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AusALPA MEDIA BRIEFING

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AIRSPACE PROTECTION AROUND AUSTRALIAN AIRPORTS: The legal basis of failed protections and the need for reform

Airspace protection means regulating development that affects aviation operations. This includes building activity around airports that might penetrate operational airspace and/or affect navigational procedures for aircraft.

The law is the underlying problem

The Department of Infrastructure, Transport, Regional Development and Communications (DITRDC) is the federal government department tasked with the responsibility of protecting the airspace associated with Australia's ex-federal airports. This task involves comprehending and applying internationally agreed airspace protection safety standards, subject to aviation safety advice from the Civil Aviation Safety Authority (CASA).

One of the underlying aims of tasking DITRDC with these responsibilities is to provide a means to protect Australia's key aviation infrastructure assets from operational degradation, so that they continue to provide service to the Australian community and its transport requirements as our national interests require.

AusALPA asserts that DITRDC and CASA are failing to fulfil these responsibilities and that there are underlying legislative and regulatory causes to these failures. Additionally, we assert that operational degradation is progressively undermining the viability of Australia's current and future air transport needs. This is counter to our national interests.

Background information and historical issues

Private entities were granted long-term leases to the ex-federal airports between 1997 and 2003. Prior to this, the airports were managed by the Federal Airports Corporation (FAC) on behalf of the Commonwealth Government. The *Airports Act 1996* sets out this arrangement and is primarily economic legislation for airport lease management, rather than aviation safety legislation. However, Part 12 of the *Airports Act 1996* also sets out the safety-based considerations applicable to approvals of airspace penetration proposals.

AusALPA believes that the *Airports Act 1996* should be cleansed of safety matters and that DITRDC should leave that field to the safety experts. The most appropriate alternate aviation safety framework is the *Airspace Act 2007,* the *Civil Aviation Act 1988* and the associated subordinate legislation.

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 necessary at the time, given the absence of any specific power in the *Civil Aviation Act 1988* or other legislation, AusALPA believes that when the *Airspace Act 2007* was drafted, Part 12 should have become part of that legislation. That Act has specificity and "covers the field" constitutionally, as well as being administered by CASA as the aviation safety regulator.

Current regulations default to the approval of airspace penetrations

Part 12 of the *Airports Act 1996* sets out that any activities that result in intrusions into prescribed airspace are called 'controlled activities', that these activities require approval and that the approvals are given under the regulations. The relevant regulations are the Airports (Protection of Airspace) Regulations 1996, commonly referred to as the APARs. Regulation 14, *Secretary to approve, or refuse to approve, proposal,* of the APARs sets out the requirements. It is clearly evident from the APARs that any genuine intent to protect airspace is effectively incapable of being achieved.

The regulations are biased almost entirely towards economic considerations. They default to departmental approval of a controlled activity unless a sufficient safety case can be mounted to prevent the approval. Subregulation 14(2) of the APARs specifies that:

> The Secretary ***must approve*** a proposal unless carrying out the controlled activity would interfere with the safety, efficiency or regularity of existing or future air transport operations into or out of the airport concerned. [emphasis added]

The APARs leave it to others to advise the Secretary if they consider such interference likely, but it remains the Secretary's sole discretion as to the weight put on those opinions regarding the degree of interference with, and consequences for, the safety, efficiency or regularity of air transport operations.

More significantly though, the strong pro-approval emphasis within the APARs is essentially unfettered due to a weak and largely ineffectual safeguarding mechanism. Subregulation 14(6) only prevents the Secretary from approving an airspace penetration if:

> …CASA has advised the Secretary that carrying out the controlled activity would have ***an unacceptable effect*** on the safety of existing or future air transport operations into or out of the airport concerned. [emphasis added]

AusALPA asserts that a defensible set of tests to establish the boundary between acceptable and unacceptable effects would be almost impossible to establish and yet this remains the key backstop test provided in the APARs to prevent penetrations of prescribed airspace. Thus, under the current legislation (applicable only to the leased Commonwealth airports), the threshold to be met to prevent penetrations of prescribed airspace are impossibly high. Moreover, while it appears that the APARS fully protect the airspace associated with instrument approaches from permanent penetration, DITRDC separately provides a mechanism that avoids that restraint by varying the approach design.

As a result, there are effectively no protections of prescribed airspace – a situation that AusALPA considers to be unacceptable.

For airports other than the leased Commonwealth airports, the situation is far worse as there are even fewer, if any, State-based protections for preventing airspace penetrations.

Coordination issues and risk assessment conflicts are embedded in law

Safety is not a binary consideration of a simple choice between safe or not safe. It is best understood as a risk mitigation process across a risk spectrum that considers aviation safety as a complete system of safety. This approach is a stated expectation by Government upon Commonwealth entities, imposed by the Commonwealth Risk Management Policy 2014. This policy supports the *Public Governance, Performance and Accountability Act 2013* and it states that each Commonwealth entity:

> …must ensure that the systematic management of risk is embedded in key business processes.

As Commonwealth entities, CASA and DITRDC are both obliged to adhere to this policy. However, the APARs are decidedly not systematic when it comes to aviation risk. AusALPA is not convinced that the economic risk to aviation as a system is holistically managed either.

Even if CASA defended its processes in the context of the Commonwealth Risk Management Policy 2014, there is no public evidence to support that view. There is no transparency of how CASA conducts its assessments, what it may consider or who makes the ultimate determination of when a penetration creates an "unacceptable" risk.

If a major penetration or a series of smaller penetrations increases the risk of collision with aircraft, then CASA would be expected to manage that risk by modifying the existing airspace, such that the "unacceptable" threshold can never be breached. Those modifications may entail imposing manoeuvring restrictions, raising minimum altitudes for approaches or reducing the operational length of runways by displacing thresholds.

However, CASA does not follow the International Civil Aviation Organisation (ICAO) standards and recommended practices for protecting the airspace specified by ICAO for visual manoeuvring of aircraft – instead, it merely accepts the elevated risk of multiple penetrations of some prescribed airspace as if those standards did not exist.

It remains unclear why there is CASA inaction in maintaining these standards for protecting prescribed airspace. On the other hand though, it is clear that the consequences of any action by CASA to modify the airspace become matters that are entirely left to DITRDC to manage – an outcome that DITRDC may well prefer that CASA did not create.

In any event, DITRDC remains perpetually conflicted in ever truly being able to achieve the Commonwealth's risk management objective whilst it remains in bondage to its irreconcilable legal obligations. Given that DITRDC must ultimately consider airspace penetration safety assessments as either having an unacceptable effect or not, and then defaulting to "approve" when it is unable to resolve this conflict, it is clear that the DITRDC cannot adhere to both the systemic management of risk requirements and its essentially binary assessment requirements set out in the APARs.

Safety cannot be secondary - AusALPA calls for reform and a government review

The safety of air navigation has in practice been made an unimportant and potentially irrelevant consideration in the current Australian safeguarding framework when it comes to decisions related to whether or not to approve an increasing array of obstacles around Australian airports. Economic opportunities are effectively the only concern.

This is an unacceptable outcome.

In 2016, DITRDC commenced public consultation on "Modernising Airspace Protection". That review did not address these fundamental issues and no further public activity has occurred in the subsequent 45 months.

AusALPA calls on the Australian Government to initiate a high level review into all matters related to the buildings approvals processes and associated airspace issues around Australian airports. This review should seek to determine the impact upon air transport safety by the current airspace penetration approvals framework and what effect this has upon the safe service provision of aviation operations to the community.

The review should examine the appropriateness of the current approvals process and whether or not this supports or undermines adherence to established safety standards. The review should also seek to determine which agency of government is most appropriate to make safety assessments. AusALPA openly questions whether DITRDC is sufficiently equipped to make aviation safety related decisions.

AusALPA considers that the APARs would more appropriately be administered by CASA and would necessarily need to transition into the Civil Aviation Safety Regulations (CASRs) for this purpose.

AusALPA believes that, ideally, the review should also consider CASA's internal processes in the areas discussed above so to:

- achieve greater coordination, both internally and externally, as part of a systems approach to safety regulation;
- rebalance the public interest over private interests; and
- revive CASA's assertiveness in providing appropriate safety advice to the other agencies and the Minister.

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