follow the form of "a pilot shall not…" and "the operator shall not require…" to ensure bipartisan constraint within each operation.

Although not all flights carry passengers, the public policy outcomes must reflect the fact that passengers trust the government to externally manage the risk over which they themselves are unable to exert any control. That system must consistently provide a single outcome: to ensure that pilots are performing at adequate levels of alertness, particularly at high risk times such as landing at the end of a protracted duty period.

The fatigue rules

Civil Aviation Regulation 210A provides the head of power for CASA to give directions to pilots and operators for the management of pilot fatigue. Subsection 98(5) of the *Civil*

[1] AIPA recognises that many other people are subject to risks from personal fatigue and also that FRMS has applicability outside aviation.

Aviation Act 1988 ensures that when such directions are issued as Civil Aviation Orders[2], as they currently are in Civil Aviation Order 48.1 Instrument 2019 (the "2019 Instrument"), they are a legislative instrument.

The 2019 Instrument serves two purposes: first, it sets out the prescriptive fatigue management rules generally applicable to pilots (referred to in the Instruments as "flight crew members" or "FCMs") and operators; and second, it separately provides for the approval of an FRMS specific to a particular operator[3]. Legislatively, those two parts are fundamentally different. We hope to demonstrate that the FRMS provisions of the Instrument are a prime example of what the Clerk of the Senate describes as a "blank cheque"[4] legislative scheme. It is therefore perhaps unsurprising that AusALPA considers CASA's management of this second purpose to be problematic.

Parliamentary scrutiny and disallowance

The first part of the Instrument is entirely consistent with the *Legislation Act 2003* - the prescriptive fatigue management rules are fully laid out for the scrutiny of the Parliament, the pilots and operators to whom they apply and the general public. Should an error of law, science or application be brought to the attention of the Parliament within the appropriate time, then the disallowance procedures allow for such an error to be prevented from coming into force. Certainly thereafter, the specific prescriptions are available for further consideration and amendment by the Executive.

In sharp contrast, the outcomes-based FRMS provisions set out in Appendix 7 of the 2019 Instrument are distinctly different in terms of providing for proper Parliamentary scrutiny compared with the prescriptive rules. Appendix 7 contains no limits on maximum duty or flight time or minimum rest *per se* – the rules relate solely to process. Later, we shall see that CASA holds the view that the specifics of individual approvals are private and not subject to any scrutiny, although we do not know on what specific basis they rely.

Furthermore, Appendix 7 does not explicitly set out how individual FRMS approvals are to be treated under the framework of the *Legislation Act 2003*, in spite of the fact that by design they approve changes to the otherwise-applicable prescriptive rules of the remainder of the Instrument, that is, they "alter the content of the law". However, CASA treats FRMS approvals as exempt from Parliamentary scrutiny and exempt from merits and judicial review by anyone other than the applicant.

Although the Committee has advised us that some procedural fairness changes were required in regard to the Explanatory Statement for the 2019 Instrument, those changes only affected the business interests of the applicant as distinct from the safety interests of those compelled to operate under whatever rules CASA chose to approve at the request of the applicant.

To be fair, it is most likely that the Committee in its normal role would not have recognised that Appendix 7 to CAO 48.1 Instrument 2013/2019 created a scheme for unscrutinised individual private arrangements between CASA and applicant operators that would allow an unconstrained CASA to abandon, fully or in part, the prescriptive scheme otherwise described in those Instruments.

It is also unfortunate that the Committee did not realise that these arrangements would have a direct effect on the health and safety of the pilots required to work to those arrangements and that CASA intended to preclude procedural fairness for those pilots.

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2 As per regulation 5 of the Civil Aviation Regulations 1988

3 See Clause 10 and Appendix 7 of Civil Aviation Order 48.1 Instrument 2019

4 See page 3 of Submission 3 to this Inquiry

Members of the Committee should be in no doubt that the arrangements, privately agreed between CASA and the operator, represent a productivity tool for the operator and a safety concern for pilots. A key plank of fatigue risk management is 'shared responsibility' – unfortunately, that does not equate to shared risk.

It is not sufficient for the Minister to treat CASA as if it is the repository of all aviation knowledge and experience – it demonstrably is not. It is not sufficient for the Minister to seek advice, or to accept CASA seeking advice, only from operators and others whose motivation is solely or predominantly financial.

For the edification of the Committee, we think it is important to expand on the adverse outcomes that have flowed from the operation of the 2019 Instrument as allowed. While conscious of the length of this submission, we feel that it is important to include sufficient detail for the Committee to understand the underlying issues and how they inform our views on addressing them.

A key ICAO benchmark standard for FRMS

One policy response to "blank cheque" legislative schemes available to the Committee is to require the inclusion of statutory benchmarks that act to significantly constrain the otherwise undefined powers proposed by such schemes. This is particularly apposite when a scheme is partly defined or referenced to a purpose for which there exists readily identifiable specificity, such as giving effect to treaties and international conventions.

Critically, Appendix 7 sets no benchmark against which the "expected" safety outcomes of the FRMS process are to be measured, contrary to a key ICAO provision with which Australia has committed to comply[5] and despite the relevant specifics being immediately available in the Instrument itself.

The ICAO standards for fatigue management are set out in Annex 6 *Operation of Aircraft*. In terms of the Australian industry sector most likely to adopt an FRMS as the preferred alternative to the prescriptive rules, the most relevant of the three parts of Annex 6 is *Part 1 International Commercial Air Transport — Aeroplanes*. The key ICAO standard that specifically addresses the required benchmark is:

> 4.10.4 The State of the Operator shall approve the operator's FRMS before it may take the place of any or all of the prescriptive fatigue management regulations. An approved FRMS shall provide **a level of safety equivalent to, or better than, the prescriptive fatigue management regulations**. [emphasis added]

The "prescriptive fatigue management regulations" are those national rules in force at the relevant time. In Australia, those rules were the Civil Aviation Order 48.1 Instrument 2013 (the "2013 Instrument") until August 2019 and thereafter the more liberal 2019 Instrument.

What is CASA's policy on a prescriptive benchmark?

When the decades old prescriptive rules, having been assessed as no longer fit for purpose, were replaced after extensive consultation in 2013, no prescriptive FRMS benchmark was included in the 2013 Instrument. The alternative approach, accepted in good faith by the stakeholders, was to set the relevant benchmark in policy and guidance material. The related CASA policy document (the Fatigue Risk Management System Handbook) was published in April 2013 and contained the following statement within subsection 2.2 *Assessment Criteria*:

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[5] See s11 of the *Civil Aviation Act 1988* and Article 38 of the Chicago Convention as published in Schedule 1 to the *Air Navigation Act 1920*

> The operator **must demonstrate** through establishing and exercising the FRMS processes and procedures in a trial, how the FRMS provides an acceptable level of safety which should be at least equivalent to or better than that required by the prescriptive rules contained in CAO 48.1 that would otherwise apply to that type of operation. The CASA Inspector must take into account how likely safety outcomes under a proposed FRMS would, in all the circumstances, compare with likely safety outcomes under application of another appropriate Appendix of CAO 48.1 that could reasonably apply in the same circumstances. [emphasis added]

That document is publicly available on the CASA website and, to the best of our knowledge, remains the relevant policy guidance[6]. AIPA expects that the references therein to the 2013 Instrument should simply be read across as referring to the new 2019 Instrument, maintaining consistency with the ICAO standard.

But what use is such a longstanding and inarguably proper safety policy if CASA fails to apply it to Australia's largest operator and its subsidiaries and obstinately refuses to explain why?

How has CASA applied its prescriptive benchmark policy?

The following example is considered by AusALPA to demonstrate a bad faith betrayal of the principles and limits described in the prescriptive parts of the 2013 and 2019 Instruments, which were broadly acceptable to those stakeholders consulted during the development of those Instruments and otherwise allowed by Parliament. While we have been given a lesson in trust and regulatory integrity, there are clearly salutary lessons for the Committee in regard to agency behaviour.

In 2019, CASA approved a trial FRMS for Qantas without any apparent benchmarking against the then extant 2013 Instrument. In February this year, CASA approved a full FRMS for Qantas and in May a full FRMS for EFA, a wholly-owned Qantas subsidiary, both without any apparent benchmarking against the 2019 Instrument. Each of those FRMSs have rulesets establishing the various duty and rest limits that substantially replicate the old rules that CASA determined some 10 or more years ago were not fit for purpose and replaced with the new Instruments.

In either case, if some form of prescriptive benchmarking did take place, what possible justification could there be for resurrecting and giving new life to decades-old rules that CASA itself repudiated as not fit for purpose? Why would CASA abandon over 10 years of specialist consultation and review of scientific research that modernised and reflected best fatigue risk management practise?

Critically, neither CASA, Qantas nor EFA[7] are prepared to demonstrate to the affected pilots that those rulesets provide at least an equivalent level of safety to the prescriptive rules, consistent with CASA's stated policy. This would be difficult to achieve given the approved rules allow significantly longer duties than the 2019 Instrument prescriptive limits. CASA appears to have abrogated its own policy and safety obligations for no obvious reason other than for the commercial convenience of the Qantas group.

At the same time, CASA staff were commenting that other operators' FRMS applications were not being processed until such time as the 2019 Instrument was published, since that was the required policy benchmark. What possible justification could there be for

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6 AusALPA has been advised that the Handbook will be revised in late 2020/early 2021

7 It is not the purpose of this submission to criticise either Qantas or EFA in relation to the merits of their FRMS application – as for any regulatory approval, they are free to request whatever they like. Regardless, it is CASA as the regulator who must assess an application with the primary purpose of maintaining or improving aviation safety, not for the purpose of supporting their business interests.

applying two different benchmarking standards and the subsequent creation of significant commercial advantage and enhanced market power for one industry player over the rest of the industry?

Competition concerns aside, this inconsistent and unfair treatment of applicants raises matters of procedural fairness, not only among competing operators but also for affected pilots. It is unfortunate that the emphasis on operators tends to obscure the fact that pilots are also directly affected by the legislation.

Procedural fairness in FRMS approvals

Despite the significant progress by the parliament in the 1970s and 1980s in opening up executive action to public scrutiny, AusALPA's experience in dealing with CASA on fatigue management in general and FRMS in particular has been frustrating. That experience is not one of illumination but of practised protection of agency secrecy and diffusion of accountability.

In terms of FOI requests, CASA relies heavily on the exemption and conditional exemption provisions of the *Freedom of Information Act 1982*. AusALPA is concerned that CASA is prioritising commercial considerations over safety. This is clear from the level of redaction in documents requested by AusALPA member associations, in this case AIPA, on behalf of pilots directly affected by CASA's approval of the Qantas FRMS. CASA apparently considered those details exempt for disclosing trade secrets or commercially valuable information and/or business information. Subsequent close examination of the approved FRMS documentation later provided to pilots reveals nothing innovative or notably different from common industry practise and nothing that supports the nature and extent of those exemptions, particularly in documents supporting the regulatory approval of a safety system.

In regard to merits or even judicial review, CASA considers the approval of an FRMS and the limits contained therein as not reviewable by the pilots subject to those limits. CASA has previously argued that pilots have no rights to be heard because they are not directly affected by the decision to approve the FRMS:

> FCM operating under an FRMS are not directly obliged under the CAO at least to comply with the FRMS flight and duty requirements in appendix 7 of CAO 48.1. Rather they are required to comply with those requirements as included in the operator's operations manual[8]. CASA does not consider AIPA is affected in a direct or immediate way by the giving of the trial approval. CASA also does not consider FCMs are affected in a direct or immediate way by the giving of the trial approval. They are not the applicant for the approval. Any effect on a Qantas FCM or AIPA is indirect.[9]

The Committee may have a view that this assertion by the Acting Executive Manager of CASA's Legal, International and Regulatory Affairs Division enlivens the classification of the FRMS approval as a legislative instrument in accordance with s8(4)(b)(i) and/or (ii) – AusALPA's lay view is that an FRMS approval "alters the content of the law" that otherwise would apply if not for the FRMS rules and that it also "has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right". Unsurprisingly, we consider CASA's view that pilots actually doing the work are not directly affected by the determination of the rules of that work to be a logical fallacy.

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8 Subclause 2.5 of Appendix 7 refers to "the relevant limits and procedures contained in the operations manual in accordance with this CAO" and subclause 2.5 stipulates that "an AOC holder's FRMS must form part of the holder's operations manual".

9 CASA letter to AIPA dated 13 February 2020

CASA also argues that the imposition of the privately negotiated limits upon the pilots does not stem from the approval decision, but rather from the 2013/2019 Instrument that provides the head of power for the approval. Hopefully the legal rationale for CASA's position will be properly examined, but it certainly won't be with any assistance from an agency determined to cover its tracks. In the meantime, the Committee is invited to form a view, not only about the circularity of the CASA arguments but also about the specific denial of procedural fairness to pilots subject to an FRMS.

One of the greatest fairness aspects of prescriptive fatigue management rules, at least until CASA resumes issuing private variations, is that all operators and pilots subject to those rules are compelled to operate on a 'level playing field' regardless of economic or political influence. Those rules were developed with AusALPA participation and with appropriate public consultation. To the extent that the safety outcomes could be estimated and eventually measured, the limits and procedures of the prescriptive rules were published and, in both Instruments, disallowable by Parliament. In contrast, the process description that is Appendix 7 reflects only an aspirational outcome rather than any sort of vehicle to estimate or measure safety outcomes, yet imposes a condition on pilots to comply with any limits privately settled by CASA and the operator.

Operator-specific FRMS approvals are the very antithesis of a level playing field. They become productivity tools that create commercial advantage for those operators who are able to arbitrage CASA's inability to provide regulatory consistency – as well as creating potential safety outcomes, these outcomes may well be anti-competitive.

Setting aside for the moment the commercial advantages for the operator, CASA has deliberately prevented the provision of any procedural fairness to the pilots legally compelled to have their fatigue state managed by those privately settled limits. We invite the Committee to note that CASA to this day refuses to engage with pilots or their representative associations or accord them any status in determining FRMS rulesets and the embedded limits prior to granting approval, despite there being no better source of experience, and in many cases knowledge, then those pilots actually conducting the operations.

CASA argues that pilots gain sufficient participation, albeit after the fact, in the undefined stakeholder engagement process of the approved FRMS. However, CASA doggedly refused during policy and process consultation for the Instruments to make any provision in the Instruments to make such participation mandatory or to adopt the ICAO-recommended Fatigue Safety Action Group (FSAG) model. Of course, CASA can now conveniently point to the absence of such a provision to argue that they lack the specific power to intervene should such hoped-for pilot participation become a sham or simply fail to take place. One can barely escape drawing comparison with how well similar "light touch" regulation of the financial sector has turned out.

AusALPA invites the Committee to contemplate the actual fairness afforded to pilots as a consequence of ex *post facto* participation in what is, contrary to the ICAO FSAG model, an advisory rather than "action" group that has no authority, makes recommendations with no guarantee of acceptance, no process for resolution of dissenting views on safety matters and a regulator who is deaf to all but the operator.

Summarising our example: CASA and the administrative law principles

AusALPA, in the context of the development and approval of FRMSs, contends that CASA has misapplied or ignored all three of the broad principles underpinning our system of administrative law.

In regard to the principle of *administrative justice*, CASA has subjugated rather than safeguarded the rights and interests of individual pilots by refusing to afford them procedural fairness while compelling them to comply with operating limits privately settled between CASA and the operator for whom they fly.

In regard to the principle of *executive accountability*, CASA has strenuously avoided the scrutiny of the Parliament, the AAT and the Federal Court while refusing to explain, let alone justify, to pilots the science and the evidence behind the decisions which directly affect the pilots' fatigue state. Those decisions are made without pilot participation by CASA officers at the behest of the operator's representatives, most of whom will rarely if ever be directly exposed to the consequences of the hazards they happily impose on others.

In regard to the principle of *good administration*, CASA irrationally fails to comply with its own policy and ICAO standards, treats aviation operators differently as a function of their size and political influence, creates competitive advantage in tailoring operator-specific FRMS with inconsistent expansion of limits not otherwise permitted and wraps the whole process in a cloak of secrecy.

AusALPA is of the strong view that CASA is refusing to embrace more open government and an approach to decision-making that ensures that it is properly informed before acting. CASA's apparent belief that commercial operators are best qualified to represent the interests of their pilot workforce and that those operators will advise CASA fully and without restraint in all matters, adverse or otherwise, is neither sensible nor justifiable.

CASA's behaviour, as if it has an unfettered discretion in regard to FRMS, must be reined in. Making regulatory decisions, especially those involving critical safety factors, without considering relevant information from all reliable sources dooms us to failure and potentially puts lives at risk.

What can this Committee do to prevent similar cases?

The example we have given is essentially similar in outcome to that which the Clerk of the Senate warned about:

> If exemption from disallowance is coupled with a legislative scheme that established only a framework and a broad power to lay down the details of the scheme in delegated legislation, it might be thought that Parliament was largely abdicating its legislative role.[10]

For the absence of doubt, AusALPA recognises the need for FRMS as an operation specific safety mechanism. We also recognise that FRMS is based on achieving a risk outcome that cannot be prescribed other than as a process and a set of principles as Appendix 7 does. However, like any framework for exempting delegated legislation from parliamentary oversight, it cannot be a blank cheque.

We believe that the dangers of a blank cheque provision or exemption must be constrained such that the essential elements of the otherwise applicable legislative scheme can only be varied or set aside in tightly controlled circumstances. Those constraints should include:

- a suitable benchmark against which changes must be measured,
- a process by which the Committee may be directly informed by affected pilots and other aviation stakeholders of unforeseen and adverse consequences of the operation of the provision or exemption;

[10] See page 3 of Submission 3 to this Inquiry

- a requirement for the proponent of the provision or exemption to identify specific classes of persons likely to have their personal interests affected by the operation of the provision or exemption, the anticipated degree of that effect and to relevantly provide for administrative review;
- a requirement for the proponent of the provision to identify specific classes of persons required to comply with the terms of the provision for whom the proponent intends to preclude from access to administrative review;
- a requirement for the proponent of the provision or exemption to publicly consult all stakeholders as a precursor to reporting to the Committee on any unforeseen and adverse consequences of the operation of the provision or exemption no earlier than 18 months and no later than 36 months after implementation of the provision or exemption; and
- a power for the Committee to serve a formal notice on the relevant Minister that the operation of the provision or the use of an exemption is no longer consistent with the scrutiny principles in Standing Order 23(3) and rectification of the defects should be initiated.

What AusALPA would like the Committee to do specifically about the 2019 Instrument

AusALPA invites the Committee to recommend to the Minister that specific changes should be made to Appendix 7 of the 2019 Instrument:

- Appendix 7 must be amended to give legislative effect to the benchmark set by ICAO and to the policy currently described in subsection 2.2 Assessment Criteria of CASA's FRMS Handbook v1.0. There are no acceptable grounds for that benchmark to be abandoned by CASA.
- Appendix 7 must be amended to give legislative effect to the requirement that an applicant for approval of an FRMS will provide to CASA a valid, scientifically defensible safety case to justify each of the deviations from the standards prescribed within Appendix 1 to 6.
- Appendix 7 must be amended to give legislative effect to the requirement that, in the interests of transparency and improving the overall industry fatigue safety knowledge base, the final safety case upon which the FRMS approval is based is published on the CASA website no later than 12 months after approval.
- Appendix 7 must be amended to give legislative effect to acknowledging that pilots are directly affected by the rules and limits within an FRMS approved by CASA to which they are compelled to comply. Consequently CASA must consult affected pilots or their representative associations to ensure that any decision in relation to approval of an FRMS is fully informed.
- Appendix 7 or the relevant review provisions in the Act or regulations must clearly provide for pilots or their representative associations to have standing in administrative law to challenge FRMS approvals on safety grounds.
- Appendix 7 must be amended to require CASA to properly and formally consider complaints from affected pilots or their representative associations about safety processes and outcomes within an FRMS that cannot be resolved with the operator.

- Appendix 7 must be amended to ensure that "the mechanisms for ongoing involvement in fatigue risk management of management, FCMs, and all other relevant personnel" must include mandatory consultation with affected pilots or their representative associations, preferably through the FSAG model recommended by ICAO.

Moving forward

We urge the Committee to carefully review how we got to the stage where a particular piece of delegated legislations allows an agency, hidden from Parliamentary oversight, to abandon its own modernised rules, ignore the stakeholder engagement and contributions thereto and acquiesce to an applicant's desire for business reasons to "phoenix" discarded rules while avoiding any administrative law scrutiny on the basis that "happy applicants do not complain".

AusALPA strongly believes that the approach taken by CASA to FRMS approvals has been shown to offend a number of the Committee's scrutiny principles. We acknowledge that these outcomes were not reasonably foreseeable by the Committee when presented with the legislation and that we also accepted the framework in good faith. In very short order, the behaviour of CASA and certain operators has demonstrated how badly we misplaced our trust.

We have made some general suggestions in the spirit of the ToRs about preventing similar situations arising as some specific recommendations in correcting the defects within Appendix 7 of the 2019 Instrument.

The Parliament has an obligation to ensure that CASA is performing properly in the public interest. It is not sufficient for the Parliament to turn a blind eye and to avoid a proper examination of CASA's behaviour and the performance of the functions allocated to it by the Parliament. It is certainly not in the public interest to leave the identified problems unrectified.

AusALPA urges the Committee to use this example to affect positive change in all delegated legislation and to fix this aviation safety problem. We stand ready to assist you with as much further information as you may require in understanding, clarifying and resolving these matters.

Yours sincerely,

[redacted]

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