



**AUSTRALIAN FEDERATION
OF AIR PILOTS**

**THE AUSTRALIAN FEDERATION OF AIR PILOTS (AFAP)
SUBMISSION TO THE STANDING COMMITTEE FOR THE
SCRUTINY OF DELEGATED LEGISLATION
OF THE
AUSTRALIAN SENATE**

**INQUIRY INTO EXEMPTION OF DELEGATED LEGISLATION
FROM PARLIAMENTARY OVERSIGHT**

SEPTEMBER 2020

Sent via email: sdlc.sen@aph.gov.au

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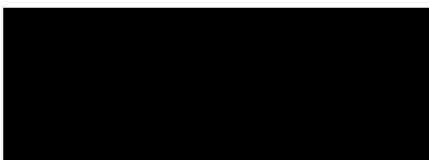
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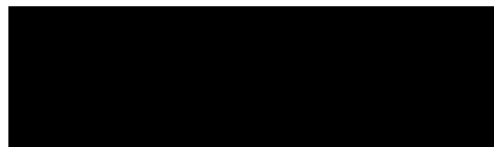
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Background

1. The Australian Federation of Air Pilots (AFAP) represents over 5,500 professional pilots in aviation safety and technical matters and is the largest professional pilot association in Australia. We engage in reforms through our active safety and technical committee, which is a major contributor to the development of Australian and international aviation safety standards. The AFAP is also a foundation member of the International Federation of Airline Pilots' Associations (IFALPA), the global body representing professional pilots worldwide, through which the AFAP contributes to international aviation standards within the International Civil Aviation Organisation (ICAO).
2. The AFAP appreciates the opportunity to provide input into the Senate Standing Committee inquiry into exemption of delegated legislation from parliamentary oversight.

Introduction

3. The AFAP acknowledges the necessity for delegated legislation and believes a positive benefit is the provision of a means for Commonwealth Government agencies to develop timely, targeted and appropriate regulation for the sector which they have responsibility for regulating. However, the AFAP also acknowledges that this arrangement exposes a risk of a lack of oversight when delegated legislation is the utilised alternative to parliamentary originated legislation. We believe that the work of Government agencies must remain as accountable to the community as would otherwise occur through normal parliamentary oversight mechanisms.
4. An unfortunate symptom of a reduction in governance and accountability of the work of Government agencies is that inappropriate regulation and unnecessary "red tape" can be created and enacted. However, the AFAP posits that the advantages of delegated legislation need not be lost due to any disadvantages and risks from diminished parliamentary oversight through delegated legislation.
5. The necessary balance can and must be restored by increasing the effectiveness of alternative mechanisms of oversight and accountability to supplement any occurrence of reduced oversight. The AFAP envisages that this can occur through two complimentary methods.
6. The AFAP believes that enhancements to Freedom of Information (FOI) mechanisms are necessary to allow greater community-based oversight of the work of Government agencies, in lieu of full parliamentary oversight. Furthermore, we believe that legislation enacting the development and promulgation of delegated legislation must be enhanced so that there is sufficient provision of more direct mechanisms of function expectation and oversight than occurs through ministerial statements of expectation.

Necessary Oversight Through Freedom of Information - Genuine Community Based Oversight

7. The AFAP believes that the appropriateness and adequacy of the existing framework for exempting delegated legislation is insufficient without a viable FOI mechanism to support the community and industry based experts to hold relevant Government agencies to account. This is especially so when and where parliamentary oversight is insufficient to do so alone, such as in the case of delegated legislation and decision outcomes based upon delegated legislation.
8. In certain highly technical fields, such as aviation, it isn't possible or appropriate for those without specific expertise to develop the necessary technical regulations and standards. However, it is also equally inappropriate for there to be insufficient oversight of the work of our public servants. The work and function of Government agencies, such as Civil Aviation Safety Authority (CASA), must be accessible to an alternative supplementary oversight mechanism when delegated legislation mechanisms are used.
9. The Civil Aviation Act (1988) ("the Act") tasks and permits CASA to develop and promulgate appropriate safety standards for the civil aviation sector. The Act also requires CASA to consult with stakeholders when performing these functions. In spite of these requirements and functions, CASA is still able to maintain a high degree of obfuscation and avoid accountability from parliamentary oversight, aviation stakeholders and the general public. More concerning though, is that there are examples where obfuscation is openly based on reasons of self-interest. In citing reasons for not disclosing requested documents, CASA FOI Officers have informed the AFAP that (in part) their decision is because:

"...disclosure of the information would reduce the public's confidence in CASA and would also have an adverse effect on the receipt and quality of information that CASA needs to perform its aviation safety role."

10. The AFAP considers this a significantly self-serving position, not in the public's interest and contrary to both the intent of FOI legislation and to that of CASA's priorities, as stated in the Act. Section 9A of the Act outlines the performance of functions of CASA and the highest priority is for aviation safety, certainly not reputational self-interest. S9A (1) states:

"In exercising its powers and performing its functions, CASA must regard the safety of air navigation as the most important consideration."

11. Given that the parliament cannot perform an oversight function on all technical regulations developed through delegated legislation mechanisms, nor the decisions based on these regulations, the AFAP believes it absolutely essential that FOI mechanisms are sufficiently robust to allow genuine industry sector and community-based oversight and accountability to occur. This must occur to supplement the reduced parliamentary oversight that occurs as a symptom of the achieving the delegated legislation advantages.
12. Strengthening of FOI provisions is a critical means to increase oversight of the appropriateness of CASA's functions and performance but it is not the only means. Amendment to the Act can also provide necessary delegated legislation enhancements too.

Embed Delegated Legislation Expectations in Legislation – Amendment to the Civil Aviation Act

13. The AFAP believes that the parliament can enhance the appropriateness of delegated legislation, enacted by the Civil Aviation Act for the civil aviation sector, through a relatively simple amendment to s9A of the Act. This would provide a necessary counterbalance to the negative effects of a lack of parliamentary oversight on delegated legislation and their outcomes.
14. Section 9A of the Act sets out the performance and function priorities that CASA must regard and consider, which necessarily includes that CASA must regard safety as the most important consideration. In 2019, the parliament amended the Act to create a mechanism to better align CASA's performance and functions to the parliament's expectations and requirements. However, these changes only addressed risk and cost-based considerations, not systemic safety based outcomes and expectations.
15. Whilst the AFAP considers the 2019 amendment to be a positive step to address some of the shortfalls created by delegated legislation, we also strongly believe that it is incomplete and that critical flaws remain. To resolve this, the AFAP proposes that s9A(3) be amended with an additional mechanism for delivering parliamentary expectations for when CASA develops and promulgates aviation safety standards under s9(1)(c). Specifically, we propose that s9A(3) must oblige that CASA must also:

“....take into account that civil aviation is a system of safety.”

16. Statements that CASA must consider aviation safety as its highest priority currently are without nuanced direction and leave too much scope for interpretation without the necessary context. Aviation is a complex and dynamic safety sensitive industry where no one party or individual can maintain a watch over all of its interrelated parts. The safety of this system is reliant upon the

parts of the system working with each other in a coordinated and effective manner. This is sometimes referred to as a systems-approach to safety.

17. The Act does not specifically require CASA to perform its regulatory development and implementation functions in a manner that considers civil aviation safety as a system. Nor does the Act require CASA to conduct its own internal functions in a coordinated or systemic manner. We believe that the absence of these core requirements means there is an insufficient focus or accountability for coordinating reforms with industry to avoid undue burden and unnecessary cost imposts, which originate from an uncoordinated regulatory reform process.
18. We strongly believe that the development and implementation of reforms should necessarily occur in a systemic manner too.
19. It is our view that all aviation stakeholders -including the general public- would benefit from an amendment to the Act that requires CASA to conduct their own processes and regulatory reform functions in a manner that involves specific considerations for coordinating its functions and reforms with regard to the aspects of the system that the reforms would interact with.

Case Study Example: Community Service Flight Regulations

A current hot topic example of a lack of systems-based consideration in regulatory development is that of Community Service Flight (CSF) regulation.

An ATSB investigation found that the CSF sector of the industry had an unacceptably heightened risk profile compared to how it was regulated, and that ongoing issues existed regarding a lack of systems and support from organisations in this sector (such as Angel Flight) to their operating pilots. I.e. the investigation found systemic, human factors, and organisational issues to address. CASA acknowledged these findings and progressed changes to the CSF regulations (delegated legislation). However, CASA provided apple solutions for oranges problems. That is, CASA provided increased minimum standards for individual pilots and for aircraft maintenance, whilst at the same time failing to address the core issues which are systemic and organisational in nature. These remain largely unmitigated risks.

The CSF sector, and other aviation stakeholders, have remained opposed to the changes introduced by CASA. Although, without identifying the nuanced remedy that we propose.

A change to the Act may not prevent CASA from doing such things again in the future however, it would certainly encourage an increased focus on systemic risks that remain unmitigated and help avoid creating relatively unnecessary change imposts on the aviation community. Such a change to the Act, as we propose, would provide a much more useful means of accountability and rectification when CASA does not consider regulatory reform on a systemic basis, as they have done in this example.

Summary and Recommendations

20. The AFAP believes delegated legislation is a necessary mechanism for technically nuanced sectors of the Australian economy but that there exists improvement opportunities for supplementing the lack of parliamentary oversight that these legislative mechanisms create.

21. The AFAP proposes that the options available, to ensure that there is appropriate and adequate parliamentary oversight of delegated legislation, are through enhancing the effectiveness of FOI provisions and through the creation of targeted outcomes-based expectations within the sections of legislation that enact delegated legislation. The AFAP thus provides three specific recommendations:

- FOI provisions should be enhanced so that they can provide an effective and viable means for community and industry sector based oversight and accountability.
- The AFAP proposes a specific amendment to s9A of the Civil Aviation Act to address the current issues associated with civil aviation focused delegated legislation and standards.
- The AFAP suggests a broader review should occur for all specific legislative mechanisms that enact delegated legislation powers with the view to ensure they are fit for purpose to achieve the expectations of the parliament, the needs of the industry sector and the community.

Australian Federation of Air Pilots

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