ALAANZ AVIATION BRIEFS

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1. Cases

The High Court on Exclusivity under the Civil Aviation Act: Section 28BE, or not to be, that was the question in *Work Health Authority v Outback Ballooning Pty Ltd*

Michael Nas, Associate Principal, Bennett & Co

Nearly six years have passed since the tragic events of 13 July 2013 when a planned early morning balloon flight near Alice Springs resulted in the death of Ms Stephanie Bernoth. Her injuries were sustained before completing the boarding of the balloon.

The events of that day led to debate before various courts over the next five years after the Northern Territory Work Health Authority (**WHA**) determined to pursue the operator under the Territory's work health and safety legislation.

Following the grant of special leave to appeal the Full Court of the Federal Court of Australia's decision – which held the Commonwealth aviation safety laws to be a complete statement of the law and intended to 'cover the field' – the Australian aviation sector has been waiting with bated breath for the High Court's ultimate decision regarding the possible application of State and Territory laws. Handed down on 6 February 2019, the judgment is one of the more significant decisions relating to Australian aviation in recent years.[1]

In the case, the High Court gave close consideration to the 'boundaries' of the 'sphere'[2] of the Commonwealth aviation safety legislation and related regulations (**Aviation Safety Regime**). According to the majority decision[3] – aspects of work, health and safety legislation may now be seen as 'not inconsistent' with aspects of the Regime. While Gageler J sided with the majority in upholding the WHA's appeal (though on distinct reasoning) Edelman J took a precisely different view, undertaking a comprehensive historical and textual analysis in his dissenting reasons.

In shorthand, the Aviation Safety Regime does not entirely and exclusively 'cover the field' when it comes to all incidents of the operation of aircraft in Australia.

This raises some difficult questions for air operators (and air lawyers). No doubt this decision will be thoroughly debated in the near-term and its full implications tested. However, that is not the purpose here; rather, as a first step, this article analyses the approaches undertaken by the Court to this issue. The implications can be debated in further work.

BACKGROUND

Stephanie Bernoth and three other passengers prepared for a flight with Outback Ballooning Pty Ltd (**Outback**). While the balloon was inflating, Ms Bernoth was directed by the pilot in command[4] to board the balloon by the side where the inflation fan was operating. In approaching the basket, the scarf Ms Bernoth wore was sucked into the inflation fan. Sadly, Ms Bernoth died later from her injuries.

The WHA filed a complaint against Outback pursuant to ss19 and 32 of the *Work Health and Safety (National Uniform Legislation) Act 2011* (NT) (**WHS Act**). The complaint alleged a breach of the duty specified by s19(3): a business or undertaking must ensure, so far as is reasonably

[1] [2019] HCA 2.

[2] To use the terms referenced by Edelman J at [111].

[3] Keifel CJ, Bell, Keane, Nettle and Gordon JJ.

[4] Edelman J includes in his Honour's description of the background the fact that the direction to board was given by the pilot in command: see [99].

practicable, that the health and safety of persons "is not put at risk from work carried out as part of the conduct of the business or undertaking". The WHS Act specifies that a workplace includes an aircraft.

The fact the complaint was brought under the WHS Act, and was not an action under the Aviation Safety Regime, is significant. It led to questions as to the exclusive reach of the Aviation Safety Regime, previously thought to 'cover the field' following the Full Court of the Federal Court's decision in *Heli-Aust v Cahill* (**Heli-Aust**).[5] While some ground operations were previously covered by the work health and safety laws, by the Heli-Aust decision, the Aviation Safety Regime governed pre-flight embarkation procedures exclusively (or so it was thought).

The procedural history leading to the High Court is as follows:

1. Initially, the WHA's complaint was dismissed in the Northern Territory (**NT**) Court of Summary Jurisdiction as invalid because the subject matter was covered by the Safety Regime. The Court there held that pre-flight operations affecting passenger safety were sufficiently within that regime;
2. That decision was quashed by the NT Supreme Court, finding it was wrong for the prior Court to determine it lacked jurisdiction. The Supreme Court held that the Aviation Safety Regime covered in-flight operations, but not necessarily all operations, such as embarkation;
3. The Court of Appeal of the NT determined the Aviation Safety Regime was a 'complete statement of the relevant law' and that there was 'indirect inconsistency' between the NT law and the Regime, the latter extending to the embarkation of passengers; and
4. On 20 April 2018, the High Court granted special leave to WHA to appeal.

MAJORITY DECISION: THE AVIATION SAFETY REGIME IS NOT INCONSISTENT WITH THE WHS ACT

The majority analysed the Aviation Safety Regime,[6] comprising the *Air Navigation Act 1920* (Cth) (**ANA**), the *Civil Aviation Act 1988* (Cth) (**CAA**), and the regulations and orders promulgated thereunder.

The majority noted the relationship between these instruments and the *Chicago Convention on Civil Aviation 1944* (**Chicago Convention**) and its Protocols, ratified and adopted in Australia by way of the ANA. The majority noted the nature, functions and powers of the Civil Aviation Safety Authority (**CASA**), established under the CAA, and its role in developing "aviation safety standards" and performing "safety-related functions". As a part of this regime, the Court considered the issuance of Air Operator's Certificates (**AOCs**) applicable to operators of lighter-than-air-aircraft, such as Outback's balloon, and the imposition of the duty on the holder of such certificates.

Section 28BE of the CAA requires the holder of an AOC, such as Outback, to take all reasonable steps to ensure all activities covered by the AOC, and everything done in connection with such activities, are done with a *reasonable degree of care and diligence*. It further provides:

> *(5) This section does not affect any duty imposed by, or under, any other law of the Commonwealth, or of a State or Territory, or under the common law".*

[5] (2011) 194 FCR 502.

[6] This description is adopted for brevity; however, the majority questioned the nature/extent of the 'regime'.

The above formed the basis for analysis. In broad outline, the majority held as follows:

1. The question of inconsistency between a State law and a Commonwealth law pursuant to s109 of the Constitution, rendering the State law invalid to the extent of inconsistency, is a question of construction;

2. Two approaches may be applied: the first may be called direct inconsistency whereby a State law would "alter, impair or detract from" the operation of a Commonwealth law. Secondly, indirect inconsistency may occur where a Commonwealth law expresses an intention to 'cover the field' and leave no room for the State law;[7]

3. While aspects of the CAA might be described as "regulatory scheme with respect to the safety of aviation", with some parts having exclusive operation, "it could hardly be said that it purports to lay down an entire legislative framework covering all aspects of the safety of persons who might be affected by operations associated with aircraft, including on-ground operations". It was apparent that the CAA was "intended to operate within the setting of other laws". One such other law is the WHS Act;

4. That s28BE – dealing with the conduct of activities by the holder of an AOC - put this "beyond doubt". This was because s28BE(5) stipulates it does "not affect any duty" pursuant to other laws, including the common law. The section therefore recognises the continuing operation of other laws. Thereby, s19 of the WHS Act is not inconsistent with the Safety Regime.

In reaching this conclusion, the majority dealt with the decision in *Heli-Aust*. There, the majority said, the Full Court had approached s28BE(5) on the basis the CAA could otherwise be read as exclusive with respect to the safety of aircraft operations. This conclusion was said to involve a misapprehension of the scope of the s28BE(1).[8]

GAGELER J: THE ACTS ARE NOT INCONSISTENT, BUT FOR DIFFERENT REASONS

His Honour considered the "running-down jurisdiction of the High Court" under s109 of the Constitution,[9] and analysed the test of inconsistency. His Honour noted the "conceptually problematic but stubbornly persistent perception" that there was a need to classify inconsistency as direct or indirect,[10] whereby a Commonwealth law either operated cumulatively on the "corpus" of State and Territory laws, or as "covering the field".

On the question, his Honour adopted the view expressed in *NSW v Commonwealth & Carlton*,[11] namely, whether the State or Territory law alters, impairs or detracts from the operation of the Commonwealth law, in that the former may alter rights or obligations under the latter, or detract from its purpose or object.[12]

In application, his Honour analysed the situation as follows:

1. The CAA has as its main object the establishment of a "regulatory framework for maintaining, enhancing and promoting the safety of civil aviation".

2. This derives from Australia's obligations under Art 37 of the Chicago Convention to "collaborate to secure the highest practicable degree of uniformity in regulations [and

[7] [33] to [34]. The majority noted that this argument was abandoned in argument: [37].
[8] [52]; See the description of that sub-section above.
[9] [64].
[10] [67].
[11] (1983) 151 CLR 302 at 330 per Mason J.
[12] [72]. His Honour also considered *Ansett Transport Industries v Wardley* (1980) 142 CLR 237 at 280.

standards, inter alia] in relation to aircraft… and all matters in which such uniformity will facilitate and improve air navigation";

3. There was "no reason to gainsay" the Court in *Heli-Aust* on the finding that the Safety Regime was an exhaustive statement of Australian civil aviation safety law.

However, in analysing s28BE, His Honour held that, by ss (5), the subject matter of the section was not within the exclusive operation of the Aviation Safety Regime. That subject-matter was described as the "general requirement to exercise reasonable care and diligence in the operation of an aircraft". His Honour considered that a State or Territory could, by s28BE(5), impose a duty on an AOC holder which coexists with the obligation under s28BE(1) to comply with the Safety Regime.

EDELMAN J: THE AVIATION SAFETY REGIME IS EXCLUSIVE

His Honour posed the question: "Does the Civil Aviation Law contemplate that its scheme, including duties concerning aviation safety, could be fragmented by the concurrent application of a different safety regime in the States and Territories?" After reviewing the historical origins of the aviation law, His Honour answered in the negative and said:

1. There could be "little doubt" that the Aviation Safety Regime contains the "implicit negative proposition that nothing other than the Commonwealth law provides upon a particular subject matter is to be the subject of legislation". His Honour called this the "core of exclusivity";

2. The exclusive matter was the "standards of safety in air navigation" (clearly including hot air balloons).[13] His Honour said only Outback focused on the "scope or boundaries of the exclusivity";

3. His Honour had regard to *Airlines No 2*[14] and Australia's obligations to secure "uniformity of standards, practices, procedures…" in accordance with the Chicago Convention. His Honour said the requirements (particularly Annex 6) did not invite "a number of standards within a single contracting state" where a minimum level of safety was required;

4. The predecessor to the Chicago Convention, the Paris Convention 1919, was described by the Privy Council as covering "almost every conceivable matter relating to aerial navigation",[15] with the Chicago Convention being similarly described in *Airlines No 2;*[16] and

5. Further, amendments to the ANA were made following ratification of the Chicago Convention on the "widest possible terms", with the Court in *Airlines No 1*[17] calling this a "studied and careful attempt to devise comprehensive rules for securing safety in and in relation to the operation of an aircraft".

Turning to a textual analysis of the Aviation Safety Regime, his Honour noted the process by which AOCs are granted under s28. In particular, AOC holders must create an operations manual under s27AB(2)(a) (an implementation of Annex 6 of the Convention). The manual contains all matters necessary to ensure safe flight operations. The Aviation Safety Regime is "highly prescriptive of the content" of the manual, and failures to comply with it.

His Honour then considered the role of the pilot in command in detail, noting that the pilot's responsibilities include the start, continuation, and end of a flight, and the safety of persons on

[13] [110], [111].
[14] (1965) 113 CLR 54 at 87.
[15] [120]; *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 634.
[16] Above, note 14, 159.
[17] (1964) 113 CLR 1 at 37.

and crew of an aircraft.[18] These responsibilities must be discharged in accordance with the manual.[19]

With respect to s28BE, His Honour reiterated that the section (introduced in 1995 after CASA was established in favour of the prior authority) states that it "does not affect" the other laws referred to in the section. His Honour emphasised the point that it does not say such other laws are 'preserved': the section neither creates new exclusions nor reinstates old exclusions – it does "not affect" such things. In that sense it was said to be a "precautionary clause" where prior to 1995 an intention had already been evidenced to 'cover the field'. Section 28BE(5) does not "unwind" this exclusivity.

His Honour concluded, after interpreting the WHS Act against the Aviation Safety Regime, that the former does not extend to matters directly involving safety standards for air navigation. Considering the inflation of the balloon as akin to the ignition of an engine, his Honour determined such matters were covered by the Regime. Accordingly, for Edelman J, s19 of the WHS Act is inconsistent with the Regime because the latter provides exclusive subject matter on that topic.

COMMENT

The precise implications flowing from the majority decision are not yet known. If (as it seems, prima facie) the decision is to be read as determining that the Safety Regime or parts thereof do not entirely or exclusively 'cover the field' in respect of aviation safety standards, then has the door been opened to the application of multiple layers of Commonwealth and State or Territory law?

Edelman J said the circumstances of *WHA v Outback* were "just a snapshot" of the ways that WHS Act could "cut across" the Aviation Safety Regime. His Honour cautioned this may undermine safety through a "fragmentation" of the Regime due to the application of differing laws in States and Territories. By contrast, the default position held since *Heli-Aust* in 2011 has been more in line with Edelman J's analysis – namely that the Regime was exclusive in respect of flight operations such as embarkation.

Leaving aside the possibility of parliamentary intervention to amend the situation, the precise impacts of the decision are likely to be tested in the near-term as aviation activities continue. It may now be for operators to consider these matters, with the question left open as to how precisely operators will be affected in practical terms.[20] On this, there is likely a need for industry guidance.

The case is likely to garner mixed reactions from different aviation system participants as they contemplate these issues. Whether participants can easily understand, mitigate and manage the impacts, will be for time to tell.

[18] [129]; See *Civil Aviation Regulations 1988* (Cth), r224(2).
[19] [129]; *Civil Aviation Regulations 1988*, r224(2A).
[20] See [90] per Gageler J.

Do State laws apply to the assessment of damages under the Carriers' Liability Act?

Jehan Mata, Special Counsel, Sparke Helmore Lawyers

Two recent decisions have considered the Civil Aviation (Carriers' Liability) Act 1959 (Cth) (the Carriers' Act) and its interaction with State legislation. The presiding judges in Wahba v Carroll & O'Dea Lawyers [2018] NSWDC 128 (Wahba) and Lina Di Falco v Emirates [2018] VSC 472 (O'Dea) took different approaches to deciding whether State-based statutes apply when considering claims made under the Carriers' Act. While the two decisions appear to contradict one another, a closer inspection reveals that the different approaches taken may be attributed to the nuances of the respective State Acts.

The Carriers' Act

By reason of ss 35L and 36 of the Carriers' Act, a carrier (i.e. airline) is liable for personal injury suffered by a passenger—and this liability is substituted for civil liability under any other law. As a result of these sections, a plaintiff who brings an action for damages suffered while on an international flight must bring that action under Federal jurisdiction.

The Judiciary Act 1903 (Judiciary Act) sets out if and when the laws of each State and Territory are to supplement the laws of the Commonwealth when determining a matter. It provides that the laws of each State and Territory will supplement Federal law where the laws of the Commonwealth are "insufficient to carry them into effect, or provide adequate remedies or punishment".

Section 109 of the Judiciary Act states that, insofar as a law of a State or Territory is inconsistent with the law of the Commonwealth, the latter shall prevail.

Wahba

In *Wahba*, a New South Wales District Court case, Justice Gibson considered whether it was appropriate to apply the *Civil Liability Act 2002* (NSW) (the Civil Liability Act) when determining damages for a claim brought under the Carriers' Act.

In this case, the Plaintiff had slipped on a staircase while disembarking an aircraft operated by Jetstar Airways Pty Ltd (Jetstar). The Plaintiff consulted Carroll & O'Dea Lawyers (Carroll & O'Dea) seeking advice about her entitlement to bring a claim. Carroll & O'Dea incorrectly advised that the three-year limitation period under the Civil Liability Act applied, rather than the two-year limitation period allowed by the Carriers' Act. As a result, the Plaintiff failed to commence proceedings in time, and subsequently brought an action against Carroll & O'Dea for professional negligence.

In assessing the professional negligence claim, Justice Gibson was required to determine the assessment of the value of the lost opportunity to sue Jetstar. Justice Gibson was therefore required to assess the Plaintiff's damages as if the Plaintiff had commenced proceedings under the Carriers' Act.

Justice Gibson examined whether s 28 of the Civil Liability Act was consistent with the operation of the Carriers' Act. Her Honour cited *Povey v Qantas Airways Ltd* (2004) 223 CLR 189 in which Justice Sorby said: "the Carriers' Act does not provide any legislative system for the assessment

of damages and is "insufficient to carry them into effect" or to provide "adequate" remedies". As the Carriers' Act does not provide an appropriate mechanism for assessment of damages, Justice Sorby held that the NSW Act was not inconsistent with the Carriers' Act and could be used to complement it.

Justice Gibson ultimately determined that the Civil Liability Act was to be applied in assessing damages. Her Honour's decision usefully sets out, in some detail, the history of the sections in question and various decisions dealing with this question, and found that the reasoning favoured such an approach. Justice Gibson came to this decision, however, with some hesitancy—so she assessed quantum under the Commonwealth and State regimes in the event that she had erred in her finding.

O'Dea

By way of background, Pt VBA of the *Wrongs Act 1958* (Vic) (the Wrongs Act) sets out that a plaintiff must have a significant injury in order to make a claim for non-economic damages. An injury is significant if the degree of whole person impairment meets the threshold level, which means:

- in the case of injury (other than psychiatric injury or spinal injury), impairment of more than 5%
- in the case of psychiatric injury, impairment of 10% or more, and
- in the case of spinal injury, impairment of 5% or more.

In the Victorian Supreme Court case of O'Dea, Justice Keogh was asked to determine whether Pt VBA of the Wrongs Act applied to a claim brought under the Carriers' Act.

The Plaintiff in this matter alleged that she had fallen and sustained an injury to her right ankle during the course of a flight. She brought a claim pursuant to s 9B of the Carriers' Act, which gives effect to the Montreal Convention (The Convention for the Unification of Certain Rules for International Carriage by Air).

Section 9E again sets out that personal injury suffered by a passenger is in substitution for any civil liability of the carrier under any other law in respect of the injury. The Carriers' Act is a law of strict liability and, therefore, proof of fault is not required. Justice Keogh acknowledged that the Plaintiff was seeking to recover damages that were within the definition of non-economic loss in Pt VBA of the Wrongs Act. However, he noted that s 28LE of the Wrongs Act relates to claims for non-economic loss in respect of an "injury to a person caused by the **fault** of another person".

Justice Keogh noted that the Carriers' Act provided the Plaintiff with the right to bring an action against the carrier for an injury sustained during the flight, despite making no allegation of wrongdoing. Applying s 28LE and Pt VBA of the Wrongs Act, which requires an element of fault, would extinguish the Plaintiff's right to recover damages.

Accordingly, Justice Keogh found that the Wrongs Act was inconsistent with the Carriers' Act in this scenario and did not apply. Justice Keogh distinguished this decision to others, which had dealt with the Civil Liability Act, noting s 11A(2) does not require the same element of fault.

Lessons from these decisions

It initially appears that these decisions are in direct conflict. However, upon delving into the reasoning behind each, the inconsistency may be explained by the different wording of the legislation in the two jurisdictions in question.

In short compass, the Civil Liability Act (i.e. the NSW Act) is broader in its construction than the Wrongs Act (the Victorian Act). The latter requires fault for the Plaintiff to qualify for non-economic damages, whereas the former applies "whether the claim for damages is brought in tort, in contract, under statute, or otherwise".

The disparity in approach may be explained by the particular wording of each State's legislation—and it will be the wording of the State's legislation that will dictate whether that legislation is applied to claims brought under the Carriers' Act.

Ultimately, there remains little authority on this issue, so it is likely to be tested again in future.

Disclosure: Sparke Helmore Lawyers acted for a Defendant to the Wahba proceedings. The claim involving our client was resolved before the final hearing. This article was first published by Sparke Helmore Lawyers on their website.

IN BRIEF

Street v Arafura Helicopters Pty Limited [2018] NTCA 11

The first instance decision in this matter was reported in Volume 73 of Aviation Briefs. What follows is a brief note on the unsuccessful appeal.

Background

The plaintiff (now appellant in these proceedings) had instituted proceedings in the Supreme Court under the *Civil Aviation (Carriers' Liability) Act 1959* (Cth) (**CACL Act**) claiming damages for injuries he sustained in a helicopter accident that occurred in the Northern Territory on 12 November 2013. The defendant (now respondent) pleaded that the appellant's right to damages had been extinguished under s 34 of the CACL Act because proceedings were not brought within two years of the accident.

The complicating issue was that, prior to 11 November 2015, the plaintiff had taken steps to commence proceedings against the defendant. He had instructed lawyers, and they had prepared documents that were intended as originating process. Unfortunately, those documents did not comply with the Rules of the Supreme Court of the Northern Territory: the Writ did not contain an endorsement of claim; a statement of claim is not an originating process; and the documents were not signed.

A further error then occurred: local solicitors, rather than a local enquiry agent, were required to be retained for the purpose of filing documents and to provide a local address for service.

The above issues were sought to be rectified on 12 November 2015. Although a local solicitor was retained, the deficiencies with the pleadings remained.

Ultimately, the correct documents were filed and the registry, exercising its discretion, backdated the date of filing the documents.

First instance

Southwood J in the Supreme Court of the Northern Territory found, on determination of a preliminary question, that the Plaintiff's claim was extinguished by the operation of Section 34 of the CACL Act.

His Honour considered that 'an action' could only be commenced when the appropriate steps had been taken to invoke the jurisdiction, power and authority of the Court, and that in respect of the proceedings, it was the Rules that governed those matters. The Rules had not been followed in respect of the originating process that the plaintiff relied upon.

Appeal

The plaintiff appealed. In issue were the following two propositions:

(a) on the proper construction of the Rules, the date of lodgement and not the date of acceptance determines when a proceeding is commenced; and

(d) as a matter of fact, the Registrar or the proper officer accepted that originating process as commencing a proceeding.

The matter was heard by their Honours Kelly, Barr and Hiley JJ, who handed down a joint judgment.

Their Honours held that it was unnecessary to determine the first of the above propositions, because the second proposition was factually incorrect: the documents had not been accepted by the registry. They had been returned to the lodging party and an email had been sent advising that the documents had

been rejected.

Their Honours found that Southwood J was correct to find that the first document to be delivered to the registry of the Supreme Court and accepted for filing was the writ which was filed on 18 December 2015: that none of the documents that were delivered to the registry before that date had been accepted for filing; and that none of the documents that were delivered to the registry before that date were on the Court file at the date of hearing the preliminary question.

The appeal was dismissed.

Bhatia v Malaysian Airline Systems Berhad [2018] FCA 1471

Facts
Dr Bhatia filed an originating application and statement of claim in the Federal Court on 4 June 2018 claiming damages against Malaysian Airline System Berhad (**MAS**) for personal injuries he allegedly suffered on board Malaysian Airlines Flight MH1 between London and Kuala Lumpur on 5 June 2016.

Issue
Malaysian Airlines Flight MH1 was operated not by MAS, but by Malaysia Airlines Berhad (**MAB**). MAS and MAB are separate legal entities.

Dr Bhatia's right to damages is governed by the *Civil Aviation (Carriers' Liability) Act 1959* (Cth) (**the CA Act**). The CA Act gives force of law to the *Convention for the Unification of Certain Rules for International Carriage by Air 1999* (**the Convention**). Pursuant to the Convention:

- the carrier (in this case, MAB) is liable for damage sustained in case of bodily injury of a passenger upon condition only that the accident which caused the injury took place on board the aircraft or in the course of any operations of embarking or disembarking;
- there is no cause of action against the carrier except as provided for by the Convention (s 9E of the CA Act); and
- the right to damages against the carrier shall be extinguished if no "action" is "brought" within a period of two years from the date of arrival of the aircraft at the destination (or the date it ought to have arrived) (Article 35 of the Convention).

Dr Bhatia's cause of action was therefore one that should have been brought against MAB, not MAS, and it should have been brought by 5 June 2018.

Proposed amendment
Dr Bhatia sought to amend the proceedings by 'correcting' the name of the respondent so that it became MAB.

Dr Bhatia's application preceded on the basis of *Federal Court Rules 2011* (Cth) r 8.21, which provided the Court with a discretionary basis to amend an originating process. Dr Bhatia's position was that, if the amendment were allowed, his "action" should be treated as having been commenced within the two-year time period required by the Convention.

MAB and MAS opposed the amendment application on the basis that any right to damages enjoyed by Dr Bhatia against MAB, and any corresponding liability of MAB, had already been extinguished and could not be revived by the Court exercising a discretionary power under r 8.21 or otherwise.

Decision of Charlesworth J
His Honour found that there was no "action" that was "brought" within two years of the relevant date.

For an "action" to be "brought" for the purposes of the Convention, his Honour found that the "action" had to be "brought" against

the relevant entity. That is, the words "brought" and "action" had to be understood as referring to the bringing of a proceeding for disputed rights and liabilities between two parties. Those words could not be understood as meaning the bringing of a proceeding against a separate party, even if the proceeding set out a cause of action that if brought against the relevant entity and if made out would be successful, and even if it was accepted that the subjective intention of the party bringing the proceeding was to proceed against only the party against who it had rights.

His Honour found that the case brought against MAS was hopeless. Only MAB could have a liability in respect of the pleaded circumstances, but no claim was brought against it.

His Honour further noted that r 8.21 would not assist Dr Bhatia, because there had not been a "mistake" in naming MAS as respondent in the way contemplated by that rule, and/or because any claim where a substitution of a respondent party occurred would be treated as having commenced on the date of amendment because of r 8.22.

Further, it was not in dispute that the Convention extinguished the substantive right to damages governed by the Convention, and Art 35 therefore operated differently from statutes erecting limitation periods within which an existing right may be enforced. It was therefore appropriate to determine the issue at an interlocutory stage and to not allow an amendment pursuant to r 8.21.

Dr Bhatia's amendment application was refused.

Kempsey Shire Council v Five Star Medical Centre Pty Ltd [2018] NSWCA 308

[This is the original, unedited headnote preceding the Court's judgment. Readers are directed to a copy of the judgment, which can be found at: https://www.caselaw.nsw.gov.au/decision/5c102c67e4b0b9ab40211ff5]

On 25 February 2014, Dr Alterator, the directing mind of Five Star Medical Centre ("the plaintiff"), flew an aircraft owned by the plaintiff from Port Macquarie to Kempsey Aerodrome. On landing at Kempsey Aerodrome in the early afternoon, the aircraft collided with a kangaroo.

The plaintiff brought proceedings in negligence against Kempsey Shire Council ("the defendant"), which owned and controlled the Aerodrome, for the costs of repairing the aircraft. The primary judge held that the defendant breached its duty of care to users of the aerodrome by:

(a) not issuing a notice to airmen (NOTAM) stating that kangaroo incursions onto the aerodrome had increased to dangerous levels; and

(b) not erecting a kangaroo-proof fence around the aerodrome.

At the time of the accident, Dr Alterator was aware of a warning published by Airservices Australia in the *En Route Supplement Australia* ("ERSA") Notice for Kempsey Aerodrome, reading "1. Kangaroo hazard exists".

The *Civil Liability Act 2002* (NSW) relevantly provides:

> **5F Meaning of "obvious risk"**
> (1) For the purposes of this Division, an *obvious risk* to a person who suffers harm is a risk that, in the

circumstances, would have been obvious to a reasonable person in the position of that person.

…

(3) A risk of something occurring can be an obvious risk even though it has a low probability of occurring.

5H No proactive duty to warn of obvious risk

(1) A person (*the defendant*) does not owe a duty of care to another person (*the plaintiff*) to warn of an obvious risk to the plaintiff.

(2) This section does not apply if:

(a) the plaintiff has requested advice or information about the risk from the defendant, …

42 Principles concerning resources, responsibilities etc of public or other authorities

The following principles apply in determining whether a public or other authority has a duty of care or has breached a duty of care in proceedings for civil liability to which this Part applies:

(a) the functions required to be exercised by the authority are limited by the financial and other resources that are reasonably available to the authority for the purpose of exercising those functions,

(b) the general allocation of those resources by the authority is not open to challenge,

The key issues on appeal were:

(i) With respect to breach (a), whether the alleged breach was a failure to warn of an obvious risk, so that liability was precluded by *Civil Liability Act 2002* (NSW), s 5H;

(ii) With respect to breach (b), whether the finding of breach should have been made in the light of *Civil Liability Act*, s 42(b).

The Court (Basten JA, McColl JA agreeing, Simpson AJA dissenting) **allowed the appeal and held:**

In relation to (i):
(Per Basten JA, McColl JA agreeing)
1. The obviousness of a risk should be assessed at a reasonable level of generality: [12]. A risk may be obvious even though it has a low probability of occurring; an increase in the likelihood of the risk materialising did not create a different risk: [14].

2. The plaintiff should have been, and was, aware of the obvious risk of colliding with a kangaroo on the runway at Kempsey aerodrome as the aircraft was landing. Contrary to the trial judge's finding that macropod levels at the aerodrome had reached "dangerous levels" around the time of the accident, there was no evidence of a significant change in macropod numbers during the early afternoon in the months prior to the accident. It was thus not possible on the evidence to conclude that a level of risk existed at the time of the accident not properly described as within the obvious risk accepted by the pilot: [33]-[34].

3. Though the plaintiff had consulted both the ERSA and NOTAM online before flying, this did not constitute requesting advice or information about the risk from the defendant, so as to engage s 5H(2)(a) of the *Act*. Though both the ERSA and NOTAM contained information provided by the defendant, each

appeared on a website operated by Airservices Australia. Even if it were correct to say that a person "requests" information from a service provider by accessing their website, it could not be said that accessing the website also constitutes a "request" to third parties who provide information to the service provider: [36].

(Per Simpson AJA, dissenting)

4. A liberal interpretation should be given to s 5H(2)(a). As the source of the information on the Airservices Australia website was in effect the defendant, it is not unreasonable to construe consulting the website as an indirect request for advice or information from the defendant: [104], [106]-[107]. Further, the defendant's breach was not a "failure to warn", but rather a "failure to provide information" which it had an obligation to provide: [110]-[111].

In relation to (ii):
(Per Basten JA, McColl JA and Simpson AJA agreeing)

5. The principle in s 42(a) of the *Civil Liability Act* is not limited to functions that public or other authorities are legally required to exercise. In the case of councils, it extends to functions exercised in response to requirements imposed by the needs of the community as understood by the council, under *Local Government Act 1993* (NSW), s 24. Accordingly, the defendant's operation of the aerodrome engaged s 42(a): [55].

6. Even if s 42(a) were not engaged, it would not necessarily follow that s 42(b) was not engaged. Section 42(b) only refers back to s 42(a) to identify the resources to which it applies, namely "the financial and other resources" of the authority: [58].

7. The evidence demonstrated that the Council did not have available resources to build a fence, without reducing funds allocated to other works and purposes. Section 42(b) precluded the Court finding a breach of duty by failure to take a precaution, in circumstances where any decision to take the precaution required an assessment of conflicting demands on the Council's budget: [64].

2. Government update

Back to the Future for Australian Drone Regulation: The Senate Inquiry into Drones and the Government's Response

Michael Nas, Associate Principal, Bennett +Co

In the last edition of Aviation Briefs I wrote about CASA's Drone Safety Review conducted at the behest of the Minister for Infrastructure and Transport and published in May 2018 (**CASA Review**).

The CASA Review countenanced a future for drones (aka UAV, UAS, RPAS etc) that built upon the lessons learned to date, and contemplated the next steps in an ever-changing regulatory environment. It also flagged the need for increasing oversight owing to the proliferation of drones and the expansion of their capabilities and applications.[1]

That drone oversight represents a complex task has been recognised since at least 2004,[2] and it is a task that currently stretches CASA's limited resources.[3] The task has become more complicated over time with the increasing sophistication and accessibility of drone technology, and the growing number of operators with little prior aviation experience. Still, CASA's Review signified that while Australian regulations were a work in progress, and work was progressing.

The report of the Senate inquiry into the current and future regulatory requirements impacting the safe commercial and recreational use of drones published in July 2018 (**Senate Report**) presented the status of Australia's drone regulations in a different light. The Committee charged with the inquiry made numerous recommendations for improvement, stating it was 'alarmed' in some cases about the status of drone operations and regulations.[4] Significantly, the Committee also called for immediate reform to Part 101 of the *Civil Aviation Safety Regulations 2001* (Cth) (**CASR Part 101**), which houses the primary components of CASA's drone rules, signaling potential implications for one of the fastest growing sectors in aviation.

In November 2018, the Government responded (**Government Response**) to the Senate Report, accepting the recommendations relating to drone registration and education which had already been proposed by CASA. The Response also declined to action certain Committee recommendations, particularly regarding reform to the 'sub-2kg rule', which recommendation the Government 'noted'. Significantly, the Government Response signaled a change of approach to drones, to be dealt with under a 'whole of government' policy going forward.

This article analyses the recommendations of the Senate Report, comparing and contrasting these against the Government Response. The intention is to shed light on the arguments and the positions taken by the Committee and the Government. As will be seen, the Government Response likely means that CASA's plan is back on track albeit with adjusted policy. While the Report sought to provide clarity regarding the future for drones, the Government Response renders that future somewhat opaque, at least in so far as regulatory outcomes in the longer-term are concerned.

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[1] CASA, 'Review of aviation safety regulation of remotely piloted systems' (2018) <https://www.casa.gov.au/standard-page/drone-safety-review>.
[2] See Matthew T DeGarmo, 'Issues Concerning Integration of Unmanned Aerial Vehicles in Civil Airspace' (MITRE Product Report, No WP 04W0000323, Centre for Advanced Aviation System Development, November 2004).
[3] CASA, 'RPAS in Australian Skies', 13 March 2018 <https://www.casa.org.au/about-us/standard-page/rpas-australian-skies-conference>.
[4] Senate Report, 70, 102, 105, 106.

Background to the Senate Report

Australian drone regulation began in earnest in 2001 when CASR Part 101 was implemented, making Australia a world leader at the time.[5] Indeed, Australia hosted some of the first forays into the world of commercial applications and witnessed some remarkable triumphs of technology.[6] From a regulatory standpoint, however, progress in relation to amendments and updates through the late 2000s was minimal.[7] In the result, CASR Part 101 (as it was) survived largely unamended for approximately 14 years.

This did nothing to impede the technological advancement of drones in the interim. While the early CASR Part 101 was sufficient at the time, the drone industry in Australia was in its relative infancy, with only a handful of entities operating under it.[8]

By 2014, CASA had seen the significant expansion of the commercial drone market.[9] At the time, CASR Part 101 featured a weight classification involving 'exempted' micro UAS of less than 100g, a 'small' category of drones up to 150kg, and a 'large' category heavier than 150kg.[10] An issue then arose as to the need to revisit the classification for the emerging class of 'light' drones.[11] In particular, the enormous variety of craft between 100g and 150kg stood out as requiring consideration,[12] and this issue featured prominently in the amendments which took effect in late 2016 (**2016 Amendments**).

The 2016 Amendments introduced the 'sub-2kg' and 'excluded category' concepts. These concepts have been debated since 2014 when CASA announced it was commencing consultation. This included a parliamentary motion for disallowance. And although the motion failed, clearly some conjecture about the propriety of the rules has survived.

Media reports of safety and privacy issues involving drones in Australia and elsewhere have subsequently fed concerns. In October 2016, not long after CASR Part 101 was amended, the Senate charged the Senate Rural and Regional Affairs and Transport References Committee (**Committee**) with undertaking an inquiry. Nearly two

years in the making, the Senate Report followed on the heels of the CASA Review.

Breaking Down the Senate Review

The terms of reference for the Senate Review defined a much broader envelope than a review of just the 'sub-2kg rule' and included inquiries into:

- The current and future state of the industry and the regulatory requirements for safe commercial and recreational use of drones;

[5] Senate Report, 14.
[6] See for instance the early successes of the Aerosonde UAV: Walker, Malcolm M J M, 'The Evolution of Specific Legislation Governing Australian Unmanned Aerial Vehicles (UAVs)' (Discussion Paper, Civil Aviation Safety Authority – Australia, 9 June 1999).
[7] See CASA, 'CASR Part 101 History' <https://www.casa.gov.au/standard-/casr-part-101-unmanned-aircraft-and-rocket-operations-history-0>.
[8] Senate Report, 14.
[9] Civil Aviation Safety Authority, *Notice of Proposed Rule Making – Remotely Piloted Aircraft Systems*, NPRM 1309OS, May 2014.
[10] See Nas, M, *Classifying Unmanned Aircraft Systems: Developing a Legal Framework for the Purposes of Airworthiness Certification* (Masters Thesis, Murdoch University, 2015) <http://researchrepository.murdoch.edu.au/id/eprint/29646 > (**Thesis**).
[11] Civil Aviation Safety Authority, *Notice of Proposed Rule Making – Remotely Piloted Aircraft Systems*, NPRM 1309OS, May 2014.
[12] Australian Aerospace Industry Forum, 'Recommendations of the Australian Aerospace Industry Forum Sub-Committee on Unmanned Aircraft Systems Certification and Regulation for Routine Access of Small UAS to Class G Airspace' (Recommendation Paper, Australian Aerospace Industry Forum, November 2010), 11 < http://www.industry.gov.au/industry/IndustrySectors/aerospace/Documents/Final_for_Web.pdf >.

- The importation of drones;
- International, state and local drone regulation and developments; and
- Security, privacy and insurance issues.

In all, 94 public submissions were lodged in response to the inquiry. More than 70 witnesses gave evidence at the public hearings that ensued.

The Committee made 10 primary recommendations, calling for a detailed reconsideration of the approach to drone regulation. Whilst the Report acknowledged the difficulties faced by CASA in its work, it can be read as a critique of CASA's work.

The following is a review of the key aspects of the Report, with the Government Response appended.

Analysis of Key Recommendations of Senate Report

- ***The Sub-2kg Rule & the Excluded Category (Recommendation 1)***

The Committee considered the 2016 Amendments, in particular the 'sub-2kg' and 'excluded category' concepts. The 2016 Amendments created new weight classes, sub-dividing the prior class between 100g and 150kg. Under the Amendments, drones weighing less than 2kg were no longer required to obtain Remote Pilot Licences (**RePLs**) or RPA Operating Certificates (**ReOCs**), subject to compliance with 'Standard Operating Conditions' including altitude and airspace restrictions.

CASA's stated intention was to reduce the 'cost and legal requirements for lower-risk operations' and to 'cut red tape'.[13] However, to some this appeared to be a 'deregulation of the entire UAV (drone) industry'.[14]

Whilst observing there had been no reported drone collisions in Australia, the Committee considered that safety and privacy-related issues were now 'commonplace'.[15] The Committee noted comments that it was simply a matter of time until a drone brought down a commercial airliner.[16] The ATSB stated there was indeed 'cause for concern'.[17]

The Committee reviewed the data, including:

(a) ATSB figures recording 180 drone safety-related occurrences between 2012 and 2016, with a 'jump' in mid-2015.[18] An ATSB analysis indicated drones could likely penetrate the wing or fuselage of an air transport aircraft, and otherwise pose high risk of penetration or damage to general aviation aircraft windscreens;[19]

(b) Laboratory testing and computer modelling from the UK concluding that even drones of 400g 'may pose a critical risk to windscreens and tail rotors of helicopters';[20]

(c) A 2015 report produced in the US by a UAS Rulemaking Committee which concluded that 250g drones presented an 'acceptable risk level' and, therefore, represented a 'satisfactory weight threshold'.[21]

[13] Senate Report, 15
[14] Senate Report, 15
[15] Senate Report, 29
[16] Senate Report, 31, referring to Prof. Ron Bartsch's comments to 9 News in February 2018.
[17] Senate Report, 31. See also the comments of Airservices Australia recorded at Senate Report, 23.
[18] Senate Report, 32
[19] Senate Report, 41
[20] Senate Report, 34
[21] Senate Report, 37

Those making submissions[22] and the Committee considered such matters cast doubt on the rigour of CASA's 'due diligence' prior to the 2016 Amendments.[23] The Committee concluded:

(d) it was "concerned by evidence presented through the inquiry that RPAS falling under the excluded category (weighing less than 2kg) are able to do significant damage to passenger aircraft when mid-air collisions occur";

(e) it was "alarmed by CASA's apparent lack of due diligence prior to introducing the amendments";

(f) "contrary to CASA's assessment that these RPAS are 'lower risk', the committee considers that even small RPAS weighing less than 2kg are capable of causing damage to rotorcraft, aircraft, people and property"; and

(g) "reforms to Part 101 should be made in line with the evidence available about RPAS collision and risk.[24]

Recommendation 1 of the Senate Report therefore recommended CASA draw on the growing body of international empirical research and collision testing on RPAS below 2kg to immediately reform CASR Part 101.[25]

Government Response to Recommendation 1: "Noted"

The Government did not consider the above data mandated immediate reform, and stood by the fact there had been no confirmed reports of a collision between drones and manned aircraft. The Government considered its data collection and participation in international programmes (part of its response to other recommendations) would assist CASA in monitoring this issue. The Government will review its position as technologies advance.

- ***Mandatory Registration (Recommendation 2)***

The Committee considered the lack of traceability when it comes to identifying drones and their operators in the event of an incident, noting CASR Part 101 did not require formal registration for drones weighing less than 150kg flown for recreation.[26]

Mandatory registration was (and is) therefore a significant issue, particularly given the potentially positive implications for safety, training, and enforcement which may flow from such a regime. This was covered in CASA's Safety Review,[27] which indicated 86% support (of the 910 respondents) for some form of registration regime. The most commonly cited delineation for registration was the 250g weight limit referred to by other regulators.[28]

The Committee noted the Joint Statement issued in September 2016 by 16 aviation sector parties including the International Air Transport Association (**Joint Statement**). The Joint Statement called for registration of all RPAS to 'occur compulsorily at the time of purchase or resale', noting the probable deterrent effect this may have on drone operators, encouraging compliance by operators on the basis their details are recorded.[29]

However, not all feedback on registration was positive; some pointing to the potential cost

[22] See, for instance, Senate Report, 22, 41.
[23] Senate Report, 102 and 39 - 42.
[24] Senate Report, 102.
[25] Senate Report, 101-103.
[26] Senate Report, 43.
[27] Senate Report, 43-50 (*inter alia*).
[28] Senate Report, 46.
[29] Senate Report, 45.

imposts.[30] Nonetheless the Committee felt this could likely be overcome.[31]

The Committee concluded 'the implementation of a mandatory registration regime presents the opportunity to create more stringent criteria for those wishing to operate an RPAS and to educate prospective operators', and further that 'the mandatory registration of RPAS is a sensible and logical step towards effective regulation'.[32]

Recommendation 2 recommended that the Australian Government introduce a mandatory registration regime for all drones weighing more than 250g. This should include a basic competence test.

Government Response to Recommendation 2: *"Agreed"*

The Government considered the Committee's recommendation (including competence testing) was consistent CASA's Safety Review. CASA has commenced reviewing cost-effective solutions for a mandatory registration scheme.

- ***Training & Education (Recommendation 3)***

CASA flagged possible changes to its training and education regime in the CASA Review, suggesting support for a mandatory scheme.[33]

Demonstration of proficiency has traditionally formed part of aviation safety regulation through the issuance of operators' certificates and pilot licensing. Yet, the Committee noted there was no formal procedure requiring excluded category operators to learn the standard operating conditions or demonstrate compliance with the rules.[34]

For drones – particularly excluded category and sub-2kg operations – this represents a particular problem; namely, the ease with which drones can be accessed means inexperienced operators are not subjected to traditional 'checks and balances'.[35]

The Committee took account of the Joint Statement and the emphasis on fostering awareness of the legal responsibilities applicable to aviation operations.[36] It recommended operators be required to successfully complete a basic competence test regarding the safe use of drones and demonstrate an understanding of the penalties for non-compliance.

Having stated that it was 'alarmed' by reports of reckless and inexperienced drone operators, the Committee endorsed in ***Recommendation 3*** a tiered education regime for all drone users whereby the level of training required would be 'geared to the level of risk posed by each operation',[37] with users 'unlocking' capabilities with their demonstrated competence.[38]

Government Response to Recommendation 3: *"Noted"*

The Government supported a broader training and education regime, which it will work to implement in a cost-effective and careful manner. The Government noted that by requiring users to 'unlock' benefits, the Recommendation may require technological capabilities that are not feasible at this time.

[30] Senate Report, 50, 51.
[31] Senate Report, 104.
[32] Senate Report, 51.
[33] CASA Review, 8, 9.
[34] Senate Report, 51.
[35] Senate Report, 51, 52, 54.
[36] Senate Report, 56.
[37] The Committee there echoed the sentiment of the Australian Association for Unmanned Systems: See Senate Report, 59.
[38] Senate Report, 106.

- ***Airspace Usage & Enforcement (Recommendations 4 & 5)***

The Committee noted drones can access congested airspace and interfere with emergency operations. It noted the difficulties encountered by emergency services using helicopter landing sites (which, given comments regarding the potential vulnerability of helicopters to drone damage, was concerning).[39] The Committee also noted the 11 near encounters between aircraft and drones in January 2018 alone.[40]

Submissions were made to the Committee proposing access to vulnerable airspace be 'off-limits' to drones, or restricted only to commercial drones.[41] The Committee was also 'alarmed' to learn 'airspace over or in the vicinity of Parliament House is not declared as a prohibited area'.[42] In that context, the Committee was concerned by reports of a drone operating over Parliament House in June 2017, thereby operating over a public building and over a 'populous area'.[43]

Recommendation 4 recommended CASA join with other authorities to prohibit the use of drones in airspace above vulnerable areas, significant public buildings and infrastructure.[44]

Whilst the Committee considered CASA's 'Can I fly there?' app represented a step in the right direction, the possibility of technical restrictions to prevent unlawful drone operations such as 'electronic, physical or other measures' was noted by the Committee.[45]

Against that background, the Committee emphasised the importance of adequate enforcement powers. It received submissions that federal and state police are often best placed to address drone infractions. Elsewhere, such as in the US, laws have been passed authorising agencies to 'use reasonable force to disable, disrupt, damage or destroy a [drone] that poses a threat to safety or security'.[46] Similar laws are in place in the UK.[47]

While Australia's work on enforcement measures continues,[48] and whilst the Committee recommended the strengthening of such measures, it considered technological solutions should assist in this endeavour.

Government Response to Recommendation 4: *"Agreed in Principle"*

CASA will continue to work with enforcement agencies to develop processes to restrict drone incursions in vulnerable airspace. The Government stated some mechanisms are already in place but are difficult to apply just to drones. There may be other options such as legislative action at state or territory level, or the use of geo-fencing or other technologies as they advance.

The Committee further considered the implementation of altitude and distance restrictions for drones. The potential for ADS-B, Traffic Collision Avoidance Systems (**TCAS**), and geo-fencing solutions to control the misuse of drones and any consequences was noted.[49] The Committee supported the continued investment in such technologies as well as traffic management solutions

[39] Senate Report, 65.
[40] Senate Report, 67.
[41] Senate Report,65 to 67.
[42] Senate Report, 70
[43] The Committee raised the question as to the characteristics of 'a significant density of population' to be deemed a 'populous area' under the standard operating conditions. Indeed the definition of populous area has been an item for regulatory consideration for some time: See Reece Clothier, Rodney Walker, Neale Fulton and Duncan Campbell, 'A Casualty Risk Analysis for Unmanned Aerial Systems (UAS) Operations over Inhabited Areas' (Paper presented at AIAC12 – Twelfth Australian International Aerospace Congress, 2nd Australasian Unmanned Air Vehicles Conference, 19 – 22 March 2007, 3, 4.
[44] Senate Report, 107.
[45] Senate Report, 107.
[46] Senate Report, 75.
[47] Senate Report, 76.
[48] See for instance CASA's inter-agency forum in November 2017 on the topic: Senate Report, 75.
[49] For an explanation of these technologies, see Chapter 6 of the Senate Report.

such as Unmanned Traffic Management (**UTM**) and the OneSKY CMATS platform.[50] The Committee 'strongly encourage[d] the government to continue to utilise the technical and industry expertise of stakeholders to develop future solutions to RPAS safety'.[51]

Recommendation 5 therefore specified that the Government and CASA should work with drone manufacturers to develop technological solutions for airspace restrictions for drones.

Government Response to Recommendation 5: *"Noted"*

While the Government supports the efforts of manufacturers to develop these technologies, it considered the development of technical standards to be unfeasible given the number of manufacturers, which are mainly overseas.

- ***Airworthiness Standards (Recommendations 6 & 7)***

The Committee commented on the importance of airworthiness standards for drones, which could facilitate consistent technical design and manufacture of drones in a manner similar to that which already applies to conventional aircraft.[52] The Committee noted an RMIT study in 2016 indicating that technical issues account for more than half of the number of drone accidents,[53] and also acknowledged CASA's work in consulting with global aviation regulators towards an airworthiness framework.[54]

Such a framework has been identified as a critical aspect for future drone regulation, and a key to the wide-scale integration of drones into shared airspace.[55] However, having been identified in 2004 as a topic of 'high legal complexity'[56] the pace of progress has been relatively slow internationally. Submissions to the Committee noted the central importance of an airworthiness regime[57] including because it may play a role in addressing many of the other issues concerning drones (for instance, airworthiness rules may play a role in mandating technology-based solutions to prevent unwanted airspace incursion).[58]

The Committee stated its concern in particular at the absence of 'a nationally consistent standard of airworthiness for very small and small RPAS',[59] and commented that it was 'yet to receive any indication that CASA is actually progressing airworthiness standards for RPAS'.[60]

Recommendation 6 therefore recommended CASA and the Department of Infrastructure Regional Development and Cities develop appropriate airworthiness standards for drones of all sizes and operations. ***Recommendation 7*** specified the need to develop import controls to enforce such standards for foreign manufactured drones.

Government Response to Recommendation 6: *"Agreed in Principle"*

The Government noted it holds reciprocal airworthiness arrangements with other nations which could be explored in this regard. CASA is actively engaged with ICAO and other regulators to develop airworthiness standards for RPAS. This a long-term matter to be considered as part of the 'whole of government' approach to be adopted in relation to other recommendations.

[50] Senate Report, 77-89.
[51] Senate Report, 111.
[52] Senate Report, 107.
[53] Senate Report, 108.
[54] Senate Report, 108.
[55] Thesis, above note 10, 64 to 70, 112 to 116.
[56] De Garmo, above note 3, 2 to 41.
[57] See for instance the comments of CSIRO: Senate Report, 84, 85.
[58] See the comments of IALPG: Senate Report, 86.
[59] Senate Report, 108.
[60] Senate Report, 85.

Government Response to Recommendation 7: *"Not agreed"*

The Government stated it is not feasible for border control agencies, which do not have the capacity to test and implement such standards. The Government supports instead CASA's participation in international efforts to develop airworthiness standards.

- ***Regulatory Approach (Recommendations 8 to 10)***

The Committee observed that the 'multi-faceted' nature of drone technology and the diversity of relevant stakeholders represented a particular challenge.[61] It is convenient to deal with the following recommendations as a group, geared towards a cohesive approach to drone regulation, regulatory development, and enforcement.

Recommendations 8 to 10 contemplated improving the regulatory approach to drones, under the auspices of a 'whole of government approach', including (inter alia) the need:

(a) for comprehensive research and data gathering in relation to drone operations, the demographics of the stakeholder and operator base, and the location and nature of drone operations;[62] (***Recommendation 9***)

(b) for the above matters to provide an 'evidence base on which to assess the efficacy of current regulations' and inform future policy;[63] (***Recommendation 9***)

(c) robust consultation (the Committee noting that the 2016 Amendments had been preceded by only a one-month consultation period).[64] The Committee encouraged consultation with a broader cross-section of society, beyond the 'traditional aviation sector'. This includes the need to consult insurers, recreational drone operators, agriculture industry representatives, mobile network operators and many others (for instance, lawyers);[65] (Committee view, part of ***Recommendation 9***)

(d) to embrace technological solutions as part of the regulatory toolkit, noting that this will raise difficult questions regarding apportionment of responsibility and liability, as well as in relation to precisely how such technologies will be 'integrated into compliance regimes' (Committee view, part of ***Recommendation 9***);[66]

(e) to consider harmonising state-based surveillance and privacy laws (part of ***Recommendation 8***), noting that the concerns raised in the House of Representatives Standing Committee 'Eyes in the sky' report on air safety and privacy 'remain largely unaddressed',[67] notwithstanding growing concerns about drone technology; and

(f) following development of the 'whole of government approach', to work with State and territory agencies to develop nationally consistent enforcement strategies, including the delegation of powers to issue on-the-spot-fines (***Recommendation 10***).

[61] Senate Report, 109.
[62] Senate Report, 110.
[63] Senate Report, 110.
[64] Senate Report, 110.
[65] Senate Report, 111.
[66] Senate Report, 111. As an example, the implementation of mandatory geo-fencing systems or inbuilt altitude restrictions would raise questions as to responsibility for the accuracy of any data involved.
[67] Senate Report, 112.

Government Response to Recommendations 8 to 10: *"Agrees in Principle (8 & 9)", "Agreed" (10)*

The Government noted the recommendations regarding privacy issues (see ***Recommendation 8****). Though it considered these were matters for state and territory governments, the Government stated it would engage these governments to consider a possible harmonisation of privacy laws pertaining to drones.*

On information gathering (see ***Recommendation 9****), the Government stated that Airservices Australia collaborates with industry regarding drone operations and shares this data with CASA and ATSB. The ATSB uses this information to develop a 'risk picture'. Going forward the Bureau of Infrastructure, Transport and Regional Economics will commence compiling statistics on drone operations, as it does for conventional aviation. This will be facilitated by the information gained from the mandatory drone registration scheme. Airservices Australia is also investigating drone detection technologies including a possible trial in 2019.*

On ***Recommendation 10****, the Government agreed. It intends to address enforcement issues as part of the adoption of the 'whole of government' approach.*

Reflections & Directions

The Senate Report questioned the state of drone regulations and the process by which the regulations were derived, suggesting a number of amendments. Questions now arise as to how precisely the Committee's recommendations affect CASA's current and ongoing work. For, instance, CASA has confirmed its regulatory roadmap for drones (which was due late 2018 but not yet published) will now be delayed pending implementation of the 'whole of government' approach.[68]

The ramifications for the 'sub-2kg' rule may be easiest to reflect upon: prima facie, the Senate Report called for reconsideration of the regulation. It seems for now reforms will not be made – no doubt a benefit to fledgling industry that has (at least in part) organised itself around these rules. Nonetheless, it is apparent the issue has not gone away. Recent media relating to drone usage suggest that questions remain and that the industry is still in the process of understanding the precise risks.[69]

As an observation, the continuation of the 'sub-2kg rule' is notable given CASA has said it will be a 'fast-follower' of other jurisdictions and their developments in drone regulation, and these other jurisdictions do not recognise this rule.

In any event, the Committee's endorsement that mandatory registration for drones be pursued aligned with CASA's stated intentions and so will be adopted. This has led to the recent release of draft policy papers.[70] So too the findings of the Committee largely echo CASA's views regarding the need for a focus on training and education as a priority, which has been actioned under CASA's accreditation proposals.

The Committee's views on the need for enhancements to Australia's enforcement capability recalls the multi-faceted nature of drone operations, and the inherent differences to conventional aviation. For instance, the proposal to empower police forces to deal at a local level with

[68] See https://www.casa.gov.au/standard-page/australian-association-unmanned-systems-exploring-unmanned-future-conference
[69] See for instance Pamela Gregg, 'University of Dayton Research Institute – Risk in the Sky?' (22 September 2018) <https://www.suasnews.com/2018/09/university-of-dayton-research-institute-risk-in-the-sky/>. The relevant video has drawn attention and differing reactions: see for instance < https://www.spatialsource.com.au/unmanned/dji-attacks-drone-crash-test >.
[70] CASA, Proposed New Remotely Piloted Aircraft (RPA) Registration and RPAS Operator Accreditation Scheme, < https://consultation.casa.gov.au/regulatory-program/pp1816us/ >

infractions by drones naturally differs from the way infractions would be dealt with in general or commercial aviation. Still, it appears possible changes will be investigated by the Government. The recent Gatwick and Heathrow drone incidents brings this issue to the fore.

Clearly there is no single remedy to the issue of drone compliance and enforcement, the Committee proposing that changes to registration, training and education would all contribute to addressing the issue. Additionally, the Committee considered that technological solutions should be assessed, including research into UTM and other solutions designed to control drone usage. Amongst these solutions, geo-fencing seems to hold potential for minimising airspace incursions. However, there are many challenges in implementing proposed solutions. For the moment, the Government appears to be aware of the issue and supportive of attempts to resolve it, but the Response suggests this will be an area of ongoing work.

Development of airworthiness standards that prescribe the expectations for design may provide a format for addressing some of these challenges. Certainly the absence of an agreed airworthiness code for drones has been noted for many years as a hindrance to the regulatory process.[71] This indeed is a difficult and technical area.[72] So too is the question of how to actually evaluate the risks involved in drone usage.[73] Submissions to the Committee illustrate that airworthiness remains a live issue, and the Government Response suggests this too is a work in progress.

The nature of CASA's consultation may need to be revisited in light of the Senate Report. Submissions made to the Committee by Qantas and Telstra notably recommend a broadening of the interests represented in the regulatory development process.[74] The Government Response does not offer an express response to the critiques of the Committee in relation to consultation or the process deployed in promulgating the 2016 Amendments.

Certainly, the Senate Report made clear the complex and diverse task that drone regulation represents. CASA is not alone in facing these difficulties. It should not be forgotten that other regulators have been subjected to adverse commentary over time in relation to drones, and even ICAO has been critiqued for delay on the issue.[75] It seems, at the least, CASA requires not only greater resources, but also greater access to broader regulatory, academic and technical communities. In some cases, the issues raised by drone operations extend beyond CASA's remit (for instance, privacy issues).

Hence, it appears the next steps centre around the implementation of the 'whole of government' approach, which may hold the key to resolving some of these issues. At the heart of this process is the gathering of reliable data about Australian drone operations in order to provide a stable and informed platform for regulatory change. No doubt undertaking this process will be an intensive exercise. However, the parameters for this work and the timeframes involved remain unclear, and the future outcomes remain to be seen. The inner mechanics of the 'whole of government approach' are not clearly visible in the Government's Response, and developments hereafter will be monitored by industry with keen interest. At least in that respect, the future for drones in Australia may not be so different: while regulatory change may be on the horizon, it is

[71] See Reece A Clothier, Jennifer L Palmer, Rodney A Walker and Neale L Fulton, 'Definition of Airworthiness Categories for Civil Unmanned Aircraft Systems (UAS)' (Paper presented at Proceedings of The 27th International Congress of the Aeronautical Sciences, Acropolis Conference Centre, Nice, 19 – 24 September 2010), 883; Sofia Michaelidis-Mateo and Chrystel Erotokritou 'Flying into the Future with UAVs: The Jetstream 31 Flight (2014) 39 Air & Space Law 111, 117.
[72] See for instance the discussion in Jeffrey M Maddalon, Kelly J Hayhurst, Daniel M Koppen, Jason M Upchurch, A Terry Morris and Harry A Verstynen, 'Perspectives on Unmanned Aircraft Classification for Civil Airworthiness Standards (Technical Report NASA/TM-2013-217969, National Aeronautics and Space Administration, 1 February 2013) (**NASA Report**), 8.
[73] See for instance, NASA Report, above note 71, 10.
[74] Senate Report, 94.
[75] See for example Milan Plucken, *The Regulatory Approach of ICAO, the United States and Canada to Civil Unmanned Aircraft Systems in Particular to Certification and Licensing* (Masters Thesis, McGill University, 2011), 61, 62.

difficult to ascertain its form and proximity clearly.

3. Conference

We are looking forward to the 2019 Aviation Law Association of Australia and New Zealand Conference.

Register at: https://www.eiseverywhere.com//ehome/alaanz2019. Great variety of topics covered including: international updates, airports, insurance, airlines, future trends in aviation, regulatory updates, litigation, air cargo, space law and a hypothetical. Fantastic networking opportunities and an air traffic control tower tour too!

4. Contributors

Jehan Mata
Senior Associate, Sparke Helmore

Michael Nas
Associate Principal, Bennett + Co

The editors thank all regular and new contributors in 2018 and 2019.

The format of Aviation briefs is currently under consideration, and will be a topic for discussion at the 2019 Aviation Law Association of Australia and New Zealand Conference.

Please feel free to speak with us or email any suggestions.

5. Editors and Secretariat

Genevieve Butler
Australian Transport Safety Bureau
Genevieve.Butler@atsb.gov.au

Dino Liistro
Sparke Helmore Lawyers
Dino.Liistro@sparke.com.au

ALAANZ Secretariat
Mecca Concepts Pty Ltd meccaconcepts@bigpond.com