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By email: rrat.sen@aph.gov.au

Dear Committee

**SUPPLEMENTARY SUBMISSION – "AVIATION MEDICAL APPROVALS"**

I make this supplementary submission as a consequence of the assertion made by the then CEO of CASA to the Committee, on 20 November 2020, that:

> *In the last 12 months we approved 25,000 aviation medicals and rejected 84.*[i]

I am happy for this submission to be published and for me to be identified as the author.

As a preliminary point, I note that despite my deep understanding of Part 67 of the *Civil Aviation Safety Regulations 1998*, I am not sure what an "aviation medical" "approval" is. For the purpose of this submission, I assume that the CEO of CASA's assertion was about the number of times CASA issued a medical certificate or equivalent in the specified period. However, as is often the case when raw statistics are cited without further definition (and in this case, "25,000" seems a remarkably round figure) my assumption could be wrong.

I submit, based on my first-hand knowledge and discussions with medical professionals and flying colleagues, that CASA Avmed now demands tests and examinations, and imposes conditions and restrictions on medical certificates, many of which are not justified on objective evidence, risk and medical grounds. The assertion that CASA "approved 25,000 aviation medicals" provides no insight into the costs, stresses and risks borne by the applicants to get their medical certificates, and no insight into the conditions and restrictions imposed on those certificates.

I respectfully urge the Committee to ask CASA these questions:

1. In respect of the "25,000 aviation medicals" to which reference was made by CASA on 20 November 2020:

   (a) How many of the holders of or applicants for "aviation medicals" were required to undergo tests or examinations that could not ordinarily be done by the DAME or DAO in his or her premises?

   (b) How many of those tests and examinations were considered necessary by the DAME/DAO and qualified specialists with knowledge of the holder's/applicant's particular circumstances?

   (c) What is CASA's estimate of the dollar cost of those tests and examinations?

   (d) How many conditions/restrictions, other than conditions/restrictions relating to vision correction, were imposed on the "aviation medicals"?

   (e) How many of those conditions/restrictions were considered necessary by the DAME/DAO and qualified specialists with knowledge of the holder's/applicant's particular circumstances?

2. On how many occasions has a pilot with a 'safety pilot' condition/restriction imposed on his or her medical certificate by CASA Avmed suffered an episode requiring the intervention of the 'safety pilot' (noting that circumstances of that kind must be reported to the ATSB and the ATSB would routinely disclose the circumstances to CASA)?

I submit that the answer to question 2 is: Zero. However, I will of course stand corrected on the provision of evidence to the contrary.

As background to further questions that I respectfully urge the Committee to ask CASA, I note that in 2015 I applied to the AAT for review of a CASA Avmed action that I contended was unlawful. The proceedings were resolved in my favour (I can provide the Committee with a copy of the Tribunal document), without hearing and formal decision by the Tribunal, after CASA wrote to me in the following terms on 17 April 2015 (I can provide the Committee with a copy of the CASA letter):

> *I advise CASA accepts your contention that a restriction "for CASA audit" cannot be lawfully placed upon a medical certificate...*

I respectfully urge the Committee to ask CASA these questions:

3. Did CASA write to Mr Clinton McKenzie on 17 April 2015 to advise him that CASA accepted his contention that a restriction "for CASA audit" cannot be lawfully placed upon a medical certificate?

4. If the answer to that question is yes, on how many occasions after that correspondence did CASA Avmed place the purported restriction "for CASA audit" on a medical certificate?

I submit, based upon my first-hand experience and knowledge of the circumstances of other medical certificate holders, that CASA Avmed continued deliberately to do that which CASA acknowledged is unlawful.

As background to a further question that I respectfully urge the Committee to ask CASA, I note that by letter dated 16 October 2018 (I can provide the Committee with a copy of the letter) CASA Avmed suspended my medical certificate and asserted (in bold):

> ***Please be advised, CASA is unable to make a risk assessment for your fitness to return to flying until 12 months has elapsed following your ... procedure.***

That assertion was wrong, both as matter of the laws of physics and the laws of humans. CASA did do a risk assessment and a medical certificate was issued to me before 12 months had elapsed, but only because I commenced AAT proceedings.

In the course of the AAT proceedings (which were resolved in my favour without final hearing and decision by the Tribunal – I can provide the Committee with a copy of the Tribunal document), the Tribunal said this about the CASA Avmed statement quoted above:

> *[T]he statement that CASA will be unable to take a decision until 12 months have elapsed would appear to have the effect that CASA has attempted to bind decision-makers in the future regardless of what evidence might be before them. Further, that appears to be at odds with the wording of subregulations 67.240(4) and (5), which contemplate that a person might bring forward information at any time and by doing so would oblige CASA to assess whether in those circumstances the suspension of a medical certificate should be lifted or maintained.*

I respectfully urge the Committee to ask CASA this question:

5. On how many occasions has CASA Avmed written to the holder of or applicant for a medical certificate, asserting that CASA is "unable" to make an assessment of a person's fitness until after a period specified by CASA?

I submit that CASA Avmed has made that unlawful assertion on numerous occasions, knowing that it is unlawful.

I note that, in the course of and for the purposes of the AAT proceedings referred to immediately above, I obtained a report from one of Australia's foremost experts in the field relevant to the circumstances that resulted in CASA Avmed suspending my certificate. (I can provide the Committee with a copy the report.) The report says, among other things:

> *...thus demonstrating that there was absolutely no current ... basis upon which he should be denied access to flying, at this time, other than speculative risks based on poor quality data taken from small number surveys that have no relevance when applied to a single case.*
>
> *...that should be sufficient to respond to the arbitrary rules, based on pseudoscience from a small case series.*

I submit that this AAT process:

- Proved – unsurprisingly – that the qualified specialists with responsibility for my diagnosis and treatment were correct and the non-specialists in Avmed were incorrect. (The qualified specialists included a person who is himself a pilot and expressed the view, a month after the procedure of concern to CASA Avmed, that I met the applicable standard.)

- Wasted around $10,000 of my money and hundreds of hours of my time.

- Contributed not thing one to the safety of air navigation as a matter of objective fact.

As background to further questions that I respectfully urge the Committee to ask CASA, I note that in 2013 AAT matter[ii] Deputy President Hack SC of the Tribunal said this about opinion evidence given by erstwhile CASA Principal Medical Officer Dr Navathe and the Tribunal's expectations of CASA in future matters involving medical opinion evidence:

> *Dr Navathe's witness statement concluded [in terms quoted by the AAT]. Despite the fact that the statement does contain the declaration of duty required by the Guidelines [for persons giving expert and opinion evidence] it could not be plainer that Dr Navathe is an advocate for his own decision. I do not propose to have any regard to his opinions. For the future I would trust that CASA's Legal Branch would exercise independent judgement in deciding what witnesses ought to be relied upon and the content of their statements. They ought, obviously enough, be confined to matters that are relevant and witnesses out to be those who can truly provide an independent opinion.*

The above is a matter of public record.

My submission is that Deputy President Hack SC's trust was misplaced.

In my most recent AAT matter, the statement submitted by the CASA decision-maker concluded with the declaration of duty required by the Guidelines for persons giving expert and opinion evidence. The decision-maker was not professionally qualified to express opinions about the medical issues relevant to my particular circumstances, and the content of the decision-maker's statement made plain, through selective citation of studies and exaggeration of risks, that he was an advocate for his own decision.

I respectfully urge the Committee to ask CASA these questions:

6. On how many occasions has CASA submitted statements, to the AAT, containing expressions of opinions about medical matters, which statements were made by the maker of the decision the subject of the AAT review?

7. On how many occasions has the maker of a CASA decision the subject of AAT proceedings appeared as a witness to express opinions about medical matters relevant to his or her own decision?

All of my experience and observations of CASA Avmed actions over the last dozen or so years (and my experience in Tribunal proceedings) lead me to conclude that:

- CASA Avmed is suffering a chronic case of noble cause corruption.

- CASA no longer has the corporate integrity to be a proper contradictor in AAT matters, or at least not in medical certification matters.

I hasten to add that I am not suggesting CASA Avmed's actions are criminal. I am asserting that CASA Avmed engages in systemic unlawful behaviour by failing to comply with the legal constraints on its own actions, which constraints Avmed perceives as insubstantial and unnecessary impediments to Avmed doing whatever is, in Avmed's opinion, necessary to promote the noble cause of aviation safety.

My preferred definition of noble cause corruption comes from Wikipedia (with footnotes removed):

> *Noble cause corruption is corruption caused by the adherence to a teleological ethical system, suggesting that people will use unethical or illegal means to attain desirable goals, a result which appears to benefit the greater good. Where traditional corruption is defined by personal gain, noble cause corruption forms when someone is convinced of their righteousness, and will do anything within their powers to achieve the desired result. An example of noble cause corruption is ... neglect of due process through "a moral commitment to make the world a safer place to live".*
>
> *Conditions for such corruption usually occur where individuals feel no administrative accountability .... These conditions can be compounded by arrogance and weak supervision.*

Thus, when I challenged Avmed and they faced the prospect of embarrassing exposure in AAT proceedings, in relation to an unlawful entry on my medical certificate, Avmed merely changed my certificate but continued to make the unlawful entry on other certificates (including – astonishingly – a subsequent certificate issued to me two years later). The commencement and continuation of the practice was, in Avmed's opinion, in the interests of its noble cause.

When I challenged Avmed and they faced the prospect of embarrassing exposure in AAT proceedings, in relation to the unlawful assertion about what Avmed was "unable" to do, Avmed did it. But only for me. The commencement and continuation of the practice was, in Avmed's opinion, in the interests of its noble cause.

And evidently Avmed has no compunction in continuing to make statements, in AAT matters, claiming to be qualified to provide truly independent expert opinions about medical issues relevant to their own decisions. I have little doubt they truly believe it. That is a cardinal symptom of someone suffering a case of noble cause corruption.

When I ran a public 'blog' detailing my latest interactions with Avmed, an apologist for Avmed made this – frankly chilling – post:

> *The emotional effort and time to 'fight' for a principle or against perceived slights is not going to be healthy for you in the long term.*

In other words, I should just 'cop' whatever unlawful behaviour Avmed chooses to engage in, because that behaviour is of no material consequence and the effort to resist would be bad for my health.

To people with that mindset, their compliance with the law is a matter of mere principle, not substance. Someone on the receiving end of their unlawful behaviour has suffered a mere perceived slight. Avmed is the authority, and it is for others to comply with whatever, in Avmed's opinion, is required in the interests of aviation safety. The law is for Avmed to wield against others, not for Avmed to comply with if it gets in the way of doing whatever, in Avmed's opinion, will contribute to the achievement of its noble cause.

The single quotation marks around 'fight' and the comment about resistance being bad for your health manifest the languid arrogance of someone who knows that if a mere individual wants to take on an authority committed to a noble cause, the authority is going to bring to bear formidable resources and tactics to drive the individual into the ground. Every 'trick in the book' is going be used to 'win', including casting the individual in the worst possible light by exaggerating and catastrophizing risks and downplaying matters in favour of the individual. And the process will *certainly* be *very* bad for the individual's financial health. I have been the subject of it, first-hand.

I have the expertise to see through the unlawful behaviour and have the resources to expose it. Sadly for the individuals concerned and the aviation industry, the same cannot be said of the great majority of the individuals subjected to this Avmed behaviour.

Bluntly, CASA has spent a lot of time, money and effort in the last dozen years or so, trying – sometimes successfully – to get the AAT to believe that the likes of "arbitrary rules, based on pseudoscience from a small case series" are instead objectively meritorious requirements that contribute causally and positively to aviation safety. Based on my analysis of AAT matters involving Avmed decisions over a period of 18 years, and my experience in the jurisdiction and knowledge of the rate and outcomes of applications to the AAT in respect of other government agency administrative decisions, my view is that CASA Avmed makes too many unnecessary decisions, and too many bad decisions.

I consider and submit that CASA no longer has the corporate integrity to be a proper contradictor in AAT matters, or at least not in medical certification matters. CASA appears to me no longer to understand that these matters are not about 'winning' and 'losing'. CASA appears to me no longer to understand that expert opinion evidence is supposed to provide independent, objective, dispassionate assistance to the AAT, and not be a vehicle for adversarial advocacy in support of the unqualified opinions of the maker of the decision under review, leveraging off the natural cognitive bias of people contemplating the ghastly prospect of an aviation disaster.

I consider and submit that CASA's response, to the New Zealand CAA's recent announcement that colour vision deficiency would now be treated as an operational competence issue rather than medical fitness issue, was – frankly – childish. Rather than accept the objective evidence of the 21st century – as the NZ CAA has done - and adopt, as the '3rd level' test, an operational competence test, CASA suggested that Australian pilots with colour vision deficiency should arrange to undergo the test under the New Zealand rules. CASA steadfastly leaves the unlawfully-determined CAD test as the '3rd level' test for Australian purposes. This is the behaviour of people who will steadfastly maintain the same opinion, irrespective of what new evidence is put before them, because they are "convinced of their righteousness".

I finally note that all this is merely the outcome of a change in personnel, in around 2008, from people who understood how the aviation medical certification system integrates properly into a coherent system of civil aviation safety, to people who do not. Prior to this change, there was no spate of medically-related accidents and incidents indicating a need for a more intrusive, restrictive and destructive approach to medical certification.

The aviation medical certification system has disintegrated from the system of civil aviation safety, and is now a vehicle for people with strong, non-expert medical opinions to intrude and impose their will on practically defenceless individuals, in the face of actual expert opinions and the objective risks. The "25,000 aviation medicals" "approved" by CASA these days come at enormously greater costs – and not just in dollar terms - than were paid to achieve the same outcome 20 years ago (I was there), with no measurably causal reduction in medically-related accidents and incidents in aviation.

Clinton McKenzie

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[i] Page 44 of the Hansard.

[ii] *Bolton and Civil Aviation Safety Authority* [2013] AATA 941 (23 December 2013)