

Suite 6.01, Level 6  
243-249 Coward Street  
Mascot NSW 2010

T. +61 2 8307 7777  
F. +61 2 8307 7799  
E. [ausalpa@aipa.org.au](mailto:ausalpa@aipa.org.au)

27 November 2015

## By Electronic Transmission

Steve Campbell  
Project Leader  
Civil Aviation Safety Authority  
GPO Box 2005  
**CANBERRA ACT 2601**

Email: [part121@casa.gov.au](mailto:part121@casa.gov.au)

Dear Mr Campbell,

### CD 15200S – Part 121 of CASR – Large aeroplane operations

This submission is tendered on behalf of the Australian Air Line Pilots Association (AusALPA). AusALPA is comprised of the Australian and International Pilots Association (AIPA) and the Australian Federation of Air Pilots (AFAP) and represents more than 5,000 professional pilots within Australia on safety and technical matters.

AusALPA takes an active stake in the Australian aviation industry, participating in inquiries in the Australian aviation sector and contributing members to various industry forums. AusALPA is also an active member of the global pilot body, the International Federation of Air Line Pilots' Associations (IFALPA), which represents over 100,000 airline pilots internationally.

The Association has two main areas of concern on which it will make comment. These are in the matter of offences of strict liability, and the matter of fuel requirements. There is also an area of minor concern with regard to documentation and the carriage of inflight security officers, on which comment will be made.

#### 1. Offences of Strict Liability

AusALPA has a concern regarding legislation through which offences are made out against pilots for, in practice, the acts or omissions of third parties.

The relevant bill, the *Civil Aviation Legislation Amendment (Part 121) Regulation 2015*, contains no less than 160 strict liability offence provisions, with more than 27% of these either applicable solely to a flight crew member or the pilot in command (PIC) him/herself, or to a member of the flight crew *and jointly* the air operator.

While the numbers alone are confronting, in and of themselves they are not the concern.

Where AusALPA does hold concern is that some of these provisions create criminal offences of potentially career-ending significance where the relevant conduct (acts or omissions) are descriptors of conduct more aptly ascribed to the air operator, and not both the air operator and the pilot.

The concern is partially allayed by point 10 of the new CASA Regulatory Philosophy however, it is important to ensure that this philosophy carries through to the new Part 121. Point 10 of the Regulatory Philosophy states:

*10. CASA has a legitimate, but limited, role in pursuing punitive action for breaches of the civil aviation legislation*

CASA has a legitimate, **but limited**, role in the pursuit of punitive action against a person for alleged breaches of the civil aviation legislation. CASA will not pursue regulatory administrative action to vary, suspend or cancel a civil aviation authorisation for punitive purposes.

It is the strong view of AusALPA that the pilot in command (PIC) or any flight crew member should not be exposed to a potential criminal penalty when acting upon ostensibly accurate information provided by airline personnel in the conduct of their roles with the air operator. The following comments stand notwithstanding the defences that may be invoked in such cases, should they be prosecuted, under the *Criminal Code Act 1995 (Cth)*, which is further discussed below.<sup>1</sup>

It is the case within regular public transport and commercial cargo operations, that commercial necessity and economies of scale dictate that many individuals and teams cooperate to ensure flight safety through the use of numerous operational systems and processes. These comments should be read against the background of that reality.

#### *1.1 Example – proposed regulation 121.455*

##### **121.455 Loading of aeroplane**

(1) The operator and the pilot in command of an aeroplane for a flight each contravene this subregulation if, when the flight begins, the aeroplane is loaded in a way that contravenes the aeroplane's weight and balance limits.

(2) The operator and the pilot in command of an aeroplane for a flight each contravene this subregulation if, during the flight, the aeroplane ceases to be loaded in accordance with the aeroplane's weight and balance limits.

(3) A person commits an offence of strict liability if the person contravenes subregulation (1) or (2).

---

<sup>1</sup> Section 6.2 of the Act points to section 9.2 in relation to defences, and which relevantly provides:

9.2 Mistake of fact (strict liability)

(1) A person is not criminally responsible for an offence that has a physical element for which there is no fault element if:

- (a) at or before the time of the conduct constituting the physical element, the person considered whether or not facts existed, and is under a mistaken but reasonable belief about those facts; and
- (b) had those facts existed, the conduct would not have constituted an offence.

(2) A person may be regarded as having considered whether or not facts existed if:

- (a) he or she had considered, on a previous occasion, whether those facts existed in the circumstances surrounding that occasion; and
- (b) he or she honestly and reasonably believed that the circumstances surrounding the present occasion were the same, or substantially the same, as those surrounding the previous occasion.

Penalty: 50 penalty units.

In the example here the PIC is exposed to a criminal sanction if an aircraft took off above its maximum allowable weight. This offence may reasonably have been committed, not deliberately by the PIC, but purely because the loading information provided to the pilot was incorrect (as provided by other individuals within the air operator). The pilot has no way of determining whether or not such information is in fact valid.

Exposing the pilot to the consequences of prosecution for a criminal offence would offend the common sense principle that liability should depend on the actions of those actually liable for the offence. In this case the person providing the inaccurate information, or an airline system, or combination of the two, is truly the liable party and not the PIC. Thus, we would oppose the offence being directed to the PIC, but support it remaining an offence provision for the purposes of the air operator, who has a higher level responsibility for the systems and processes used by PICs within its purview.

This view towards the use of strict liability offences is supported by inquiries and reports from various levels of government. Examples include:

## 1.2 Deterrence

Another related point in respect of the use or rather, arguably, overuse of strict liability offence provisions, is the deterrent aspect of these kinds of offences. The *Guide to Framing Commonwealth Offences, Infringement Notices, and Enforcement Powers*,<sup>2</sup> published by the Criminal Justice Division of the Attorney-General's Department aims to "provide[s] a general overview of the types of things that need to be considered when developing or amending offences and enforcement powers, including relevant principles and precedents".<sup>3</sup>

The document is necessarily only reflective of Government policy up to 2011, when it was published, although it is recognised that many principles are of long standing.

The *Guide* provides, at p.22, "... *strict [and absolute] liability should only be used in limited circumstances, and where there is adequate justification for doing so. This justification should be carefully outlined in the explanatory material.*"<sup>4</sup>

The deterrence value of strict liability offences for pilots is often overstated, or in our view, overly relied on to support the high number of such offences, notwithstanding the alternative disciplinary and enforcement mechanisms now open to CASA, as outlined in its own *Enforcement Manual*.<sup>5</sup> These considerations, as well as the recent recommendation of the Aviation Safety Regulation Review Panel that CASA:

*[17.] ... publishes and demonstrates the philosophy of 'just culture' whereby individuals involved in a reportable event are not punished for actions, omissions or decisions taken by them that are commensurate with their*

---

<sup>2</sup> September, 2011 edition available at <http://www.ag.gov.au/Publications/Documents/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers/A%20Guide%20to%20Framing%20Cth%20Offences.pdf>.

<sup>3</sup> *Ibid*, at page 5.

<sup>4</sup> *Ibid* at p 22.

<sup>5</sup> See the latest version of the CASA Enforcement Manual, available at [https://www.casa.gov.au/sites/g/files/net351/f/\\_assets/main/manuals/regulate/enf/009rful.pdf](https://www.casa.gov.au/sites/g/files/net351/f/_assets/main/manuals/regulate/enf/009rful.pdf).

*experience and training. However, actions of gross negligence, wilful violations and destructive acts should not be tolerated,*

indicate that the draft Part 121 be properly redrawn with this more recent mindset, and not just in those instances where a *reportable* event eventuates.

An online article prepared by the CASA Legal Services Group (as it was then known in 2007) provides a justification for strict liability offences. It notes that there are two good reasons for the inclusion of offences without a mental element:

*Firstly, because one of the major functions of the criminal law is to deter certain forms of misconduct, and to make it clear that conduct jeopardising public safety and health may be punishable in the absence of any blameworthy mental state, it sends a strong deterrence message.*

*Secondly because, as a practical matter, it would be so extraordinarily difficult to prove that a person actually intended to act so as to jeopardise public safety or health, successful prosecutions would be so unlikely that the law would be meaningless.<sup>6</sup>*

We would agree there is merit in the second suggestion from a legal standpoint. Proving offences in the circumstances of many commercial aviation situations, and the effects inadvertence or recklessness can have on flight safety, are well known. However, that, if anything, merely points to a need for more carefully drawn regimes rather than over reliance on one blunt regulatory tool.

Likewise, the need for deterrence is not in argument. However, the sheer dearth of prosecutions, and even fewer successful convictions must point to the need for a better way to deter pilots from reckless conduct – indeed, reckless conduct constituting criminal conduct was recently highlighted by the Germanwings disaster to often be less concerned with intentional negligence, than mental disorder or some other relatively uncontrollable or “un-regulatable” circumstances.

### 1.3 Defences

In potentially the most recent Australian judicial examination of the defence of honest and reasonable mistake of fact in the context of a statutory strict liability offence (i.e. being in charge of, and using for commercial fishing, a foreign vessel whilst within the Australian Fishing Zone [AFZ]), the Court in *Aregar v Australian Fisheries Management Authority*, discussed and applied the principles of this defence.

In *Aregar*, the Court stressed that the defence is applicable only when (the belief) is “an affirmative belief. Inadvertence, the mere absence of knowledge, or not turning one’s mind to the issue, is not sufficient”.<sup>7</sup> Hiley J suggested “[T]he only excuse is the existence of an actual or positive belief, based on reasonable grounds, in the existence of some fact or facts which, if true, would make the act in question innocent.”<sup>8</sup> Thus, there is protection for a pilot in respect of a strict liability prosecution, to raise evidence of his or her actual positive beliefs that, if accepted by a court as reasonable, could exculpate the pilot from liability. In *Aregar* the defendant/appellant, on the evidence, knew that his vessel was in fact within the AFZ, and so the defence was unsuccessful in his case, and the appeal failed.

<sup>6</sup> See “What is Strict Liability” in *Flight Safety Australia* SEPT–OCT 2007

<sup>7</sup> See *Aregar v Australian Fisheries Management Authority* [2015] NTSC 61, at [82].

<sup>8</sup> Hiley J quoting with approval, Handley JA and Mahoney JA agreeing, in *Von Lieven v Stewart*, at (1990) 21 NSWLR 52, at pp 66-67.

In a similar case (*Su v AFMA*<sup>9</sup>), the defendant succeeded in his defence because of a proven reasonable mistake of fact about the location of the AFZ, which was ultimately shown to have been based on an erroneous statement made by the Taiwanese supplier of a GPS unit, on which the master of the vessel relied to navigate.

These cases demonstrate the lengths needed with respect to the factual and evidential inquiry necessary to make out the defence, and in doing so bring into sharp relief that Commonwealth resources could better be directed at other deterrent and disciplinary efforts for either untrained or reckless pilots, over such a costly forensic inquiry.

***Recommendation:***

Where CASA intends to retain a strict liability offence as drawn in the draft bill, there must be detailed and specific explanatory material provided to justify the inclusion of the offence provision as opposed to another mechanism or style of regulation.

## **2. Fuel Requirements**

The Association has concern regarding the definition and application of Discretionary Fuel. The way the term is defined and placed in the Manual of Standards (MOS), we feel, has the potential to undermine the authority of the pilot in command with respect to the ordering and carriage of fuel. The stated aim of the Civil Aviation Safety Authority (CASA) was to, as far as possible, align the new Part 121 with the International Civil Aviation Organisation (ICAO) Annex 6.

Annex 6 legitimises the authority of the pilot in command with respect to discretionary fuel in the section on pre-flight requirements. There is no such section in the Part 121 or the MOS. Part 121. D.7 Fuel requirements does not make direct reference to fuel descriptions or quantities but simply refers to the MOS paragraph 121.235.

ICAO Annex 6 paragraph 4.3.6.3 refers to “*The pre-flight calculation of usable fuel required ...*” Part of the requirement is discretionary fuel. It goes on in paragraph 4.3.6.5 to determine that “*A flight shall not commence unless the usable fuel on board meets the requirements in 4.3.6.3...*” Paragraph 4.3.6.5 does not include discretionary fuel however 4.3.6.3 states that it “*... shall be the extra amount of fuel to be carried at the discretion of the pilot-in-command.*” There is no doubt as to the ability of the pilot in command to order the fuel and to have that fuel carried.

This is further reinforced in the Flight Planning and Fuel Management Manual where section 3.1 states:

*“sufficient fuel is carried to allow for deviations from the planned operation and that the pre-flight calculation of **usable fuel required includes:** taxi fuel, trip fuel, contingency fuel, final reserve fuel, and when required; alternate fuel, additional fuel, and **discretionary fuel**”*

Neither Part 121 D.7 nor the MOS makes any reference to preflight fuel requirements. The Acceptable Means of Compliance and Guidance Material (AMCGM) is totally silent on all aspects of fuel carriage other than in the area of Performance Based Contingency Fuel Planning.

---

<sup>9</sup> *Mei Ying Su v Australian Fisheries Management Authority* No 2 [2008] FCA 1485.

The MOS in section 2.5 Fuel requirements simply considers commencement of flight requirements. There is no pre-flight calculation requirement. There is therefore no formal acknowledgement of the ability of the pilot in command to order discretionary fuel. Discretionary fuel is mentioned only in the definitions and has a comment which potentially questions its legitimacy (“Discretionary fuel is not required.”).

*Part 121 Manual of Standards Instrument 2015*

*Preliminary, 4, Definitions*

**discretionary fuel** means extra fuel carried at the discretion of the pilot in command. Discretionary fuel is not required.

This is the only fuel mentioned in the definitions which relates to an amount of fuel which can be ordered. The only other fuels mentioned in definitions are “emergency fuel” and “minimum fuel” which relate to fuel states or status and not to an amount of fuel carried for a specific reason.

For consistency, this definition should be removed and covered in Chapter 2, paragraph 2.5.2 where all other fuel quantities are described. If the definition is to remain then the last sentence regarding requirement should be deleted.

**Recommendation:**

1. Remove the term from the definitions section, or
2. Delete the last sentence – “Discretionary fuel is not required”

**CHAPTER 2: (SUBPART 121.D – OPERATIONAL PROCEDURES)**

Discretionary fuel is mentioned in paragraph 2.5.2 where it appears as a Note to the paragraph, once again with a comment questioning its legitimacy (“Discretionary fuel ...is not a required fuel element.”).

*2.5.2 The amount of fuel that must be carried for a flight*

*Note: **discretionary fuel**: which shall be the extra amount of fuel carried at the discretion of the pilot-in-command, is not a required fuel element.*

This note appears contradictory. In the first instance it states that the fuel is at the discretion of the pilot in command and in the second says that it is not a required fuel element. The note needs to be clear in its intent, that is, that any discretionary fuel ordered by the pilot in command must be carried.

In this instance the note should be expressed in a positive form and not a negative form thus leading to clearer interpretation of intent and avoiding the possibility of misinterpretation. All reference to not being a required element should be deleted.

**Recommendation:**

That the note to Chapter 2, paragraph 2.5.2 be amended to read:

*Note: **discretionary fuel**: the extra amount of fuel which shall be carried at the discretion of the pilot-in-command.*

The Association wishes to point out a possible conflict between this proposed legislation and Security legislation with regard to carriage of Air Security Officers (ASO).

**121.55 Carriage of Documents**

MOS 1.1.1 requires notification of:

*o)...if there is a person on board who may require special consideration during the flight or during an evacuation of the aeroplane - a **statement identifying the person and the special consideration;**"*

1.1.3.1.1.1 *Example 2:*

*Persons who may require special consideration (see paragraph 1.1.1 o) might include the following:*

- a) an air security officer;*

**Comment:**

This may be contrary to current security regulations regarding carriage of ASO which require anonymity of the ASO with information made available only to the pilot in command.

**Conduct of the Part 121 Process**

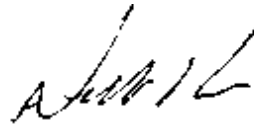
The Association wishes to formally recognise the part played by the CASA representatives on the Working Group. They approached the process with open minds and a willingness to listen to and consider all points of view. When suggestions were made which were considered effective, appropriate and in line with the intent of the policy purpose of Part 121 we note that they were incorporated into the document.

We commend in particular, Mr Stephen Campbell and Mr Miles Gore-Browne for their efforts in conducting the Working Group in the true spirit of industry consultation and cooperation.

Yours sincerely,



**David Booth**  
**President AusALPA**  
**President AFAP**



**Nathan Safe**  
**President AIPA**

**Tel: 61 – 2 – 8307 7777**

**Fax: 61 – 2 – 8307 7799**

**Email: [ausalpa@aipa.org.au](mailto:ausalpa@aipa.org.au)**