Advancing the interests of our members and the profession

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Our Ref: T40-00-86

Dear Mr Wolfe,

AIPA RESPONSE TO MODERNISING AIRSPACE PROTECTION PUBLIC CONSULTATION PAPER

The Australian and International Pilots' Association (AIPA) is the largest Association of professional airline pilots in Australia. We represent nearly all Qantas pilots and a significant percentage of pilots flying for the Qantas subsidiaries (including Jetstar Airways Pty Ltd). AIPA represents over 2,100 professional airline transport category flight crew and we are a key member of the International Federation of Airline Pilot Associations (IFALPA) which represents over 100,000 pilots in 100 countries.

AIPA, through its Safety and Technical Sub-Committee, is committed to protecting and advancing aviation safety standards and operations. We are grateful for the opportunity to provide our views to the Department of Infrastructure and Regional Development (DIRD) on modernising airspace protection.

OUR POSITION ON AIRSPACE PROTECTION AND AIRPORT SAFEGUARDING

AIPA firmly believes that the Standards and Recommended Practices (SARPs) developed by ICAO in relation to the design, construction and airspace protection for airports are the minimum acceptable standards for safe operation of aircraft in Australia. ICAO SARPs can and should form the basis of consistent domestic standards as part of the goal of harmonising aviation regulation - subject to such variations that provide an equivalent level of safety while catering for local environmental and geographic constraints.

The ICAO standards for protected airspace for instrument approach and departure procedures as well as for airport operations are safety standards. The enforcement of safety standards is the remit of CASA. They are not economic standards and any gains in "efficiency or regularity of air transport operations into or out of an airport" that may arise do so solely as an incidental consequence of the safety standards. As such, Australian-modified airspace design standards cannot be determined by commercial interests. Consequently, DIRD's primary role as an economic regulator and facilitator

is an inherent conflict in this safety-based decision-making, leading AIPA to view DIRD's continuing involvement as the lead agency as inappropriate. The safety case that underpins the design of protected airspace must remain sound and relevant to the operational need - any commercial outcomes are entirely secondary.

Despite our continuing support for consensus with the States, AIPA also firmly believes that, that the Commonwealth has the constitutional powers to declare that the airspace designed by ICAO for airport operations, including instrument procedures, is to be protected at appropriate airports from intrusion or compromise by made-made objects and structures.

Based on the established powers of the Commonwealth in regard to the safety regulation of Australian aviation, we believe that we must stop following the historical misdirection of the *Airports Act 1996* and revert to the most appropriate aviation safety legislation, in this case the *Airspace Act 2007* and the *Civil Aviation Act 1988*. Accordingly, while we support the need to legislate the protections, we do not support the proposed legislative framework.

THE PUBLIC CONSULTATION PAPER

The Executive Summary

While we are conscious of the historical difficulties associated with the development of compatible and consistent land use planning regimes in relation to the 21 leased Commonwealth airports, AIPA suggests that the Consultation Paper should explicitly set out the rationale for what might be described as "creeping incrementalism" rather than real reform of the existing legislative framework, including introducing the very necessary legislative protections being proposed. If there is some perceived barrier to unilateral Commonwealth action, then it should be stated. If it is considered to be too sensitive to discuss, then the whole process seems somewhat nugatory.

In any event, the statement:

> "The options presented in this consultation paper take advantage of existing measures under the Airports Act and the CA Act and their supporting regulations."

is the nub of a major issue with the proposal. Regardless of whether DIRD's propensity to cling to the *Airports Act 1996* as the primary legislation is a measure of constrained vision or a desire to minimise both the scrutiny and procedural pain of major legislative refocusing, AIPA sees the outcome as a waste of an opportunity for real reform.

In our view, the *Airports Act 1996* and the companion *Airports (Transitional) Act 1996* were primarily designed as the necessary legislation to cover the commercial arrangements attendant to dismantling the Federal Airports Corporation and the subsequent creation of leases for private operation of Commonwealth infrastructure assets. While the inclusion of Part 12 "Protection of airspace around airports" was critical at the time, given the absence of any specific power in the *Civil Aviation Act 1988* or other legislation, AIPA believes that Part 12 should have become part of the *Airspace Act 2007* when it was drafted, as that Act has specificity and "covers the field" constitutionally, as well as being administered by CASA as the safety regulator.

The weakness in using the *Airports Act 1996* as the regulatory vehicle is in part the dominance of lease management of the core regulated airports, a very narrow focus, over a more widely cast but very small part devoted to airspace management that has only been applied (through the regulations) to 30 airports in the whole of Australia. The best illustration of the fallacy of the existing legislative framework is that the recently designated international airport, Brisbane West Wellcamp Airport, appears to be

excluded from any protections contained within the *Airports Act 1996* or its subordinate legislation and there is no clarification as to whether and on what basis it might be protected after this proposed "modernisation".

The Consultation Paper already acknowledges the obstacle and hazard mitigation measures under Part 139 of the Civil Aviation Safety Regulations 1998 (CASR), which are applicable to all certified and registered aerodromes, including the core regulated Commonwealth airports, and which we believe should also apply to all joint-user airports. While it remains a matter for Defence, it seems eminently sensible that Defence would create parallel protections.

AIPA is of the view that the greatest step forward that the Commonwealth could make in clarifying the requirements would be to transfer all of safety-related material out of the *Airports Act 1996* and its subordinate legislation into the relevant parts and subordinate legislation of the *Airspace Act 2007* and the *Civil Aviation Act 1988*.

While mentioned in the Executive Summary but not in the main text, the three international regulatory examples quoted each represent law-making in jurisdictions that do not have constitutional question marks about powers to regulate. Importantly, due care must be afforded in terms of technical content since the US does not use ICAO Annex 14 or ICAO Document 8168 (PANS-OPS) as the basis of its airport design or airspace protection.

Background

Lack of Transparency and Accountability

AIPA agrees that the establishment of prescribed airspace should be clearly defined in appropriate legislation by the Commonwealth pursuant to its powers related to aviation safety. However, the airport operator's role is not to establish the prescribed airspace *per se* – that is the role of the safety regulator, including the consideration of any site-specific variations due to terrain and existing obstacles.

We agree that it is appropriate for the airport operator to lead the stakeholder engagement on the basis that the ongoing protection of the airspace prescribed by the aviation safety regulator should be the responsibility of the airport operator. To the extent that compliance issues arise, the airport operator does not (and should not) have any authority to enforce the necessary protection and should only act as a reporting entity to the aviation safety regulator.

AIPA also agrees that the proponent of an application for intrusion into prescribed airspace must provide a safety case (and not a business case) for consideration by the aviation safety regulator.

As a related issue, we believe that there should be a publicly accessible register of applications, safety cases and decisions similar to the US Government system of public dockets designed specifically for public transparency of regulatory decisions. It is unacceptable that the Australian public has to resort to Freedom of Information requests to try to understand how decisions are made by DIRD delegates on obstacle penetrations of airspace already protected under the Airports (Protection of Airspace) Regulations 1996.

Regulatory Overlap

AIPA firmly believes in single source regulation to the greatest practical extent.

Absent / Ambiguous Legislation and Scope for Improvement in Regulatory Oversight

AIPA agrees that there is ample scope for regulatory improvement.

Reform Proposal 1 – Modernising Airspace Protection under the *Airports Act 1996*

As previously indicated, AIPA firmly believes that the *Airports Act 1996* is the wrong vehicle for protecting the required airspace and that DIRD is the wrong regulator. Airspace protection is required for all significant airports, not just the core regulated Commonwealth airports.

All of the proposed improvements are strongly supported in principle. While we understand the significant workload created, we see little legislative impediment to shifting all of the existing/improved legislation into the *Airspace Act 2007*. Part 12 of the *Airports Act 1996* would be completely superfluous under a scheme that protected airports generally. The detailed description and design characteristics of the airspace could reside in the Airspace Regulations 2007 or in CASR Part 139, without stretching the principle of single source regulation too much. All of the proposed benefits of airspace declaration are retained in this alternative approach.

From our perspective, airspace protection is safety regulation entirely consistent with the objects of the *Airspace Act 2007* and having the DIRD acting on advice from CASA and Airservices is an unnecessary bureaucratic process that adds in the potential for economic decisions to taint the safety outcomes.

While AIPA respects the need for public consultation and respects the heavy emphasis by DIRD on that process in this document, the reality is that prescribed airspace is not a consensus outcome in design - the design standards are set by ICAO. It remains true that there is a choice in regard to the provision of instrument procedures at an airport, but that is a binary choice: you either provide the procedure and its prescribed airspace or you accept the operational limitations of not having that procedure.

Great care should be exercised to ensure that the handling of applications for controlled activities does not send a signal that airspace protection is a negotiable design outcome. Again, we believe that DIRD's primary role is as an economic regulator and thus is not the best organisation to consider controlled activities (which by definition compromise safety-based standards).

Proponent's obligation

AIPA strongly supports creating an obligation on a proponent to provide a safety case as a precondition of consideration.

Regulation 95 of the Civil Aviation Regulations 1988

The very narrow focus of the terms of CAR 95 largely reflect the formulation found in regulation 111 of the Air Navigation Regulations from 1937, which appears to reflect the Constitutional limits placed on the Commonwealth at the time. We consider the power to mark or remove hazards a critical safety issue.

The Consultation Paper proposes to repeal CAR 95 but is silent on the retention and expansion elsewhere of that most important power that AIPA strongly believes that CASA must retain.

Conclusion

The Consultation Paper ends this section with:

> Reform Proposal 1 aims to provide certainty and clarity for proponents and State, Territory and Local governments in dealing with off airport development proposals, and reduce unnecessary delays in development processes

Unfortunately, it is not clear to us what characterises the nature or frequency of typical delays in development processes. Assessing what may or may not be unnecessary is impossible from the presented material and the complete lack of public transparency of DIRD decisions prevents any broader examination. We do not believe that specifying an application process but hiding the subsequent deliberations is transparent.

AIPA suggests that asserting Commonwealth control of airspace protection will allow more cohesive and effective regulation as well as fundamentally and positively changing the role of State and local governments in managing off-airport developments affected by protected airspace limitations.

Reform Proposal 2 – Protecting the National Communications, Navigation and Surveillance Network

AIPA strongly supports the protection of CNS facilities. In our view, the Key Outcomes only partially support the Policy Objective, mostly through the "creeping incrementalism" approach that pervades the whole Consultation Paper.

While the presumption that Airservices, a Government business enterprise, will remain as the civil Air Navigation Service Provider (ANSP) is not unreasonable, the reality is that we have a regulatory framework that is designed for the ANSP to be a private entity if future governments decide that to be appropriate. Airservices is not the "owner" of the majority of the CNS facilities, rather it is the agent of the true owner, the Commonwealth, and future arrangements may well see those same CNS facilities leased to a private ANSP.

At the same time, there is already a mixture of facility ownership, the policy implications of which do not seem to be fully realised. The potential problems that stem from the ownership of the facility are not well defined in the Consultation Paper, but we expect that there would be some difficulty with the Commonwealth legislating to protect or indemnify private assets without some form of contractual or declaratory consideration that binds the owner of the facility to provide continuity of service.

In short, the first step must be to legally create a "national CNS network" of declared facilities that are essential to the safe conduct of aviation in Australia. There will be a sub-layer of desirable/important facilities that fall short of "essential", but nonetheless are worthy of consideration in the context of protection against interference with their intended function.

Importantly, AIPA believes that assessment, declaration and protection of CNS facilities are safety rather than economic functions, notwithstanding that the design of the national CNS infrastructure is clearly a 'national interest' economic and Defence function. We consequently believe for consistency that there should be a clear separation of roles where the former function is assigned to CASA and the latter assigned to DIRD.

In all respects, Airservices should not be given regulatory control of anything that the Government would be unwilling on public policy grounds to grant to a private ANSP.

Reform Proposal 3 – Mitigating Risks to Aircraft Flying Beyond Aerodromes

Current Regulatory Powers

AIPA feels that much of the discussion in this section of the Consultation Paper clouds the issues.

The vast majority of aviation rules are intended to manage the risk to normal aircraft operations conducted above 500ft other than during take-off and landing. Specialist

aerial work operations conducted below that height are not normal operations in that regulatory context and lengthy discussions about flight planning rules for normal operations distract the reader from the issue of identifying and marking low level obstacles.

CASR Part 175 'Collection of Obstacle Data'

AIPA strongly believes that there is no argument about the ambit of Subpart 175.E and the lack of association with airports (not just aerodromes) is deliberate. As the relevant Airservices webpage states:

> Under Part 175.E, Airservices may request information about an object or structure **anywhere in Australia** to confirm ownership, geographic location, dimensions and whether the structure or object is marked or lit.
>
> http://www.airservicesaustralia.com/services/aeronautical-information-and-management-services/part-175/

Key outcomes: 1

AIPA strongly supports mandating power line marking in accordance with the Australian Standard, noting that the Standard has two parts:

> **AS 3891.1**, Air navigation—Cables and their supporting structures—Marking and safety requirements, Part 1: Permanent marking of overhead cables and their supporting structures for other than planned low-level flying; and
>
> **AS 3891.2**, Air navigation—Cables and their supporting structures—Marking and safety requirements, Part 2: Marking of overhead cables for planned low-level flying operations.

We also believe that there should be voluntary guidelines developed for national adoption for cables that do not otherwise require marking in accordance with the Australian Standard.

Unless there is a Constitutional limitation of which we are not aware, we do not support the model framework approach. To the best of our knowledge, the model framework approach does not have a strong track record in achieving uniform legislation in any sector due to the States' unwillingness to compromise in certain areas. AIPA does not believe that consensus is likely and the current paucity of protections cannot be allowed to persist.

Key outcomes: 2

AIPA strongly supports mandating the marking and lighting of wind turbines under the *Civil Aviation Act 1988* in accordance with ICAO Annex 14.

In parallel, we also strongly support mandating the provision of a safety case and an aviation impact statement with all wind farm proposals, including wake analysis, for assessment by CASA. CASR Part 175 is about data collection and Airservices is the publisher of that data – they are not the safety regulator.

Again, we do not support the model framework approach as a viable or acceptable option.

Key outcomes: 3

As desirable as this may be, as proposed it is an industry rather than government outcome. In our view, that misses the point.

AIPA strongly supports the Australian Government exploring ways to make it mandatory for relevant infrastructure proponents, developers and owners to provide the aerial work sector with all relevant obstacle data as a safety obligation.

Conclusion

We accept the premise that the risk management of obstacles to low flying cannot be managed by the Commonwealth in isolation. We also accept that the coordination by aviation agencies, State, Territory and Local government agencies and industry will not result in a uniform outcome.

However, AIPA believes that the Commonwealth must take the lead in legislating for all aspects of aviation safety and, if necessary, preventing the States from undermining that aviation safety framework by instigating local variations or refusing to ensure compliance with that framework.

SUMMARY

AIPA strongly supports the protections and risk management ideals that underpin this Consultation Paper.

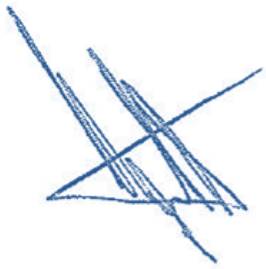
On the other hand, we do not support the choice of legislative framework proposed or the current choice of lead agency.

While it is unsurprising that DIRD would promote the *Airports Act 1996* as their preferred vehicle, it is primarily economic legislation for lease management and not aviation safety legislation that 'covers the field' in Australia. While Part 12 has the option to be applied more generally, to do so would merely fragment the safety regulation framework even more. The *Airports Act 1996* should be cleansed of safety matters and DIRD should leave that field to the experts.

The most appropriate aviation safety framework is the *Airspace Act 2007* and the *Civil Aviation Act 1988* and the associated subordinate legislation. DIRD should also be very clear that, in terms of providing advice for decision-making, Airservices is not a regulator but just a service provider and procedure designer.

Thank you again for the opportunity to participate.

Yours sincerely,



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