Strategies of Enforcement Utilized by the Australian Civil Aviation Regulatory Body and their Influence on Safety

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A Thesis submitted in fulfilment of the requirements for the award of Doctor of Philosophy

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STATEMENT OF ACKNOWLEDGEMENT

Many people have helped me to have a better understanding of the issues, which formed the complex subject matter of this thesis, including a wide range of people within the Civil Aviation Safety Authority.

Nevertheless special thanks must go to my supervisors Associate Professor Michael Head and Associate Professor Steven Freeland who agreed to take over my supervision after the untimely death of my original supervisor.

I owe a great debt of gratitude to my former supervisor, the late Associate Professor Alexis Goh, for it is she who encouraged me at the very beginning when the going was tough and she who constantly reassured me that the subject was indeed worth the effort to keep pursuing.

Finally, and by no means least, a special note of thanks must go to my husband Stanley, for his endless patience, understanding and support during the whole research process.
STATEMENT OF AUTHENTICATION

The work presented in this thesis is, to the best of my knowledge and belief, original except as acknowledged in the text. I hereby declare that I have not submitted this material, either in full or in part, for a degree at this or any other institution.
ABSTRACT

Enforcement strategies utilized by the civil aviation safety regulator in Australia have to date, received scant attention from researchers. This thesis is a first attempt to look at such enforcement strategies and apply them to practical situations. It does so in an all embracing manner, taking into account the part played by aviation's historical origins, both international and domestic, that have led to the complex set of aviation safety regulations now in existence. It pays particular attention to the historical importance of Australia's former unique two-airline policy and the constitutional problems facing the early lawmakers dealing with a constitution written before the advent of aviation. It describes and examines regulatory theory as it relates to such enforcement strategies and attempts to bring together such theory with practice by applying it to practical examples. Finally it analyses how certain pressures and influences may have swayed the type of enforcement strategies pursued by the regulator at various times as these are evidenced in parliamentary inquiries and reported cases in the years since economic deregulation of the aviation industry.

The thesis puts forward the hypothesis that strategies of enforcement employed by the civil aviation regulatory authority have a profound effect on aviation safety. It contends that evidence drawn from inquiries and reported cases over a twenty-year period point to a regulator who prefers a compliance strategy of cooperation with industry, rather than a sanctioning or deterrence strategy.

The thesis also emphasizes that the evidence drawn from various inquiries and coroner's inquests points to the fact that such a strategy, if it is lacking or seen to be lacking in adequate checks and balances, can pose an increased risk to aviation safety. Emphasis is placed on the need for the aviation safety regulator to be at all times cognizant of the dangers that are inherent in a compliance based enforcement strategy, especially where the regulator puts itself in 'partnership' with industry.

A number of topics have been identified for further research. They include the need for a greater comparative analysis of enforcement strategies used by regulators in similarly aligned countries to Australia, the concept of regulatory 'capture' and a comparative inquiry into the sometimes ambiguous dual role of 'educator' and 'policeman' expected of the regulator.
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<tbody>
<tr>
<td>AAAC</td>
<td>Australian Aviation Advisory Committee</td>
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<td>AAT</td>
<td>Administrative Appeals Tribunal</td>
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<td>AAUP</td>
<td>Australian Aviation Underwriting Pool Pty Ltd</td>
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<td>AC</td>
<td>Advisory Circulars</td>
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<td>AD</td>
<td>Airworthiness Directive</td>
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<td>AFAP</td>
<td>Australian Federation of Air Pilots</td>
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<tr>
<td>AIP</td>
<td>Aeronautical Information Publication</td>
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<tr>
<td>ALAEA</td>
<td>Australian Licensed Aircraft Engineers Association</td>
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<tr>
<td>AME</td>
<td>Aircraft Maintenance Engineer</td>
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<tr>
<td>AOC</td>
<td>Air Operator Certificate</td>
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<tr>
<td>AOPA</td>
<td>Aircraft Owners &amp; Pilots Association</td>
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<tr>
<td>ASI</td>
<td>Air Speed Indicator</td>
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<td>ASIR</td>
<td>Air Safety Incident Report</td>
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<td>ATM</td>
<td>Air Traffic Management</td>
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<td>ATSB</td>
<td>Australian Transport Safety Bureau</td>
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<td>BITRE</td>
<td>Bureau of Infrastructure, Transport and Regional Economics</td>
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<td>CAAP</td>
<td>Civil Aviation Advisory Publication</td>
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<tr>
<td>CAIR</td>
<td>Confidential Aviation Incident Reporting</td>
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<tr>
<td>CAO</td>
<td>Civil Aviation Order</td>
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<td>CAR</td>
<td>Civil Aviation Regulation</td>
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<td>CASR</td>
<td>Civil Aviation Safety Regulation</td>
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<td>CASA</td>
<td>Civil Aviation Safety Authority</td>
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<tr>
<td>DME</td>
<td>Distance Measuring Equipment</td>
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<tr>
<td>EASA</td>
<td>European Aviation Safety Authority</td>
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<tr>
<td>FAA</td>
<td>Federal Aviation Administration of the United States</td>
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<td>FAC</td>
<td>Federal Airports Corporation</td>
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<td>FOI</td>
<td>Flying Operations Inspector</td>
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<td>GA</td>
<td>General Aviation</td>
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<tr>
<td>GNSS</td>
<td>Global Navigation Satellite Systems</td>
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<td>GPS</td>
<td>Global Positioning System</td>
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<tr>
<td>HSI</td>
<td>Horizontal Situation Indicator</td>
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<tr>
<td>IATA</td>
<td>International Air Transport Association</td>
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<td>ICAO</td>
<td>International Civil Aviation Organization</td>
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<td>IFR</td>
<td>Instrument Flight Rules</td>
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<td>ILS</td>
<td>Instrument Landing System</td>
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<tr>
<td>LAME</td>
<td>Licensed Aircraft Maintenance Engineer</td>
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<tr>
<td>MEL</td>
<td>Minimum Equipment List</td>
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<tr>
<td>NDB</td>
<td>Non-directional Beacon</td>
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<tr>
<td>MOS</td>
<td>Manuel of Standards</td>
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<tr>
<td>MTOW</td>
<td>Maximum Take-Off Weight</td>
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<tr>
<td>RMI</td>
<td>Radio Magnetic Indicator</td>
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<tr>
<td>RRP</td>
<td>Regulatory Reform Program</td>
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<td>RPT</td>
<td>Regular Public Transport</td>
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<tr>
<td>SMS</td>
<td>Safety Management Systems</td>
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<tr>
<td>TAAATS</td>
<td>The Australian Advanced Air Traffic System</td>
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<tr>
<td>TAWS</td>
<td>Terrain Awareness Warning System</td>
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<tr>
<td>VOR</td>
<td>VHF Omnidirectional Range</td>
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SUMMARY AND METHODOLOGY

Introduction

This thesis examines the strategies of enforcement pursued by the regulatory body responsible for overseeing civil aviation safety in Australia. In particular, it seeks to analyse strategies of enforcement utilized by the regulator in the low capacity Regular Public Transport (RPT) and charter category of aircraft. It excludes high capacity Regular Public Transport aircraft such as those used by Qantas, Virgin and the former Ansett airlines. In the analysis it examines how certain pressures and influences may have swayed the type of strategies pursued at various times and whether or not different enforcement strategies have been to the detriment of the safety goals the regulator aims to achieve.

Historically, aviation as a means of transport spans a mere 100 years, yet its influence on the world has been immense. From the very beginning the concept of 'safety' in relation to this new mode of transport has been uppermost in the minds of all who have come into contact with it, even in the most cursory manner. Australia has the great advantage of a relatively benign geographical and weather environment compared to many parts of the world. Yet fatal accidents, which should not happen, still occur.

Volumes have been written regarding the regulatory schemes countries have set up to monitor aviation safety and ensure that those who step onto an aircraft to be transported from one point to another, do so with the understanding that they can expect to complete their journey and finally arrive safe and sound at their destination. Such writings often go into great detail regarding the content of a particular regulatory scheme, or whether such a scheme is effective. Throughout all these volumes one important aspect attracts minimal attention. This is the 'strategies of enforcement' that are pursued by the regulatory authority in overseeing compliance with its

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regulations and the pressures or influences that lead to particular strategies being preferred over others. It is an examination of these strategies of enforcement that has been undertaken in this thesis. In doing so three main components have been considered necessary to put into practice a full appreciation of the issues involved. These are, first of all an understanding of the regulations themselves and the historical progression of their development. Secondly an explanation of regulatory theory, primarily as it relates to enforcement strategies and thirdly the application of such theory to practical examples as found in Parliamentary inquiries, coroners inquests and reported cases.

Throughout the evolution of the aviation industry in Australia a host of external factors have impinged on the development of the rules designed to regulate the safety of the industry. An understanding of these factors contributes to a greater understanding of the now complex modern day rules on which the regulator bases its current enforcement policy. A brief history of the formative years of aviation in the manner it relates to regulating 'safety', Australia's role in this history and the importance of the growth of international aviation bodies is described. Taken overall this is in an endeavour to show how these different elements work in an historical context, to contribute to the type of aviation safety regulation now embodied in law in Australia. The historical development of the Civil Aviation Act and Regulations are discussed at various times. This is primarily where they are deemed relevant to the central subject of the regulator's enforcement strategy, and where an understanding of their growth is relevant to the main theme of the thesis. The methodology described herein, justifies employing the 'historical method' of research for the chronological description of the development of the body of rules governing aviation safety.

It is not the aim of this thesis to deal with the infrastructure - 'Airservices Australia', the airports, security and such like that make up a large part of the

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2 Airservices Australia is a Commonwealth government statutory body formed in July 1995 when the former Civil Aviation Authority was split into two separate government bodies, 'Airservices Australia' and the 'Civil Aviation Safety Authority'. Airservices Australia
industry. All have an input in varying degrees into safety; all are large crucial fields in themselves, however such infrastructure examination lies outside the scope of this thesis. Rather the concentration is on the aviation safety regulatory scheme, its policies and mode of enforcement.

As part of an analysis of the question, the thesis also seeks to define the role regulatory philosophy may have, in assisting the regulator in its task of overseeing aviation safety in the ever-increasing complexity of the deregulated aviation environment in which it now operates. It looks at the possible advantages a greater awareness of such regulatory philosophy may have on aviation safety.

The Motivation for the Study
Inspiration for the thesis comes from the occurrence of two fatal aviation accidents and the subsequent Parliamentary inquiries that took place in their wake in the mid 1990s. The first was an inquiry into aviation safety in the commuter and general aviation sectors presented in December 1995, following the crash of a small commuter aircraft at the town of Young, in country New South Wales in June 1993. The second inquiry examined in some considerable detail the relationship between the aviation safety regulator, the Civil Aviation Authority and Seaview Air, following the crash of another small commuter aircraft whilst on route to Lord Howe Island some 18 months later. Both inquiries display a similar disturbing theme running through them in relation to the enforcement strategy of the regulatory authority at the time. The theme revolves around the manner in which the regulator adopted a compliance based strategy of enforcement in carrying out its functions, to the point that it 'offered itself up as a willing captive' to the

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4 Commonwealth of Australia, Commission of Inquiry into the Relations Between the CAA and Seaview Air (1996) Vol 1 & 2, ('The Staunton Report').
industry it was charged with regulating.\(^5\) Those conducting both inquiries expressed disbelief as to how the regulator could have erred so badly in its duty by permitting the strategy of enforcement it was currently utilizing, to reach the point that it became completely 'captured' by those whose behaviour it was supposed to be overseeing.

Inadvertently drawing attention to the phenomenon of an enforcement strategy, coined by two prominent regulatory theorists as having 'manners gentle',\(^6\) both reports outline a particular type of behaviour on the part of the aviation safety regulator that respective chairmen concluded, had gone a long way to being responsible for the two fatal aviation accidents.

**Structure**

The thesis is composed of several components. The first two chapters deal with an historical overview and explanation of the evolution of the aviation regulatory regime in Australia. This is considered necessary to 'set the scene' for the discussion that follows, as it is submitted that a full understanding of Australia's civil aviation safety regulation cannot be viewed in a vacuum. An historical description of its evolution is essential to comprehend factors that have shaped the changes occurring in the deregulated Australian aviation world, post 1990.

To a major extent the regulation of aviation safety law in Australia derives from international law sources. Thus the important role of the development of the international regulatory body, the International Civil Aviation Organization (ICAO), is included in this discussion. The evolution of this body is considered together with a discussion of one of its major flaws, - that of the lack of satisfactory enforcement tools to support its international regulatory role as aviation's prime safety authority. The dominant role of


several United States aviation based organizations that have stepped into this void is also discussed.

Chapter three deals with the constitutional issues the law makers were presented with last century, as they struggled to fit the now practical world of aviation into a constitution that was formed before man had taken his first flight. It describes how Australia's constitution has been interpreted in a manner that permits the question of aviation safety to come under the jurisdiction of the Federal Parliament despite, for obvious reasons, it not being mentioned in section 51 of the Australian Constitution.

Australia's civil aviation regulatory position, as it appears at the beginning of the twenty-first century, is discussed in chapter four. This period heralded a time of relative stability, with a committed head of the Authority overseeing a more innovative enforcement policy, striking some accord at least with modern day regulatory theory and philosophy.

In chapter five, an outline of current regulatory theory is undertaken, together with a description of strategies of enforcement that may be used by regulators in today's world. This is in preparation for the analysis and application of that theory to relevant reported cases and Parliamentary inquiries in chapter six of this thesis.

Chapter six is divided into three sections, each embarking on an analysis of reported cases that have come before the Administrative Appeals Tribunal and the Federal Court, in addition to relevant inquiries into the aviation regulator since deregulation of the industry first commenced in 1988. This is in an attempt to discern specific strategies of enforcement that may have been followed by the regulatory authority over the past 20 year period, and what pressures or influences may become apparent from this analysis that could have led to certain strategies being preferred over others, together with their possible effect on safety.
Chapter seven analyses what conclusions may be drawn from this study and sets out a series of possible future research questions. It is proposed that if undertaken, such research should lead to a much greater understanding of the role of regulatory theory and philosophy as applied to aviation safety.

**Methodology:**

The specific aim of this thesis is to identify, examine and analyse a little emphasized area of aviation safety. It excludes high capacity Regular Public Transport (RPT) operations because there have been no recorded cases of safety regulation enforcement cases being brought before the tribunal or courts in this category. Similarly Parliamentary inquiries studied in the time span this thesis covers have dealt only with low capacity RPT and charter category of aircraft. There have been no inquiries dealing with high capacity RPT operations.

The hypothesis put forward is that in overseeing the enforcement of its regulations, the Australian civil aviation safety regulator prefers a compliance strategy of cooperation with industry. It chooses a path that shows a preference for an enforcement strategy of persuasion and cooperation, rather than one of confrontation and sanctioning, one that involves voluntary adherence to regulatory requirements, rather than one favouring a sanctioning or deterrence strategy containing as it does, the application of a punishment for non-compliance.

The analysis traces this path with a specific emphasis on the last 20 years since deregulation of the industry. Reasons why a compliant approach to enforcement are investigated and questions posed, as to whether a less compliant strategy may have gone some way to preventing several serious accidents in the last two decades. Alternatively it also looks at whether such a compliant strategy, when it is combined with an effective oversight regime for those implementing it, may indeed be the most effective strategy for the regulator to pursue?
Different models of regulatory theory are explored, with a particular emphasis on 'responsive regulation' as espoused by the regulatory theorists Ayres and Braithwaite. These theorists have been chosen for greater emphasis because they have addressed in a practical way the oscillating question of having on the one hand strong state regulation of industry and on the other hand full economic deregulation, - a scenario particularly relevant to Australia's aviation industry. Furthermore they address in some detail the inescapable fact that there must be some sort of symbiosis between state regulation and self-regulation if successful compliance is to be achieved. This thesis transposes their theories onto regulation of the Australian aviation industry in the RPT low capacity and charter categories of aircraft and draws conclusions based on factual evidence deduced from Parliamentary inquiries and reported cases.

A further aim of this research, if the hypothesis is proven, is to highlight the increased risk that a heavily compliance based strategy, if lacking in adequate safeguards, poses to aviation safety. Linked to this aim is the desire to emphasize the need for the Australian aviation safety regulator to be at all times cognizant of the dangers that are inherent in a compliance based enforcement strategy, where the regulator puts itself in 'partnership' with industry, if that is the path the regulator either chooses to follow, or inadvertently follows.

Thus the main objective of the research is to examine how the aviation safety regulatory authority utilizes its enforcement strategy to achieve its stated aims. Such a research project explores the interaction of many factors and requires a number of different methodologies.

It is submitted that there is a paucity of existing research on this topic and this is an area of law that is ripe for research. An extensive literary review revealed virtually no research carried out in Australia on this subject.

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7 Ian Ayres and John Braithwaite, Responsive Regulation: Transcending the Deregulation Debate (1992).
Grabrosky and Braithwaite, provide the main empirical research undertaken in a wide encompassing manner when, in 1986, they analysed enforcement strategies of 96 different Australian business regulatory agencies. Their findings are referred to throughout this thesis. Similarly an analysis of the inquiries and cases makes little or no reference to assistance that may be gained from incorporating regulatory theory and philosophy into the planning of the regulator's enforcement policy. There is barely any reference in the Administrative Appeals Tribunal and Federal Court cases studied, to regulatory theory in any of its guises. On occasion the Administrative Appeals Tribunal has referred to the 'enforcement policy' of the regulator together with its inability at times to recognise when it has been 'captured' by the industry, however overall reference to regulatory theory does not appear in the findings and decisions of the AAT or in the judgments of the Federal Court.

When selecting the appropriate methodology that comes close to achieving the desired research objectives, it is necessary to consider the study in parts, which in turn enables the interaction of many factors. Some parts, especially the early chapters lend themselves to an historical research methodology and others, in particular chapter six, to a case study approach. Each part serves a different purpose and answers different research questions.

The Historical Method

The chapters dealing with aviation's evolution essentially require an examination to be made of a series of events over a period of time in order to observe the main trends emerging. One of the strengths of the historical method is that it allows for a qualitative and interpretative assessment of the available material.

Our current Australian aviation regulatory scheme has at times evolved in a unique way over the past 80 years. Thus in this thesis several chapters have been devoted to tracing the history of regulatory development from its very

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8 Peter Grabrosky and John Braithwaite, Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies (1986).
9 Chapters 2, 3 and 4 of this thesis.
beginnings. In doing so the classic 'historical methodology' based on principles enunciated by Gilbert Garraghan has been utilized.\(^\text{10}\)

This involves three main operations.

1. The search for material on which to work for sources of information, essentially using 'trial and error' rather than working to a planned set of rules.\(^\text{11}\) This is the initial step.

2. Examining from the viewpoint of evidential value, the weighing up of the material or sources.\(^\text{12}\)

3. A formal statement of the findings of the above two processes.\(^\text{13}\)

These three operations result in the assembling of a body of historical data, which when presented in written terms should result in the presentation of substantive conclusions.

The above theory of the historical method when translated into practical use in this thesis does not necessarily involve the three operations being taken up in strict succession. Rather they tend to overlap one another. The heuristic element could not be seen to be doing its work without the application of some of the principles of criticism. A mass of material has been handled, with each piece having its value in the context of this thesis evaluated and assessed as to its bearing on the subject.

Both primary and secondary sources have been used in the historical method. The National Archives of Australian has been a great source of primary material especially for the early years of aviation.\(^\text{14}\) Similarly much use has been made of the specialised information available in the 'Airservices Australia' library based in Canberra. This library is a veritable treasure trove of aviation documents and historical information. While much of the

\(^{10}\) Gilbert J Garraghan, A Guide to Historical Method (1946) 33.  
Historical method may be defined as a systematic body of principles and rules designed to aid effectively in gathering the source-materials of history, appraising them critically, and presenting a synthesis (generally in written form) of the results achieved.

\(^{11}\) Ibid 34. 'The search for material on which to work for sources of information, (heuristic)'.

\(^{12}\) Ibid. 'The appraisement of the material or sources from the viewpoint of evidential value'. Regarded as so important a step that the whole process of historical method often goes by the name of 'historical criticism'.

\(^{13}\) Ibid. 'A formal statement of the findings of heuristic and criticism'

\(^{14}\) The National Archives of Australia is an agency of the Australian Government, established under the Archives Act 1983.
collection of data was concentrated in the early stages of the investigation, some of it continued well into the stage of final composition. The collection of data constantly merged into the process of analysis. This was especially prevalent in chapter five, which deals with regulatory theory, where findings later rely on the qualitative analysis of the available regulatory literature and are brought together with an examination of the main regulatory themes that permeate the research. This chapter was placed immediately before analysis of inquiries and cases undertaken in chapter six in order to facilitate a reference back and forth as the analysis through chapter six progressed.

Case Study
The methodology in chapter six uses a variation on the case study approach. This has been chosen because it best answers the 'how' or 'why' questions implicit in the hypothesis, with the focus being on a contemporary phenomenon within a real life context. It would be described by the research methodologist Robert Yin,\(^\text{15}\) as an 'explanatory' case study as distinct from either an 'exploratory' or 'descriptive' case study.

Strictly speaking a case study research methodology refers to a method that involves a thorough, in-depth analysis of an individual, group, institution or other social group. However in this thesis a variation on a pure case study approach has been used because it does not concentrate on one particular case,\(^\text{16}\) rather it is comprised of data from Parliamentary inquiries and reported legal cases taking place within the boundaries of a strict selection criteria.

Thus by closely examining a relatively small number of cases and comparing and contrasting them, much can be learnt about significant features of the phenomenon under discussion and how it varies under different circumstances. Case study research is particularly well suited to the investigative processes being undertaken in this research.\(^\text{17}\)

\(^{15}\) Robert K Yin, Case Study Research Design and Methods (1989) 8.
\(^{16}\) Helen Simmons, Case Study Research in Practice (2008) 5.
\(^{17}\) Robert Yin, Case Study Research: Design and Methods (1989) 8.
The method by which the inquiries and cases were chosen:

1. Inquiries and cases studied included only those involving aircraft that fell into the low capacity Regular Public Transport (RPT), or charter category of fixed wing aircraft. This excluded high capacity aircraft such as those operated by major airlines such as Qantas, Virgin and the former Ansett Airlines.

2. All reported cases coming before the Administrative Appeals Tribunal and the Federal Court from 1990 to 2009 that involved the civil aviation safety regulator were reviewed. This covered the twenty-year period immediately following deregulation of the industry.

3. From the above, only cases containing reference, either explicit or implied, to the regulator's enforcement strategy were selected.

Furthermore qualitative methods have been used in the case study approach because they facilitate an understanding of the central issue sought out in each particular case studied.\textsuperscript{18}

A final consideration is that it is deemed essential in the methodology to connect and tie in, the theory of regulation with the analysis that takes place in chapter six. Therefore chapter five, explaining the relevant regulatory theory, is placed after the chapters dealing with the historical and constitutional matters and prior to the detailed analysis of the inquiries and cases. In this way it forms a necessary connection and important link to the main focus of the research.

\textsuperscript{18} Ibid 10. Yin does not exclude qualitative methods from a study of the case.
CHAPTER 1

THE EVOLUTION OF AVIATION'S REGULATORY RULES: FROM LIFT-OFF TO 1939

1.1 Introduction

This thesis is in part concerned with the rules that govern and control aviation safety. Thus it is appropriate, in the opening chapter, to look at the early development of these rules both overseas and in Australia, for this early growth must be understood in the climate in which it evolved, to give greater understanding to the reasoning behind the complex web of international rules that substantially determine Australia's own aviation safety regulatory system.

The early rule making forms a fascinating progression in historical terms. First, because of the era in which it commenced and second, because of the speed with which technical progress forced the hand of the law makers of the time to keep pace. For the early rule makers had, as well as these aspects to contend with, the entirely new concept of the third dimension of 'space' and its role in a revolutionary notion of coping with a completely new form of transport.

Long before aircraft were developed theories had evolved about the ownership of air. Who actually owned the airspace above the ground was a concept the early international aviation lawmakers grappled with in a fascinating tug-of-war, prior to and immediately following, the First World War. Early concepts, dating back to Roman times,\(^1\) that airspace should be open to the free use of all, were quickly dispersed when man's ability to actually use the airspace in a transport sense, finally eventuated. With the advent of the aeroplane, the actual power this entailed came at last to be fully recognised.

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\(^1\) H B Jacobini, 'International Aviation Law A Theoretical and Historical Survey' Journal of Public Law (1945) 314, 316:

The Romans thought the air should be a res nullius and open to the free use of all, and that it might be used freely as might the flowing water, the sea shores, and the sea.
1.2 The First Two Decades of International Aviation
It was the years immediately after the end of World War I that saw the
impetus of aviation in Europe, as a serious transport mode, really 'take off'.
Prior to this era however, some legislative movement had begun to emerge
and some of it showed remarkable foresight in demonstrating an excellent
view of the future.

As early as 1783 a hot-air balloon in France, constructed by the Montgolfier
brothers, first successfully left the ground and whilst carrying two very brave
passengers remained airborne for 25 minutes. This feat was followed by
several other similar attempts and in 1785 a hot air balloon crossed the
English Channel.²

With the long dreamed for concept of man's mastering of the physics of
'flight', followed the realization that this revolutionary success now had to be
legalized in some manner. It had to fit in with international life.

Today we take for granted that aircraft in flight can and do operate over a
person's land without infringing their property rights. However historically
this is a feature unique to aviation law, which in a sense serves to highlight the
different concepts that the early law makers were confronted with as they
grappled to lay down rules to cope with the new mode of transport.

Traditionally property law defined a person's real property as 'extending from
a line drawn around the boundary of the land to the centre of the earth and to
the extremities of the heavens'.³ Infringement of a person's proprietary rights
could bring an action for trespass or nuisance.

Old concepts of 'property' and the extent to which a state was sovereign of the
air above its territory had to be considered and rethought. Several decades of

² Peter Keenan, Anthony Lester and Peter Martin, Shaw & Beaumont on Air Law (3rd ed,
³ Ronald Bartsch, Aviation Law in Australia. (2nd ed. 2004) 8. Quoting an old maxim cujus
est solum ejus est usque ad coelum meaning; 'Whose is the soil, his is also that which is up to
the sky'.
the hot air balloon era had, in effect, drawn attention to some of the many problems that may be in store for the new dawn of aviation. In the first decade of the twentieth century international lawyers were beginning to turn their attention to what some perceived as a complete revolution in the means of transport and communication.\textsuperscript{4} Those we now acknowledge to be imaginative, forward-looking thinkers in the field were not, however, without their detractors. Some were inclined to align themselves with Simon Newcomb, an eminent authority on transport in the late 19th and early 20th centuries, who basing his opinion on the 'known laws of nature', doubted whether a time would ever come when passengers could be transported through the air 'in safety and comfort upon a machine that can be available at will'.\textsuperscript{5}

The problem of formulating legal rules for the conduct of air navigation was mooted at many international conferences after 1905. It was in 1905 that Wilber Wright conducted his first long flight in a 'heavier-than-air' machine, a staggering distance of 24 miles at 38 miles an hour.\textsuperscript{6} Progress then began to 'take off', culminating at the end of the decade with M. Bleriot's crossing of the English Channel.

Scepticism or not, as early as December 1908 Ministers of the French Cabinet decided to invite the governments of the world to a conference in Paris, the subject of which was to be the legal problems of aerial navigation. As no date was set for the conference time dragged on and it did not actually eventuate until May 1910. In March of that year the 'Institute of International Law' had met and the discussions of this body clearly emphasized that there was a wide divergence of opinions on air law, which were held by various 'experts' of the day.\textsuperscript{7}

One of the big stumbling blocks to achieving consensus at these early conferences was the conflict of opinion as to whether State sovereignty

\textsuperscript{5} Simon Newcomb, 'The Prospect of Aerial Navigation' (1908) North American Review 337.
\textsuperscript{6} Ibid 49.
\textsuperscript{7} The Times, London, 29th March 1910.
extended to the airspace above State territory. Analogies with the freedom of the High Seas were made and dispensed with. One of the many reasons given for such dispensation being that the freedom of the seas is really predicated on the impossibility of the effective control by any State. Thus the analogy of the sea with the air immediately above a State fell down.

First considerations were however of a military nature. It was primarily military policy, which was the main reason for the British opposition to the German proposals for freedom of transport in the air space above a nation for the 'air-vessels' of all nations. The British saw this as an undesirable opportunity for espionage. Such a right would limit 'the elementary right of a state to take each and every measure which it considers necessary for self-preservation'. In taking and firmly sticking to this stance Britain had however a practical dilemma on its hands. It was all well and good to be able to determine from time to time what foreign aircraft may be permitted to enter the airspace above its territories, however foreign restrictions on British aircraft entering foreign territory could limit Britain's commercial aspirations and interfere with possible air routes to its far flung overseas colonies. It was a two edged sword.

It was also argued by the opponents of 'freedom of the air' that in times of war, the neutral states would be placed in an impossible position where they could have air battles fought over their territory, without being able to claim that their neutrality had been infringed.

By the time the conference got underway in 1910 the principal European powers, specifically Britain, France and Germany, were deeply divided on the fundamental question of 'freedom of the air'. Included in The French delegation at the conference was a distinguished international lawyer,

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9 John C Cooper, 'Some Historic Phases of British International Civil Aviation Policy' (1947) 23(2) International Affairs (Royal Institute of International Affairs 1944-) 189, 190.
10 Ibid 192.
Fauchille. It was he who in 1901 had first put forward the 'freedom of the air' doctrine. This doctrine had in 1906, been robustly opposed by the equally eminent British international lawyer, Professor Westlake.11 Most of the European jurists favoured Fauchille's argument for 'freedom of the air'. When the conference opened, the German and French delegates both put forward proposals following this line. Britain dogmatically opposed it, saying in a very carefully worded document that, 'while wishing in every way possible to encourage and develop air navigation, it is evidently necessary to safeguard the interests and sovereignty of the State.'12

Despite this major stumbling block the delegates to the 1910 Conference went on to draft an extremely interesting convention which was, except for the rather important and disputed provisions of the right of entry of foreign aircraft into a nation's airspace, complete and ready for signature. The conference adjourned with the understanding that it would meet again after the various problems could be considered by the nations concerned. It never did meet again. The threat of war was imminent and the discussions that went on at that conference seem to have got lost in the traumatic events that followed with the advent of World War I. Had the stance of the British been different the question of the sovereignty of airspace might have given way to 'freedom of flight' and the whole history of international aviation in the 20th century might have been very different.

Despite the failure of the 1910 Paris conference it was ultimately extremely important because it paved the way for many of the resolutions of the 1919 Paris Convention held in the year following the end of hostilities in World War I.13 Meanwhile in the intervening decade Britain had seen fit to pass legislation protecting its air sovereignty. To enforce its position in 1911 and 1913 the British Government passed two Aerial Navigation Acts, which gave the Home Secretary wide powers over the flight of aircraft into its airspace.

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11 John C Cooper, 'Some Historic Phases of British International Civil Aviation Policy' (1947) 23 (2) International Affairs (Royal Institute of International Affairs 1944-) 23, 190.
12 Ibid 191.
13 Aeronautical Commission of the Paris Peace Conference of 1919. The International Aviation Conference held in Paris in 1919.
They also authorized the creation of prohibited zones. Airspace sovereignty and control over a nation's airspace was accepted and with the advent of World War I in 1914, the final quashing of the 'freedom of flight' doctrine was complete. The position was re-examined during the War. In 1918 a committee had been set up to report on 'the steps which should be taken with a view to the development and regulation after the war of aviation for civil and commercial purposes from a domestic, imperial, and an international viewpoint'. Matters decided by this Committee formed the basis for Britain's position the following year at the Paris Peace Conference. This contemplated an exchange of the widest possible privileges of flight. It insisted on the maintaining of a country's sovereignty over its airspace but subject to this sovereignty, there would be practically no restrictions on civil flying between nations which agreed to the convention. However this was not ultimately accepted and the final draft of the Paris Convention of 1919 was much more restricted. Thirty-three nations, including Australia were present in Paris in 1919. Most attending states went on to ratify the Convention. One major power, the United States did not, nor did several of the South American countries.

1.3 International Aviation in the Aftermath of World War I

With a continuing non-ratification of the Paris Convention of 1919 by the United States and confusion as to the meaning of the provision that international 'airways' should be subject to the consent of the States over whose territory the aircraft in flight passed, the French government called a meeting in Paris in 1929 to attempt to resolve the difficulties and to clarify what were seen by some as ambiguities in the drafting and interpretation of Article 15 of the Convention. Those interested nations who had not ratified

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15 The Aeronautical Commission of the Paris Peace Conference of 1919. This conference had the task of drafting an international convention to govern air navigation in time of peace.
16 John Cooper, 'Some Historical Phases of British International Civil Aviation Policy' (1947) 23(2) International Affairs (Royal Institute of International Affairs 1944 - ) 95. Article 15 stated that every aircraft of a contracting State had the right to cross another State without landing following a route fixed by the State, over which the flight would take place, subject to a requirement of landing when commanded to do so by the State flown over, and that 'the
the Convention, including the United States, were invited and attended. There was no questioning the established fact that each State had sovereign control of the air space above its territory. The question was whether, subject to that sovereignty, airlines of one contracting State could fly over and land in the territory of other contracting States without restriction, or whether a special agreement was needed in each case.\textsuperscript{17} In 1929 the United Kingdom took exactly the same position it had done in 1919 --- that of wide and unhindered commercial flight to be allowed as a privilege between the aircraft and airlines of contracting States. In this stance it was joined by the United States, however both these powerful countries were in a minority position in which they were supported only by the Netherlands and Sweden. All the other nations present voted to change Article 15 of the Paris Convention so that it required beyond question a special agreement by the nation whose territory was being flown over, before commercial airlines could be established. Thus each nation had full authority to admit or refuse the entry of commercial air operations into its territory on any basis, or for any reason that it chose.\textsuperscript{18}

Between 1929 and the start of World War II the British government kept to the same stance it had held in 1919 and 1929. The United States however moved towards a semi-isolationist position evidenced by the passing the somewhat restrictive Civil Aeronautics Act of 1938.\textsuperscript{19} World War II however

\textsuperscript{17} Ibid 195
\textsuperscript{18} Ibid 197.
\textsuperscript{19} Passed by Congress in 1938 the Civil Aeronautics Act created an independent federal agency called the Civil Aeronautics Authority (CAA), and vested in it wide powers to regulate airline fares and to determine the routes that air carriers would serve. More importantly, from an international viewpoint, this Act required a procedure whereby every foreign commercial airline that wished to enter the United States had to apply to the Civil Aeronautics Board for permission to enter, and would be granted that permission only after a public hearing had been held to determine its fitness to fly into United States territory together with a finding by the Board that such entry was in the public interest.
was to see Britain change tack, leaving behind its former free trade policies of 1919 and 1929.

1.4 Australia's Early Contribution to the Evolution of Aviation

For a country so isolated, so geographically large and having such a small population Australia made important technical contributions to the origins of aviation. Much of this contribution can be attributed to one man, a wealthy inventor Lawrence Hargrave. Born in 1850 he devoted a great deal of his life to the development of flight. In this he was fortunate in having inherited considerable wealth from the family coal mining ventures enabling him to devote most of this time to his interests in conquering the world of flight. When he died in 1915 he had witnessed the birth of aviation, as we know it and lived to see two of his most significant inventions be developed by other similar minded inventors.\(^2^0\)

In 1889 he invented the rotary compressed air engine, which while it was never sufficiently developed to propel an aircraft it did anticipate much future engine development. His second significant invention was the box kite. With this contraption, which was basically composed of an arrangement of box kites, Hargraves lifted himself into the air at his property near Stanwell Park in New South Wales in November 1894. This was significant because later it was the box kite, which was the basis of most early German and French aeroplanes. Hargraves refused to patent the concept saying that he believed in the free exchange of ideas and it was an honour for him to have his work acknowledged amongst his peers.\(^2^1\) His attempts at designs for a steam engine capable of powering an aeroplane were rather less successful and after the Wright brothers first flight in America in 1903, Hargraves realized that being so far from the action in the Northern Hemisphere, his role as an inventor in the field of aeronautics was at an end. Although he did not achieve actual flight, his work made a significant contribution to the world's early aviation developments.


\(^2^1\) He was awarded a medal from the Bavarian Government in appreciation of his contribution to aviation.
At the beginning of the twentieth century when aviation was in its infancy Australia's defence policy was based on its proximity to Asia, its reliance on the 'Mother Country', Britain and the ideal of a 'White Australia'. As a country Australia saw itself as a European nation isolated from other European nations. Thus the early history of aviation in Australia must be viewed within the context of the prevailing attitudes at the time. It followed that adequate defence of this isolated continent was uppermost in the minds of the government. The recent experience of the use of aircraft in World War I drew attention to the fact that Asia, with its vast population, was not now viewed as a distant continent in terms of possible 'invasion'. The development of flight had altered this perception. In 1920 in a speech to the Commonwealth Parliament debating the proposed Air Navigation legislation the then Prime Minister Billy Hughes, said that to the north and north west of Australia lay seven hundred and fifty million Asians, half the population of the entire world and about one hundred and fifty times Australia's population. Legislation was seen as necessary to control and encourage civil aviation not only from the point of development of the country, but also from the point of view of defence.

The Australian Commonwealth Government passed the first aviation related legislation in 1920. This Act authorized regulations to give effect to the 1919 Paris Convention. In the light of the European legislative experience it is interesting that it took Australia so long to put into place an administrative framework for the regulation of civil aviation. Prior to the enactment of this legislation any so called 'pilot' regardless of qualifications was free to fly and carry passengers in any 'aircraft' capable of taking off.

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22 The West Australian, (Perth), 31 July 1923, 6. Isolation and fear of 'invasion' by the 'hordes' from the north were constant themes expressed in the Press of the day, especially so in Western Australia.
25 Air Navigation Act 1920 (Cth.), No. 50 of 1920
It was not as if Australia was unaware of legislation designed to regulate civil aviation, which had been passed in Britain some nine years previously.27 This legislation, the first to be enacted in Britain, was brought in by the British Parliament following concerned public opinion regarding the safety of the public after an unfortunate and fatal accident at the commencement of an air race at the Issy-les-Moulineaux aviation ground, near Paris, on 21 May 1911.28 The leading editorial in the Times newspaper on 22 May 1911 following the accident, was scathing in its criticism of the risks involved in aircraft flying over crowds and called for legislation to be passed immediately to deal with the matter.29 The coronation of Edward VII was due to be held in a few weeks time and on 24 May 1911 in response to questions in the House of Commons the Minister, Winston Churchill, advised that:

A short Bill dealing with this obvious danger has been prepared and I trust it may be passed by consent. General legislation on the subject will be necessary in the future.

This will be merely an interim Bill.30

When the full text of this 'interim Bill' became available two days later it became clear that it was not just a temporary measure brought in to cover the Coronation ceremonies, but rather legislation designed to be of a general nature controlling civil aviation.31

The legislation was called the 'Aerial Navigation Act 1911' and it alarmed the newly formed Royal Aero Club who regarded the measure as 'unnecessary and likely to be harmful to the development of flying'.32 Talks were held with the Parliamentary Aerial Defence Committee to consider the Bill and the Royal

27 Aerial Navigation Act 1911.
28 The Times, (London), 22nd May 1911, 7. Competing in the Paris-Madrid air race four competitors took off successfully from the field whilst the fifth competitor, M.Train, experienced difficulty in starting his machine. A crowd had gathered to witness the start, together with an official party that included the French Prime Minister and the Minister for War. After some delay, with M.Train seemingly unable to get started, the Ministers and their party left the official stand and regardless of warnings, strolled to the middle of the course. At the same time M.Train managed to coax his reticent aircraft into the air only to find at a height of some 20 to 40 feet that 'neither his engine nor his rudder was working satisfactorily, and (he) decided to come to earth'. In attempting to avoid the crowd the aircraft unfortunately 'hurled itself at a speed of 30 or 40 miles an hour into the group of Ministers and their party'. The French Prime Minister, M.Monis was seriously injured, and his Minister for War, M.Berteaux was killed. Two other members of the party suffered minor injuries.
29 The Times, (London), 22nd May 1911, 11.
30 The Times, (London), 25th May 1911, 15.
31 The Times, (London), 27th May 1911, 10.
32 The Times, (London), 29th May 1911, 10.
Aero Club had some success in gaining minor amendments. Assent was given to the Bill on 2 June 1911, and the 'Aerial Navigation Act 1911' became law.

The Australian government of the day must have been well aware of the tragic accident at Issy-les-Moulineaux, and the subsequent swift passing of the Aerial Navigation Act 1911 in Britain, yet it did not see fit to immediately consider complementary legislation or clarify Australia's position in regard to the Act. At the time various Australian government Ministers and officials were in London for the Coronation of Edward VII and ought to have been aware of the reports in the Times and the controversy surrounding the passing of the Act, yet the first evidence of the implications associated with them does not appear in official records until some six months later. On 23 November 1911, the Secretary of the Department of Defence Cdr. S.A. Pethebridge, wrote a minute to the Secretary, Attorney General's Department saying, 'Would you kindly say whether this Act may be held to apply to the Commonwealth without local legislation?'. Unfortunately the Attorney General's opinion is unknown.

There were few aviators in Australia at this time and thus little urgency to legislate in the English manner, nor did there appear to be concern as to where the power to legislate may be derived from, bearing in mind that the Australian Constitution coming into force in 1901 pre-empted the aviation era.

Early in 1912 Cdr. Pethebridge, again wrote to the Attorney General's department with a specific request for a regulation under the Defence Act to control the flight of aircraft over specific areas of the Commonwealth as may be prescribed from time to time saying:

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33 The Times, (London), 30th May 1911, 12. For example there was a reduction in certain penalties for offences and an amendment to 'exempt aviators, (from prosecution), who might be carried out of their proper course by stress of weather'.

34 Australian Archives, Series number MP. 84/1. Item 1802/1/11. Application of the Aerial Navigation Act 1911 of the United Kingdom.

35 Secretary of the Department of Defence.
The Minister would be glad if the Crown Law Authorities would frame a Regulation under the Defence Act 1903-1911, Section 63 (1) (f), Section 124 (1), and Section 85 to provide that the Minister of State for Defence may, from time to time, by order, prohibit the navigation of aircraft over the whole or any portion of the Commonwealth as may be prescribed in that order, and to prohibit the navigation of aircraft, (except when actually employed in the services of the Commonwealth Government) at all times, within a distance of one mile of any fort or naval dockyard.\(^{36}\)

The regulation also made provision for the prohibition of a flight over any part of the Commonwealth if that flight originated from a departure point outside the Commonwealth, and gave wide powers to the Minister of Defence to prohibit flights over any defence work or property that he may deem from time to time to be appropriate.\(^{37}\)

In addition to receiving comments from the Military these first 'draft' regulations were submitted to the Naval Board for their examination. The Naval Board gave the draft quite detailed examination, prefacing their reply with the statement that:

Hurried legislation in a matter which presents so many new and obscure faces on the navigation of the air is to be very much deprecated. The whole question is now under consideration in England, and it would be most desirable to know how such questions are being dealt with by the British Authorities before taking action (other than temporarily), in Australia.

These draft regulations were passed to a Committee of defence personnel to recommend any changes and submit a report to the Secretary of the Department of Defence, which was formally done on the 15th May 1912.\(^{38}\)

Among several changes and additions the report recommended the inclusion of a clause of the 'registration of aerial machines'. This appears to be the only aspect of the considered draft regulations that eventually found itself actually in legislation. The Defence Act 1912 was subsequently amended and assent granted on 4 September 1912. This is of considerable historical significance as

\(^{36}\) Aerial Navigation Regulations. Australian Archives Series number B197/1 Item 1821/1/4, 
\(^{37}\) Ibid. 
\(^{38}\) Ibid, Item 1821/1/4. This material is in Commonwealth Naval Board Item 1912/1489
it represents the first mention of aeroplanes, termed here 'aerial machines' in legislation enacted in Australia.\textsuperscript{39}

As decreed by the Council for Defence draft 'aerial navigation regulations' were sent via the Prime Ministers Department for transmission to the Secretary of State for the Colonies

For favour of the advice of the Overseas Defence Committee on the 10th October 1912, and submitted to the Governor General on the 15th October. Attention was drawn in this correspondence to the amendment to s. 67 of the Defence Act 1912 with regard to the power to register 'aerial machines'.\textsuperscript{40}

This action however crossed over with moves afoot in England to introduce a Bill to amend their Aerial Navigation Act 1911. The amendments were particularly concerned with drastically increasing penalties for any breaches of the Act for non-compliance with the Regulations, with great emphasis on security implications for non authorized flights over 'prohibited areas'. A copy was sent to the Governor General in Australia on 14 March 1913 and included the advice that a memorandum on 'the subject of the control of navigation of aircraft and the measures which are being taken in the United Kingdom is now being prepared by the Overseas Defence Committee'.\textsuperscript{41} No reference was made to the proposed Australian regulations in the memorandum, nor in a similar one on the same subject of the control of aircraft, which followed on 15 August 1913. The correspondence simply ended with the comment that, 'Your Ministers will doubtless consider in the light of the information furnished in this Memorandum the question of procuring the enactment of legislation on the subject in Australia'.

\textsuperscript{39} The Statutes of the Commonwealth of Australia, Vol 4, 1912-1913, compiled by H.B.Bignold, the Law Book Company of Australasia, Limited, Sydney, 1914, Act No.5 of 1912.

Clause 7 of the Defence Act 1912 amended Section 67 of the Principal Act [Defence Act 1903-1911], to read s 67:

\begin{quote}
The owner of any vehicle, horse, mule, bullock, aerial machine, boat or vessel, or of any goods, required for naval and military purposes, shall, when required to do so by an officer authorized in that behalf by the regulations furnish it for those purposes, and shall be recompensed therefore in the manner prescribed, and the owners of any vehicles, horses, mules, bullocks, aerial machines, boats or vessels may be required by the regulations to register them periodically.
\end{quote}

\textsuperscript{40} Ibid, Australian Archives, Item 1821/1/4

\textsuperscript{41} Ibid, Australian Archives, Item 1821/1/4
Having not received a direct reply to proposals sent to England for 'draft regulations' which had been sent to the Secretary of State for the Colonies on 10 October 1912, the then Chief of Staff on 28 October 1912 advised the Secretary of the Department of Defence that 'the legislative steps taken in Great Britain should supply the basis of any action taken overseas, (and thus in Australia)'.\(^{42}\) He went on to suggest that a Bill for an Act should be submitted which should follow the lines of the British Aerial Navigation Acts 1911 and 1913.

Nothing further in Australia seems to have been done to regulate aviation until after the outbreak of War in 1914. Then, using the War Precautions Act 'Aerial Navigation Regulations' were prepared and were to come into operation as Provisional Regulations until it was realized that the War Precautions Act 1914 contained no provision for the control of aerial navigation, nor was there adequate provision under the Defence Act to make the proposed regulations. Finally to create the necessary power the Defence Act 1903-14 was amended by the Defence Act 1915 which received assent on 30 April 1915.\(^{43}\) The 'Aerial Navigation Regulations' required the owner of any aircraft to register that aircraft and gave the Minister for Defence specific powers to limit flight over certain designated areas.\(^{44}\) Linked to war time and using the defence power such regulations were clear, however at the end of the war in 1918 this defence power was permitted to lapse and there was a break in the continuity of administration of aerial navigation until 1921 when Australia's first Air Navigation Act came into force.

In the interim period after the end of World War I in 1918 and the Paris Convention for the Regulation of Aerial Navigation in 1919 the still operative Council of Defence in Australia had formed an 'Air Traffic Committee' to advise on civil aviation and had for the times, come up with some enlightened

\(^{42}\) Ibid, Australian Archives, Item 1821/1/4
\(^{44}\) Issued as Statutory rule 113 on the 7th July 1915.
views. From one opinion of the Committee, that of the Attorney General, dated 1 April 1919, we see that there was concern 'as to the constitutional position of the Commonwealth in regard to legislation on the subject of aerial navigation'. In this same opinion it was suggested that the subject always in the past referred to as 'aerial navigation', be more properly termed 'aviation'.

Section 51(i) of the Australian Constitution namely 'Trade and commerce with other countries, and among the States' was thought to be where the Commonwealth Parliament obtained its power to legislate regarding aviation. It was of course recognised that under this power legislation would be restricted to interstate and foreign trade and commerce, and the power to control intrastate aviation would still lie with the States. Even at this early stage the writer of this opinion drew attention to the fact that he thought it essential that additional powers be obtained by the Commonwealth either by alteration of the Constitution or by reference by the States under S.51 (xxxvii) of the Constitution.

A great deal of effort was expended in discussing the issue with the States --- mostly to no avail as the suggestion of a co-operative complementary form of legislation to enable a Commonwealth Act to be applied on a uniform basis across Australia was met with suspicion. The States did not want to hand over the power of control to the Commonwealth, so eventually the Commonwealth acted alone.

Thus the first Australian Air Navigation Act 1920 was granted assent on 2 December 1920, gazetted on 11 February 1921, and came into force on 28 March 1921. It was quite simple in appearance, doing little more than

45 Commonly referred to as the 'Paris Convention'.
47 Ibid, 435
48 Ibid.
49 G A, Shearer, The Foundation of the Department of Civil Aviation 1919 - 1939 (Masters Thesis, University of Melbourne, 1970) 9. See also chapter three of this thesis for a discussion on constitutional issues affecting the control of aviation.
establish the authority to make regulations for putting into effect matters decided at the 'International Convention for the Regulation of Aerial Navigation' that had been agreed to at the Peace Conference in Paris in 1919. However it commenced the era in the development of Australia's excellent safety reputation in aviation with a regulatory regime that presided over aviation for the major part of the twentieth century. A 'Controller of Civil Aviation' was swiftly appointed and he began to immediately draft the Aerial Navigation regulations, which were based on those agreed to at the Paris Convention. These in turn had been based on the English model which itself incorporated an earlier work done in France by the Aero Club of France and The Fédération of Aéronautique International. There was some consultation with trade groups in the final drafting of the regulations although it was the Minister for Defence, Senator Pearce, who remained the decision maker as he had done under the Defence Act.

1.5 The Australian Scene 1921 - 1939

The period after World War I, until the start of the Second World War saw aviation in Australia take some decisive steps. Having passed the Commonwealth Air Navigation Act 1920 in wide terms, the Commonwealth government expected the States to quickly follow with complimentary legislation as had been discussed and agreed to at the Premiers Conference in 1920. However it was only Tasmania that actually passed and proclaimed legislation in the precise manner of the agreement reached at that

51 The four main clauses in the Air Navigation Act 1920 were:
1. This Act may be cited as the Air Navigation Act 1920.
2. This Act shall commence in relation to the several States and Territories on such days as are respectively fixed by Proclamation.
3. In this Act unless the contrary intention appears ----
   'Territories' means Territories under the authority of the Commonwealth and included Territories governed by the Commonwealth under a mandate:
   'The Convention' means the Convention for the Regulation of Aerial Navigation signed in Paris on the thirteenth day of October, one thousand nine hundred and nineteen.
4. The Governor-General may make regulations for the purpose of carrying out and giving effect to the Convention and the provisions of any amendment of the Convention made under article thirty-four thereof and for the purpose of providing for the control of Air Navigation in the Commonwealth and the Territories.

53 The Sydney Morning Herald, (Sydney), 7 January 1921, 10. The Minister for Defence Senator Pearce gave permission for a representative of the Aeroplane Traders Association to confer with Brinsmead in the drafting process.
conference. Queensland eventually passed an Act somewhat in accordance with the Premiers conference resolution, and Victoria, and South Australia, also legislated but only to provide a rather restricted reference adding very little to the Commonwealth power. Western Australia took almost twelve months to pass its legislation and New South Wales did not legislate at all at this stage.

The passing of the Air Navigation Act 1920, regardless of the lack of anticipated support from the States, was a major milestone in the history of civil aviation in Australia. Despite the failure of the States to give effect to the resolution adopted during the Premiers Conference, the Commonwealth nevertheless assumed that it had full power over civil aviation and this position remained unchallenged until 1936. During the intervening years the Commonwealth government created a civil aviation authority whereby it was organized as a Branch of the Department of Defence. Heading the new Branch was Lieutenant Colonel H C Brinsmead with the title of Controller of Civil Aviation. Brinsmead took up his duties on 16 December 1920. He guided the embryonic Civil Aviation Authority through its first difficult decade and it is he, who really laid the foundation of Australia's subsequent Civil Aviation Authority. Amongst his peers of the time he was considered well qualified for the job and the fact that he had, whilst in England, been sent by the War Office as a member of the British Delegation to the Paris Peace Conference in 1919.

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55 No. 42 of 1920: An Act to refer to the Commonwealth the control of Air Navigation and for purposes connected therewith. 20 December 1920.
57 No 30 of 1921: An Act to refer to the Parliament of the Commonwealth the Control of Air Navigation and for the purposes connected therewith.

Brinsmead was apparently well qualified for the task of setting up Australia's first civil aviation organization:

He had a distinguished war record, had attended a senior officers course at Clare College, Cambridge, and had been, from April 1917 to April 1919, Staff Officer for Aviation to the Australian Flying Corp. He had then been attached to the British delegation to the Paris Peace Conference.
1919 put him in close contact with Inter-Allied Conferences when civil aviation was under discussion.\textsuperscript{62}

It is indeed fortunate that Brinsmead did seem to be blessed with the necessary skills, as his was to be a daunting task. He had to create an organization capable of meeting a new dimension in transport. Initially, bearing in mind that his organization was under the control of the Department of Defence, Brinsmead divided it into three sections each in charge of a Superintendent. Advertisements for the three positions appeared in January 1921 and appointments were made quickly.\textsuperscript{63}

It was also fortunate for the early development of Australian civil aviation that the Prime Minister of the day, (William M Hughes), was quite a champion of aviation, saw a bright future in it and had himself experienced close personal contact with military aviation during the first World War.\textsuperscript{64} He together with his Minister for Defence, Senator G Pearce foresaw a hopeful future for aviation and Pearce quickly outlined government policy for civil aviation in a Minute to Cabinet in September 1920, which stated:

\begin{quote}
The Government recognises the urgent necessity of controlling and encouraging civil aviation not only from the point of development of the country but also from the point of view of defence in case of emergency.\textsuperscript{65}
\end{quote}

Bruised from the very recent European experience of World War I, it was inevitable that those responsible for the country’s defence made a very close connection between civil aviation policy, and naval and military defence

\textsuperscript{63} Commonwealth Gazette No. 38, 28 April 1921, 773. Captain E. J. Jones was appointed as Superintendent of Flying Operations, Captain F.W. Follett, Superintendent of Aircraft and Captain E. C. Johnstone, Superintendent of Aerodromes, all of whom had served in the Australian Flying Corps or in the Royal Air Force.
\textsuperscript{64} F. S Briggs and S H Harris, Joysticks and Fiddlesticks (1926) 75. Diary note May 17th 1919 from the pilot F. Briggs. Monday morning's glance at daily orders sent me sky high. I have been signally honoured with William Morris Hughes, Australia's fighting Prime Minister, as my passenger. As an Australian I must confess that I think my most important passenger is Mr. Hughes.…. 
policy and their individual administrations. Pearce's Minute was well received by Parliament and set the pattern for the policy that would be pursued by the Civil Aviation Branch for the next 10 years.

Growth in civil aviation in the 1920's was steady but not spectacular. The lack of speed in its development was frequently criticised in the editorial comment of the early aeronautical magazine 'Aircraft', blaming the Civil Aviation Branch for the slow growth in the number of licenced pilots. Whether this criticism is justified or not is unclear, however the Branch did seem to be moving forward in providing 'landing grounds' not only in large metropolitan areas but also in more remote country areas, together with emergency landing grounds at suitable intervals along designated air routes. It worked steadily in helping the small fledgling airline companies setting up in the 1920's to establish airmail services. Hudson Fysh, (later of Qantas), was free with his praise for the Branch in assisting his company with their early services.

At the same time that some individuals were attempting to establish airlines others were set on undertaking 'record breaking flights' as a way of demonstrating the reliability of aircraft as a means of transport. It was in this sphere that the embryonic Civil Aviation Branch flexed its muscles, keeping an eagle eye on the often ill-prepared flights over water. If the Branch considered the flight too risky it simply forbade it. One such pilot, Guy Menzies, commenting on his planned Tasman crossing said just prior to his flight that had he revealed where he intended to commence the flight from, 'the flight would have been prohibited by the Department of Civil Aviation'.

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66 Ibid 32. Quoting information from Departmental files and Aircraft magazine, as the number of licensed pilots in 1923 being merely 38 with the number having grown to 284 by the year 1928. Similarly in December 1921 there were only 12 licensed landing grounds however seven years later in 1928, this had increased to 172.
67 Aircraft Magazine, January 1926. Editorial Comment.
68 In the 1920s aircraft engines were underpowered and unreliable, thus payloads that could be carried were often below safe margins of profit.
70 Ibid 59.
The unsure legislative base on which the Civil Aviation Branch relied for its power seemingly progressed through the 1920s without any real challenge. Record breaking flights took place and received glowing support in the press. However in the early 1930s there was also growing unease in the Branch as to the extent of the power they possessed to prevent aircraft they regarded as not airworthy undertaking long flights over water. In November 1934 the then Prime Minister, Mr Lyons, discussed with the Director of Civil Aviation if he, as Director, had power to seize such aircraft. The Director's opinion at the time as reported in the press of the day was that there was no authority by which the aircraft could have been seized to prevent the flight.71

The Civil Aviation Branch itself was made up mostly of those who were, or who had been in the past, pilots themselves. There was by those in authority at times a reluctance to discipline those they regarded as being of their own 'fraternity', even when such loyalty was in strict conflict with their position as an officer of the Civil Aviation Branch.72 It was difficult to balance the job of enforcing regulations and also encourage genuine attempts at establishing an 'Airline'. The press then, as indeed now at times, was only too willing to highlight criticism of the Branch, especially in regard to what some pilots reported to it as the 'restrictive nature' of the Branch.73 Criticism too was free in regard to the establishment, state and maintenance of aerodromes. The Branch's connection with the defence department resulted in many of the aerodromes being controlled by the air force. If an aerodrome was seen as being adequate for the air force's requirements then the air force was not

71 The Sydney Morning Herald, (Sydney), 24 November 1934, 3. Reference being to the defiance of two pilots Whitehead and Nicholl who planned a Trans Tasman flight in an aircraft the Civil Aviation Branch considered unsuitable for the job. The Branch suspended the registration and air-operating certificate of airworthiness of their aircraft, yet they went ahead and successfully completed the flight to New Zealand. The Sydney Morning Herald article threw the gauntlet down to the Commonwealth Government stating that if aviation were to take the place it rightly should do as a means of transport then foolhardy 'stunts' must be stamped out, and to achieve this adequate Commonwealth powers were needed.

72 G A Shearer, 'The Foundation of the Department of Civil Aviation 1919 - 1939' (Masters Thesis, University of Melbourne, 1970) 37:
During the era of the record breakers, officers of the Branch had their patience sorely tried, the more so because they, (or many of them), had been pilots themselves. There was loyalty to a fraternity, to a class who knew the freedom of the air conflicting with a loyalty to the Department for whom they worked. … It was hard to encourage the training of pilots on one hand and to clamp down on reckless flying on the other.

73 Ibid.
inclined to spend its allocation of money to improve it to a standard demanded by some civil aviation pilots.\textsuperscript{74}

Regulations during this time were redrafted and reassessed. The depression of the early 1930's had some impact on the development of civil aviation but not as much as might have been expected given the severe economic climate of the time. Of course aviation was still partly subsidised by the government.\textsuperscript{75}

The prime reason given for such subsidization was that it was a 'defence measure'. The State Governments were not happy about such subsidies as the airlines, such as they were at the time, provided strong competition for the State run railway systems. The swift delivery of mail was a big issue and the States jealously guarded revenue from this source. Brinsmead openly said that his department was not trying to compete with the railways but rather direct efforts to 'make the fullest possible use of aeroplanes in those many districts of the Commonwealth where railway facilities are non-existent, and where the carriage of passengers and mails can be, from a national point of view, profitably undertaken'.\textsuperscript{76}

1.6 Constitutional Turbulence in the 1930s

In parallel with problems with the state controlled railways, Brinsmead also contended with the uncertainty and growing doubt as to the powers of the Commonwealth over the intrastate control of civil aviation. This weakness in the constitutional validity of the Act and the Regulations made pursuant to the Act was finally tested in 1936,\textsuperscript{77} several years after Brinsmead, severely injured in an aviation accident in Bangkok in 1931, had handed over control of the Branch to Captain Edgar Johnston, the previous Superintendent of Aerodromes. He was formerly appointed to Brinsmead's position as Controller of Civil Aviation in May 1933, at a time when Australia was beset with the economic problems of the 'Great Depression' and criticism of the Civil Aviation Branch was general and varied. The population had by this time

\textsuperscript{74} Ibid 38.
\textsuperscript{75} Commonwealth Archives, Melbourne, Department of Defence File 44/1/211
\textsuperscript{76} G A Shearer, 'The Foundation of the Department of Civil Aviation 1919 - 1939' (Masters Thesis, University of Melbourne, 1970) 42.
\textsuperscript{77} R v. Burgess; Ex parte Henry (1936) 55 CLR. 608.
become more conscious of the 'age of aviation', and were cognisant of the
benefits aviation could bring to small isolated towns. Requests for aerodromes
and landing grounds from such sources were numerous.\(^78\)

There continued in the aviation community a restless uneasiness about the
control of the Civil Aviation Branch being administered by the Department of
Defence. Newspaper reports of the time start to display a feeling that a
separate department, or at least a department other than that of defence should
administer civil aviation.\(^79\) It was felt that the development of civil aviation
was hindered by the strict discipline and 'atmosphere of secrecy' that was
associated with defence matters.\(^80\)

Early in 1936, partly as a result of criticism of the Branch, the Minister for
Defence, Mr. Archdale Parkhill, announced that he intended to set up a board
'in connection with civil aviation, on lines similar to those of the military
board, the naval board and the air force board'. On the 27th February 1936,
Cabinet gave its approval to the formation of the Board, which came into
existence on the 7th April 1936.\(^81\)

Questions were asked of the Minister for Defence in the House of
Representatives regarding the setting up of a new organization.\(^82\) He
confirmed and defended the establishment of a new and expanded Board, with
the head of the new board, the Controller-General now reporting directly to
the Minister. That Minister however was still the Minister for Defence, so in
reality although the line of responsibility may have shifted slightly, the same
constraints of operating within the Department of Defence remained.\(^83\)

\(^78\) G A Shearer, 'The Foundation of the Department of Civil Aviation 1919 - 1939' (Masters
\(^79\) The Argus, (Melbourne), 7 February 1936.
\(^80\) G A Shearer, 'The Foundation of the Department of Civil Aviation 1919 - 1939' (Masters
\(^81\) Ibid 50.
\(^82\) Commonwealth, Parliamentary Debates, House of Representatives, 18 March 1936,
\(^83\) G A Shearer, 'The Foundation of the Department of Civil Aviation 1919 - 1939' (Masters
Discontent continued and an important constitutional challenge to the validity of the Air Navigation Regulations was made in 1936, in what has come to be known as the ‘Goya Henry Case’.\(^8^4\) This case brought to a head the unease and general concern that the political leaders of the time had expressed in regard to the defective legislative power the Commonwealth possessed to legitimately control important aspects of civil aviation that it had, since 1921, been purporting to control. The constitutional challenges that this case threw up will be discussed in chapter three when the whole ‘constitutional question’ is considered in some detail. However briefly, the constitutional challenge to the Air Navigation Act had its beginnings at the Sydney Central Police Court on 1 November 1934 when a pilot, Henry Goya Henry, was fined one pound for breach of the Air Navigation Act, when he piloted an aircraft without holding a current pilot’s licence.\(^8^5\) His licence had been suspended on 28 September 1934 for 14 days. Two days after the suspension Henry piloted an aircraft at Mascot and thus was charged with being in breach of the regulations. The Magistrate found him guilty, and ruled that ‘the Commonwealth Air Navigation Act 1920 and the regulations issued under it were valid’.\(^8^6\) Counsel for Henry had argued that the Commonwealth had no power under the Constitution to legislate in intrastate aviation. Counsel pointed out that after the passing of the 1920 Air Navigation Act the States had been expected to pass complementary Acts handing the agreed aviation power to the Commonwealth. As this had not been done in New South Wales, Henry's counsel argued that the regulation under which his client was charged was invalid.\(^8^7\)

\(^{84}\) R v. Burgess; Ex parte Henry (1936) 55 CLR. 608.

\(^{85}\) The Sydney Sun, (Sydney), 2 November 1934, 3.

\(^{86}\) Section 4 of the Air Navigation Act 1920 purported to empower the Governor-General to make regulations:

(i) for the purpose of carrying out and giving effect to the Paris Convention of 1919 and the provision of any amendment to the Convention made under Article 34 thereof, and

(ii) for the provision of providing for the control of air navigation in the Commonwealth and Territories.

The Act did not go into details, however the regulations did. For example Reg. 6 forbade flying ‘within the limits of the Commonwealth …. unless the personnel of the aircraft is licensed’. Effectively some of the Regulations exceeded the articles and annexes in the Convention and others were not included at all.

\(^{87}\) R v. Burgess; Ex parte Henry (1936) 55 CLR 608.
Following his conviction Henry pursued the matter in a legal battle, which ended in a High Court challenge to the constitutional powers of the Commonwealth.\textsuperscript{88} An important case in Australia's constitutional history,\textsuperscript{89} Henry sought an order absolute to prohibit further proceedings on his conviction from the offence under the Air Navigation Regulations arguing, as he had done in the lower court, that the flight undertaken was an intrastate flight to which these regulations did not apply.

The High Court held that so much of section 4 of the Air Navigation Act 1920, as gave the Commonwealth power to make regulation for carrying out and giving effect to the Paris Aviation Convention of 1919, was a valid exercise of the 'external affairs' power contained in section 51(xxix) of the Constitution. However, although the regulations largely followed the Paris Convention, they did not represent all its provisions and in some respects differed from the Convention. Therefore the Court held that they could not be sustained on the basis that they carried out and gave effect to the Convention\textsuperscript{90}. Furthermore the Court found that the Air Navigation Regulations were designed to control aviation generally and not merely to give effect to the Convention. Some regulations were found to be 'in conflict with the fundamental principles of the convention'; they did not show 'a faithful pursuit of the purpose' of the convention but rather a 'wide departure from the purpose'.\textsuperscript{91} Thus the constitutional provision of s.51 (xxix) of the Constitution as implemented in the regulations,\textsuperscript{92} could not be supported because Regulation 6, under which Henry had been convicted, was seen by the Court as an insuperable part of the regulations and was thus, in this instance, invalid. His conviction was quashed.

1.7 State and Federal Legislative Co-operation

Not unexpectedly the Commonwealth government acted quickly to attempt to remedy the situation. Cabinet met immediately following the handing down of

\textsuperscript{88} Ibid.
\textsuperscript{89} Colin Howard, Australian Federal Constitutional Law (2\textsuperscript{nd} ed, 1972) 256.
\textsuperscript{90} Ibid 646.
\textsuperscript{91} Ibid.
\textsuperscript{92} Air Navigation Regulations 1921 (Cth) reg 6. This was the regulation under which Henry had been convicted.
the judgment and hurriedly decided to prepare legislation to amend the Air Navigation Act 1920, together with its regulations, by redrafting the Act so as to omit reference to the general control of aviation. The new Regulations of 1936 came into force on 25 November 1936 and were limited to controlling aviation only in those areas in which the Commonwealth considered it was constitutionally competent to legislate.

The Cabinet meeting also decided to put forward legislation seeking to change the Constitution to give the Commonwealth full power to control civil aviation. The Referendum Bill was introduced to the public in a statement by the then Attorney General\(^93\) on the 14th November 1936, explaining that the proposed referendum to refer power over control of civil aviation was to be linked with another controversial matter of the time, concerning marketing issues and known colloquially as the 'Dried Fruits' referendum.\(^94\) The referendum involving both these issues was held on the 6th March 1937. It failed to gain the majority votes needed to alter the Constitution. Aviation opinion at the time blamed the failure of the proposed aviation amendments on the fact that they were linked with a very contentious referendum concerned with marketing.\(^95\) Menzies was shocked by the lack of voting support for the aviation changes. The amendments to the Air Navigation Act instituted after the judgment in the 'Goya Henry' case now narrowed the Commonwealth control over intrastate air navigation to the limited extent necessary to give effect to the Paris Convention. This left the States with the costly option of having to enact legislation and set up administrations of their own to deal solely with intrastate aviation. Clearly with the technical advances that had been made in aviation, since they last considered the matter some 15 years previously, this was an unsatisfactory state of affairs. The Commonwealth worked swiftly to call another conference with the States.\(^96\) The aim was to 'ensure the safety of air traffic' by first of all agreeing amongst themselves about requirements they wished to make regarding aviation safety,

\(^93\) Mr. Robert G. Menzies, (later Sir Robert Menzies, Australia's longest serving Prime Minister).
\(^94\) Sydney Morning Herald (Sydney), 12 November 1936.
\(^95\) G A Shearer, 'The Foundation of the Department of Civil Aviation 1919 - 1939' (Masters Thesis, University of Melbourne, 1970) 60.
\(^96\) The West Australian (Perth) 6 April 1937.
and second that the conference 'should appoint a committee of experts to make
recommendations for a code of uniform regulations'. Agreement was
reached and the Commonwealth was given the task of drafting the necessary
legislation for the States, incorporating a group of proposals that had been
adopted unanimously at the conference. All existing regulations under the
Commonwealth Air Navigation Act 1920 - 1936 were to be consolidated into
one set of regulations. Regulation 6 limited the application of the regulations
to international aviation within Australian Territories, aviation in relation to
trade and commerce with other countries and among the States, and aviation
within the Territories. Thus together with the enactment of the States 'Uniform
Air Navigation Acts of 1937 and 1938' the scope of the Commonwealth's new
regulations was considerably enhanced. The agreed scheme of legal control
adopted in 1937 between the State and Commonwealth in so far as it related
to safety, continued without substantial change until 1963.

The constitutional validity of the new Act and regulations was tested in the
High Court in 1939 in the second 'Goya Henry' case. This time the High

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98 The Melbourne Age (Melbourne), 17 April 1937. Report on the heads of agreement reached at the conference:
   1. That all the governments are agreed that uniform rules should be adopted throughout Australia in relation to air navigation and aircraft particularly regarding the airworthiness of machines, licensing and competence of pilots and rules affecting air traffic and the regulation of aerodromes;
   2. That each State reserve its rights subject to the general rules in paragraph one to make its own laws with respect to transport regulations and also to establish State-owned services;
   3. That each State subject to the reservation in paragraph two, to submit to its Parliament a law relating to air navigation and aircraft in accordance with the Commonwealth rules existing from time to time;
   4. That matters referred to in paragraph one shall be extended to apply to air navigation and aircraft within the jurisdiction of a State;
   5. That all laws in paragraph three be submitted to the State Parliaments and that a Committee representing the Commonwealth and States be appointed to review the existing air navigation regulations;
   6. That the proposed State laws will provide that the administration of such law shall be vested in the Commonwealth to avoid duplication of administration staff.
   These new Air Navigation Regulations gazetted on 5 August 1937 were a consolidation of the Air Navigation Regulations (1936), the Air Navigation (Investigation of Accidents) Regulations (1927), the Air Navigation (Enquiry Committee) Regulations (1929) and the Civil Aviation Board Regulations (1936).  
101 R v. Pool, ex parte Henry (1939) 61 CLR 634
Court ruled in favour of the Commonwealth and upheld the validity of the 1936 Act and the new regulations. The High Court again dealt with section 51(xxix) of the constitution and the degree of adherence between it and the convention to whom it was giving the force of law.

As this thesis is directly concerned with regulations that are made pursuant to the Air Navigation Act, chapter three contains a description in some detail, of the continuing constitutional problems that for several decades beset the lawmakers as they grappled with constitutional issues which affected the control of civil aviation in Australia.

### 1.8 The 'Kyeema' Disaster

Australia's first significant fatal air crash triggered the nation's first serious Commission of Inquiry into the possible reasons behind the disaster.\(^{102}\)

From the newly formed Civil Aviation Board's perspective, the Inquiry's findings were somewhat critical. Evidence that came out in the Inquiry indicated that not all the blame should have been laid at the feet of the Board. Evidence was given of the obstructive activities of the government of the day, which had according to the Inquiry, played a significant role in the events leading up to the crash. The findings of the Inquiry do not entirely mask the failings of the government. They do however at times seem to deflect blame on to the Board.\(^{103}\)

By the late 1930's aircraft design had progressed significantly from the former wood and cloth assembly of the 1920's to relatively high-speed multi-engine metal constructions. (The Board had put in a request to the government for the purchase of a 'suitable' aircraft for its own use). With the mechanical and technical improvements in flying, aircraft were now capable of coping with far more adverse weather conditions than had previously been the case.

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\(^{103}\) Ibid.
Cockpit instruments enabled adequately trained pilots to ‘fly blind’ using instruments to negotiate descent through cloud to help meet airline schedules on time. Although advances in the aircraft cockpit in this regard were significant, such advances were not followed up with the installation of the necessary ground based transmitting stations. Ground support in the form of complimentary navigational beacons were required for satisfactory flying under ‘instrument conditions’ to take place. Some beacons on the most popular interstate routes had, by the 1930’s been installed. However due to the political nature of the government in pursuing a policy of ‘only buying British’ the Board had been unable to purchase a suitable aircraft to undertake the necessary ‘testing’ of these beacons. Thus although installed they were not in use, still awaiting the outcome of the wrangling between the Board and the government as to which aircraft should be purchased to do the testing job. The Board had made extensive enquiries and had come up with an American aircraft that fulfilled its need admirably. Unfortunately for the Board, the Australian government, still living in a sense in an era of ‘Empire first and foremost’, had stipulated in approving the purchase of an aircraft for the use of the Board, that it must be a British manufactured aircraft. The Board was unable to find a British manufactured aircraft that could do the job it required. A stalemate was reached. The Board remained adamant that there was no British manufactured aircraft available to satisfactorily carry out the required ‘testing’ procedures for the beacons, and the government of the day continued to stick doggedly to the policy that they must ‘buy British’. Twelve months elapsed from the date Cabinet had given its approval for the purchase of a ‘suitable’ aircraft. During this time the popular aviation magazine ‘Aircraft’ had kept up a relentless campaign in various articles criticising the tardiness of both the Board and the government in failing to provide adequate navigational aids to the emerging airline industry. These articles, quite rightly as it turned out, predicted dire consequences in the form of a serious aviation accident if the situation were not remedied quickly.

On the 25th October 1938 an Australian National airways DC2 named ‘Kyeema’ crashed in the Dandenong Ranges on approach to a landing at Essendon airport, Melbourne. It had been travelling from Adelaide to
Melbourne and had experienced good weather until approximately 40 miles from Melbourne. Here it encountered a layer of cloud, forcing the pilot to rely on the somewhat minimal instruments he had at his disposal for navigation once he had entered the cloud and lost visual reference to the ground or horizon. Eighteen people, including the pilot died in the crash.\footnote{104}

This crash, one of the worst in Australia’s aviation history, heralded a turning point in the manner in which the control of air traffic was managed, and spelt the end of the Board.\footnote{105} After the ’Kyeema’ disaster the Department of Civil Aviation was created, completely independent of the jurisdiction of the Department of Defence.

The extent of the public outcry which followed the crash, added fuel to the call for a public inquiry, with newspapers such as the Melbourne Argus asking probing questions about the lack of adequate navigational beacons.\footnote{106} In response the Defence Department commissioned the Air Accident Investigation Committee to conduct an independent inquiry into the ’Kyeema’ disaster. The findings of this report were significant in that they placed a previously little highlighted responsibility for aviation safety on the need for the establishment of adequate navigational aids. Hence it was not now merely ‘pilot training’ and ‘pilot discipline’ that was the sole domain of safety in the skies, but it was also the concern of the governmental authorities to provide better navigational devices.\footnote{107} The report commented that, ’It is beside the

\footnote{104}{G A Shearer, ’The Foundation of the Department of Civil Aviation 1919 - 1939’ (Masters Thesis, University of Melbourne, 1970) 75.}

\footnote{105}{Ibid.}

\footnote{106}{The Argus, (Melbourne), 27 October 1938, 3:
Is it not a fact that the Lorenz beacon equipment installed at Essendon eighteen months ago has not been placed in regular service? If so why has this delay occurred and who is responsible? Has the Minister been informed by the civil authorities that there was no departmental machine suitable for testing the beacon service.}

\footnote{107}{The findings and approach of the Air Accident Investigation Committee are in contrast to the findings of the Ellington Report which had been presented a mere three months prior to the ’Kyeema’ disaster. (’Report on the Royal Australian Air Force’, Commonwealth Government Printer: Canberra, 16th July 1938). This report by Sir Edward Ellington, an Air Marshall in the Royal Air Force, had been in response to governmental concerns about the increasing rise in Royal Australian Air Force fatal accidents during the 1930’s. Ellington’s brief however, was to look at and report on safety in both the RAAF and civilian aviation. His findings placed responsibility for aviation safety squarely on the shoulders of the individual pilot. He regarded both training and a strict disciplined approach to rules and regulations as the primary means to ensure the safe operation of an aircraft.}
point to say there is no legal responsibility on anyone to provide aids for the assistance of pilots in such responsible work'. The Committee emphasised the need for additional 'helpful' guides' that should be available to pilots in flight to supplement the pilot's own navigational skills. Some of these recommendations were influential in shaping the modern form of Air Traffic Control that we have today.

The years 1921 to 1939 saw aviation evolve under the control of the Defence Department, born in a sense out of the need, post World War I, for national security in the light of a newly recognised threat to the nation of possible air strikes by hostile nations in times of war. Viewed in the context of the day, it is perhaps understandable that an obvious choice for the first regulator of civil aviation should have been such a department. During this time the regulator's method of governing aviation safety had focused primarily on a pilot's training and discipline. The expectation was that the pilot would be initially well trained and henceforth be completely obedient to flying regulations. In this way the 'disciplined pilot' became the means by which aviation safety was maintained.

In a sense this method worked reasonably well whilst aircraft were relatively slow and unsophisticated in terms of navigational instrumentation. The Air Accident Investigation Committee for the 'Kyeema' disaster was the first body to highlight the fact that by 1939 the pilot's natural limitations needed some satisfactory assistance in the form of a provision of navigational support, if he were to avoid similar disasters to that which the Committee was reporting upon. It also re-shaped the course of civil aviation in Australia. The very public demand for an open inquiry into this air crash had led the public to

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108 Air Accident Investigation Committee (AAIC), House of Representatives, Department of Defence, Report into the Crash of National Airways DC2 'Kyeema' VH-UYC (25 October 1938) 4.
110 Ibid 41.
expect a similar course of action in all subsequent air disasters of comparable magnitude. This expectation has continued to the present day.\textsuperscript{111}

Furthermore in the light of the findings of the Kyeema Inquiry, the government had to be seen to be taking some decisive action to allay the criticism it had received regarding its lack of action in providing adequate radio navigational aids installed at major aerodromes and then failing to flight test them. Such lack of action on the part of the government had in reality resulted in rendering the navigational aids operationally useless and therefore, it was concluded, contributed to the accident.

In a Cabinet reshuffle that took place in November 1938, the status of civil aviation changed from being a small sub-section of the Ministry of Defence to being a major section of a new portfolio given to the former Minister for Defence, Harold Thorby, who now held the title of Minister for Works and Civil Aviation.\textsuperscript{112} The Department of Civil Aviation was thus formally created by the government of the day and with it came a new era for the regulation of civil aviation in Australia.\textsuperscript{113} The civil aviation industry had, at the end of the 1930's, emerged not just as a fast developing mode of transport, but also as an industry that captured the emotions and interest of the voting public who placed the concept of 'safety' very much to the fore. It was therefore one that any politically astute government had to be seen to be monitoring and controlling in a manner acceptable to this same public.\textsuperscript{114}

Politics had well and truly entered into the arena of civil aviation and as shall be demonstrated in succeeding chapters, here it remains to the present day.

\textsuperscript{111} G A Shearer, 'The Foundation of the Department of Civil Aviation 1919 - 1939' (Masters Thesis, University of Melbourne, 1970) 76. It is difficult to know precisely why public opinion reacted the way it did at this precise time in aviation history, however Shearer believes that more and more people were becoming aviation-conscious as evidenced by figures quoted in the Board's Annual Reports. In 1934-35 the total miles flown by civil aircraft were 5,641,281, compared with a threefold increase in 1938-39 of 15,554,769 miles. Similarly passengers carried increased for 62,910 in 1934-5 to 136,475 in 1938-39.

\textsuperscript{112} Commonwealth Parliamentary Debates House of Representatives 26 October 1938 - 24 November 1938, 1150 (Harold Thorby, Minister for Works and Civil Aviation).

\textsuperscript{113} Commonwealth, Commonwealth Gazette 1938, No. 69, 25 November 1938, Executive Minute No.168.

\textsuperscript{114} G A Shearer, 'The Foundation of the Department of Civil Aviation 1919 - 1939' (Masters Thesis, University of Melbourne, 1970) 86.
CHAPTER 2

THE RAPID EXPANSION OF CIVIL AVIATION IN THE
AFTERMATH OF WORLD WAR II: 1939 - 2000

2.1 The Chicago Convention of 1944

The Second World War gave tremendous impetus to the development of civil aviation. As a direct result of the war, enormous advances in technology had taken place both from the point of view of aircraft design itself, as well as technical advances in ground to air navigational aids.

From Britain's perspective the war had totally disrupted her passenger services, which in turn affected the development of civil aeroplanes. On the plus side the war had led to a considerable improvement in many airports, in safety and in the number of pilots available for peace time aviation. The general public too, had throughout the war witnessed the power of the aeroplane and had generally become more 'air-minded'.

Just prior to the Chicago conference the British Government commissioned a White Paper, designed to set out its views on the future of aviation and how 'some form of international collaboration will be essential if the air is to be developed in the interests of mankind as a whole, trade served, international understandings fostered and some measure of international security gained'.

As the war entered its final stages and victory for the Allies was realistically on the horizon, thoughts gained momentum in Britain in relation to the role of civil aviation after the war. The United States was emerging out of the conflict as the strongest aviation power in the world and again the 'freedom of the air'...
versus the 'airspace sovereignty' debate was reopened. In November and December of 1944 the United States invited delegates from 55 allied and neutral nations to meet at the 'International Civil Aviation Conference' in Chicago. The conference was ostensively to plan for international cooperation in the field of air navigation in the post war era.

The delegates to the conference could collectively draw on knowledge collected in the aviation field over almost forty years with experience combining public international law, private international law, bilateral agreements, the policies and experience in the regulation of foreign air transport of all nations and the legal rules which had been developed from all these fields. Their deliberations went on for 37 days, during which time they had basically failed to agree on any real 'economic control' of international aviation.

The delegate's brief had been to 'make arrangements for the immediate establishment of provisional world air routes and services' and 'to set up an interim council to collect, record and study data concerning international aviation and to make recommendations for its improvement'. It was also to 'discuss the principles and methods to be followed in the adoption of a new aviation convention'.

The convention was faced with two expansive essential questions.

i) Whether universally recognized navigational and technical standards could be agreed upon, and

ii) Whether international rules concerning the economics of air transport could be agreed upon.

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6 Fifty-two of the invited Nations attended. Russia initially accepted, however she finally declined at the last minute.
7 Charles S Rhyne, 'Legal Rules for International Aviation' (1945) 31(2) Virginia Law Review 267, 306. After working for 37 days a contemporary assessment of their efforts was that they performed 'a miracle in formulating general principles of world-wide application to replace the regional conventions and individual agreements which clutter up sound planning in the international aviation field'.
Predictably different nations had very different views regarding the achievement of these goals. The United States, as the leading aviation power in the world in 1944, favoured a laissez-faire system of aviation free enterprise. In this model 'market forces would determine capacity, frequency and fares on transcontinental routes' in much the same way that any other tradeable commodity operated.\(^9\) Thus international aviation, according to the United States, should be guided by free competition rather than international regulation and the proposed international organization should have only technical functions. Led by the United Kingdom, another group of countries wanted an organization which would have considerable economic clout. One that would be empowered to allocate the international routes that the airlines of different countries would be allowed to fly, have the ability to regulate the frequency of flights and fix rates. This of course would involve a multilateral 'surrender of sovereignty' to an international regulatory body, yet the United Kingdom did not put forth any provisions for the composition or the decision-making rules of this body.\(^10\)

Australia, together with New Zealand put forward a radical proposal, which called for international ownership and operation of international transport. This was in effect the antithesis of the general freedom of international flight and was soundly rejected when considered by the first Committee of the Conference. The Australian and New Zealand delegation then rallied behind the Canadian proposal. Canada wanted an international authority to fix and allocate routes, frequencies, capacity and rates. The United States vehemently opposed the British position, and objected to the establishment of an international authority that would have any more than consultative or advisory economic powers. However many delegates opposed the United States proposition of unrestricted passage between nations and finally, much to the United States' vexation, this concept was defeated. So after weeks of


discuss the Conference failed to agree on any generally acceptable rule for economic control in international air transport.

The Conference concluded on 7 December 1944 with the signature of a 'Final Act' that was a formal and official record summarizing the work with five main documents emerging from the conference.

1. The first document, labelled 'Final Act' gave: ---
   i) A list of the delegates present,
   ii) A number of resolutions covering the work of the Conference together with matters that did not, or could not, be considered, or those on which agreement could not be reached but were such that should be considered by the delegate's Governments and the newly formed Provisional International Civil Aviation Organization in the future.
   iii) The inclusion of a 'standard form' agreement outlining the rules to be used in bilateral negotiations for air routes between nations, which was strongly recommended for use. This standard form has subsequently been widely used and has done much to bring a measure of consistency into the many bilateral agreements that have been negotiated between member nations.

2. A document setting out the agreement reached to establish initially a 'Provisional International Civil Aviation Organization', which at a time within the next three years would leave behind its provisional status and become the International Civil Aviation Organization, (ICAO).

3. In line with the above, the third document stated the Convention's intent to establish a permanent international aviation organization and it enunciated the principles in 'air navigation' and 'air transport', which the nations who ratified the treaty should follow. Furthermore it made it clear that this convention

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12 The 'provisional' status as an interim body was required pending the ratification of a permanent world civil aviation convention. Canada, (Montreal), was chosen as the seat for this provisional organization with the Executive Committee of the Conference taking into consideration the war which was still in progress in Europe and the Pacific, and the desire of the Conference to start its work as quickly as possible.
superseded previous aviation conventions such as the Paris Convention of 1919 and the Havana Convention of 1928.\textsuperscript{13}

4. 'The International Air Services Transit Agreement', also known as the 'Two Freedoms' document gave participating nations: ---
   a) The right of non-stop flights over another participating nations air space,\textsuperscript{14} and,
   b) The right of non-traffic stops. That is technical stops for refuelling, maintenance, repairs and such like.\textsuperscript{15}

5. 'The International Air Transport Agreement' has come to be known as the 'Five Freedoms' document. The first two freedoms ('a' and 'b'), are the same as in the Air Services Transit Agreement. The other three freedoms are: -
   c) The right to discharge passengers, mail and cargo taken on board in the home nation,
   d) The right to discharge passengers, mail and cargo to travel to the home nation.
   e) The right to pick up and discharge passengers, mail and cargo to or from any contracting nation.

It was stipulated that air carriers were required to follow reasonable direct routes, and as in the 'Two Freedoms' agreement they could be required to

\textsuperscript{13} The Havana conference of 1928 evolved from the Sixth International Conference of American States held in Havana in 1928. It closely followed the Paris Convention of 1919 in format, was led by the United States, and its 21 nation attendees were primarily from South America and the Caribbean region. No permanent commission was established at the time of its formation to carry out its provisions as had occurred with the Paris Convention. Provisions were included for the interchange of data on technical information between the contracting nations either directly or through the Pan-American Union. The convention guaranteed the right of innocent passage of aircraft and formulated the rules for international air navigation between the contracting states relating to aircraft identification, landing facilities, and standards for pilots. It also stated the right of each country to set the route to be flown over its territory.

\textsuperscript{14} That is the 'right of transit'.

\textsuperscript{15} Charles S Rhyne, 'Legal Rules for International Aviation', (1945) 31(2) Virginia Law Review, 267, 308. This document was considered a big forward step in the area of international air transport involving a large part of the world. It was stipulated that participating nations could designate the route to be flown over by air carriers of other nations, and could require an air carrier making technical stops to provide commercial airline services from those stops.
provide commercial airline service from technical stops. Cabotage rights were reserved to accepting nations. Also at the time of signing, nations were able to reserve the fifth freedom stating specifically that a foreign carrier could not pick up and discharge traffic in their country. It is the fifth freedom with its right to carry traffic between two foreign countries situated along the initiating country's route, that has produced the most controversy and trouble. This freedom proved to be of particular interest to countries with long-distance services because as an outbound aircraft deposited passengers or cargo at various stages along its route the payload for the airline progressively decreased unless other fifth freedom passengers or cargo could be picked up. However to do so it may impinge on the third or fourth freedom traffic of the local or regional air transport enterprises with whom the long-distance operator may be competing. Many countries came to consider competition from fifth freedom traffic as presenting an economic danger to their own air service. Nowadays specific problems are frequently solved by the negotiation of bilateral air agreements.

Apart from the agreed Five Freedoms of the Air, there have been four other 'freedoms' added since the Chicago Convention was signed. These offer very little variation on the original five. When the United States and British delegations submitted their separate proposals to the Convention the true 'hub' of the problem emerged. This was the difference in the concepts of these two nations as to how 'pick-up traffic' on long haul flights should be controlled. The fifth freedom was essentially the sticking point, ---- the right of an air carrier to take on and discharge passengers at intermediate points along a

16 Cabotage in this context referred to the right of each nation to reserve for itself its own national services traffic between points on its own territory.
17 Edward Weld, ICAO Assistant Secretary General for Air Transport, 'ICAO and the Major Problems of international Air Transport' (Speech delivered at the Italian Society for World Organization, Rome, 20 May 1953).
18 Ralph Azzi, 'Specific Problems Solved by the Negotiation of Bilateral Air Agreements (1967) 13 McGill Law Journal 303, 305.
19 6th Freedom: The right to carry passengers or cargo from a second country to a third country by stopping in one's own country.
7th Freedom: The right to carry passengers or cargo between two foreign countries without continuing service to one's own country.
8th Freedom: The right to carry passengers or cargo within a foreign country with continuing service to or from one's own country.
9th Freedom: the right to carry passengers or cargo within a foreign country without continuing service to or from one's own country.
route traversing a number of countries. Both nations were in agreement with the point that the Fifth Freedom right should be limited so that air carriers comprising the links of a through route could have a reasonable 'opportunity' to compete with an air carrier 'traversing' the whole route. What they could not agree upon was the formula to achieve the limitation.\footnote{International Civil Aviation Organization, Chicago Convention <http://www.icao.int/icao/en/Chicago_conf/intro.html>. Last visited June 2008.} Without an agreement on the formula to be used to satisfy all points of view and all situations it became necessary to revert to the Conference's original plan of arranging for world routes through bilateral negotiations between nations, rather than through an over-blanket grant of commercial transit privileges by each member nation to all the other member nations.

Thus in conclusion it was only the first two 'freedoms', those dealing with overflights and technical stops that were fully adopted by the Convention. The third, fourth and fifth freedoms became terms for separate negotiations between nations as they formulated their individual bilateral air transport agreements. They are now regarded as the basic 'working rules' for all such agreements.\footnote{Geoffrey Clive Baldock, 'Some Legal Aspects of an "Open Skies" Aviation Policy for Australia' (Doctor of Juridical Science Thesis, University of Western Australia, 2003) 16.}

It was agreed amongst the participating nations that the Convention would only come into force thirty days after its ratification by a 26th State.\footnote{The Chicago Convention entered into force on the 4th April 1947.}

2.2 The International Civil Aviation Organization (ICAO) --- A lasting legacy of the Chicago Convention.

From the aviation safety viewpoint the most important result that emerged from the 1944 Chicago Convention was the establishment of the International Civil Aviation Organization. The conference set the scene for the establishment of a worldwide common basis for the technical and operational aspects of international civil aviation and was a striking achievement. It established the foundation for what is now a vast network of interlinked
functions and responsibilities, all having the same object --- that of safety in the air.

Because of the inevitable delays that were anticipated would take place in waiting for the ratification of the Convention by the 26th State the Conference signed an 'Interim Agreement', which foresaw the creation of a Provisional International Organization. This was to be of a technical and advisory nature with the purpose of collaboration in the field of international civil aviation (PICAO). The provisional organization was in operation from August 1945 until April 1947 when the permanent ICAO came into being.23

ICAO thus became in effect, the regulatory authority that established the Standards and Recommended Practices (SARPS) for the aviation world. It was not at the beginning, nor is now, an enforcement authority. This fact over the years since its establishment has been a matter of some concern to the aviation industry. Contracting States are required to notify ICAO whenever their national aviation regulations differ from the ICAO standards, however it does not have the authority to insist on compliance.24

The reality is that each participating nation takes on the responsibility of drafting and implementing its own regulations. In doing so it incorporates the standards and recommended practices as set down by ICAO that it wishes to include. What actually evolved was a hybrid pattern of interaction. Government negotiations revolved around traffic rights and route structures with the gradual acceptance of the 'freedoms of the air' easing the pre-1939 conflict element seen in earlier bilateral agreements.25 It became the job of the airlines to work out their fare structure along international routes. This they did within the framework of the International Aviation Transport Authority's (IATA's) traffic conferences.26

23 'International Civil Aviation Organization' <http://www.icao.int>. Last visited June 2008
24 See chapter four of this thesis for an explanation of ICAO's current oversight protocol.
26 IATA is an association of international airlines founded in Havana in 1945.
ICAO actively promoted multilateral cooperation amongst governments in the technical field to standardize air navigation practices and together with IATA it established a forum for extensive airline cooperation. Interestingly, both organizations experienced relatively little 'negative spill over' of political controversies in the first two post war decades.27

ICAO's organizational structure is vast. Part II of the Chicago Convention details its objectives and structure. It also outlines the functions and roles of each component of the Organization.

It consists of: ---

i) The Assembly, which has since its inaugural meeting on 6 May 1947, seen almost universal acceptance of international civil aviation technical standards. Its composition is made up of representatives of all contracting States who are party to the Chicago Convention and meets every three years to review the work of the organization and set policy for the coming year. It also votes a triennial budget. Funding to run the organization comes from its member States in proportions as are voted by the Assembly.28

ii) The Council is the governing body of ICAO and is elected by the Assembly for a three-year term. Currently it is composed of 36 States who are chosen under three headings.

a) States of chief importance in air transport

b) States which make the largest contribution to the provision of facilities for air navigation, and

c) States whose designation will ensure that all major areas of the world are represented.

As its governing body the Council gives continuing direction to the work of ICAO. It is here that Standards and Recommended Practices are adopted and incorporated as Annexes to the Convention on International Civil Aviation.29

Its functions are set out in Articles 54 and 55 of the Convention.

29 International Civil Aviation Organization <http://www.icao.int>
iii) The Air Navigation Commission consists of a panel of 15 technical experts who are nominated by the States but who serve however, in their independent capacities. These participants develop and propose the Standards and Recommended Practices for consideration by the council.\textsuperscript{30}

iii) The Secretariat is headed by a Secretary General and undertakes the general administration work of the organization. It is divided into five main divisions with professional personnel being recruited across a wide geographical range.
   a) Air Navigation Bureau
   b) Air Transport Bureau
   c) Technical Co-operation Bureau
   d) Legal Bureau
   e) Administration and Services Bureau.\textsuperscript{31}

2.3 The Role of ICAO and its Historical Evolution as Aviation's International Regulatory Body.

Throughout the last decades of the twentieth century and well into the first decade of the twenty-first century the United States has remained the dominant power in civil aviation and as such wielded enormous influence on its regulatory development. It follows that it is the policies of the United States government, and the modus operandi of its Federal Aviation Administration, (FAA), that have had a significant effect on international civil aviation and the workings of ICAO.

On the international aviation scene the current position of ICAO is an organization that is the foremost international aviation regulatory authority, yet it is one that is lacking its own adequate enforcement powers. The gap caused by the lack of such enforcement powers has resulted in the coming together of the aviation industry in an attempt to develop far reaching oversight programs to link in with ICAO's own safety criteria. The following

\textsuperscript{30} These are universally referred to, and understood in the aviation industry as 'SARPS'.

\textsuperscript{31} The modern day role of ICAO as it impacts on aviation safety, is discussed in detail in chapter four of this thesis.
sections explore the ramifications of the power of the United States in 'calling the shots', not just in the economic area of civil aviation, but in the oversight of 'safety' with which it is intimately involved.

One of the most prominent stated objectives of ICAO has always been that of safety. The Chicago Convention itself contains a regulatory scheme that aims to ensure a common international system.\(^{32}\) Although the Convention did not succeed in establishing a multi-lateral economic regulatory system, it did create a forum for the technical and operational unification of international civil aviation.\(^{33}\) In theory the provisions of the Convention created a global set of standards for safety related national legislation which should, again in theory, allow States to easily recognise each others level of implementation of these standards.\(^{34}\)

Two very important provisions are contained in Article 12 of the Convention. The first is that each member State undertakes to ensure that every aircraft flying over its territory, as well as all aircraft which carry its nationality mark, comply with that State's rules and regulations. The second is that each member State undertakes to keep its own regulations uniform with those established under the Convention.\(^{35}\)

Here we have the crux of one of the most important safety functions of ICAO. This is the adoption of international standards and recommended practices and procedures concerning the safety, regularity, and efficiency of air navigation. Universally known in the industry as SARPS the Standards and Recommended practices are contained in 18 annexes to the Chicago Convention.\(^{36}\) These Standards and Recommended practices comprise all

\(^{32}\) Convention on Civil Aviation, 7 December 1944, 15 UNTS 295, ICAO document 7300/6. An original objective was stated to be to: 'Promote safety of flight in international air navigation'.


\(^{34}\) The national regulatory systems of all member States are interconnected by the provisions contained in Articles 12, 29-35, 37 and 38 of the Chicago Convention.

\(^{35}\) Ibid, Article 12.

\(^{36}\) Article 37 of the Chicago Convention states that:
   Each contracting State undertakes to collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedures and organization in relation to aircraft,
operational and technical aspects of aviation and form the basis for the continuing safe development of international civil aviation. In the process of developing SARPS, the member States are widely consulted with and given every opportunity to express their views at the various stages of development.\textsuperscript{37}

Article 38 of the Convention requires 'any State which finds it impracticable to comply in all respect' with any international standard to immediately notify ICAO of the differences between its own regulations or practices and those established by the ICAO standard. ICAO is then required to immediately notify all other States of the differences, which exist between the international standard and corresponding standard of the State, which is unable to comply. In practice this 'escape clause' implies that in many instances some member States may lawfully elect to not be bound by the required standards. The 'flexibility' inherent in this aspect of the quasi-legislative function of the Annexes comes in for criticism from time to time. If it is to function properly there must be a 'critical' limit as to the number of States that opt to depart from a recommended standard beyond which the effectiveness of the standard could be seen to quickly decrease.\textsuperscript{38}

The problem of an insufficient level of compliance with, or the failure to notify any differences from international standards by member States, and the

\begin{itemize}
  \item Communications systems and air navigation aids, including ground marking;
  \item Characteristics of airports and landing areas;
  \item Rules of the air and air traffic control practices;
  \item Licensing of operating and mechanical personnel;
  \item Airworthiness of aircraft;
  \item Registration and identification of aircraft;
  \item Collection and exchange of meteorological information;
  \item Log books;
  \item Aeronautical maps and charts;
  \item Customs and immigration procedures;
  \item Aircraft in distress and investigation of accidents;
\end{itemize}

and such other matters concerned with the safety, regularity, and efficiency of air navigation as may from time to time appear appropriate.


lack of enforcement authority has been of concern to ICAO for quite some
time.\textsuperscript{39} One of the main objectives of ICAO is to ensure that all member States
will adopt and follow at least the minimum degree of accepted norms. For
many years, relying heavily on voluntary application of SARPs by member
States, ICAO had no way of monitoring their actions. Similarly, with its main
power of enforcement being by moral persuasion, it had no mechanism for
imposing penalties on non-conformers even when they were identified.\textsuperscript{40}

In an effort to try to overcome these problems ICAO, driven to some extent by
the actions of the United States which are described below, moved to improve
its safety oversight by initiating an audit program. In 1995 ICAO members
agreed to a voluntary Safety Oversight Assessment Program that (from 1996),
would conduct independent safety audits of aircraft and airworthiness. The
system was limited in its scope, being of a confidential nature and voluntary.
By 1998, of the then full complement of some 183 states, 85 had requested
safety oversight assessments and 26 had indicated that they would not be
seeking such assessment.\textsuperscript{41} The program found widespread deficiencies in
those member States assessed in regard to their abilities to maintain ICAO
minimum standards.\textsuperscript{42} Each State as part of the assessment process was
required to produce an 'action plan' for which it could seek ICAO assistance,
for the rectification of identified deficiencies. The weak link was that an
action plan did not necessarily mean implementation; rather it simply
identified actions a member State 'intended' to take.

In 1999 ICAO took a further step by initiating a mandatory universal safety
oversight audit program (USOAP) that included a systematic reporting and
monitoring mechanism on the implementation of SARPs. It consists of
regular, mandatory systematic and harmonized safety audits, designed to
assess the level of ICAO standards and recommended practices, identify
safety concerns or deficiencies, and provide recommendations for their

\textsuperscript{39} Ibid 310.
\textsuperscript{40} Kenneth Button, Audrey Clarke, Ginta Palubinskas, Roger Stough and Marc Thibault,
Management 1, 3.
\textsuperscript{41} Ibid.
\textsuperscript{42} Ibid.
resolution. According to a statement by the then President of ICAO’s Council, Dr Assad Kotaite, at a conference of directors-general of civil aviation held in Montreal in March 2006 the findings of these audits would be made public by being placed on ICAO’s web site. Although in this same address Dr. Kotaite urged all directors-general to meet the deadline, namely 23 March 2008, for posting audit reports, this posting on the web site is done only if the States audited authorised such publication. This has now eventuated and can be seen as a great step forward in achieving some semblance of ‘transparency’ from that of the findings of the previous voluntary scheme where the findings remained ‘confidential’. As at 5 June 2008, 182 States, which form a total of 96 per cent of ICAO’s member States had agreed to have results of the audit listed on ICAO’s web site. The current President of the ICAO Council noted that ‘the fact that most States have authorized ICAO to go public means that they recognise the critical safety benefit of transparency’.

However it should be noted that ICAO still has no real ability, other than moral persuasion, to enforce compliance with the standards, and any audit conducted by ICAO can only be conducted with the agreement of the relevant State.

As we shall see described below, ICAO’s ‘Achilles heel’ in this regard has unintentionally served as a catalyst for the international aviation industry to come together. The industry has devised safety oversight and comprehensive auditing processes. In this manner the industry works with ICAO to maintain and raise safety standards in the continually expanding aviation world of the twenty-first century.

2.4 The Dominant Role of the United States

The whole matter of the lack of enforcement procedures by ICAO has been of considerable concern to many in the aviation industry over a long period of time, but perhaps none more so than to the United States, who claimed to have suffered several incidents and accidents on its territory supposedly caused by foreign owned aircraft in the 1980s.

In 1991 the United States Federal Aviation Administration (FAA) made the decision to start assessing foreign countries to determine whether the countries met the international standards established by ICAO. The policy was formally announced on 24 August 1992 and described just how the FAA would assess whether a foreign civil aviation authority complied with the minimum ICAO standards for aviation safety oversight.49 These assessments were undertaken in compliance with the Chicago Convention which itself allows member States to conduct routine inspections of foreign carriers in relation to aircraft markings, airworthiness, registration certificates, and crewmember certificates.50 Ostensibly the program did not look at whether a foreign airline was deemed to be safe or not, but rather it looked at whether the county where the airline was registered had a civil aviation authority in place and the extent to which that authority regulated its carriers in maintaining operational and safety procedures. The benchmarks for the assessment were basically the Standards and Recommended Practices (SARPS) for aircraft operations and

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\[\text{\footnotesize After a series of accidents and incidents in the United States involving foreign commercial aircraft, the Congress and the Department of Transportation, led by the FAA, began to question the assumption that oversight of foreign carriers was adequately addressed by the home government since a country must pledge to adhere to ICAO's international safety standards. In 1991, we started sending evaluation teams to various countries to work co-operatively to assess their civil aviation oversight capabilities. The FAA found that, in many cases, countries were simply not meeting their international obligations under the ICAO agreements.}
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\[\text{\footnotesize 49 Federal Aviation Administration, International Aviation Safety Assessments (IASA) Program <http://www.faa.gov/safety/programs_initiatives/oversight> (Last visited 10 June 2008).}
\]
\]
maintenance established by ICAO.\textsuperscript{51} The focus of the investigation was to be sure of an individual countries' ability to adequately adhere to these ICAO standards to 'ensure that all foreign carriers that operate to or from the United States are properly licensed and with safety oversight provided by a competent Civil Aviation Authority in accordance with ICAO standards'.\textsuperscript{52}

In practical terms this really meant that the United States had taken upon itself to assess foreign airlines. It believed that without an adequate regulatory body it was unlikely that a specific carrier would be 'totally safe' if its flag country did not pursue satisfactory oversight.\textsuperscript{53}

At the start of the program the United States created three categories of rating to which a country may belong. These were 'acceptable', 'conditional' and 'unacceptable'.\textsuperscript{54} Also in the first two years of operation the FAA did not disclose the results of its audits to the public. It reasoned that the success of the program required a great deal of cooperation and negotiation between the civil aviation authorities of the foreign countries and the FAA and releasing results, particularly unfavourable results, may lessen future cooperation and thus prove counter productive. Eventually however the FAA bowed to public opinion and in September 1994 reversed a three year policy of silence and released the list of nations whose flag carriers were prohibited from flying to

\textsuperscript{51} Federal Aviation Administration, International Aviation Safety Assessments (IASA) Program <http://www.faa.gov/safety/programs_iniatives/oversight> (Last visited 10 June 2008).

\textsuperscript{52} Ibid.


\textsuperscript{54} Federal Aviation Administration, International Aviation Safety Assessments (IASA) Program <http://www.faa.gov/safety/programs_iniatives/oversight> (Last visited 10 June 2008).

Category I was deemed to be 'acceptable' and in compliance with minimum international standards for aviation safety:

Category II and III applied to countries whose CAAs were found not to be providing safety oversight in compliance with the minimum international standards established by ICAO. The FAA normally placed a country in Category II if one of its carriers provided air service to the United States at the time of the FAA assessment. The FAA placed a country in Category III if none of its carriers provided air service to the United States at the time of the FAA assessment. Carriers from Category II countries were permitted to maintain, but not expand, current levels of service under heightened FAA surveillance. Carriers from Category III countries were not permitted to commence service to the United States.
the United States because of inadequate safety oversight by their regulatory authority.  

These steps were not without their critics, even within the United States. The critics felt in particular that the position of ICAO as the international aviation safety regulator was being usurped by the actions of the United States Department of Transport and the FAA. In an opposing argument one such critic pointed to what he considered as the 'less than perfect' altruistic objectives on the part of the United States authorities in undertaking to act as international 'policeman' to the international aviation community. The arguments against the stance of the United States, which are essentially outside the scope of this thesis, levelled serious allegations backed up with some impressive evidentiary facts, as to the flaws in the stated reasons why the United States undertook the 'policeman' role in the first place, and why it did not instead throw its efforts behind supporting ICAO.

Critics aside, the United States ventured on, continuing with the program. In May 2002 the FAA changed the number of rating categories it used from three to two, in an effort to avoid the confusion that had apparently arisen from having two different categories regarding non-compliance with ICAO standards. The FAA felt that the wrong impression had been created in the minds of some in the aviation industry, as well as the travelling public, that a Category II rating reflected a higher degree of compliance with ICAO standards than a Category III rating. Category III was deleted completely and Category II redrafted to basically incorporate the level of standard of the previous Categories II and III in the one category.

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57 Ibid 322-331.
59 Ibid. Category II now read that:

The Federal Aviation Administration assessed this country's aviation authority and determined that it does not provide safety oversight of its air carrier operators in accordance with the
Under the revised rating system countries in the former Category I were initially, automatically placed in Category I, whilst countries under the former categories II and III were all placed in the new Category II rating. Those countries, which were formerly in Category III, had a double asterisk placed beside their names.\(^6\)

The FAA reviews the category determinations of all countries included in its International Aviation Safety Assessment categorization scheme at least once every two years, or when it receives new information about a country that may question that country's ability to continue to comply with ICAO's minimum safety standards. It claims that it will continue to work with countries to improve safety oversight capabilities in cases where the assessment process has revealed deficiencies.\(^6\) As at June 2008, the United States had assessed the civil aviation authorities' of 100 countries. This total number includes groups of countries such as the 'Organization of Eastern Caribbean States' as one entity because the group of small countries involved share the same civil aviation authority. Australia currently enjoys Category I status.\(^6\)

\(^{60}\) Ibid.
\(^{61}\) Ibid.
\(^{62}\) <http://www.faaa.gov/avr/isa.htm> (Last visited June 2008). The Organization of Eastern Caribbean States who come under the one Eastern Caribbean Civil Aviation Authority, are minimum safety oversight standards established by the International Civil Aviation Organization (ICAO). This rating is applied if one or more of the following deficiencies are identified:

1. The country lacks laws or regulations necessary to support the certification and oversight of air carriers in accordance with minimum international standards;
2. the CAA lacks the technical expertise, resources, and organization to license or oversee air carrier operations;
3. the CAA does not have adequately trained and qualified personnel;
4. the CAA does not provide adequate inspector guidance to ensure enforcement of and compliance with minimum international standards, and
5. the CAA has insufficient documentation and records of certification and inadequate continuing oversight and surveillance of air carrier operations. This category consists of two groups of countries.

One group are countries that have air carriers with existing operations to the United States at the time of assessment. While in Category II status, carriers from these countries will be permitted to continue operations at current levels under heightened FAA surveillance. Expansion or changes in services to the United States by such carriers are not permitted while in Category II, although new services will be permitted if operated using aircraft wet-leased from a duly authorized and properly supervised United States carrier or a foreign air carrier from a Category I country that is authorized to serve the States using its own aircraft.

The second group are countries that do not have air carriers with existing operations to the United States at the time of their assessment. Carriers from these countries will not be permitted to commence service to the United States while in Category II status, although they may conduct services if operated using aircraft wet-leased from a duly authorized and properly supervised U.S. carrier or a foreign air carrier from a Category I country that is authorized to serve the United States with its own aircraft.
2.5 The Development of Safety Audits and the Role of the International Air Transport Association.

The foremost global airline industry group is the International Air Transport Association, (IATA). Founded in its current form in 1945 by airline operators it represents the world's scheduled international airlines. IATA's stated broad aim is to promote safe, regular and economic air transport. Any airline that has been licensed to provide scheduled air services by a government who is an ICAO member is eligible to join IATA.63

This organization is now a very large and very influential player in worldwide aviation safety oversight. It is referred to in this thesis because of the highly successful way it has, in a relatively short space of time, managed to revolutionize the standardization of the use and 'necessity' of safety audits for the airlines.64 Although classed as an international industry group its influence is such that its dealings in relation to 'safety' have a far-reaching effect over aviation in general.

With the growth of code sharing that evolved amongst international airlines in the 1990s, came a concern that safety standards were not as uniformly compliant with ICAO standards as the industry would expect.65 As code sharing increased into the twenty-first century so did the proliferation of airline safety audits by the civil aviation authorities of different countries.66

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65 ‘Code sharing’ in international aviation is a marketing arrangement used by airline operators fundamentally to assist their market presence and competitive ability in the market place. It operates when an airline places its designator code on a flight operated by another airline and sells and issues tickets for that flight. One of the main benefits for the host airline is that it provides an additional stream of income.
Commencing in 2001 the International Air Transport Association collaborated with a wide range of aviation groups, regulatory authorities, safety management organizations and those with specialist auditing skills. What evolved was the 'IATA Advisory Group' (IAG), leading directly to the establishment of a comprehensive auditing system. Known as the IATA Operational Safety Audit program (IOSA), it is essentially the main internationally recognised and accepted evaluation system that is designed to assess the operational management and control system of an airline.

In a very short space of time IOSA has become a common safety audit benchmark for international airlines worldwide. It is not, nor ever was, intended as a substitute for state regulatory oversight. However the IOSA audit reports provide very valuable data to assist ICAO member states in risk assessment, and organising their own inspections.

Before leaving the 'international scene' as it currently presents, some mention should be made of a different form of safety audit that aims very much at being pro-active and on going. This is LOSA, Line Operations Safety Audit. It is a form of auditing developed in 1990 by the University of Texas with the support of the United States FAA. The aim of LOSA is to decrease human error and improve operational quality, which it does through analysis of flight crew duties and the effects of fatigue. A prime objective of the process is to discover trends in handling human errors and factors that trigger human errors within individual airlines by analysing and evaluating results of the monitoring. The airline can then implement any necessary corrective action.

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IOSA is the acronym for 'IATAs Operational Safety Audit'. This article gives a very detailed account of the process of the formation of the audit process, as well as an excellent description of the difference between IATA's audit system and that undertaken by the International Civil Aviation Organization's Universal Safety Oversight Audit Programme (USOAP).
68 Ibid.
69 The International Air Transport Association, <http://www.iata.org>. This web site contains a detailed description of IATA and the IOSA audit process. It also has a 'Registry', which lists all airlines that have undergone an IOSA audit by an IATA approved audit organization and have successfully satisfied the audit. The 'registry' is updated on a continuous basis on the web site.
70 Ibid.
based on the results of the analysis.\textsuperscript{71} On going monitoring and re-evaluation can then verify the effects of any corrective action taken. At present this is an entirely voluntary safety program and its results are at the discretion of the airline who is being audited as to whether that airline wishes to share the result with its regulatory authority or not.

\textbf{2.6 Australia's Civil Aviation Situation - Post World War II}

On the domestic front this section outlines the drastic change in the regulatory sphere that the end of the two-airline policy brought and the effect of deregulation on the aviation industry. It describes the turbulent times of deregulation in the early 1990s when Australia's own aviation regulator seemed to 'get it so wrong'.\textsuperscript{72}

At the end of the war Australia was well placed to take advantage of the rapid increase in aviation technology and in the numbers of trained and experienced air and ground crew available after hostilities ceased. The aviation industry had been transformed by the war, with the Royal Australian Air Force having trained thousands of men in skilled trades now able to provide a large pool of skills for the industry. One contemporary writer described the progress as 'miraculous'.\textsuperscript{73} In 1939 - 1940, paying passengers carried were a mere 106,135. In just five years this figure had trebled to 320,377.\textsuperscript{74}

Another advantage was that large numbers of Australians had during the war found that through necessity, they had become accustomed to air travel where it was viewed, not a curiosity, but as a legitimate and acceptable form of transport. The aeroplane was now seen as a transport vehicle in the same class

\textsuperscript{71} United States Federal Aviation Administration Advisory Circular No 120-90, (27 April 2006) 1:
A LOSA is a formal process that requires expert and highly trained observers to ride the jump seat during regular scheduled flights to collect safety related data on environmental conditions, operational complexity, and flight crew performance. Confidential data collection and non-jeopardy assurance for pilots are fundamental to the process.

\textsuperscript{72} Report from the House of Representatives Standing Committee on Transport, Communications and Infrastructure, Parliament of the Commonwealth of Australia, Plane Safe, Inquiry into Aviation Safety: the Commuter and General Aviation Sectors (1995) xi. The report reveals a regulator at war with itself and under constant attack from vested interests within the general aviation and commuter industry’.

\textsuperscript{73} Stanley Brogden, The History of Australian Aviation, (1960) 147.

\textsuperscript{74} Ibid 146.
as road transport or shipping, not merely a device for breaking records or the travel right solely of the elite in society.

A rapid growth in staff numbers had occurred in the Department of Civil Aviation. Just prior to the War in May 1939 the new department started off with a staff of 251, of whom 107 were in the central administration and 144 were at 'aerodromes, flying boat bases, aero radio stations and on field duties'. Only 104 of these were actual permanent employees. By the end of June 1946 the total number of staff was 1305, of which 372 were in the Central Office in Melbourne.

The Labor government of the immediate post war era followed a policy of strict control over the rapidly expanding aviation industry. It witnessed the swift opportunistic operations of several small airlines in buying up cheap aircraft from the Services and 'Disposal Stores', which could, for minimal cost be converted to carry passengers. The Department of Civil Aviation laid down very strict operating and certification standards in relation to just what type of aircraft could be registered for use for the commercial transport of passengers. Furthermore any would-be aviation operator who arose in the late 1940's had to have at least a realistic financial backing.

The regulatory regime grew in concert with the increase in aviation activity. The government was definitely 'on side' in this respect. It believed that there were 'significant public good' elements arising from aviation services to justify committing large and ever increasing amounts of money to the Department of Civil Aviation.

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75 The Department of Civil Aviation had been formed after the 'Kyemma disaster' of October 1938, and had been in existence less than 12 months when Australia found herself at war in September 1939. The Department of Civil Aviation was to remain in existence for the next 50 years.
77 Ibid 149.
The government was politically committed to introduce legislation to nationalise the airline system.\textsuperscript{79} The government also believed that aid was necessary to develop a viable aviation industry, which would form part of a modern transport system and assist in the revitalization of the Australian economy as a whole.\textsuperscript{80} It was perceived that the public demanded high levels of safety with the result that expenditure by the Department of Civil Aviation on anything regarded as affecting operational safety had the political advantage of hardly ever being questioned by Ministers of the government or opposition members.

2.7 Australia's Two-Airline Policy, its political background and the style of regulation with which it was accompanied.

Aviation and government have always seemed to encompass a strangely symbiotic relationship in Australia. None more so that the post World War II period between 1952 and 1987. For neigh on forty years the various governments of the day unashamedly, in a decidedly paternalistic manner, manipulated the Constitution to limit access to Australia's domestic interstate aviation industry exclusively to only two domestic airlines.\textsuperscript{81}

\textsuperscript{79} The defeat of the 1937 referendum followed by the advances in aviation spurred on by the Second World War assisted in setting the tone for the development of Australia's civil aviation industry. The important milestones of the two-airline policy commencing in the 1950s, and the government's earlier attempt to nationalize the industry, leading to the High Court challenge of 1945, are discussed below.
\textsuperscript{80} J E Schofield, J D Walker, P McCulloch, Aviation Retrospect: From Civil Aviation Branch to Department of Aviation 1985 Commonwealth of Australia Government Printer, 9.
\textsuperscript{81} Information on this policy has been gleaned primarily from two writers who were contemporary with the time the policy was in force, and wrote their accounts of the policy whilst it was in operation. A third important source utilized in gaining an overall picture is contained in an article published in the Journal of Air Law and Space, by Trevor Pyman. The latter was a former diplomat, who at a critical time in the development of the two airline policy, was transferred to take charge of the International Division of the Civil Aviation Department in the late 1950s and into the 1960s.

i) Stanley Brogden, Australia's Two-Airline Policy (1968).


Both the above writers paint quite a glowing picture of the policy, coming down heavily on its advantages for Australia's aviation industry at this particular time in history.

iii) Trevor A Pyman, 'Reflections on the Rationale, Legality and Continuity of Australia's "Two Airline" Interstate Domestic Air Services' (1995) 20(3) Air and Space Law 146, 146. Pyman analyses the background motivation to the policy and some of its general features, emphasising in particular the legal factors which gave it such a unique character.
Euphemistically referred to as the 'regulated competition' between two airlines, the policy operated within a strong government controlled tight framework of regulation.\textsuperscript{82}

The Labor government in power at the end of the war was keen to nationalize the domestic airline operations.\textsuperscript{83} In pursuance of this aim it passed the Australian National Airlines Act 1945 which established the Australian National Airlines Commission as a statutory corporation to conduct the proposed airline operation. This it considered preferable to having the airline it wanted to establish operate as part of the Federal departmental structure.\textsuperscript{84} Trans Australian Airlines, (TAA), came into being as the government owned airline and as such, prevented a certain amount of 'multi-airline' competition which most likely would have occurred without some government intervention.\textsuperscript{85} TAA's regular service as an airline began in 1946. It soon established itself as a worthy competitor for the main private airline --- Australian National Airways Pty Ltd, (ANA). A price cutting war, led by a smaller operator, Ansett Airways, erupted in the late 1940s. The private airlines were struggling against strong competition from the government owned TAA.

The Labor government lost power to the Conservative government of Robert Menzies in December 1949. In a speech to Parliament in November 1951 the new Prime Minister (Menzies), made the first statement of the airline policy that would be followed by his government.\textsuperscript{86}

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\textsuperscript{83} Harold W Poulton, Law, History and Politics of the Australian Two Airline System (1981) 70.

\textsuperscript{84} Ibid 70.

\textsuperscript{85} Stanley Brogden, Australia's Two-Airline Policy (1968) 90.

\textsuperscript{86} Ibid 91. Prime Minister Menzies said that his election platform of 1949 had promised to maintain and expand full and developing air services:

We are still only at the early stages of air transport. As for the government airlines, which were designed by the Chifley government to be monopolies (and failed to be so only because of a High Court decision), we shall put them on to a true competitive basis, with no preferences either in cheap capital or dollar expenditure. Though the future of their operative staffs is assured, because Australia needs them, in the form of their future management and control will be considered in the light of results and circumstance.
The new government's policy reflected the paternalistic attitudes of the time. It reasoned that the retention of a government owned airline was a good thing but not to the point where it could become a virtual monopoly.\textsuperscript{87} Competition could be engendered by the continued existence of a privately owned airline. The commercial reality at the time was that the privately owned airline ANA, was in a poor financial position and was being competitively out-performed by TAA.\textsuperscript{88} The government also considered the commercial reality that Australia's vast geographical areas with massive distances between cities of settled population and the country's comparatively small overall population could not realistically, in its opinion, support more than two major airlines.

So began an era of strict regulation, strongly government controlled, in a way to achieve the government's desired goals. It was decided that forms of regulation should be ‘instituted’ to give both the government owned airline and the private airline equal access to the market place, which both airlines needed to provide adequate service to the public at the same time as operating profitably. Two airlines could satisfy the interstate aviation needs of the Australian public and therefore two airlines it would be.\textsuperscript{89}

To achieve this outcome the government established what came to be known as the 'Airline Agreements'. The first of these was signed in 1952 between ANA and the government. TAA was not a party to this first agreement however it did become a party to all future agreements between the private airline and the government after1952, until the final agreement was signed in 1981. Short formal statutes were passed which ratified the agreements after signing.\textsuperscript{90}

\textsuperscript{87} Regardless of government policy the existence of a government monopoly had been ruled out by the High Court in 1946 when it held that the government was not legally entitled, under the Constitution to establish a monopoly trunk route using TAA to establish such. Australian National Airways Pty Ltd v The Commonwealth (1945) 71 CLR 29.


\textsuperscript{89} Ibid.

\textsuperscript{90} David Corbett, Politics and the Airlines (1965) 130. After the first agreement in 1952, others were signed and ratified by legislation in 1957, 1961, 1972 and 1981. Ratification took the form of short formal approval statutes passed by the Commonwealth government shortly after each agreement was signed.
The Airlines Agreements were 'open handed' in the sense that they did not give TAA (the government airline), any preferred advantage over ANA (the privately owned airline). Some analysts considered that the private airline had been given some advantages in the way of guaranteed government business for equal access to mail and government passengers. However the private airline in 1952 was in a poor financial position and needed some incentive help if it were to succeed. By 1957, the year Reginald Ansett took over ANA, it had managed to build up its operation under the Airline Agreement, however some small advantages it received in the 1952 Airline Agreement remained.

When ANA was taken over by Ansett the name changed to Ansett-ANA and became one of the divisions of Ansett Transport Industries, the latter eventually expanding into a large commercial operation.91

The duopoly the government created in 1952 referred to the two interstate operators. In practice its effects extended throughout Australia. The only State that managed to successfully maintain an intrastate airline was New South Wales with East-West Airlines, which had managed to resist all take-over, offers.92

In the Airlines Agreements which were between TAA, ANA, (later Ansett), and the government, the parties undertook that there would be no third airline. The two operators would buy and operate aircraft of a similar type at the same time and over mutually agreed routes with negotiated timetables at agreed cost for both passengers and freight. The Commonwealth government for its part guaranteed loans for the purchase of aircraft. It was the job of the Minister for Civil Aviation to set the annual profit target for TAA. He also controlled

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91 Stanley Brogden, 'Australia's Two-Airline Policy' (1968) 3. By the 1960s Ansett Transport Industries owned a large land transport division, including the Pioneer network of express and tourist bus services, several intrastate airline operations, hotels and motels throughout Australia, manufacturing enterprises and television interests.

92 Ibid 4.
volume in the sense that he decided each six months on the total ton-miles\(^93\) to be provided by the airlines for the next six months, at a certain load-factor over competitive and non-competitive routes. The theory behind this was that the airlines would be unable to provide over-capacity.

2.8 The Legal Basis of the Two-Airline Policy

The Airlines Case of 1945 was pivotal in setting the scene for the development of the policy \(^94\). It had settled the question that the providers of interstate airline services were indeed engaged in interstate trade and commerce which the government had the power to regulate, but in so doing it could not breach s 92 of the Constitution, which guarantees that trade and commerce amongst the States shall be absolutely free.

Furthermore although it ruled out the notion of a government owned monopoly it also gave the 'green light' to the Commonwealth being able to establish a body or corporation to take part in interstate trade and commerce and to create a statutory corporation for that purpose. \(^95\) The Airline Agreements signed by TAA and ANA and subsequently incorporated in small statutes provided the mechanism for the rules regarding air routes, timetables, fares and freight charges that would be followed by both airlines.

The Commonwealth had from the beginning of aviation activity born virtually the whole cost of developing the facilities for aviation. That is the expense of providing aerodromes and aviation facilities. Whilst having the responsibility for co-ordinating air services its actual legal control as determined by the Constitution, was theoretically limited to being 'in the interests of safety in air

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\(^93\) Ibid 5. Ton-mile was a standard measurement used by the airline industry at this time to express work performed. It referred to the number of miles flown by each ton of revenue earning load carried during any one year. It included both freight and passenger load. Load factor was the percentage of the total capacity of an aircraft, which was actually used, expressed in terms of a full year. For example an airline with a 65.6 per cent 'load factor' had used that amount of the aircraft capacity, which it had provided.

\(^94\) Australian National Airlines Pty Ltd v The Commonwealth (1945) 71 CLR 29.

\(^95\) Harold W Poulton, 'Law, History and Politics of the Australian Two Airline System' (1981) 44.
navigation'. However what occurred in practice under the Airline Agreements was substantially different. This could be achieved because of the existence of a considerable amount of co-ordination under the two-airline policy. Contractual arrangements between the Commonwealth and the two airlines and formal and informal consultation with state transport authorities supported the operational success of the policy.

From the beginning, the Airline Agreements Act 1952 provided the necessary machinery for 'rules concerning air routes, timetables, fares and freight rates'. If disagreement occurred there was provision in the Act for the parties to put their case to an independent Chairman who in turn could adjudicate on the matter in dispute. His powers were however limited to those matters, which the parties had agreed could be subjects for his consideration.

Pivotal to the success of the policy was the 'collusion' of the private airline to agree to be bound by the terms of the original and then successive Airline Agreements. On the face of it s 92 of the Constitution, which guarantees freedom of interstate trade, would seem to prohibit economic regulation of interstate aviation. However in turn for certain 'benefits' ANA (later Ansett), bound itself to the Agreements and in reality in so doing 'colluded' with the government to circumnavigate the constitutional intent of s 92. In essence this outcome was able to be achieved by the Commonwealth with the use of the unequivocal power it held to control the importation of aircraft. It was in the undoubted interests of TAA and ANA to agree to certain 'restraints' as a safeguard to defend their common interests against competitive challenges by outsiders.

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96 Ibid 50. Regulation 203 of the then regulations made pursuant to the Air Navigation Act provided:

In exercising any power or performing any function under this Division, the Director-General shall have regard to the need for co-ordinating, in the interests of safety in air navigation, all operations of the kinds referred to in regulation 191 of these regulations.

97 Ibid 51.

98 R v Anderson; Ex parte IPEC-Air Pty Ltd (1965) CLR 113, 177.

A fundamental feature of the Airlines Agreements was what came to be known as the ‘rationalization clauses’. To ensure that one of the main aims of the policy was achieved, --- that of preventing excess capacity on competitive routes, the industry had to be structured carefully so that each airline had roughly an equal share of the traffic. Capacity was determined by a string of complicated rationalization procedures involving consultation and mutual agreement amongst the two airlines and the government. The ‘rationalization clauses’ were most comprehensive. They took into account all relevant factors such as aircraft training requirements and the optimum revenue load factors that could realistically be achieved, and the expected rates of traffic increases. Furthermore each airline agreed to dispose of any aircraft that would enable it to provide capacity in excess of that which the Minister had determined. It also agreed not to purchase or lease aircraft without the Minister's approval. These rationalization clauses in the Airline Agreements in effect prevented TAA and Ansett-ANA from exercising the normal privileges of a licence holder, because each was restricted in relation to the number of services it was allowed to operate under its licence.100

As stated previously the High Court had acknowledged that some measure of control was permissible for regulating interstate trade and commerce provided it did not go as far as actually prohibiting or hindering the said trade and commerce.101 Thus it was acceptable to formulate a system of licensing interstate air operators designed to make sure that the operator could

101 Australian National Airways Pty Ltd v The Commonwealth (1945) 71 CLR 29. This was a challenge by TAA, Australian National Airways Pty Ltd and two other private operators to the validity of the Australian National Airways Act of 1945. The private airlines failed on their first argument, which was that the trade and commerce power did not allow the Commonwealth itself to establish an interstate air carrier. However they had success with their second argument where they claimed that sections 46 and 47 of the Act contravened section 92 of the Constitution. This was, so they asserted, because those two sections interfered with the freedom of private operators to undertake interstate air services. The Commonwealth for its part argued that air services were simply a facility which people used when engaged in interstate trade. If users were receiving an adequate service there could be no barrier to interstate trade. The court ruled sections 46 and 47 of the Act invalid. They said that the provision of an air transportation service was itself trade and commerce and these two sections effectively prevented private operators from providing interstate services. The court further held that sections 46 and 47 were severable from the other provisions, and so the Act remained a valid enactment establishing the statutory corporation, the Australian National Airlines Commission.
satisfactorily comply with the Air Navigation Regulations. The big question was to what extent could a regulation proceed without being viewed as a 'hindrance'. This was somewhat of a fine line to negotiate. It was not legally possible for the Commonwealth to refuse a licence to engage in interstate trade and commerce for purely economic policy reasons. (Such as limiting interstate air services to only two major airlines). Yet the issuing of such a licence could legitimately be dependent on matters connected with 'safety' which themselves overlapped with a range of technical and operational matters.

During the time when the legislated 'two airline policy' prevailed, the question of whether reasonable regulation aimed at assisting orderly and stable interstate air services would be consistent with s 92 as a law regulating access to interstate air transport, was never tested in the High Court.

The important 'power' that the government used to keep the two-airline policy firmly on the rails was the power dealing with overseas and interstate trade and commerce. This was tested in the High Court in 1965 when the freight company IPEC challenged a refusal of the Director-General of Civil Aviation to grant permission under the Customs (Prohibited Imports) Regulations, for IPEC to import freight aircraft to use in its airfreight operations. IPEC’s argument was that the effect of the refusal to grant the necessary approval for the importation of appropriate aircraft it sought was a violation of its legal right to engage in interstate trade. The High Court did indeed reaffirm that s 92 protected the freedom of IPEC to engage in interstate trade, however the Court also held that s 92 did not extend beyond protecting the activity of interstate trade and commerce itself. Thus it did not protect the steps that preceded the act of engaging in interstate trade and commerce. It followed that s 92 did not guarantee freedom to IPEC to acquire and import the aircraft it required to maintain the service. Furthermore the Court held that 'the Commonwealth could validly prohibit or restrict the importation of aircraft

102 Section 92 of the Constitution states that trade, commerce and intercourse amongst the states shall be absolutely free.
103 R v Anderson; Ex parte IPEC-Air Pty Ltd (1965) 113 CLR 179
under the overseas trade and commerce power.\textsuperscript{104} This highlights the 'lynchpin' control the government was able to use effectively to continue to implement its two-airline policy for nearly forty years. During this significant amount of time there were no successful challenges to the policy.

Throughout this time also there was a considerable amount of 'cooperation' from the State governments.\textsuperscript{105} Residual powers lying with the states under the Constitution allowed them to regulate intrastate air services. Basically however, the States evolved their own regulatory regimes mainly relating to the licensing of intrastate airlines.

The final Airlines Agreement Act of 1981 followed several Commonwealth government inquiries into the aviation industry in an era when the United States had recently embraced total deregulation of its domestic airline industry.\textsuperscript{106} The United States situation had a large impact on the manner in which Australians were coming to view their own aviation industry with its very tight regulated government control. The 1978 inquiry came out in favour of a continuation of the two-airline policy seeing it as 'a system most suited to Australia with continued control over import of aircraft to maintain the two-airline policy at this time'.\textsuperscript{107} However the inquiry did recommend some changes to allow for greater competition and these changes were reflected in the 1981 Airlines Agreement.

Critics of the two-airline policy were somewhat dissatisfied with the results of the 1978 inquiry and continued their assault on the continuation of the policy. A further shorter inquiry followed in 1981.\textsuperscript{108} This was rather heavily

\textsuperscript{104} Harold W Poulton, Law, History and Politics of the Australian Two Airline System (1981) 8.

\textsuperscript{105} For example in relying on the States to pass specific legislation to permit TAA to fly intrastate routes. In reality it was only Queensland and Tasmania that actually passed this legislation, at least until the two-airline policy was nearing the end of its life.


weighted towards a discussion of airfares and how a less rigid policy would be beneficial in 'freeing up' the market. The critics continued with their assault on the policy, but not to the extent that they were able to forestall the adoption, by the conservative government in power in 1981, of the final in the series of Airline Agreements.\(^{109}\) This agreement was to last until 1987 with a further three years until 1990 before the effect of the policy finally came to an end. Under the 1981 Airline Agreement the parties were entitled to three years notice of termination of the Agreement. The government in 1987 gave that notice.

A Labor government seized power from the conservatives in 1983. Initially it affirmed its 'attachment' to the principles of the stability provided by the two-airline policy that had been revised somewhat in the 1989 agreement. As the decade of the 1980s progressed the government seemingly influenced by aviation activities overseas appointed, in 1983, an 'Independent Review of Economic Regulation of Domestic Aviation', (The May Commission).\(^{110}\) This was to 'consider the total framework of economic regulation best suited to the national requirements'.\(^{111}\) The May Committee submitted its report to the government in 1987. It was an exhaustive report of considerable historical interest. However in the end it did not clearly enunciate why the two-airline policy had actually out-lived its usefulness. Rather it presented a series of five options for the government to consider ranging from keeping the status quo to total deregulation and all possibilities in-between. The Labor government in power at the time chose deregulation. Following on swiftly from the release of the 'May Report' the Minister for Transport and Communications (Senator Gareth Evans), made a statement on 7 October 1987 that the government would pull back from the previous economic regulation of domestic air transport and allow deregulation of the industry. Therefore the previous controls over the importation of aircraft were repealed, the detailed 'determination' of passenger capacity ceased, fares ceased to be controlled


with the abolition of the Air Fares Committee and the former 'constraints' on the entry of new domestic airlines to trunk routes removed.

The policy that followed was in stark contrast to that which had gone before. In a sense it reflected the global thinking of the Western world some 40 years on, one now very favourably disposed to the free flow of market forces with far less government regulatory involvement.112

Not all in the aviation industry were happy about the prospect of total deregulation. The media however greeted the new policy direction with great applause, 'proclaiming a new and beneficial era in civil aviation policy even before it had arrived and been tested'.113

On the other hand the pilots and other employees involved in the industry were not so joyful at the prospect. The 1989 decision to deregulate the aviation industry served to exacerbate friction between sections of the union movement and government. In July 1989 negotiations regarding pay, superannuation and conditions between the Australian Federation of Air Pilots and the management of Australian Airlines, (formerly TAA), which had been going on for some time came to a shuddering halt. The 'strike', which followed paralysed interstate air services for months and ended with the complete restructure of the industry.114 As with most large, (and this was one of Australia's largest), industrial disputes problems had been festering for a number of years before finally coming to a head in 1989. This had involved the Australian Federation of Air Pilots, together with other industry related groups in a series of 'disagreements' with the government over policy, various

112 The United States commenced a process of deregulation some 10 years earlier than Australia. In 1978 the Airline Deregulation Act was passed removing entry and price restriction on airlines, affecting in particular the airlines permitted to serve specific routes.

113 Ibid 156.

114 Although commonly referred to in the popular press as the 'Pilots' Strike', this is incorrect terminology. It was a 'dispute' where the pilots involved voluntarily 'resigned' from their positions at a certain point in the dispute, ostensibly to avoid threatened Court action by their employers.
structural changes viewed as affecting jobs in a negative fashion, and aviation safety.\textsuperscript{115}

As the bitter negotiations continued, stretching through the latter half of 1989, they eventually widened to bring in Ansett Airlines together with its two subsidiaries IPEC and East West Airlines, the Australian Council of Trade Unions, the Australian Industrial Relations Commission, the Victorian Supreme Court and the Hawke Labor Government. Pilots resigned 'en masse' to protect themselves from legal action by their employer. The government, determined not to be beaten, used all possible means at its disposal to ensure that the pilots' actions did not bring the air services in the country to a complete halt.\textsuperscript{116}

From the pilots' point of view the whole episode ended in disaster. Australian Airlines and Ansett offered new employment awards to the pilots who had resigned, which were based on individual contracts. Although the pay in these awards was not necessarily less, the employment hours required and the employment conditions were vastly different from that which the pilots had enjoyed under the former award. Some pilots broke ranks and returned to work signing individual contracts. Their fellow pilots regarded them as 'traitors to the cause' and the rancour and ill feeling that resulted split the pilot community down the middle. Some pilots left Australia for overseas jobs, some returned to Australian Airlines and Ansett under the less favourable employment conditions offered and others never worked in the industry again.

From the government's point of view many in the industry felt that it had successfully paved the way for the new era of 'deregulation' that it planned to

\textsuperscript{115} Anne Learmouth, 'Government Policy, Aviation Deregulation and the 1989 Pilots' Dispute' (Paper presented at the 19th Conference of the Association of Industrial Relations Academics of Australia and New Zealand (AIRAANZ) 2005) 106. The various other related unions represented transport workers, air traffic controllers, flight attendants and flight engineers. As far as a wages increase was concerned the pilots were seeking a 29.47 per cent increase, a figure that incensed the government and drew little support from the public at large.

\textsuperscript{116} At the height of the dispute the government utilized the services of the Royal Australian Air Force, chartered aircraft and employed overseas pilots.
commence in 1990. It had 'won' in the sense that it had completely demolished the pilots’ federation together with their collective bargaining power in all areas of their employment. On the eve of deregulation this led to the airlines being in a strong position to address their long-standing concerns about pilot productivity. The process of change, which followed the end of the two airline policy, its very strict regulation and the sudden entry of Australian aviation into a deregulated environment, was the start of somewhat turbulent times ahead for the industry. What occurred was a significant structural change in both the identity of the regulator and the way in which its operating income was funded. Turbulent times in an industry combined with party political intervention rapidly created the risk of both individuals and corporations missing the most important safety issues.

2.9 The Australian Domestic Scene Following Deregulation

The year 1988 was a landmark year for civil aviation in Australia. The regulatory authority that had served the industry well for the preceding 50 years was replaced with the passing of the Civil Aviation Act 1988. Under this Act the Civil Aviation Authority (CAA), was established as a Commonwealth Statutory Authority on 1 July 1988.

It had two main functions:
i) To conduct safety regulation of civil air operations in Australia, and
ii) To provide services to the aviation industry, such as air route and airways facilities, information services and consultancy and management services.

At the same time as the creation of the new Civil Aviation Authority a new statutory body to control airports, namely the Federal Airports Corporation

119 The Civil Aviation Act 1988 (Cth) became the primary source of regulatory legislation in Australia, replacing the former Air Navigation Act 1920.
120 It later became a Government Business Enterprise following the passage of the Civil Aviation Amendment Act 1990, on 20 June 1990.
(FAC) was established, coming into being on 1 January 1988. Both the CAA and the FAC were set up on the basis that they would attract full cost recovery from the industry and also pay a dividend. Cost recovery was very much to the fore with both new authorities. As far back as 1984 the Bosch report had predicted change when it had recommended ‘full cost recovery using transparent and effective forms of user charges … [that] would impose much needed commercial disciplines’. Bosch was also critical in his report of the political priorities of previous governments who had favoured money being put into visible structures such as airport construction before updating traffic control technology and air navigation equipment. Bosch had not held back in attacking the old Department of Aviation, claiming they had been most reluctant to be at all innovative. The commercial measures he had recommended were very much planned to reduce the government’s expenditure on aviation and were at the same time aimed at making the industry more efficient.

As far as the interstate carriers were concerned deregulation brought sudden changes. Within the space of only a few weeks of the final end date of the two-airline duopoly, a new interstate airline commenced operations. Not unexpectedly a price war immediately erupted amongst Ansett, Australian Airlines and the newcomer Compass Airlines. Airfares on the interstate route that Compass flew in competition with Ansett and Australian Airlines dropped to unprecedented levels. While this benefited the travelling public all three airlines sustained heavy losses, with only the two well-established airlines being in a position to sustain those losses and survive. Compass Airlines lasted exactly one year before it was forced to close its doors. A further

121 Federal Airports Corporation Act 1986 (Cth).
124 Ibid 73.
125 Ibid 74.
126 Compass Airlines was formally launched on 1 December 1990.
attempt at starting up the new airline with 'Compass II' undertaken a short time later met a similar fate in less than seven months.\textsuperscript{127}

On the accident investigation side, as had been previously announced by the government in October 1987, an investigative bureau charged solely with investigating incidents and accidents was recreated as a totally separate identity from the regulator. Known as the Bureau of Air Safety Investigation (BASI) it was now to be quite separate from the Civil Aviation Authority and was to remain within the Department of Transport and Communication with direct responsibility to the minister.\textsuperscript{128} The reasoning was that by placing it completely outside the authority of the Civil Aviation Authority both operationally and geographically, this would reduce the reluctance of some in the industry to report safety incidents to BASI.

Under the direction of its CEO, Dr. Rob Lee, BASI produced an impressive safety journal that was distributed freely throughout the industry giving regular 'human factor' articles and urging all in the industry to use its Confidential Aviation Incident Reporting (CAIR) facility.\textsuperscript{129}

\subsection*{2.10 The Effect of Deregulation on the Regulator}

The winds of change were blowing hard as Australia entered the 1990s. The tight regulation that had gone hand in hand with the government's two-airline policy for 40 years finally came to an end. The newly formed Civil Aviation Authority, following recommendations made in the Bosch report and

\textsuperscript{128} Department of Transport and Communications (1987) 'Domestic Aviation: a new direction for the 1990s', (Statement by the Minister Senator Gareth Evans QC, Canberra, 7 October 1987).
\textsuperscript{129} Dr. Rob Lee was a psychologist of some note at the time he was appointed to head BASI. The manner in which he led investigations and was pro-active in an educational sense saw the instigation of an innovative incident-reporting programme called Confidential Aviation Incident Reporting, or CAIR as it came to be known. He oversaw the production of the BASI journal, a most informative and well-written publication that did much to raise the awareness of the importance of 'human factors' in all aviation activities.
subsequent government policy, pursued cost recovery for regulatory services rendered and aimed at achieving economic efficiencies.\textsuperscript{130}

Quite radical reforms followed the appointment of the sometimes-controversial businessman Dick Smith, as Chairman of the Board of the Civil Aviation Authority in February 1990. His term as Chairman came to be described as the 'slash and burn' era in Australian aviation and it is he who has been rightly or wrongly accused of coining the term 'affordable safety'.\textsuperscript{131} Some in the aviation industry viewed his short term as Chairman as the 'dark ages' of aviation safety regulation in Australia.\textsuperscript{132} Smith repeatedly argued that while it was a given fact that air travel should be safe, it should also be affordable and this in practical terms, comes down to a trade off between the costs of aviation safety and the costs it 'imposes' on those who travel by air.\textsuperscript{133}

In a zealous quest for change, with a program of micro-economic reform and board restructure as a priority, Smith forged ahead. He was assisted in his goals by the appointment of Frank Baldwin as the Civil Aviation Authority's Chief Executive Officer.\textsuperscript{134} Baldwin was on the same 'wave length' as Smith. In his submission to the 'Plane Safe' Inquiry in 1995 he described his brief for the job as one 'to take the CAA - an inert, centralised, bureaucratic edifice - and turn it into an efficient customer-oriented business enterprise'.\textsuperscript{135} Smith wanted to see more people take advantage of air travel. To do so fares needed to come down. He argued that spending increasing amounts of money in an effort to make what was an already 'safe' system 'safer' was a self-defeating exercise. This would only push up airfares and force less people to use air

\textsuperscript{132} Ibid 20.
\textsuperscript{135} Ibid. Baldwin's submission to the Inquiry was not delivered personally but came as part of the submissions put forward by Dick Smith.
transport, with the end result that they would choose a less safe means of transport, - in particular an increasing use of cars.\textsuperscript{136}

Smith's stated aim was to improve the Civil Aviation Authority's efficiency and effectiveness. The Authority's Annual Report of 1990/1991 outlined his strategy to achieve this outcome, namely substantially reducing the size of the organization, cutting running costs and generally taking a more business style commercial approach to the Authority's day to day running.\textsuperscript{137}

As part of his policy aims Smith ordered a 'Review of Resources' to take place and be finalized by mid 1991. Achieved on target this set out how the CAA could achieve optimum performance with minimum cost.\textsuperscript{138} It described major changes in the organization with a considerable reduction in staff numbers over a planned five-year period. In fact the CAA planned to reduce its staff by a massive 50 percent by July 1996.\textsuperscript{139} Staff reductions went hand in hand with a significant reorganization in the structure of the CAA. It was in future to concentrate on its central activities of aviation safety regulation, air traffic control, navigation and fire fighting. In the Civil Aviation Authority's annual Report of 1990/1991 it was stated that the divisions managing 'core business activities' would become 'profit centres' and henceforth would be assessed against agreed performance and 'bottom line' financial targets.\textsuperscript{140}

Such unprecedented reforms and rapid change severely challenged the entrenched power structures and cultures within the CAA. Criticism of the change abounded, staff felt their jobs and thus livelihoods threatened and not surprisingly acted to protect their positions as best they could. Certain industry

\textsuperscript{136} Ibid, 117.
\textsuperscript{140} Ibid 114. Quoting from the Civil Aviation Authority Annual Report 1990/1991, 12.
groups such as the Licensed Aircraft Engineers Association banded together expressing their distress and concern at the introduction of revised aircraft maintenance regulations and suggested proposals to review aircraft maintenance engineers' licences. CAA staff enlisted the help of the media in claiming the drastic reforms taking place under Dick Smith's chairmanship and the way these reforms were being implemented by his CEO, Baldwin, threatened air safety.\textsuperscript{141}

Smith vigorously defended his reforms on all fronts. Nevertheless agitation by industry groups together with CAA staff and the media led to the minister Senator Robert Collins, establishing in March 1992 an 'aviation safety forum' specifically to address the concerns of the Licensed Aircraft Engineers Association. Its finding reaffirmed that the CAA's prime responsibility was that of aviation safety, and furthermore recommended that its commercial functions should be separate from its regulatory functions.\textsuperscript{142}

Dick Smith ceased to be chairman of the CAA Board in February 1992. Frank Baldwin resigned as Chief Executive Officer exactly one year later.

2.11 Two Major Air Crash Investigations and Two Damning Inquiries

Two major air crashes, both involving small commuter type aircraft occurred in the first half of the 1990s. In historical terms just as the Kyeema disaster of 1938 marked a watershed in Australia's aviation regulatory history, so too did these two fatal air crashes.\textsuperscript{143} The investigations that followed, together with two extensive inquiries, are described in some detail below, as their findings are most important to the central theme of this thesis.

\textsuperscript{143} On the 11th June 1993 a Monarch Airline Piper Chieftain VH-NDU carrying two pilots and five passengers crashed at Young NSW. On the 2nd October 1994 a Seaview Airlines Rockwell Commander VH-SVQ crashed into the sea, en route to Lord Howe Island. All nine passengers together with the one pilot died.
The two accidents proved to be the catalyst that worked as a 'wake up' call to the government. Something was seriously wrong with their aviation regulator.

The Monarch air crash is simply the visible tip of a very large and potentially very destructive iceberg. The CAA has obviously fallen down on its prime responsibility to conduct safety regulation of civil air operations in Australia. It has no excuse. The CAA has been given the teeth. The problem is that it is not using them.  

2.11.1 Monarch Airlines

On the 11th June 1993 a small commuter aircraft travelling from Sydney and owned by Monarch Airlines, crashed on approach to Young airport in country New South Wales. As with most aviation accidents a chain of events preceded the sudden loss of seven lives. Reading the Coronial Inquest one can only be dismayed at the litany of errors and lack of oversight committed by the regulator, that ultimately led to this loss of life. The Coroner found that all on board had died from multiple injuries which they suffered when the aircraft in which they were travelling crashed at Young, 'because the plane was defective in that essential navigational equipment had been removed from the plane twelve days before'. The errors stretched back weeks before the tragic event and those relating to the lack of oversight by the regulator will be addressed in detail in chapter six of this thesis.

In this accident a Piper Navajo Chieftain aircraft, operated by Monarch Airlines, was on a regular public transport scheduled flight from Sydney to the country town of Young, in New South Wales. There were two pilots and five passengers on board. Weather conditions were poor with low cloud in the area and the anticipated arrival time was around 7.35 pm. Flying time was

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144 Parliament of Australia, Parliamentary Debates, Senate, 12 October 1994, 1552-1553 (Senator D Brownhill, New South Wales-Deputy Leader of the National Party of Australia). Quoting from a speech given by the former shadow Minister for Transport John Sharp in the House of Representatives in May 1994. The evidence gleaned during the subsequent inquiry proved this statement to be reasonably accurate in a number of examples provided to the Commission. [Commonwealth of Australia, Commission of Inquiry into the Relations Between the CAA and Seaview Air (1996) Vol 1 & 2, ('The Staunton Report')]

145 Coroners Court of New South Wales, Coronial Inquest into Deaths resulting from air crash of Monarch Airlines Aircraft at Young of 11 June, 1993, 2.

146 Ibid 2.
approximately one hour and being winter, darkness had already fallen by the time the aircraft departed Sydney. At 7.18 pm whilst attempting a non-precision approach to the runway at Young aerodrome the aircraft descended below the minimum safe altitude for the circling approach the pilot was attempting to make, and struck trees. A fire developed on impact and all seven occupants suffered fatal injuries. This form of accident in aviation circles is called 'Controlled Flight Into Terrain' (CFIT). The primary cause of such an occurrence is often attributed to 'pilot error'. However 'pilot error' in this case was not deemed to be the primary cause. In his findings the Coroner excluded pilot error and attributed 'skill fatigue' as being the primary cause of the accident. The Bureau of Air Safety Investigation, (BASI), defines 'skill fatigue' as:

The deterioration in performance caused by work that demands persistent concentration and a high degree of skill. It is an insidious phenomenon associated with failure of memory, judgement, integrating ability and presence of mind. Its effects may occur in conjunction with, and be accentuated by, other factors such as sleep loss.  

There were significant 'other factors' which set the scene for this accident, a number of which occurred well before the aircraft left the ground at Sydney's Kingsford-Smith airport. They included equipment deficiencies, inadequate operating procedures, inaccurate visual perceptions and the aforementioned 'skill fatigue'.

The approach the pilot made into Young that fateful evening was a non-precision instrument approach using a non-directional beacon as guidance as he followed a set pattern of descent. It was an approach the pilot had made into Young three times in the previous 90 days. He was not unfamiliar with either the aerodrome or the NDB approach he was making.

148 Ibid.
149 The term NDB in this context refers to the Non Directional Beacon navigation aid that the pilot was using on his approach to Young airport. This navigational instrument comprises a radio transmitter situated conveniently close to the runway. It consists of two pieces of equipment, - the ADF or automatic direction finder on the aircraft that detects the NDB signal
One of the most significant factors that came out of the investigations was the lack of an operating autopilot. The BASI report and the Coroner's Inquiry both voiced a long and unfortunate history of the autopilot's removal and the serious ramifications that followed this step, in which both the regulator and the operator of Monarch Airlines were shown in an exceedingly poor light.

The pilots coming into land would not necessarily be relying on the autopilot itself so much, but rather two vital instruments, the HSI and RMI that were rendered inoperative by the removal of some of the autopilot's associated parts. It was this action that provided the causal link to the final disaster. It was decided by the Coroner that the performance of the pilot in command was seriously diminished by reason of 'skill fatigue', which primarily arose from his having to perform three NDB approaches without the assistance of an operative HSI and RMI.

It was submitted during the Coroner's Inquiry that the fact that the autopilot was not working and that two important instruments were also inoperative was not enough on their own to cause the crash. There were other instruments that gave the pilot height and directional information. However in answer to this 'contention' from the opposite viewpoint, it was submitted that the lack of an

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150 To overcome the fact that the aircraft was operating without a functioning autopilot a copilot was required to be in the right hand seat for each commercial flight undertaken. The presence of a second instrument rated pilot in this situation met the minimum conditions specified by the regulator in the Civil Aviation Orders.

151 See Appendix 1. This describes the long and complicated history of the removal of the autopilot. Its removal as reiterated by the Coroner's report is reproduced in some detail because of the causal link between its removal and the ultimate crash of the aircraft. It is also referred to later in this thesis in discussions on the approach taken by the regulator to what are in reality gross breaches of the regulations. See also: Coroners Court of New South Wales, Coronial Inquest into Deaths resulting from air crash of Monarch Airlines Aircraft at Young of 11 June, 1993, 29-40.

152 The, Horizontal Situation Indicator, (HSI), is an instrument that is normally mounted below the artificial horizon in place of a conventional directional gyro. It combines both the Directional Gyro (DG), and the VHF Omni-directional Radio Range (VOR) display. It reduces the pilot's workload by lessening the numbers of elements required in the pilot's instrument scan.

The Radio Magnetic Indicator, (RMI), is an aircraft navigational instrument that, when coupled to a compass shows direction of, and bearing to, a selected navigation aid.
autopilot together with an inoperative HSI and RMI placed enormous physical demands on the pilot. As a result he suffered 'skill fatigue'.

'Skill fatigue' is distinguished from 'pilot error' in the sense that it is not a case of a momentary error of judgment or 'inadvertence' on the part of the pilot, but a condition that has a gradual onset whereby the pilots skills are gradually being degraded over a period of time. In this case with key navigational instruments not working and the autopilot inoperative, meaning the aircraft had been hand flown since take off in Sydney, the pilot's normal skills were progressively reduced by the overload of pressures on him, whereby he descended below the minimum height for a circling approach and literally flew the aircraft into the ground. The coroner found that 'but for the removal of the autopilot components the accident would not have happened'.

2.11.2 Seaview Airlines: On 2 October 1994 disaster struck the Australian aviation world again with the loss of a small Regular Public Transport (RPT), flight which plunged into the sea off the coast of New South Wales whilst en route to Lord Howe Island. On board were nine passengers and one pilot, all of whom were deemed to have lost their lives in the crash. A small amount of wreckage was recovered from the sea that suggested the aircraft had impacted at high speed.

The flight in an Aero Commander 690 aircraft, VH-SVQ, owned and operated by Seaview Air, was planned as a regular public transport flight on 2 October 1994 from Sydney to Lord Howe Island, with an intermediate landing at

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153 Coroners Court of New South Wales, Coronial Inquest into Deaths resulting from air crash of Monarch Airlines Aircraft at Young of 11 June, 1993, 20.
154 Department of Transport and Regional Development, Bureau of Air Safety Investigation, Rockwell Commander 690 VH-SVQ en route Williamtown to Lord Howe Island New South Wales, on 2 October 1994, Report No 9402804 (1996)
155 Although planned as a Regular Public Transport flight, the Seaview Inquiry found that in reality this was an unauthorized RPT flight and should have been designated as a 'charter flight'. See, Commonwealth of Australia, Commission of Inquiry into the Relations Between the CAA and Seaview Air (1996) Vol 1 ('The Staunton Report') 358.
Williamtown. The flight departed Sydney shortly after 11.00 am carrying baggage that had been off loaded from another company service which was to operate direct from Sydney to Lord Howe Island that same day.

The flight to Williamtown proceeded normally arriving at about 11.40 am. Evidence was given that after disembarking, the pilot was observed by other people in the Williamtown terminal building conversing with passengers before proceeding back to the aircraft. The pilot did not dally long at Williamtown. At 12.06 pm, he informed Sydney Flight Service that he was taxiing at Williamtown for Lord Howe Island. He said he intended to climb to an altitude of 21,000 feet. After becoming airborne he informed Sydney Flight Service that he was tracking 060 on climb to 23,000 feet, which had been the original cruising level he put on his flight plan. Furthermore his track as stated on his flight plan was 068. Although not significant in themselves these small errors are just two of a number of small errors the pilot made that day.\footnote{Ibid 3.}

The pilot reported passing 20,000 feet on climb to 21,000 feet, and shortly afterwards he asked Flight Service if another company aircraft (VH-IBF), being flown by Seaview's chief pilot, Clive McIver and operating out from Sydney direct to Lord Howe Island, had departed. He was advised that it had departed. As the aircraft was being tracked on radar it was possible to determine that the radar trace for VH-SVQ showed that the pilot discontinued his climb at 20,400 feet, some 23 minutes after departure. Only three seconds later at 12.31, the aircraft commenced a descent. The last recorded radar trace was at 19,800 feet, one minute after starting his descent from 20,400 feet. The pilot failed to make a scheduled 'position report' which should have been given at 12.32. At 12.35 he notified Flight Service that the aircraft had commenced a descent to 13,000 feet. At 12.38 the pilot asked Flight Service if the Seaview aircraft VH-IBF, was yet communicating with them on high frequency radio and was told that this aircraft was not expected to join the high frequency band for another 30 minutes. VH-SVQ's pilot then requested Flight Service to advise the pilot of VH-IBF to call him on the company
VHF frequency. At the same time as he gave this request he told Flight Service that he had just passed the reporting point he was scheduled to pass at 12.32 and said he would shortly give an estimate for his next reporting point. At 12.45 he relayed an estimate of 13.10 for the second reporting point, saying that the aircraft was maintaining an altitude of 16,000 feet. He gave no explanation for the amended altitude level and Flight Service did not ask for one. This was the last communication Flight Service had with the aircraft.

The chief pilot of Seaview Air, flying VH-IBF, gave evidence that he had contacted Paul Sheil, the pilot of VH-SVQ on the company frequency at about 12.40 and Sheil had reported to him that he was experiencing severe vibration which he thought was caused by airframe or propeller icing. Prior to this call the pilot of VH-SVQ had also contacted a second Seaview aircraft that was operating a flight from Coffs Harbour to Lord Howe Island. Both pilots who had been contacted reported hearing a radio transmission from the pilot of VH-SVQ stating that he had 'lost it'.

The conclusions of the BASI report stated that the exact factors that directly related to the loss of the aircraft could not be determined. However, evidence uncovered in the course of the investigation pointed to a long list of inadequacies in the operation of Seaview Air, its chief pilot and company administration, as well as an abysmal level of safety oversight provided by the CAA.

'The Commission of Inquiry into the Relations between the CAA and Seaview Air', looked at the significance of the conversations the pilot Paul Shiel had with the pilot of VH-IBF, (McIver). John Green, the managing director of Seaview Air was a passenger in the aircraft with McIver. The Commission’s
findings were disturbing. Ten minutes before the final transmission from VH-SVQ Clive McIver made contact with the pilot, Paul Sheil. From that contact a number of things became apparent: -

* It was clear that VH-SVQ had a problem with ice and that the problem had existed for some time.
* It was also clear that the manifestation of the problem was airframe vibration. The aircraft felt out of balance.
* The pilot had descended from 20,000 to 16,000 feet in an attempt to overcome the problem, but it had persisted.\(^\text{162}\)

Neither Clive McIver nor John Green seemed to recognise the grave difficulties Paul Sheil was experiencing, he required assistance from someone who had much more experience than he did with flight in icing conditions. However it seems that he was given almost no assistance from the two experienced pilots in VH-IBF to understand the problem he was facing, or to find a solution to it. In speaking about the last transmission from Paul Sheil to VH-IBF, John Green said: -

'Next thing I heard was Paul's voice saying, "I've lost it Clive, I've lost it." He sounded frightened.

John Green gave his reaction to those words:

"I was very concerned, but I didn't think there was grave and imminent danger …" \(^\text{163}\)

It is inconceivable, so Commissioner Staunton said, that two experienced pilots speaking with a less experienced pilot in some difficulty in icing conditions would not have appreciated the seriousness of that pilot's plight.\(^\text{164}\)

Both John Green and Clive McIver stated to the Commission that it was not until VH-SVQ had failed to arrive at Lord Howe Island, which was an hour after their last radio contact, did they both recognise the reality of the situation that the aircraft may have crashed into the sea.

Further compounding these actions Clive McIver did not advise Flight Service of the last conversation he had with Paul Sheil, nor do anything to initiate a

\(^{162}\) Ibid.
\(^{163}\) Ibid 33.
\(^{164}\) Ibid 34.
'Search and Rescue phase'. Commissioner Staunton was scathing in his view that this failure to report in the appropriate manner to Flight Service was both unacceptable and inexcusable. The Commission accepted the submissions made by the CAA on this issue, they were:

(a) Mr Green and Mr McIver knew the aircraft had been lost when they heard the last transmission from the pilot. Their evidence to the contrary was a deliberate falsehood.
(b) Messrs Green and McIver deliberately elected to delay raising the alarm for one hour and twenty minutes.
(c) Messrs Green and McIver elected not to divert their aircraft to search for VH-SVQ even though they could easily have done so.
(d) Messrs Green and McIver both lied to the Commission in trying to explain why they did not raise the alarm and why they did not divert.

These actions probably speak louder than any words about the standards of the manager and chief pilot of Seaview Air. Evidence of a slipshod company with virtually no safety culture abounded well before the loss of VH-SVQ. Sadly this situation had been well demonstrated to the regulator over a considerable period of time and the regulator failed badly in its regulatory duty. The burning question is why? Chapter six of this thesis explores this phenomenon in some depth whilst merging it with current theories of enforcement strategy.

2.11.3 Commission of Inquiry into the Relations between the CAA and Seaview Air.

The terms of reference of the inquiry set up to enquire into the Seaview Air disaster were specifically to look at the 'relationship' between the CAA and Seaview Air' and this included a detailed investigation of the manner in which Seaview Air was granted the status of Regular Public Transport, (RPT).

Briefly the Inquiry dealt with:
* the appropriateness of actions of officers of the CAA;
* their diligence and propriety in discharging their responsibilities relating to the safety of Seaview Air;

165 Commonwealth of Australia, Commission of Inquiry into the Relations Between the CAA and Seaview Air (1996) Vol 1 & 2, ('The Staunton Report').
* Seaview Air’s diligence and propriety in discharging its responsibilities relating to safety; and
* the effectiveness of the CAA’s management systems and internal communication.  

A broader issue emerged from this inquiry, one that forms the basis for this research. It is the process of regulatory enforcement in the aviation industry. The report highlighted the various pressures and influences that might have affected the CAA’s enforcement strategy. The inquiry found that despite the obligation belonging to the CAA to supervise adequate surveillance of Seaview Air it had, over a three year period done very little and discovered almost nothing, at a time when warning after warning should have alerted the CAA that serious safety issues were amiss with the company. Seaview Air emerged from the inquiry as a ‘slipshod and often wilfully non compliant organization in which breaches of regulations, and unacceptable practices, were commonplace’.  

The inquiry looked at three main issues and asked:

* Were there shortcomings in the operations of Seaview Air?
* If there were, to what extent were they known to the CAA or, if not known, to what extent ought they to have been known, through appropriate investigation?
* What did the CAA do to ensure that Seaview Air adhered to appropriate standards?  

Because the sample of cases presented to the Inquiry extended beyond Seaview Air, the Commission was in a position to observe the system in operation with officers who were unconnected with overseeing Seaview Air. Manuals that were in use within the CAA to provide guidance to officers as to how they should respond to a breach were examined by the Inquiry. The Commissioner concluded that reading these manuals one would have expected that officers of the CAA would ‘earnestly consider prosecution or suspension when a serious breach was uncovered’. He went on to say that if action were

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166 Ibid 1.
167 Ibid 2.
168 Ibid.
169 Ibid 3.
not taken by an officer of the CAA in such circumstances one would expect questions to be asked about either the diligence of the officer, or the relationship the officer may have with the operator.

The Commissioner went on to state that these 'commonsense assumptions' could not confidently be made as far as officers of the CAA were concerned. There was a very major gap between enforcement procedure as stated in the manuals and what in reality actually took place, or more importantly, often did not take place. It was clear to the Inquiry that there were examples of serious breaches that were never referred for prosecution. 170

The Inquiry was very seriously concerned about the CAA's approach to unsafe practices. It concluded that the CAA suffered from 'institutional timidity' in relation to acting in the legislated manner when transgressions occurred. In fact in its own submissions to the Inquiry the CAA accepted its transgressions in this respect and actually stated that:

To the extent that outside pressures (legal, political, industry and managerial) affected the ability or resolve of officers to take decisive and forceful action may be termed as "institutional timidity", then that expression is probably an accurate description of an environment which existed at that time in which officers may have been wary of making particular decisions. 171

In fact the CAA, (now CASA), 172 went on to affirm that:

CASA hopes that the Report of the Commission will give clear and unequivocal support for the view that regulatory staff are entitled to and should take strong action against contravention of safety regulations. 173

170 Ibid.
171 Ibid.
172 Note the Civil Aviation Authority (CAA) was disbanded in its combined safety regulatory role and service provider on 6 July 1995 and two separate entities, the Civil Aviation Safety Authority (CASA) and Air Services Australia (ASA), were formed in its place. The former is the safety regulator and the latter the service provider.
The Commission was particularly critical of the attitude and work ethics of the general manager of Seaview Air, John Green and the chief pilots Gregory Matthews and Clive McIver. Gregory Matthews was described as being ineffective in his duties as a chief pilot specifically because he was subservient to and dominated by, a wilful John Green. Clive McIver who followed on from Matthews as chief pilot was only marginally better. Both fell very short of the standard required of a chief pilot.

An important discussion that took place within the Commission revolved around the CAA officer Bob Hoy, who was somewhat unfortunately labelled as the 'whistle-blower' in this scenario. The discussion and Bob Hoy's evidence became a focal point for 'furnishing insight into what was wrong with the CAA at that time'. An experienced officer, Hoy had worked for over 40 years in the aviation industry. He gave repeated warnings about safety deficiencies in the Seaview Air operation, on one occasion going as far as making a trip to Canberra to put his concerns in person to the CEO of the Civil Aviation Authority, Mr.Rosser. Hoy's attempts to 'regulate' in what he considered to be an appropriate manner were constantly thwarted by his superiors and other CAA officers. He was regarded as being 'heavy-handed' and 'out of step with the rest of the army' by his peers. Limitations were placed on him in the professional exercise of his delegated authority. The Commissioner however made it quite clear that it was Bob Hoy who was very much 'in step', in that he was putting into effect standards that were embodied in aviation legislation. It was the management of the CAA and much of 'the army', that was out of step in their efforts to please and appease industry. The Inquiry concluded that Bob Hoy was not 'afflicted by the institutional timidity which emasculated much of the CAA'.

174 Bob Hoy was the Airworthiness Inspector for the Coffs Harbour region, and the surveillance of Seaview Air fell within his jurisdiction.
176 Ibid 20.
177 Ibid 21.
2.11.4 The Plane Safe Inquiry.\textsuperscript{178}

Prior to the Seaview Air crash the government had instigated a Parliamentary Inquiry into the Monarch Airlines crash that had occurred at Young NSW in June 1993. Called the 'Plane Safe Inquiry' it was taking place at the time the Seaview Air crash occurred in October 2004.

On 20 July 1994, just over a year after the Monarch Airlines crash, the Minister for Transport requested the committee of the Plane Safe Inquiry to inquire into and report on:

(i) The adequacy of air safety standards in the commuter and general aviation sectors in Australia, and
(ii) Compliance with, and supervision of, air safety standards in the commuter and general aviation sectors.\textsuperscript{179}

The Minister also announced a broad strategy to improve air safety regulation. One of the main features was to create an 'Aviation Safety Agency' as a separate entity within the CAA. However, only 10 days after the Seaview Air crash on 2 October 1994 the Minister announced that the cabinet had now made a decision to establish the proposed aviation safety agency as a separate and entirely independent statutory authority.\textsuperscript{180} He concluded his statement on the proposed new authority by saying that in his view 'the new arrangements are the most appropriate way of addressing the inherent conflict between the CAA's commercial and policing functions'.\textsuperscript{181}

On 28 March 1995 the Plane Safe committee received from the Minister two Bills, the Civil Aviation Legislation Amendment Bill 1995 and the Air Services Bill 1995, together with their associated memorandum. There was some urgency for the committee to review and report on these Bills as there was a stated need for the two new authorities to commence business on 1 July

\textsuperscript{179} Ibid 1.
\textsuperscript{180} Ibid 16.
\textsuperscript{181} Ibid 17
The committee endorsed the proposed establishment of an independent aviation safety authority. They commented that:

The creation of a new authority with a new and more specialised board and a new director is a far better solution for the troubled and turbulent world of aviation safety regulation in Australia than any reorganisation within the existing Civil Aviation Authority.

Most of the recommendations made by the committee to the Minister in relation to the Bills were accepted, especially the Civil Aviation Bill which dealt with the establishment of a new safety regulator, CASA.

During the course of its hearings the committee received over 250 submissions from a wide range of interested parties. In formulating its approach to its task it asked the following question: 'What are the characteristics of a world best practice regulator of aviation safety'? It went on to answer and lists such characteristics as:

* legislation that assists the regulator to carry out its tasks effectively;
* a clear articulation of the objectives of regulation, strategies to develop those objectives and performance indicators to measure achievements;
* special emphasis on aviation safety indicators;
* adequate information and knowledge of the aviation industry and intimate knowledge of the characteristics of industry that can affect safety adversely;
* the existence of processes that can develop a good working relationship with industry;
* a cohesive well knit organization with adequately trained and skilled personnel and effective leadership;
* adequate processes and skills in developing effective safety standards and in securing compliance with those standards; and
* an effective system of accountability.\(^{183}\)

The report deals in turn with each of these characteristics. In the broad context of this thesis it is interesting to note that contained in the section dealing with the relationship between the regulator and the regulated there

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\(^{182}\) Ibid 16.

\(^{183}\) Ibid 9.
begins to emerge the first indication of how things started to go wrong within the CAA with the telling quote; 'The Civil Aviation Authority was never captured by the aviation industry. On the contrary, the regulator offered itself as a willing captive'.\textsuperscript{184} Emphasis was placed on the regulator playing the 'educator-partner' role rather than the 'prosecutor' role.\textsuperscript{185} Prosecutions were seen as a last resort. The regulator was encouraged to focus on the customer. CAA annual reports in the 1991-1992 timeframe refer to a variety of examples of its service to the customer, and the need for the CAA to be 'customer-orientated'.\textsuperscript{186}

The customer however saw things a little differently. It is the travelling public that is the 'customer' of the regulator. The customer is the user of air services and the industry is the provider.\textsuperscript{187} It is the regulator's job to 'regulate'. The evidence of Captain Robert Collins succinctly demonstrated this point, underlining the difficulties for regulation when there is too much focus on the industry as the customer. He put forward a memorandum dated 24 May 1993 from Bill Edwards, then Acting General Manager, Safety Regulations and Standards. It said:

\begin{quote}
… the Civil Aviation Authority must investigate complaints to ensure the maintenance of corporate integrity and to demonstrate continued accountability to the aviation industry - an industry the CAA is committed to serve.\textsuperscript{188}
\end{quote}

The committee formed the opinion that it was this 'accountability to the aviation industry' approach, in carrying out its regulatory duties that could be an explanation for some of the shortcomings of the CAA in the performance of those duties.

The Plane Safe committee concluded that from the date of its formation in 1988, the Civil Aviation Authority was in a state of almost continual conflict, with constant reviews and reorganizations. Overt conflict within the

\textsuperscript{184} Ibid 24.
\textsuperscript{185} Ibid 22.
\textsuperscript{186} Ibid 23.
\textsuperscript{187} Ibid 24.
\textsuperscript{188} Ibid 24.
organization became apparent around the time of the Dick Smith's initiated 'Review of Resources' in the first half of 1991. This review was an action that, taken together with other reforms underway at the time, challenged the entrenched attitudes and modes of operation of the regulator that had existed for decades.\textsuperscript{189} It put in place processes that were essentially in direct opposition to the traditional approach to the type of aviation safety regulation that had occurred in the past. The concept of 'affordable safety' placed emphasis on 'efficiency', whereas the traditional approach was inclined to push issues of cost into the background with 'effectiveness' being the prime consideration. There is quite a difference between viewing the industry as a 'customer' of the regulator and viewing the regulator as that of a 'policeman' to the industry.

This process of change taking place in the early 1990's was therefore quite dramatic and so the committee thought, very poorly managed. It described this period commencing from around the time of the 'Review of Resources', as one in which the CAA 'lurched from crisis to crisis without being able to fully resolve outstanding issues before fresh problems emerged'.\textsuperscript{190}

The committee expressed high hopes for the future of the newly formed aviation safety regulator - CASA. It was very supportive of the separation of commercial interests from the control of the authority, as it saw this as being a major thorn in the side of the former CAA. Now the regulator, relieved of the former inherent conflict could concentrate unencumbered by commercial pressure on its core business - safety.

The Commission concluded its report with a long list of recommendations directed towards five main areas. They were improving safety, improving the effectiveness of CASA, increasing the knowledge of the industry, improving organizational performance and improving accountability.\textsuperscript{191}

\textsuperscript{189} Ibid 120.
\textsuperscript{190} Ibid 121.
\textsuperscript{191} Ibid 128
So, armed with a long list of recommendations, the new regulatory authority took to the air. Criticisms of the authority continued throughout the latter half of the 1990s and into the next decade. Any serious accident immediately focused the attention of the public, the media and the Parliament on the authority. There was considerable acrimony in relation to board appointments and with constant media attention the public was kept well informed as to the progress, or otherwise, of CASA fulfilling its regulatory duties.

In a topic that will be explored in detail in chapter six of this thesis, a 'deterrent' approach to regulatory enforcement appeared to emerge in CASA’s early days.\textsuperscript{192} Later, it is submitted, the pendulum started to swing and CASA began again to veer towards the appearance of a 'captured' regulator.

\textsuperscript{192} President’s report, ‘Little tin gods run rampant’ (October 2001) Aircraft Owners and Pilots Association Journal 2. This criticised the findings of the Monarch and Seaview Inquiries, complaining that they were run by ‘non-aviation’ people and in their calling for closer supervision of the aviation industry had encouraged CASA to do just that. As the President of the Aircraft Owners and Pilots Association said, CASA had ‘taken to [this modus operandi] with its ears back’.
CHAPTER 3

CONSTITUTIONAL ISSUES

3.1. Introduction

Because this thesis is primarily concerned with compliance and enforcement of the regulations governing the safety of civil aviation in Australia, it is intended to confine the discussion of constitutional matters to those constitutional issues and Commonwealth laws which are relevant to this area. Thus the individual aviation laws of the States or Territories of Australia are touched on only where relevant to the wider constitutional issue, and not examined in detail. Similarly only those significant High Court cases having a direct relevance to the topic are discussed.

The aim of this section is to clarify the constitutional sources from which the aviation safety regulator draws its power to enable it to effectively control the safety aspects of Australia's civil aviation industry. This is together with an explanation of how interpretation of the constitution by the High Court has evolved to deal with an industry whose existence the constitution founders could not have foreseen.

Decisions of the High Court throughout the last century have, to a very considerable extent, clarified the Commonwealth's constitutional powers in respect of civil aviation. Now, as we are at the beginning of the twenty-first century, the Commonwealth has undoubtedly adequate constitutional power at its disposal to regulate aviation safety in all its varied aspects. This may

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1 The situation still exists, that in certain limited intra-state aviation areas the States continue to hold legislative power. This varies from State to State and in some instances the States' cooperation is needed to ensure uniform coverage across the Continent. For more detail see Donald Bartsch, Aviation Law in Australia (2nd ed, 2004) 21.
2 In the Australian Commonwealth Constitution the States hold residual powers. This is unlike, for example, the Canadian Constitution where residual powers are reserved to the Federal Government. Thus legislative power for intrastate civil aviation can be said essentially, to belong to the States.
3 Originally the Air Navigation Act 1920 purported to apply to the control of all aviation in Australia including intrastate aviation. See chapter one of this thesis at page 23, the first 'Goya Henry Case'. R v Burgess, (1936) CLR 608.
possibly become a much larger field in forthcoming years with the increased significance of security related happenings.

The main constitutional heads of power discussed in this chapter are those, which have been held in these High Court decisions to be relevant to the regulation of aviation safety and related areas. They are:

- Section 51(i), the Trade and Commerce power
- Section 51(xxix), the External Affairs power,
- Section 51(xx), the Corporations power, and
- Section 92, Interstate Trade and Commerce,
- Section 109, the Supremacy of Commonwealth laws,
- Section 61, the Power to enter into International Treaties,
- Section 122, Territories of the Commonwealth

These sections are discussed together with the 'implied incidental powers', which may be attached to any of the above.

3.2. The Commonwealth Trade and Commerce Power -- Section 51 (i)

Section 51 of the Constitution contains most of the Commonwealth Parliament's legislative powers and the first, described in paragraph (i), is the power to make laws with respect to 'trade and commerce with other countries and amongst the States'. No power is given to the Commonwealth Parliament to legislate on the subject of intrastate trade and commerce. In the first 'Goya Henry Case', the Commonwealth had made reference to the trade and commerce power, arguing in support of its case that the 'mingling' in air routes and airports of aircraft proceeding intrastate with those engaged in travelling interstate, enabled the Commonwealth to control all aircraft. The High Court rejected this argument and maintained a distinction between interstate and intrastate trade. In doing so however, it did acknowledge the difficulties such a distinction could pose for the question of 'safety'. The Court in 1936 was

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5 R v Burgess, ex parte Henry (1936) 55 CLR 608.
6 This stance was reversed in relation to 'safety issues' in their widest form in 1965 in Airlines of NSW v New South Wales (No 2) 1965 113 CLR 54. See Harold Poulton,, Law History and Politics of the Australian Two Airline System. (1981) 41:
not prepared to accept the Commonwealth's argument that the mingling of interstate and intrastate air traffic gave the Commonwealth complete control of aviation under the 'trade and commerce' power, stating that:

A new problem would be raised if in any case it were established by evidence in respect of a particular subject matter that the intermingling of foreign and interstate trade and commerce with intra-state trade and commerce was such that it was impossible for the Commonwealth Parliament to regulate the former without also directly regulating the latter.\(^7\)

Dixon J. in his judgment alluded to the possible use of the 'implied incidental power' as linked to the trade and commerce power. However he discounted its use rejecting the contention that s 4 of the Air Navigation Act 1920 might be supported wholly, or in part, as an exercise of the power to make laws with respect to 'trade and commerce with other countries and among the States'.\(^8\) He said:

No one doubts that like every other legislative power expressly conferred, the power to make laws with respect to trade and commerce with other countries and among the States carries with it legislative authority over whatever is incidental to the subject matter to which the power is addressed. Everything that is incidental to the main purpose of a power is contained within the grant. But I think it would be a matter of regret if the application of this principle to section 51(i) of the Commonwealth Constitution led to the adoption of so indefinite a standard of validity as that enunciated in these passages. The express limitation of the subject matter of the power to commerce with other countries and among the States compels a distinction however artificial it may appear and whatever interdependence may be discovered between the branches into which the Constitution divides trade and commerce. This express limitation must be maintained no less steadily in determining what is incidental to the power than in defining its main purpose.\(^9\)

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\(^7\) R v Burgess, ex parte Henry (1936) 55 CLR 608, (Latham CJ).

\(^8\) S. 4 of the Air Navigation Act 1920 gave the Governor-General power to make regulations for two purposes:
(i) For the purpose of carrying out and giving effect to the Paris Convention and the provision of any amendment to the Convention made under Article 34 thereof; and
(ii) For the purpose of providing for the control of air navigation in the Commonwealth and Territories.

\(^9\) R v Burgess, ex parte Henry (1936) 55 CLR 608, 671, 672.
After this judgment it looked as if the only way for the Commonwealth to become directly involved in intrastate trade and commerce would be by the use of the implied incidental power. Yet in 1936 the Court was not prepared to go this far, in later years however this was to change. The implied power has had considerable relevance in several important High Court aviation cases, when the High Court has made it clear that it examines each case on its merits, with the earliest aviation reference being by Dixon J as quoted above in the first 'Goya Henry Case'. Dixon J conceded the existence of the power, although he did not actually apply it in this particular decision. It was several decades later in Airlines of New South Wales Pty Ltd. v New South Wales (No. 2), that the High Court reached a decision that reversed its findings in 1936 in the first 'Goya Henry Case'.

The Second World War, which commenced in September 1939, saw throughout its five-year duration, a very rapid acceleration in aircraft design and use. The level of cooperation experienced by many nations at the Chicago Convention of 1944 heralded in a new era for aviation. Following this

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10 Ibid 672.
11 Note that this power is distinct from the express incidental power contained in Section 51 (xxxix). The earliest formulation of the doctrine is in D'Emden v Pedder (1904) 1 CLR 91 at 110 quoted by Fullager J in Sullivan v. Noarlunga Meat Ltd (No. 1) (1954) 92 CLR 565 at 597 - 598. 'Where any power or control is expressly granted, there is included in the grant, to the full extent of the capacity of the grantor and without special mention, every power and every control the denial of which would render the grant itself ineffective'.
13 R v Burgess, ex parte Henry (1936) 55 CLR 608, 671, 672.
14 Airlines of New South Wales Pty Ltd. v New South Wales (No. 2) (1965) 113 CLR 54
15 Shortly after the decision in the 'Goya Henry Case' the Commonwealth amended the Air Navigation Act 1920 with the Air Navigation Act 1936. This amendment authorised regulations for the purpose of giving effect to the Paris Convention and also regulations providing for the control of air navigation:
   (a) in relation to trade and commerce with other countries and among the States:
   (b) within any territory of the Commonwealth.
Thus the Commonwealth regulations no longer purported to extend to intrastate aviation except to the limited extent necessary to give effect to the Paris Convention. The States were left legally free, without interference from the Commonwealth, to pass their own air navigation laws and to regulate the pattern of intrastate transportation if they so desired. The validity of the Act as amended and the new regulations resulting from the first 'Goya Henry Case' were later upheld in R v Poole; ex parte Henry (No. 2) (1939) 61 CLR 634.
16 The Chicago Convention of 1944 is discussed in detail on pages 32-38 of this thesis.
Convention, the Commonwealth amended the Air Navigation Act 1920 to
give effect to the terms of the Convention.\footnote{17}

In 1945 a group of private airlines had challenged the power of the
Commonwealth to establish its own airline under the auspices of the
Australian National Airlines Commission.\footnote{18} This was a Commonwealth
owned statutory corporation designed to operate interstate air services
pursuant to the interstate trade and commerce power.\footnote{19} Known as the 'Airlines
Case',\footnote{20} the decision established that the Commonwealth could indeed set up
its own airline to fly interstate commercial air routes and it could also operate
an airline through a statutory corporation, such as the Australian National
Airlines Commission.

As previously discussed in chapter one of this thesis, the failure of the
proposed 1937 constitutional amendment designed to give the Commonwealth
legislative power to make laws with respect to 'air navigation and aircraft' was
swiftly followed a few months later by an historic aviation conference of the
Commonwealth and State Ministers. They were brought together at the
instigation of the Commonwealth to consider means to ensure that uniform
rules would apply to all classes of air navigation.\footnote{21} At this conference all
States agreed to put in place uniform State Air Navigation Acts, which would
effectively adopt the Commonwealth Air Navigation Regulations as State law.
All States quickly followed up on their agreement and enacted State Air
Navigation Acts in the manner decided upon by the conference. This system
of legal control as it was set in place in 1937, in so far as it related to 'safety',
continued without any great change until 1963. The Commonwealth Act itself
was remarkably brief and this brevity eventually came in for some stern

\footnote{17} See chapter two of this thesis.
\footnote{18} The Australian National Airlines Commission came into being as an initiative of the then Labor Commonwealth Government who had decided, after cessation of hostilities in World
War II, that it should enter the airline business. To do so it set up a statutory corporation to
conduct the undertaking, instead of having the airline operate as part of the Federal
departmental arrangement. The Australian National Airlines Act 1945 was passed and
remained on the statute books until 1981, at which time it was repealed.
\footnote{20} Australian National Airways Pty Ltd v The Commonwealth (1945) 71 CLR 29.
\footnote{21} Harold Poulton, Law, History and Politics of the Australian Two Airline System (1981) 34.
criticism in 1956 by the Public Accounts Committee.\textsuperscript{22} The brevity can be explained to a certain extent by the fact that the uniform State Air Navigation Acts only adopted as State law, regulations made under the Commonwealth Air Navigation Act. So if the Commonwealth wanted an aviation law to apply intrastate it had to be promulgated as a regulation and not as a provision of the Air Navigation Act.

In 1964 in the first 'Airlines Case',\textsuperscript{23} a challenge was issued to the validity of the provisions of the State Transport (co-ordination) Act 1931-1956 (NSW), relating to the State licensing of aircraft to engage in intrastate air operations. The case is important because dicta in some judgments suggested that the Commonwealth power to control air navigation by way of development in commercial aviation since 1937 was not quite as limited as previously thought.\textsuperscript{24} In particular, the judgment of Windeyer J displays the Court's concern and understanding of the very different aviation related conditions that existed in the 1960s as distinct from those that existed when the Court deliberated the 'Goya Henry Case'.\textsuperscript{25}

Following this decision the Commonwealth communicated with the States along the lines that as it bore the heavy financial burden of providing and maintaining aviation facilities, it intended to assume comprehensive legal control over civil aviation in place of the then current divided control between


\textsuperscript{23} Airlines of New South Wales Pty Ltd v New South Wales (1964) 113 CLR 1.

\textsuperscript{24} See Harold Poulton, Law, History and Politics of the Australian Two Airline System (1981) 37, quoting Windeyer J:

\begin{quote}
... as to constitutional power: In my opinion the powers with respect to trade and commerce with other countries and among the States, (s 51(i)), external affairs, (s. 51 (xxxix), and incidental matters as described in s.51 (xxxix), are ample to give the Commonwealth Parliament complete power over all air navigation in Australia.
\end{quote}

\textsuperscript{25} Airlines of New South Wales Pty Ltd v New South Wales (1964) 113 CLR 51 (Windeyer J):

But in carrying out an obligation, measures that at one time might have been unnecessary may, with changing circumstances, become necessary. The great development in recent times of air traffic of all kinds in Australia; including overseas and interstate air traffic, has created a situation today that is very different from that of thirty years ago. The proper regulation in the interests or safety of the operations of interstate and overseas airlines, and the due execution by Australia of the international obligations it has accepted, may well make it desirable that the one authority should exercise sole control of all movement of aircraft in the air and of matters connected with such movement, that is to say of all matters connected with how aircraft may be used.
the States and the Commonwealth. 26 The comprehensive set of amended
regulations that eventuated from this decision purported to assume exclusive
control over all intrastate aviation.

In a reaction to this attempt by the Commonwealth to expand its control New
South Wales passed the Air Transport Act 1964 which made it an offence to
carry passengers or goods by air between places within New South Wales
without a state licence. 27 In a 'tit for tat' type scenario the licensing authority
under the new NSW Act refused an application by Airlines of NSW for a
licence to fly commercially between Sydney and Dubbo. Whilst at the same
time the rival operator East-West Airlines could not obtain a Commonwealth
licence to operate the service between Sydney and Dubbo that had been
allocated to it by the State. The end result of this stand off was that flights
between Sydney and Dubbo ceased. Airlines of New South Wales commenced
proceedings challenging the validity of the State Act. The decision in this
second Airlines of New South Wales case was a very important decision from
the point of view of the regulation of aviation safety. 28 The Court confirmed
the principle enunciated in the first 'Goya Henry Case' that the constitutional
division of power over trade and commerce had to be observed even if by so
doing it appeared artificial in an economic sense. However the Court also
made it clear that whilst in the early days of aviation, overseas and interstate
flights could be regulated without having to exert a significant control over
intrastate aviation, now 30 years on, advances in aviation technology and the
complexity of the national and international aviation scene created an entirely
different situation as far as 'safety' was concerned. A licensing law applying to
intrastate flights could now be justified to protect overseas and interstate
aviation against possible physical danger. However the court was at pains to
make it clear that leaving aside the matter of 'safety' it was entrusted to
preserve the constitutional distinctions between intrastate trade and
commerce. 29

27 Transport Act 1964 (NSW) s 3.
28 Airlines of New South Wales Pty Ltd. v New South Wales (No. 2) (1965) 113 CLR 54.
29 Ibid 77.
This case settled the question that the Commonwealth could make its Air Navigation Regulations applicable to all flying operations in Australia with the proviso that the States could operate their own licensing systems for commercial, (non-navigational), reasons.

The second Airlines of New South Wales case provided even more clarification between what the Commonwealth could and could not do regarding intrastate trade and commerce, and this was further clearly enunciated along a physical versus an economic distinction. Influenced by the growth of the air transport industry and the technological developments in aviation and air navigation aids, a majority of judges in the case decided that intrastate air navigation could, to a considerable extent, be regulated by the Commonwealth as being 'incidental' to the regulation of interstate and overseas air navigation. The basic principle involved in this case had been expressed by Dixon CJ in an earlier 1955 case whereby he stated:

A legislative power with respect to any subject matter contains within its authority over whatever is incidental to the subject matter of the power and enables the Legislature to include within laws made in pursuance of the power provisions which can only be justified as ancillary or incidental.

Although in Airlines of NSW (No. 2) much discussion was taken up with the main topic of whether or not the issuing of Commonwealth licences for intrastate air services was valid or not, the Court in doing so also considered in some detail how the Commonwealth could, by use of its trade and commerce power, legitimately extend its Air Navigation Regulations to embrace 'safety' in all its aspects. It came to the conclusion that it could:

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31 Airlines of NSW Pty Ltd v New South Wales (No 2) (1965) 113 CLR 115 (Kitto J), who stated that intrastate flights could be regulated under the trade and commerce power where: "... the law, by what it does in relation to intrastate activities, protects against danger of physical interference the very activity itself which is within federal power, the conclusion does seem to me to be correct that in that application the law is a law within the grant of federal power.

32 Wragg v State of New South Wales (1953) 88 CLR, 353, 386.
In my opinion that a federal law which provides a method of controlling regular public transport services by air with regard only to the safety, regularity and efficiency of air navigation is a law which operates to protect against real possibilities of physical interference the actual carrying on of air navigation, and therefore is, in every application that it has, a law "with respect to" such air navigation as is within federal power, and none the less so because it is also legislation with respect to that intra-State air navigation which is not within the power.33

In this case we see the final stages of the evolution of the importance of the regulation of aviation 'safety' being foremost in the Judges' decisions. If interstate and intrastate affairs 'mingled' to the extent that they could not be realistically separated in the interests of maintaining safety, then Commonwealth laws may be valid under the incidental power to the trade and commerce power in section 51 (i). The Chief Justice was at pains to point out that there are occasions, safety procedures being one of them, where it can be no objection to the validity of the Commonwealth law that it operates to include in its sweep intrastate activities.34

3.3 The External Affairs Power (Section 51 (xxix))

Paragraph (xxix) of Section 51 of the Constitution vests the Commonwealth Parliament with power to make laws with respect to 'external affairs'. This phrase has been through a series of High Court decisions and has been taken to include Australia's international treaty obligations as they relate to civil aviation.

International treaties and conventions play an important part in Australian aviation law, especially so in respect to matters of 'safety'. Australia's

33 Airlines of NSW v New South Wales (No 2) 1965 113 CLR 54, 93 (Barwick CJ).
34 Ibid 78 (Barwick CJ):
There are occasions - and the safety procedures designed to make inter-State and foreign trade and commerce, as carried on by air transport, secure, are a ready instance - when it can be no objection to the validity of the Commonwealth law that it operates to include in its sweep intra-State activities, occasions when, for example, the particular subject matter of the law and the circumstances surrounding its operation require that if the Commonwealth law is to be effective as to inter-State or foreign trade and commerce that law must operate indifferently over the whole area of the relevant activity, whether it be intra-State or inter-State. But this involves no change in the subject matter of Commonwealth power. The power is not enlarged by circumstance though what may be validly done in its exercise may be more extensive because of the factual situation.
domestic aviation law is frequently drawn from the implementation of treaties and conventions to which Australia is a party.

In looking at the High Court's approach to the external affairs power, in relation to the regulation of aviation safety again we see a gradual evolution of the use of this power together with a minor broadening of the power from when it initially came before the court in the first Goya Henry Case. Here the Court had sought to rely on the external affairs power, (in addition to the trade and commerce power), to justify the application of its Air Navigation Act and Regulations to control intrastate aviation. The argument by the Commonwealth followed the lines that the Paris Convention of 1919 imposed obligations on Australia in respect of international civil aviation and relying on the external affairs power, this also involved the Commonwealth in controlling intrastate aviation. The argument failed, with the Court finding that the Commonwealth had no general power over civil aviation pursuant to its external affairs power. The external affairs power did however give the Commonwealth the ability to enter into and ratify international Treaties and Conventions. The Court decided that on the facts in this case the Regulations as drafted by the Commonwealth did not implement the Convention properly. At times they went beyond the conditions of the Convention and were in conflict with them in several areas.

The Commonwealth moved swiftly to tidy up the drafting of the Act after the case, and when the same question came before the Court in the second Goya Henry case in 1939 the Court was again asked to decide if the recently amended Air Navigation Act of 1936 did go beyond merely giving effect to the requirements of the Paris Convention. This time the Court ruled rather

35 R v Burgess ex parte Henry (1936) 55 CLR 608.
37 After this decision the Air Navigation Act 1936 was passed which authorised regulations for the purpose of giving effect to the Paris Convention and section 4 of the Original Act was amended by omitting the words 'in the Commonwealth and Territories' and inserting in their place the words:
(a) in relation to trade and commerce with other countries and among the States: and
(b) within any territory of the Commonwealth.
38 R v Poole (1939) 61 CLR 634.
differently from its decision some three years previously. In a definite shift away from the narrow approach to the power which had been taken in the first Goya Henry Case, in the second Goya Henry Case the Court broadened its interpretation of the scope of the power somewhat, by holding that a strict adherence to the rules of the Convention is not required as they are designed to carry out and give effect to the 'substance' of the Convention.\(^{39}\)

Thus said, the Court was in no doubt whatsoever, that pursuant to the external affairs power the Commonwealth had the power to ratify international treaties. In addition, if in doing so it were necessary in order to give effect to an international convention, to regulate intrastate flights then it could indeed do so as this was seen as a part of carrying out the terms of the Convention. It could not however, depart in 'substance' from the terms of the international agreement.

From the point of view of the regulation of 'safety' the decision in the second Goya Henry Case was significant. The practical result of the case was that the Commonwealth Regulations no longer purported to extend to intrastate air navigation, except to the extent necessary to give effect to the Paris Convention, which itself covered the far-reaching field of 'aviation safety'. This field gained even wider significance on the 11th December 1947 when the Air Navigation Act 1920 was again amended to give domestic effect to the terms of the Chicago Convention.\(^{40}\) This Treaty provided a framework for the international adoption of uniform standards and practice in aviation, and it established the International Civil Aviation Organization (ICAO) as the

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\(^{39}\) Ibid 644, (Rich J): The object of the statute is to provide by regulations for the carrying out and giving effect to the Convention, and this does not mean that the regulations should be a reproduction of the rules contained in annex D to the Convention. That this was not intended by the parties to the Convention is made clear by a reference to the language of rule 39 set out in annex D. The language of this rule indicates that a strict adherence to the rules of the Convention is not required because rule 39(a) is expressed to be subject to any special regulations which may exist.

\(^{40}\) The Chicago Convention on International Civil Aviation is described in more detail in Chapter two of this thesis. Historically it is a most important international Treaty as far as safety is concerned, and one that resulted in significant Commonwealth aviation related legislation.
regulatory body for civil aviation. It effectively superseded the Paris Convention of 1919.\footnote{See page 32 of this thesis.}

In 1964 the Full Court of the High Court considered the 'external affairs' power in the first Airlines of NSW Case.\footnote{Airlines of NSW Pty Ltd v New South Wales (No 1) (1964) 113 CLR 1.} Although this case was concerned primarily with licensing matters and the question of whether a New South Wales State Act was inconsistent with the Commonwealth Air Navigation Act and Regulations, dicta in some of the judgments, especially that of the Chief Justice, threw an interesting light on the manner in which the Court may be prepared to view, in a more expansive manner, the external affairs power in relation to control of intrastate aviation. Dixon CJ drew attention to the fact that the Chicago Convention of 1944 was ratified on behalf of Australia, the ratification approved by Parliament and the text included in the First Schedule of the Air Navigation Act 1920. A study of the Schedule, so Dixon CJ stated:

\begin{quote}
suggests that obligations are placed upon the Commonwealth which extend over the whole territory of Australia and that in almost all respects the legislative power which arise from the need of carrying out the Convention given by s. 51(xxix) would suffice to support laws made with a complete disregard of the distinction between inter-State and intra-State trade.\footnote{Ibid 7.}
\end{quote}

However:

\begin{quote}
a consideration of the Regulations made under the Air Navigation Act show that that view was not adopted; in fact the Commonwealth took power under the Act and exercised the power by regulations which took account of the distinction.\footnote{Ibid.}
\end{quote}

One of the other five judges in the case seemed to go even further. Windeyer J, in reference to the constitutional power said that:

\begin{quote}
In my opinion the powers with respect to trade and commerce with other countries and among the States, (s.51 (i)), external affairs, (s.51 (xxix)), and incidental matters as described in s. 51 (xxxix), are ample to give the Commonwealth Parliament complete power over all air navigation in Australia. The need for the Australian nation to
\end{quote}
perform its international obligations under treaties and conventions relating to air
navigation, together with the trade and commerce power, suffice in my view, to bring
the subject within the legislative power of the national Parliament.  

Windeyer J went on to make reference to the observations of Dixon J, as he
then was in the first Goya Henry Case, quoting him that 'under colour of
carrying out external obligation the Commonwealth cannot undertake the
general regulation of the subject matter to which it relates'. He expanded by
way of explanation for the very changed circumstances that had occurred in
the intervening thirty years since that judgment:

But in carrying out an obligation, measures that at one time might have been
unnecessary may, with changing circumstances, become necessary. It is not that the
nature of the power changes. What changes are the conditions and circumstances
within which the power is exercisable, and in consequence the particular aspects of the
subject-matter that can be regulated. The great development in recent times of air
traffic of all kinds in Australia, including overseas and inter-State air traffic, has
created a situation to-day that is very different from that of thirty years ago.

He emphasized that the breadth of technological changes that had occurred in
aviation since the judgment of Dixon J in the first Goya Henry Case, may
have created conditions and circumstances that now required the
Commonwealth to use the powers it had to move into areas currently occupied
by the States. 'Safety' in it widest form, was clearly enunciated as being one
such area.

As previously discussed in relation to the 'trade and commerce' power, after
the judgments handed down in the Airlines of NSW (No 1) case, the
Commonwealth took the opportunity it saw offered in the decision and

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46 R v Burgess ex parte Henry (1936) 55 CLR 608.
48 Ibid.
49 Airlines of NSW v New South Wales (No 1) (1964) 113 CLR 1, 51.

The proper regulation in the interests of safety of the operations of inter-State and overseas
airlines, and the due execution by Australia and the international obligations it has accepted, may
well make it desirable that the one authority should exercise sole control of all movement of
aircraft in the air and of matters connected with such movement, that is to say of all matters
connected with how aircraft may be used.
attempted to re-enter the arena of intrastate aviation. The judgments in the not unexpected challenge,\(^{50}\) that eventuated from this attempt, were decisive in the manner in which they put beyond question, the fact that the Commonwealth could make its Air Navigation Regulations applicable to all flying operations in Australia.\(^{51}\) The Commonwealth did not depend on the States voluntarily handing over power to it to enforce aviation safety regulations, but possessed itself wide powers in this area, - the 'external affairs' power being one such power.\(^{52}\)

3.4. The Corporations Power --- Section 51 (xx)\(^{53}\)

In this modern age practically all aviation related commerce is carried on by corporations and the Commonwealth relies on the corporations power to regulate a range of commercial activity. Decisions of the High Court have given this power a wide interpretation whereby it is not restricted solely to intrastate commerce, but can stretch also to a corporation's intrastate trading activities.\(^{54}\) As yet, as far as aviation safety is concerned, the High Court has not substantially relied on this power alone or together with its associated incidental power, to support a particular decision.

3.5 Interstate Trade and Commerce --- Section 92

Section 92 of the Constitution declares that trade, commerce and intercourse amongst the States shall be absolutely free. Two aviation related High Court cases have considered this section.\(^{55}\)

\(^{50}\) Airlines of NSW v New South Wales (No 2) (1965) 113 CLR 54.
\(^{52}\) Airlines of NSW v New South Wales (No 2) 1965 113 CLR 54, 84 (Barwick CJ):
    Once it is decided, however, that some treaty or convention is, or brings into being, an external affair of Australia, there can be no question that the power under s. 51 (xxix.) of the Constitution thus attracted is a plenary power and that laws properly made under it may operate throughout Australia subject only to constitutional prohibitions express or implied.
\(^{53}\) The Constitution section 51 (xx) gives the Commonwealth power with respect to 'Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth'.
\(^{54}\) Strickland v Concrete Pipes Ltd. (1971) 124 CLR 468.
\(^{55}\) Neither of these cases have 'safety issues' as a prominent feature, however they are included because the High Court's interpretation of section 92, in the IPEC case, (R v Anderson; Ex parte IPEC-Air Pty Ltd (1965) CLR 113), in particular, is crucial to the successful implementation of the government's two airline policy and strict regulation of 'aviation safety' that is demonstrated during this era.
In the second Airlines case, in 1945, the High Court held that although the Commonwealth had the power to set up Trans Australian Airlines (TAA) as an interstate air service, the Commonwealth Parliament could not grant TAA a monopoly of interstate air services without infringing section 92. Therefore Australian National Airways Pty Ltd, (ANA), was entitled to maintain interstate services in competition with the government airline.

In 1965 IPEC-Air Pty Ltd challenged a refusal it had received from the then Director-General of Civil Aviation to obtain permission for the company to import freighter aircraft, to be used in interstate airfreight services. The company claimed that the effect of the refusal was to infringe its legal right to take part in interstate trade. The High Court did indeed confirm that section 92 protected the freedom of IPEC to engage in interstate aviation, however it also said that section 92 did not go beyond protecting the 'activity' of interstate trade and commerce. Therefore it did not protect the freedom of potential operators to purchase and import aircraft they may need to operate such a service. The steps, (in this case obtaining an import licence), preceding the engagement in interstate trade and commerce were not protected by section 92.

It is interesting that section 92 was not able to be successfully utilized to invoke an easing of the government's 'two airline policy' restriction on the number of operators engaged in the carriage of passengers and goods interstate, that was experienced for almost four decades in Australia. On the face of it, the two-airline policy was inconsistent with section 92. Yet for thirty-eight years the Commonwealth, using the legal device of controlling imports of aircraft under the trade and commerce power, was able to confine the issue of licences to Trans Australian Airlines and Ansett. It is indeed difficult to reconcile this decision with the test laid down by the Privy Council in 1949 in the Banking Case for determining how section 92 should apply to a

56 Australian National Airways Pty. Ltd. v The Commonwealth (1945) 71 CLR 29.
58 R v Anderson, ex parte IPEC-Air Pty. Ltd. (1965) 113 CLR 177.
59 For a description of the domestic 'two airline policy' that existed in Australia from 1952 until 1989 see page 54 of this thesis.
law or act of executive government. The Privy Council in the Banking Case said that section 92 was only infringed:

where the law or governmental act operated directly on interstate trade and commerce, not merely to regulate that trade, but to impose some impediment, burden or tax. Mere regulatory laws did not infringe section 92.

Following on from this it would not apparently infringe section 92 to have a system of licensing of interstate air operations simply designed to ensure that the operator would be capable of complying with the Air Navigation Regulations. Infringement would occur however if an operator were refused a licence to engage in interstate trade, 'for policy reasons, such as, for example the policy of confining interstate air services to two major operators'. The High Court in the IPEC Case took the narrow view that the importation of aircraft was not itself interstate trade and commerce, but merely the fulfilment of a condition that existed prior to engaging in the interstate trade and commerce. Furthermore the Commonwealth, under the overseas trade and commerce power, could validly prohibit or restrict the importation of aircraft.

### 3.6 Territories of the Commonwealth --- Section 122

This section of the Constitution gives a general power to the Commonwealth parliament to make laws for the government of any Commonwealth Territory. This power therefore gives the Commonwealth government full control over aviation within any Territory of the Commonwealth, including not only air navigation, which takes place solely within the boundaries of a territory, but also navigation to or from a territory. The limits of the power

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60 Bank of New South Wales v The Commonwealth (1949) 79 CLR 497 (PC).
63 R v Anderson, ex parte IPEC-Air Pty. Ltd. (1965) 113 CLR 177.
64 It reads,

The Parliament may make laws for the government of any Territory surrendered by any State to and accepted by the Commonwealth, or of any Territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of parliament to the extent on the terms which it thinks fit.

were discussed in some detail in the Airlines Case of 1945.\textsuperscript{66} The court found that the section was valid in so far as the Australian National Airlines Act 1945 authorized TAA to operate territorial air services and gave the airline a monopoly of those services. Latham CJ argued that a territorial law, although fully effective in a Commonwealth territory could not operate in a State so as to be enforced outside the Territory. This would have the effect that a service to or from a Territory that operated in a State would thus be controlled by the law of that State. Dixon J took the opposite view. However in a 1958 aviation case a majority decision of the High Court held that TAA could validly carry passengers and freight between Perth and Port Hedland in Western Australia.\textsuperscript{67} This was because it was in the course of operating an airline service between Perth and Darwin.\textsuperscript{68} In a three to two decision the Court stated that section 19B of the Australian National Airlines Act 1954 was valid to the extent it depended on section 122 of the Constitution, and it operated to that extent, within a State, to override any State law.\textsuperscript{69}

\textbf{3.7 The Supremacy of Commonwealth Laws --- Section 109}

Under their own individual constitutions the States have general legislative power. They are thus able to make laws on most of the subjects in respect of which the Commonwealth Parliament may legislate.\textsuperscript{70} Most of the powers coming under the federal list are not powers belonging exclusively to the Commonwealth but are subjects on which both the Commonwealth and the

\textsuperscript{66} In Australian National Airways Pty Ltd v The Commonwealth (1945) 71 CLR 62-63, it was decided that the Commonwealth had the right to participate in interstate trade and commerce through the establishment of a statutory corporation. The Australian National Airlines Act 1945 section 6 established the Australian National Airlines Commission and detailed its constitution, powers, functions and duties. Trans Australian Airlines (later renamed Australian Airlines) was the airline operator for the Commission.

\textsuperscript{67} Minister for Justice of Western Australia v Australian National Airlines Commission (1977) 51 ALJR 299.

\textsuperscript{68} ‘Darwin’ being the capital of the adjacent Northern Territory.

\textsuperscript{69} Minister for Justice of Western Australia v Australian National Airlines Commission (1977) 51 ALJR 299.

States may legislate. As it is obvious that conflicts could arise between Commonwealth and State laws the constitution needed to have a means of resolving such conflict. Section 109 ensures that in the event of a conflict between Commonwealth and State laws the Commonwealth law will reign supreme. This section states, 'when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid'. The Commonwealth has relied on this section to displace State laws on many subjects, including that of air navigation. This section has been held by the High Court to cover regulations not merely Acts of the Commonwealth Parliament. Thus a regulation made under an Act of the Commonwealth Parliament may displace a State Act.\(^71\)

Over time much judicial thought has gone into the interpretation of Section 109. This has resulted in the 'covering of the field' doctrine, which briefly means that where a Commonwealth law shows an intention to 'cover the field' of the matter it is dealing with, then any State law on that matter is invalid for inconsistency. This applies whether the State law in whole or in part directly conflicts with the Commonwealth law or not. It follows therefore that regulations made pursuant to the Air Navigation Act displace most State laws dealing with air navigation.\(^72\)

### 3.8 The Power to enter into International Treaties --- Section 61

Section 61 of the Constitution is most relevant to Australia's aviation treaty making powers. It vests the executive power of the Commonwealth in the Queen, whose power in turn is exercised by the Governor-General as her representative. Section 61 enables the Executive arm to negotiate and make treaties, after which the Commonwealth Parliament legislates to put these treaties into Australia's domestic laws. Until embodied in legislation a treaty, although signed, has no effect at law in Australia.\(^73\) At most ratification of a

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\(^{72}\) Ibid 21.

\(^{73}\) Minister for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273. The decision in the Teoh Case indicates that ratification of an international treaty could simply, by the ratification process, create a 'legitimate expectation' in administrative law that even prior to the embodiment of the terms of the treaty in Australian law then the executive arm of the
treaty such as the Chicago Convention simply signifies to the international community that Australia intends to be bound by the requirements of that particular treaty. Ratification also empowers the Commonwealth to legislate to place the provisions of the treaty into Australian domestic law. The Air Navigation Act has, as an annexure to it, the Chicago Convention.

3.9 Current State Commercial Regulation

Through the above heads of power, together with the implied incidental powers, the Commonwealth is able to regulate almost all aspects of aviation in Australia. It has total power in relation to aviation safety, including security-related matters, an area that is likely to come into ever increasing focus in the years ahead. Indeed these powers cover almost entirely the international, interstate and intrastate 'aspects' of the industry. In reality the States only retain authority over certain intrastate services by the granting of specific route licences. Currently four States, New South Wales, Queensland, South Australia and Western Australia are involved in the intrastate economic regulation of aviation. These States impose regulatory control in some form or another over scheduled air services, usually regulating the subsidising of uncompetitive routes.

In New South Wales, the commercial component of intrastate air transport is regulated under the Air Transport Act 1964 (NSW). The government regulates intrastate air routes by limiting competition on low-volume routes and licensing these routes on a one-route, one-licence basis. Higher volume routes are unlicensed, thus allowing for open competition. In Queensland to ensure year-round access to regular passenger transport services, especially to remote areas, the government exerts some controls over subsidised air services by way of the Transport Operations (Passenger government should make procedural allowance for the terms and act in accordance with these terms.


Transport) Act 1994 (Qld). Currently QantasLink and MacAir are the successful tenderers for the subsidised routes. 76

South Australia requires licensing of intrastate air services only for marginally viable subsidised routes. The legislation controlling such licensing is the Air Transport (Route Licensing - Passenger Services) act 2002 (SA). The Minister may declare certain routes to be a 'declared route'; it is then deemed an offence to operate a scheduled air service on a 'declared route' without a route service licence being issued by the Minister. 77

Western Australia operates a more sophisticated licensing system. The Transport Co-ordination Act 1966 (WA) is the legislation that provides for the review, control and licensing of transport services in that State. It provides for the granting of licences for aircraft, allocating permits to operate air services, imposes conditions on licences granted, collects aircraft license fees and pays subsidies to operators. 78 The economic regulations controlling intrastate air services in Western Australia are kept constantly under review. Quite strict licence conditions require that records and statistics have to be kept by both Regular Public Transport and charter services, with requirements that specified fares and freight rates are charged, and that specified timetables are observed. 79

In conclusion it is apparent that overall, the Australian constitution drafted at a time before man had made his first flight, serves the overseeing of aviation safety well. It could be argued that the States could use the licensing powers they have, to perhaps assist the safety of the small low capacity RPT and commuter aircraft, by providing more adequate subsidies to operators to make their routes more financially attractive and sustainable. Such financial discussion is outside the scope of this thesis. However it is submitted that it is a role that the States could address as being beneficial in the area of regional intrastate aviation that is so necessary for the sustainability of outback and remote areas of the country.

76 The Queensland government has committed the sum of $6.9 million each year in funding to ensure continuity of these services to remote locations for the next five years.
77 Air Transport (Route Licensing - Passenger Services) Act 2002 (SA) s 5(3).
78 Transport Co-ordination Act 1966 (WA) ss 20-21, 46-47
CHAPTER 4

THE CIVIL AVIATION REGULATORY OUTLOOK AT THE BEGINNING OF THE TWENTY-FIRST CENTURY

4.1 ICAO Enters the Twenty-first Century

ICAO has entered the twenty-first century secure in its role as the world's principal regulatory authority for civil aviation. However it continues to lack the all-important requisite for any regulatory body --- that of the power to enforce its rules.\(^1\) As described in the preceding chapter lacking this key essential the world's dominant aviation power, the United States has stepped in, and although ICAO may indeed enunciate the 'rules' it is left to others to devise enforcement procedures.

4.2 ICAO's Plan for its Future Role

In 2003 ICAO instituted the 'Global Air Navigation Plan'.\(^2\) Since its beginning it has had two additional reworked editions, the most current one in 2007.\(^3\) The overall aim of the plan was to ensure that a safe, secure, efficient and environmentally sustainable air navigation system was available at the global, regional and national levels. This required the implementation of an air traffic management system that allowed optimum use to be made of enhanced capabilities provided by technical advances. The broad aim of the plan was to assist the aviation community to transition from the air traffic control environment of the twentieth century to the performance-based, integrated and collaborative air traffic management system needed to meet aviation's requirements in the twenty-first century.

The Global Air Navigation Plan is a 'work in progress', a vision where long-term initiatives plan to be added to the global plan as the technology improves.

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\(^1\) See chapter two section 2.2 of this thesis for an explanation of the lack of such enforcement powers at its inception.


and the supporting provisions are developed. ICAO sees it as a strategic
document providing the planning methodology that will lead to global
harmonization in the field of air traffic management and global air navigation.

In a similar vein to the Global Air Navigation Plan, ICAO in 2007 launched
its Global Aviation Safety Plan. This initiative followed an approach and
philosophy akin to that of the Global Air Navigation Plan but with a greater
emphasis on 'safety'. Both plans were developed with the close participation
and cooperation of the worldwide aviation industry. Both also provide a
common framework to make sure that regional, sub-regional, national and
individual schemes become coordinated to deliver a 'harmonized safe and
efficient international civil aviation system'.

ICAO is acutely aware, whilst acknowledging that the attainment of 'safety'
 itself is the highest priority in aviation, the public perception of safety needs is
extremely relevant. This is itself related to the trust attributed to the aviation
safety system in force. Every time an accident occurs this trust is undermined.
Thus the challenge as ICAO sees it, is to drive the already low accident rate
even lower.

The Global Aviation Plan has the following three safety targets for 2008-
2011:

i) Reduce the number of fatal accidents and fatalities worldwide irrespective of the
   volume of air traffic.
ii) Achieve a significant decrease in accident rates, particularly in regions where these
    remain high.
iii) No single ICAO region shall have an accident rate more than twice the worldwide
    rate by the end of 2011.

The basis for the plan involves a 'Safety Roadmap', which has been prepared
and developed by the 'Industry Safety Strategy' group in close cooperation
with ICAO.

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9750 AN/963.
5 Ibid 3.
6 Ibid 4.
4.3 Australian Regulatory Management Crisis in the late 1990s

Having had the Civil Aviation Safety Authority established in July 1995 as an independent statutory authority under section 8 of the Civil Aviation Act 1988, the once fused 'commercial' and 'safety' functions of the former Civil Aviation Authority remained separated as aviation in Australia entered the new millennium. The new body Airservices Australia took up the task of the 'service provider'. Whilst under section 9 of the Act, the Civil Aviation Safety Authority, (CASA), became responsible for the safety regulation of civil air operations within the Australian territory, the operation of Australian registered aircraft and the promotion of high standards of aviation safety. CASA was governed by a Board of Directors appointed by the Minister for Transport and Regional Services with the Director of Aviation Safety, fulfilling the chief executive officer's role and being also a member of the Board. The Director took overall responsibility for CASA's administration and operational activities and the Board decided the objectives, strategies and policies to be followed and ensured CASA performed its functions in an efficient and effective manner.⁸

Despite the separation of the two functions, in the form of the safety and services arms previously coming under the one umbrella of the Civil Aviation Authority, management controversies, together with personality conflicts within the governing Board of the newly established Civil Aviation Safety Authority did not cease. The CASA Board became the hub of some fierce debates and public campaigns against it at the end of the 1990s, and early into the next decade.⁹

A change of government had occurred in the federal sphere in 1996. Following widespread criticism of the board, the new Minister for Transport and Regional Services John Sharp, took steps to change the board's

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⁹ Bills Digest No. 148 2002-03, Civil Aviation Amendment Bill 2003 (Cth) 2
membership. In May 1997 the board was expanded to 7 persons and the controversial businessman Dick Smith was appointed CASA's Deputy Chairman. On 26 September 1997 the then CASA Director Leroy Keith, left after the board passed a no-confidence motion in his management strategy. Two members of the board, one being the Chairman Justice Fisher, resigned in protest at the board's handling of the former Director. Not long after this trouble within the board Dick Smith was appointed Chairman on 24 December 1997. This was of course Mr Smith's second appointment as Chairman of the Board, the first having been to the board of the former Civil Aviation Authority in 1990.

On 1 July 1998 Mick Toller, a former senior Cathay Pacific Airlines captain, became the new director of Aviation Safety. Mr Toller had been in the job only a matter of weeks when he was faced with the fatal crash of a seaplane north of Sydney on 26 July 1998. Following this crash, organizational deficiencies were identified within the operating company, Aquatic Air Pty Ltd, concerning the management and conduct of charter operations carried out by the company and also in the safety regulation of those operations by CASA. The Minister commissioned a review of CASA's regulation of the plane's operators, Aquatic Air. CASA was criticized for its failure to suspend Aquatic Air prior to the accident and some of its actions were considered defective and not ideal, but could not be considered improper. The chairman of the board Dick Smith believed, on the contrary, that the report showed up continuing deficiencies in CASA. Dick Smith resigned as chairman in March 1999 amid allegations of collusion between the CASA Board and airlines over a trial of low flight level airspace management.

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10 Aviation Section The Australian (Sydney) 10 July 1996
11 Bills Digest No. 148 2002-03, Civil Aviation Amendment Bill 2003 (Cth) 2.
13 Commonwealth of Australia, Review of the Regulation by the Civil Aviation Safety Authority of Aquatic Air Pty Ltd trading as South Pacific Seaplanes.
14 Bills Digest No. 148 2002-03, Civil Aviation Amendment Bill 2003 (Cth) 2.
15 Bills Digest No. 148 2002-03, Civil Aviation Amendment Bill 2003 (Cth) 2. Following a fatal seaplane crash north of Sydney in July 1998, Stephen Skehill was commissioned by the Minister to review CASA's regulation of the seaplane's operators, Aquatic Air. Mr Skehill’s report was completed in October 1998 and tabled in Parliament in February 1999. The report found that a small number of CASA actions were defective and not
4.4 CASA's 1999/2000 Audit

Following on from a recommendation in the Plane Safe Inquiry, in December 1995 for an 'efficiency audit' of CASA, this was commenced in 1998. The audit's objectives were to assess the efficiency and effectiveness of the management systems and procedures used by CASA to ensure compliance with regulatory controls across the whole range of operations with which it dealt, including that of entry control.

The audit made reference in its report to the considerable turmoil the Authority had experienced since its formation in 1995. As described above there had been frequent top management turnover and accompanying related changes in strategic emphasis and policy direction. It emphasized that what the Authority really needed was a period of relative management stability, to enable it to focus more consistently on its objectives and be fully effective in carrying out its functions.

On the whole however, the audit report was good, with the audit office concluding that CASA's regulatory regime for ensuring compliance by the aviation industry with Australia's aviation safety legislation had been such, that it contributed towards Australia's highly regarded safety record. It did however make 13 recommendations aimed at improving CASA's compliance to be preferred, although not improper, including its failure to suspend Aquatic Air. The then CASA Chairman, Mr Dick Smith, was reported as believing that the Skehill report showed the continuing existence of deficiencies at CASA. However Mr Smith resigned in March 1999 amid allegations of collusion between the CASA board and airlines over a trial of low flight level airspace management.

On the basis of improving organisational performance it was recommended that 'the Australian National Audit Office undertake an efficiency audit of the Civil Aviation Safety Authority in 1998'.

This included,  
Air Operator's Certificate (AOC) holders, operating passenger-carrying aircraft within High Capacity Regular Public Transport (HCRPT); Low Capacity Regular Public Transport (LCRPT) and charter industry sectors; and Certificate of Approval holders.

18 Ibid.
processes. Included in these was the recommendation to, 'identify those operators with a significant history of non-compliance and developing appropriate enforcement strategies, including ensuring that the quality of the evidence collected is able to expedite any enforcement action'.\textsuperscript{19} The audit findings also concluded that although CASA had well documented procedures to ensure compliance with its legislation, there were shortfalls in adherence to these procedures, which CASA needed to address.\textsuperscript{20}

The report made reference to the inordinate number of 'inquiries' at various levels that had beset CASA since its formation in 1995.\textsuperscript{21} Reference was made to the Plane Safe inquiry,\textsuperscript{22} that had found that the former CAA had also been in a state of almost continual internal conflict from 1988 until 1995 and had in that time, also undergone constant reviews and reorganizations. In the seven years it was in existence it had seen 'eight ministerial changes, four chairmen, four chief executives and six heads of safety regulation'.\textsuperscript{23} The audit report considered that since it was established in July 1995 CASA had proved to be little different in this regard than had been its predecessor. At the time of the audit CASA had seen several changes at both the board and senior management level and had attracted ongoing and extensive debate in Parliament.\textsuperscript{24}

\textsuperscript{19} Ibid 13.
\textsuperscript{20} Ibid.
\textsuperscript{21} Ibid 37. These include:

- an inquiry into aviation safety by the House of Representatives Standing Committee on Transport Communications and Infrastructure Plane Safe December 1995;
- a Commission of Inquiry into Relations between CAA and Seaview Air completed in 1996;
- various quasi legal internal inquiries into regulatory failures within CASA, such as the 1998 Skehill inquiry into the Aquatic Air fatal accident and the Pearce Report of deficiencies in certain engines;
- Bureau of Air Safety Investigation (BASI) reports of aircraft accidents and incidents that often include recommendations for CASA;
- a BASI investigation of the recent efforts to change “G” airspace management in 1999;
- the Willoughby & Broderick report concerning the CASA organisation structure; and

\textsuperscript{23} Ibid 37.
\textsuperscript{24} Ibid.
On the question of enforcement the audit report discussed what it termed the 'graded path concept' as an enforcement policy. This it saw happening 'where circumstances permit'. This 'graded path of enforcement action' the audit report described, in the first instance, as involving education and counselling. If this was unsuccessful in gaining compliance, or a serious breach of safety regulations occurred, stronger deterrent action was to be considered.

In reality as a 'policy', it was not all that different from that discussed below under the heading 'CASA's current enforcement policy'. However in the late 1990s the legislative powers were not adequately in force to put the policy into operation in full, to the same extent as the future CEO of CASA was able to achieve, once the 2004 amendments to the Act were passed.

In October 1998 the CASA Board agreed to an underlying philosophy for its enforcement policy, which followed closely on the 'pyramid example', espoused by the regulatory theorists of the early 1990s, Ayres and Braithwaite. This is discussed in more detail in chapter six of this thesis. The policy was later expanded, taken on board, and put into operation by Bruce Byron, who took over as CEO of CASA in 2003.

The audit report actually suggested a 'Pyramid of Enforcement', commenting as it did, so that CASA would require additional legislative powers to implement the suggested procedure. The pyramid related CASA's powers to the supporting surveillance and entry control. It emphasized the fundamental importance of the supporting processes situated at the base of the pyramid. It consisted of four main levels. At the base was 'surveillance and entry control'.

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25 Ibid 105.
27 Ian Ayres and John Braithwaite, Responsive Regulation: Transcending the Deregulation Debate (1992) 35.
The second level up consisted of 'voluntary undertakings, fines, counselling, non-compliance notices and aircraft safety reports'. The third level was 'suspension and cancellation' and the top final level was 'prosecution'.

The audit report drew attention to the fact that questions were raised about CASA's reluctance to take enforcement action when necessary. This was referring to, in particular, the Seaview Inquiry, where it noted that a climate of 'institutional timidity' had been created within CASA

The report's summing up drew attention to the fact that CASA had a range of legislative powers to adequately deal with non-compliant operators and applauded the seeking of additional powers, that it considered would enhance its ability to take prompt action where contraventions were identified. It noted also that as a general rule, CASA's preferred approach was to apply a graded enforcement strategy that would, it concluded, encourage compliance without immediate recourse to penalties. On this theme one of the audit report's stated recommendations was that CASA should:

- review those operators with a significant history of non-compliance and, if considered appropriate, develop enforcement strategies specific to those operators; and
- ensure that the quality of the evidence collected would expedite enforcement action.

CASA agreed with 12 of the 13 recommendations and stated that it had proposed a number of additional enforcement tools to enable it to deal with operators who may engage in inappropriate practices, which may not necessarily constitute breaches of the legislation. These additional tools, namely enforceable voluntary undertakings and administrative fines, would also deal with operators who had a history of minor non-compliances, which would not completely justify prosecution or certificate action. Unfortunately at the time of the completion of the audit, legislative changes necessary to

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29 Ibid.
32 Ibid 116.
utilize these proposed tools had not yet been enacted. A full slate of such changes did not occur until the introduction of the Civil Aviation Amendment Bill early in 2003.\textsuperscript{33}

A follow-up Australian National Audit Office report found in mid-2002 that CASA's management of aviation safety compliance systems had overall, seen improvement.\textsuperscript{34} As far as 'enforcement' was concerned this audit found that CASA had improved its enforcement strategies such that it was better placed to secure operator compliance with the Act and the Regulations, than it had been with the former enforcement strategies that were in place at the time of the 1999 audit.\textsuperscript{35}

\textbf{4.5 The ARCAS Airways Inquiry}

In October 2000, the Senate Rural and Regional Affairs and Transport Legislation Committee produced a report on the small regional airline, ARCAS Airways, operating out of the town of Albury in New South Wales.\textsuperscript{36} This report was commenced following information that came out of an examination of CASA during the Committee's 2000-2001 budget estimates on 2 May 2000 and 24 May 2000. The information revealed in the budgets estimates examination concerned the company concealing from CASA, unofficial 'defect books' pertaining to each of its three aircraft. The defect books were non-official books used by ARCAS pilots and engineers to record defects on the aircraft. Such defects were not necessarily being recorded on the official CASA maintenance releases, as they should have been. Thus knowledge of certain defects remained hidden from CASA officials. Serious safety concerns were raised that ARCAS flew aircraft with known defects. These defects were such that, had CASA been aware of them, they would have required rectification prior to the aircraft being allowed to fly.

\textsuperscript{33} Civil Aviation Amendment Bill 2003 (Cth).
\textsuperscript{35} Ibid 14.
\textsuperscript{36} Senate Rural and Regional Affairs and Transport Legislation Committee, Commonwealth of Australia, Administration of the Civil Aviation Safety Authority: Matters Related to ARCAS Airways (2000).
In addition to the investigation of the safety of ARCAS aircraft and the actions of ARCAS personnel in concealing known defects, the actions of certain CASA officials prior to, and following the discovery of the defect books, was also investigated. This investigation is looked at in greater detail in chapter six of this thesis, in particular the actions of Mr Laurie Foley, who at the time was the Assistant Director of Aviation Safety Compliance at CASA. Following the discovery of the defect books by a CASA official Mr Foley initially endorsed the advice of his subordinate, Mr McKenzie that ARCAS was no longer to be permitted to conduct Regular Public Transport operations. Subsequently however, Mr Foley reversed his original decision based apparently on advice from those CASA officers in day-to-day contact with ARCAS. The Committee found that Mr. Foley's action, in reversing the suspension of ARCAS's Air Operators Certificate, was not justified.

The ARCAS report led to recommendations for legal prosecutions and the creation of a new position of Deputy Director of Aviation Safety within CASA. CASA demoted Mr Foley as its head of aviation safety compliance, and on 22 December 2000 Mr Foley resigned from CASA.

A new chairman was appointed to the board in 2001. This was Mr Ted Anson. He had formerly been the chairman of the Australian Maritime Safety Authority and was asked by the government to consider the existing CASA board structure and to report on whether it was appropriate for safety regulation to be a statutory authority. His report was completed in mid-2002 but not made public.

The Civil Aviation Amendment Bill of 2003 was thought to contain some of Mr Anson's recommendations. Of particular note was the decision to do away with the CASA Board and appoint one person, the chief executive officer (CEO), in its place. The CEO was charged with the full responsibility for deciding the strategic direction of CASA and reporting directly to the Minister. This was the way in which the Australian Maritime Safety Authority operated at the time Mr Anson was its Chairman. This move was historically interesting, as one hundred years after the birth of aviation, Australia was
again looking to and implementing procedures that seemingly worked in a maritime safety environment. History was however, only a few years later, to prove that although it may well work very well in the maritime world, such a change in governance might not have been the best move as far as aviation safety was concerned. The September 2008 Senate Inquiry into the administration of CASA recommended a return to the re-establishment of a Board structure for the Authority.\footnote{Senate Standing Committee on Rural and Regional Affairs and Transport, Commonwealth of Australia, Administration of the Civil Aviation Safety Authority (CASA) and related matters, (September 2008) 44: The Committee recommends the Australian Government strengthen CASA's governance framework and administrative capability by introducing a small board of up to five members to provide enhanced oversight and strategic direction for CASA.}

Having the CEO of CASA virtually replace the board had been seen, in 2003, to place CASA more directly under Ministerial supervision than had previously been the case. Additionally the government claimed that other changes were introduced to provide greater procedural fairness in instances of suspension and cancellation of an aviation licence. Also as is discussed in more detail below, under 'CASA's current enforcement policy', the introduction of a demerits scheme, together with self-reporting was aimed at shifting some onus onto the aviation industry to ensure compliance with appropriate safety standards.\footnote{See page 124 of this thesis for a discussion of the demerits scheme.}

\section*{4.6 CASA's Recent Enforcement Policy}

As previously stated the conduct of the safety regulation of civil air operations in Australia, together with the operation of Australian aircraft outside Australian territory is CASA's primary function under the Civil Aviation Act. This it achieves in the words of the Act by, 'developing effective enforcement strategies to secure compliance with aviation safety standards'.\footnote{Civil Aviation Act 1988 (Cth) s 9(1)(d)}

Thus the Civil Aviation Act 1988 forms the basis of the current aviation safety legislation and describes CASA's role in enforcing the regulations. The Civil Aviation Regulations made pursuant to the 1988 Act are gradually now being replaced with the Civil Aviation Safety Regulations 1998. Until they are...
completely replaced it is necessary for industry participants to refer to both sets of regulations. The regulations are supported by a number of other documents:

1) The Civil Aviation Orders that are published by CASA from time to time, and have the backing of the regulations in relation to compliance.\(^{40}\)

2) The Civil Aviation Advisory publications that provide guidance in a designated subject area for complying with a related Civil Aviation Regulation. These have to be read in conjunction with the referenced regulation.\(^ {41}\)

In line with the Regulatory Reform Program the Civil Aviation Safety Regulations (CASRs) currently being developed are divided into a number of Parts. To each Part there may be attached the following documents.

1) A Manual of Standards (MOS) that comprises specifications (Standards) prescribed by CASA.

2) Advisory Circulars (ACs) that are intended to provide recommendations and guidance to illustrate a means, but are not necessarily the only means, of complying with the Regulations. Advisory Circulars explain certain regulatory requirements by providing interpretive and explanatory material.

3) Airworthiness Directives (ADs) that take their authority from Part 39 of the new regulations.\(^ {42}\)

\(^{40}\) Civil Aviation Regulations 1988 (Cth) reg 5:

(1) Wherever CASA is empowered or required under these regulations to issue any direction, instruction or notification or to give any permission, approval or authority, CASA may, unless the contrary intention appears in the regulation conferring the power or function or imposing the obligation or duty, issue the direction or notification or give the permission, approval or authority in Civil Aviation Orders or otherwise in writing.

(2) Expressions used in Civil Aviation Orders shall, unless the contrary intention appears, have the same meanings as in these regulations.

(3) If a direction, instruction or notification relating to a person is issued in Civil Aviation Orders, the direction, instruction or notification, as the case may be, is taken to have been served on the person on the date on which the making of the Order is notified in the Gazette.

\(^{41}\) Civil Aviation Advisory Publications (CAAPs) are advisory only. They provide recommendations and guidance to illustrate a method, or several methods, not necessarily being the only method by which legislative requirements may be met. They also provide a means of illustrating the meaning of certain requirements by offering interpretive and explanatory guidance.

\(^{42}\) Part 39 of the proposed CASRs, (39.001), prescribes the requirements for the issue, review and exclusions of an airworthiness directive for an aircraft or aeronautical product (where an unsafe condition exists and is likely to affect other aircraft/product).
In governance terms CASA is an independent statutory authority managed by 'the Director of Aviation Safety', at the time of writing Mr Bruce Byron, who is appointed by the Minister and is directly responsible to him for deciding CASA's objectives and policies including CASA's enforcement policy. Amendments were made to the Civil Aviation Act and Regulations in February 2004 that, according to the Authority, 'increased CASA's ability to respond appropriately to legislative breaches and provide room for a more cooperative approach to gaining compliance'.

The Minister for Transport and Regional Services, John Anderson, introduced the Bill into Parliament claiming that the 'new enforcement measures will provide CASA with a wider range of enforcement tools to better match the regulatory action to the seriousness of the breach'.

An initiative of CASA's chief executive officer, Bruce Byron, this new approach to enforcement looked on face value, impressive. It should be noted that several of its proposals had been mooted by the previous Director of CASA as far back as 1998, but there was not then the legislative authority to put them into effect until the passing of the 2004 amendments. Mr Byron claimed the new approach would enable CASA to adopt a new philosophical attitude to enforcement. This Mr Byron stated, in his foreword to the newly drafted enforcement manual, was based on his belief that:

- A person who reports making an honest mistake generally should not be prosecuted or fined, nor should they have their licence, certificate or authority suspended or cancelled
- There should be a measured response to less serious contraventions of the safety rules which should involve counselling, warnings, training, infringement notices or enforceable voluntary undertakings, rather than either criminal prosecution or the suspension or cancellation of licences, certificates or authorities.
- People who consciously choose to operate outside the rules or who put the lives of fare-paying passengers at risk should be prosecuted and removed from the industry, no matter how powerful they are, or are seen to be.

44 Ibid, foreword.
45 Ibid.
The Enforcement Manual itself is quite comprehensive, providing details to CASA officers about each of the existing enforcement tools available and the circumstances in which these tools should be used. Much emphasis is placed on the fact that to be effective the enforcement procedures must be 'fair, reasonable and consistent' and furthermore must be 'perceived' as being fair by those to whom the enforcement procedures may apply. This, Mr Byron was at pains to point out does not rule out the application of the full force of statutory sanctions where they are warranted:

It does encompass the right of a person to objective, even-handed consideration of all the circumstances surrounding any breach before action is taken. It also requires officers to make every effort to understand a person's position and take it into account, as well as to let the person know of CASA's position. There should not be a rigid adherence to precedent without due regard to unusual circumstances.46

Also embodied in the philosophy of new enforcement procedures is the concept that whilst considering each case they must individually deal with, officers should 'feel free' to recommend actions that, in their professional judgment will appropriately 'serve' CASA's safety mandate. Thus the element of 'discretion' on the part of the regulatory officers is highlighted.47 Reference is made to the many factors that must be considered when the officer is faced with choosing an appropriate course of action to ensure compliance. It is acknowledged that the weight given to the various factors the officer may encounter must often be left to the discretion of the individual regulatory officer. Material in the enforcement manual is designed to give 'guidance' in relation to the proper exercise of that discretion. Emphasis is placed on the exercise of discretion with quite a lengthy discourse on the manner in which regulatory officers will be expected to operate.48 Time will tell if the officers'

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46 Ibid.
47 See page 82 of this thesis for an example of the occurrence of a serious outcome when officers have taken very different approaches to an exercise of discretion in interpreting identical regulations.
48 Civil Aviation Safety Authority, Enforcement Manual (June 2004) 3.

The success of the enforcement program set out in this Manual will depend on the good judgement of officers who are able to:
• Earn the respect of the aviation community rather than expecting it merely by virtue of their office
discretion is viewed by the industry as operating in a 'fair and just' manner. At least the regulator is here giving some recognition to the fact that the concept of 'discretion', as far as different officers at the coalface are concerned, is an area that is in need of guidance.49

The current enforcement policy voices six main changes to the former system. i) The 'Aviation Self Reporting Scheme' offers limited indemnity for the self-reporting of unintentional breaches of the regulations. Modelled on a scheme currently operating in America it gives protection from an action by CASA if an individual reports an unintentional breach he or she has made to the Aviation Transport Safety Bureau within ten days of the breach.50

ii) The external review of any decision CASA may make to vary, suspend or cancel licence certificates or other authorizations becomes subject to two new procedures. These fall into two categories and involve two different processes. Where an alleged breach, which is considered a 'serious and imminent threat to safety', occurs CASA can still take immediate action such as suspension of a licence or authorization. However within five days of the suspension, CASA must apply to the Federal Court confirming the suspension for the period of time CASA considers necessary to complete an investigation. If CASA obtains the order requested, it can issue a 'show cause' notice and subsequently vary, suspend or cancel the relevant permission at the end of the 'show cause' process. The affected party concerned can appeal CASA's decision to the Administrative Appeals Tribunal. Thus the procedure allows CASA to act immediately in a situation it judges to be necessary to protect safety but only for a period of five days prior to it coming before the Federal Court for a ruling as to whether it has made the correct decision. Thus it is CASA who in

・ Exercise objectivity and judicious restraint, since failure to do so may provoke disregard for compliance and safety.
・ Promptly and precisely detect and investigate possible contraventions and report their findings to the appropriate managers
・ Determine whether a contravention has, in fact, occurred and whether it involved a risk to aviation safety
・ Consider mitigating factors present at the time of an incident or contravention
・ Ensure that the civil aviation rules are fairly and equally enforced and that all persons and corporations are treated equally under the law
・ Recommend or take effective enforcement action in the case of breaches of civil aviation rules, particularly when such breaches are deliberate, in order to protect the safety of air navigation

49 See chapter 5 (5.11), of this thesis for a discussion of the role of 'discretion' in enforcement. 50 CASA does not administer the scheme. This is in the hands of the Australian Transport Safety Bureau (ATSB).
this instance is the one who must seek the court order to confirm the action it has taken.  

The second procedure comes into force where it is considered non-compliance has occurred and there is no serious and imminent risk to air safety. What follows is an automatic stay of any enforcement decisions CASA has made, for five business days after notification of the action it considers appropriate. During the five-day period when CASA's action is stayed, the alleged non-compliant individual can apply to the Administrative Appeals Tribunal for a formal review of the original decision. Such an application to the Administrative Appeals Tribunal within the five-day period has the result that CASA's decision is automatically stayed for a further 90 days to enable the matter to be heard by the Tribunal.

iii) A Demerit Point System has been instituted which is similar in operation to that used for motor vehicle licences. Points are incurred for certain

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51 Civil Aviation Act 1988 (Cth) s 30DC
(1) Where CASA has reason to believe that the holder of a civil aviation authorisation has engaged in, is engaging in, or is likely to engage in, conduct that contravenes section 30DB, CASA may suspend the authorisation by giving written notice to the holder. Note: CASA is not required to give the holder a show cause notice before making a decision under this subsection.
(2) The notice of the decision must include a summary of Subdivisions C and D. However, a failure to include such a summary does not affect the validity of the notice.
(3) The suspension ends at the end of the fifth business day after the day on which the holder was notified of the suspension, unless before that time CASA makes an application to the Federal Court under section 30DE. Note: If CASA makes an application in time, the suspension continues in force until it comes to an end under the rules in section 30DI.

52 Civil Aviation Act 1988 (Cth) s 31A. Automatic stay of certain reviewable decisions.
(1) This section applies to a decision under this Act or the regulations that is reviewable by the Administrative Appeals Tribunal if, before making the decision, CASA was required by this Act or the regulations to give a show cause notice to the holder of the civil aviation authorisation concerned.
(2) This section does not apply to a decision under section 30DI or a decision under the regulations to cancel a licence, certificate or authority on the ground that the holder of that licence, certificate or authority has contravened a provision of this Act or the regulations (including the regulations as in force by virtue of a law of a State).
(3) If this section applies to a decision, the operation of the decision is stayed by force of this section.
(4) The stay ceases to have effect at the end of the fifth business day after the day CASA notified the holder of the decision, unless, before the end of that fifth business day, the holder applies to the Tribunal for an order under subsection 41(2) of the Administrative Appeals Tribunal Act 1975.
(5) If the holder applies to the Tribunal as mentioned in subsection (4), the stay continues to have effect until the Tribunal makes an order under subsection 41(2) of the Administrative Appeals Tribunal Act 1975 or decides that no order should be made.
(6) If the holder applies to the Tribunal as mentioned in subsection (4), the holder must give a copy of the application to CASA as soon as practicable after lodging it with the Tribunal.
regulatory breaches, and an individual or an organization's aviation authorization is suspended or cancelled when a number of points are incurred within a fixed period.\textsuperscript{53} It is stated in the enforcement manual that such a system largely removes the scope for 'discretion' by CASA in relation to specified regulatory breaches.\textsuperscript{54} This may or may not be so, however a CASA official still makes the decision to issue the infringement notice in the first place.

As with the motor registry scheme CASA keeps a demerit point register.\textsuperscript{55} When issued with an infringement notice for an offence an individual can choose to pay the fine, or if prosecuted and found guilty a set number of demerit points, (depending on the severity of the offence), is recorded against the individual's licence. Again in concert with the motor vehicle system, if within a three-year period there have been 12 or more points accrued, the individual's licence or certificate is automatically suspended. The suspension period is variable depending on the number of demerit points incurred. In addition, if an individual has had an automatic suspension on two occasions, a third occasion will prohibit the application for a new licence or certificate for three years.\textsuperscript{56}

\textsuperscript{53} Civil Aviation Act 1988 (Cth) s 30DT
Regulations may prescribe offences to which the demerit points scheme applies. The regulations may prescribe:
(a) offences to which this Division applies; and
(b) the number of points that are incurred in relation to an offence.


\textsuperscript{55} Civil Aviation Act 1988 (Cth) s 30EG
CASA must maintain a demerit points register:
(1) CASA must maintain a register that records details necessary for, or directly relevant to, the administration of this Division.
(2) CASA must, if it becomes aware of it, correct any mistake, error or omission in the register.
(3) The regulations may provide for other matters in relation to the keeping of the register.

\textsuperscript{56} Civil Aviation Act 1988 (Cth) s 30EC
Demerit cancellation notice:
(1) CASA must give the holder of a civil aviation authorisation a demerit cancellation notice if:
(a) the holder incurs demerit points for a prescribed offence; and
(b) taken together with demerit points incurred by the holder for offences committed by the holder in the 3 years ending on the day the offence was committed, the holder has incurred at least 6 demerit points in relation to the same class of authorisations; and
(c) the holder has, twice previously, been given a demerit suspension notice in relation to that class of authorisations.
(1A) If a person incurs demerit points before becoming a holder of a civil aviation authorisation, then, for the purpose of paragraph (1)(b), those points are taken to have been incurred by the holder for offences committed by the holder.
(2) The effect of giving the notice is that:
There is provision for an application to CASA for reinstatement of a suspended or cancelled licence or certificate in cases of serious hardship. Certain conditions accompany such a reinstatement and if CASA refuses to reinstate the licence or certificate an application for a review of the decision can be made to the Administrative Appeals Tribunal.\footnote{57}

iv) Enforceable Voluntary Undertakings make their first appearance into aviation safety regulation under this ‘enforcement policy’ initiative. They are modelled on section 87 B of the Trade Practices Act,\footnote{58} and provide a system whereby CASA can accept written undertakings from people or organizations in relation to compliance. The undertakings, as their name suggests, are completely voluntary and are intended to deal with infringements where prosecution or licence action may be otherwise unwarranted.\footnote{59} An enforceable voluntary undertaking creates a legal obligation on the individuals or organizations concerned to undertake training or to discontinue certain activities. They can be individually designed to fit the individual circumstances of each matter. They are viewed as being less severe and thus less damaging to an individual’s reputation than administrative action and have a flexibility that can be tailored to deal with specific circumstances in each case. If an individual or organization breaches an enforceable voluntary undertaking, CASA can take the matter to the Federal Court requesting orders against the offender.

\footnotesize{(a) from the start date specified in the notice, all of the holder's civil aviation authorisations of that class are cancelled; and
(b) the holder is not entitled to be granted a civil aviation authorisation of that class for 3 years from the date of the notice.}

\footnote{57} Civil Aviation Act 1988 (Cth) s 30EF

CASA may reinstate if satisfied that holder’s livelihood depends on authorisation:

(1) A holder of a civil aviation authorisation who has been given a demerit suspension notice or demerit cancellation notice may apply to CASA to have the authorisation reinstated.

(2) Subsection (1) applies despite paragraphs 30DY(2)(b), 30DZ(2)(b) and 30EC(2)(b).

(3) If, and only if, CASA is satisfied that the suspension or cancellation would cause the holder severe financial hardship because, without the authorisation, the holder would not be able to earn the holder’s principal or only income, CASA may:

(a) reinstate the authorisation; and

(b) impose on the authorisation such conditions as CASA considers appropriate in the circumstances.

\footnote{58} Commonwealth Trade Practices Act 1974 (Cth).

\footnote{59} Civil Aviation Act 1988 (Cth) s 30DK.
v) One of the 2003 amendments to the Civil Aviation Act involved a significant change to the Authority's powers as they apply to flight crew and aviation engineers, (LAME's), licences. CASA cannot now cancel a flight crew or licenced aircraft maintenance engineer's licence unless there has been a conviction, or a court has found that the individual has committed an offence under the Regulations. Once a conviction is obtained CASA can cancel the authorization. However the Administrative Appeals Tribunal can still review the cancellation.

CASA's current Enforcement Policy clearly recognises that breaches of the regulations may occur for many different reasons, from a genuine misunderstanding of the law, to blatant disregard for aviation safety. The range of enforcement tools the policy described fits the 'enforcement pyramid' favoured by the regulatory theorists, Ayres and Braithwaite, and described in detail in chapter five of this thesis. A series of 'enforcement tools' are suggested ranging from the mild 'counselling' tool, up to what would be the

60 Civil Aviation Regulations 1988 (Cth) reg 269.
Variation, suspension or cancellation of licence, certificate or authority:
(1) Subject to this regulation, CASA may, by notice in writing served on the holder of a licence or certificate or an authority, vary, suspend or cancel the licence, certificate or authority where CASA is satisfied that one or more of the following grounds exists, namely:
(a) that the holder of the licence, certificate or authority has contravened, a provision of the Act or these regulations, including these regulations as in force by virtue of a law of a State;
(b) that the holder of the licence, certificate or authority fails to satisfy, or to continue to satisfy, any requirement prescribed by, or specified under, these regulations in relation to the obtaining or holding of such a licence or certificate or an authority;
(c) that the holder of the licence, certificate or authority has failed in his or her duty with respect to any matter affecting the safe navigation or operation of an aircraft;
(d) that the holder of the licence, certificate or authority is not a fit and proper person to have the responsibilities and exercise and perform the functions and duties of a holder of such a licence or certificate or an authority; or
(e) that the holder of the licence, certificate or authority has contravened, a direction or instruction with respect to a matter affecting the safe navigation and operation of an aircraft, being a direction or instruction that is contained in Civil Aviation Orders.

61 Civil Aviation Act 1988 (Cth) s 31.
62 Ian Ayres and John Braithwaite Responsive Regulation: Transcending the Deregulation Debate (1992) 58.
apex of the pyramid where one would find cancelling of a licence or air operator's certificate, to criminal prosecution.\textsuperscript{63}

It is interesting to see how these changes to CASA's enforcement policy can play out in practice. An address delivered at the ALAANZ annual conference in Melbourne in 2005 provided an encouraging example of these changes in operation. Peter Carter, an aviation lawyer from Brisbane gave an example of the effectiveness of the changes. He compared the outcome of two cases, both involving breaches of the regulations for low flying. The first case involved a lengthy and expensive hearing in the Rockhampton Magistrates Court.\textsuperscript{64} Mr Carter handled the second case again involving low flying, by taking advantage of the new 'Aviation Self Reporting Scheme'. His client lost demerit points on several of the breaches and paid substantial fines, but avoided what could have amounted to a maximum penalty of two years imprisonment. Mr Carter saw this second case as an example of the new system working well. The expenses, anxiety and personal costs of litigation were avoided for the


The tools listed in order of ascendency are:

- Counselling
- Remedial training
- Enforceable voluntary undertakings
- Variation, suspension and cancellation of authorisations
- Infringement notices
- The demerit points scheme
- Recommending prosecution

\textsuperscript{64} Peter Carter, 'The David Boughen Memorial Address' (Paper presented at the Aviation Law Association of Australia and New Zealand, Melbourne, 17 March 2005) 2.

The facts of the first case were that in 1992 a local grazier had breached regulations regarding low flying over land. The grazier hired a QC and robustly defended the action brought by the regulator in the Rockhampton Magistrates Court. The defence was successful on the basis that the ground observers (who were lay persons), could not be relied upon as having the appropriate level of skill to estimate the height of the aircraft as being less than 500 feet above ground level. The grazier in defending the action incurred significant costs, some of which were awarded against the Authority. He also incurred personal costs, time lost in months of preparation and the Commonwealth also expended considerable resources of its own. Contrast this scenario with the second case described by Mr. Carter, which took place after the advent of the new enforcement policy. In the second case among other breaches, the pilot had flown under the Sydney Harbour Bridge and in doing so had penetrated two areas of restricted airspace. One of these areas was unfamiliar to her. Mr Carter urged her to report the infringements under the Aviation Self Reporting Scheme. The procedure for this has the following requirements:-

1. It must be made to the ATSB within ten days of its occurrence on its approved form.
2. It must detail the breach and state the regulation that has been breached.
3. The occurrence must not fall within the stated exceptions, which includes deliberate acts.
4. A person can only benefit from this scheme once every five years.
pilot and the expenditure of public resources associated with a prosecution were also avoided.\textsuperscript{65}

4.7 Safety in Regional Aviation

In 2003 the House of Representatives Standing committee on Transport and Regional Services was charged with inquiring into a range of matters pertaining to commercial air services in regional and rural Australia. Its report was tabled in the House in November 2003.\textsuperscript{66} It was an extremely comprehensive report totalling 286 pages in all, of which 30 pages were devoted solely to the role of the regulator.

The inquiry found that evidence submitted to them from a wide range of people and organizations, suggested that aviation safety regulations and the way they were administered imposed significant costs on small operators. This in turn was contributing to a reduction in the number of regional operators and the level of air services that were available in regional areas.\textsuperscript{67} CASA’s response pointed out that its regulatory efforts focussed on protecting air travellers. To achieve this outcome it centres its efforts on improving safety by changing the ‘culture’ of operators and having them accept responsibility for safety.\textsuperscript{68}

Of particular interest in this report, in relation to the subject of this thesis, was the manner in which the report identified, and tried to ‘mix together’, the ever present difficulty of the regulator being both ‘educator’ in terms of instructing and encouraging in an attempt to impart what it considers to be the correct safety culture, and ‘policeman’ in carrying out its regulatory duties when non-compliance is detected.

\textsuperscript{65} Ibid.
\textsuperscript{66} Commonwealth of Australia, House of Representatives Standing Committee on Transport and Regional Services, Regional Aviation and Island Transport Services: Making Ends Meet, (November 2003).
\textsuperscript{67} Ibid 184.
\textsuperscript{68} Ibid 187.
Much evidence was given in the various submissions, from a range of small regional operators, as to their difficulty in dealing with CASA. This was particularly so regarding costs. Dick Smith told the committee:

> When you talk to the people at CASA, they are very well meaning but they are destroying an industry. It is the dream job. They can sit there, and without this pressure of cost, they can dream up safer ways of doing things.  

This was confirmed by evidence from a large range of small aviation operators, as well as State governments such as New South Wales and Tasmania. The 'excessive' costs of complying with CASA's ever increasing regulatory requirements were seen, not only to impact on the cash flow and financial viability of smaller regional operators, but also to increase the level of financial risk to which these firms were exposed, and ultimately to impact on safety.

CASA's 'risk management' approach to managing aviation safety was analysed and explained, with reference to recommendations that came out of both the Seaview inquiry of 1996, and the Plane Safe report of 1995. The report found that the priority CASA gives to certain sectors of the industry is based on its risk management approach to managing aviation safety. This is in turn, based on the aviation safety statistics, which CASA appears to interpret as reflecting the level of maturity in the 'attitude' and 'culture' that the different

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69 Ibid. Dick Smith, transcript of evidence, Canberra, 4 June 2003, 578.

70 Ibid 185. NSW Government, submission no. 151, 5; South Australian Government, submission no. 148, 8-9; Western Australian Government, submission no. 150, 9-10; Tasmanian Government, submission no. 155, 12.

71 Ibid 192.

72 Risk management is a systems-based approach that centres on the identified hazards involved in every aspect of the aviation operation. It is an approach that can involve a very long list of activities such as aircraft flight operations, procedures on the flight deck and aircraft maintenance, down to baggage handling and seemingly more mundane and less high-status aspects of aviation. Each phase of the operation is analysed and the degree of risk associated with the identified hazards assessed, leading to actions to either eliminate or minimize those risks to an acceptable level.


sectors have to safety.\textsuperscript{75} This came out of the evidence taken by the Seaview inquiry of 1996, which pointed to the company's attitude to safety and regulation as contributing to the accident.\textsuperscript{76}

Further evidence of factors contributing to the safety culture in different sectors of the industry was provided by the Plane Safe inquiry, which discussed the relationship between operator profitability and safety. The report said that higher operating margins, as were evident in the larger airlines appeared to be correlated with lower accident rates. Equally lower margins, as occurred in small regional airlines expected to be correlated with higher accident rates.\textsuperscript{77} This suggested that companies with lower operating margins used unsafe practices and pressured pilots to compromise safety,\textsuperscript{78} in an effort to remain financially viable'.\textsuperscript{79} The 2003 Parliamentary inquiry into Regional Aviation recommended that CASA, in addition to enforcing aviation safety compliance, place greater focus on activities to assist industry in complying voluntarily with the regulations.\textsuperscript{80}

4.8 Regulatory Reform

\textsuperscript{75} House of Representatives Standing Committee on Transport and Regional Services, Commonwealth Parliament, Regional Aviation and Island Transport Services: Making Ends Meet, (November 2003) 200.
\textsuperscript{77} Ibid 54-57.
\textsuperscript{78} Various studies have been undertaken, primarily in the United States, that indicate that lower profitability is correlated with higher accident and incident rates, particularly for smaller carriers. See; Nancy L Rose, 'Profitability and Product Quality: Economic Determinants of Airline Safety performance' (1990) 98(5) Journal of Political Economy 944-964.
\textsuperscript{79} A later United States study in 2005 looking at the link between financial performance and air safety after deregulation, using accident rates as a measure of safety, came to similar conclusions. This study highlighted an inverse relationship between profitability and air safety, especially for the smaller regional air carriers, raising important policy implications for the aviation safety regulator. See; Sunder Raghavan and Dawna L Rhoades, 'Revisiting the relationship between profitability and air carrier safety in the US airline industry' (2005) 11(4) Journal of Air Transport Management 283-290.
\textsuperscript{80} House of Representatives Standing Committee on Transport and Regional Services, Commonwealth of Australia, Regional Aviation and Island Transport Services: Making Ends Meet, (November 2003) 200:

To highlight the rationale for its risk management approach, CASA told the committee that, according to ATSB statistics, the accident rate for the charter sector of the industry was five to seven times greater than the RPT sector (a total of 375 accidents compared with 50 accidents respectively over the past 10 years).

\textsuperscript{80} Ibid 212.
A Regulatory Framework Program was first instituted by the newly formed CASA in 1996, after it recognized that many safety regulations were unnecessary or unnecessarily restrictive compared with international standards. At times they were seen as ambiguous, difficult to comply with and difficult to enforce. In fact they were plain ‘out of date’, and to make them work the regulation frequently required exemptions, which in turn imposed addition costs on the industry and on CASA. The objective of the program was to completely review and revise the Australia aviation safety requirements that were then contained in the Civil Aviation Regulations (CARs) and the Civil Aviation Orders (CAOs). The revised legislation was to be called the Civil Aviation Safety Regulations (CASRs).

CASA initially embarked on a validation exercise of existing legislation to:

• consolidate existing rules for each subject in one place;
• incorporate the federal government's administrative and legal policies (without altering aviation safety policy);
• adopt the part numbering system used by the USA code of Federal Aviation Regulations (FARs).

Called the 'Regulatory Structure Validation Project (RSVP), the aim initially was not to harmonise current policy with international practice, as it was thought that the ensuing consultation process was unnecessary for what was essentially to be a restructuring exercise. The revised regulations were due to come into effect mid 1997 and by the end of 1996 it was two-thirds complete. However there was concern within the Authority that long standing safety issues would not be addressed under the Regulatory Structure Validation Project, and the project was halted and a second stage of reform commenced. This was known as the Regulatory Framework Program (RFP), and whilst building on the work done by the previous group, its brief was to 'conduct a complete review, and rewrite the Australian aviation safety

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82 Civil Aviation Safety Authority, Regulation Impact Statement, RIS 980 1 (June 1998) 2.
83 Civil Aviation Safety Authority, Review of Regulatory Reform Program (August 2001) 9.
84 Ibid.
Again robust words described the aims of the Regulatory Framework Program. The object was to develop regulations that were clear, concise and aligned with international standards and practices. The timetable for completion of the Regulatory Framework Program was the end of 1998. Joint industry and CASA technical committees were set up with each committee having responsibilities for a specific subject area, and corresponding parts of the regulations.  

Changes in senior management in CASA in December 1997 saw some reshuffling of the Regulatory Framework Program staff and the timeframe for finalisation was revised to December 2001. However there were further changes in senior management and Board representation in 1998 and this prompted an organization review and the closure of the Regulatory Framework Program office. The rational behind the closure was that although well resourced, the Regulatory Framework Program had produced very little in the way of regulatory reform. In other words it was proving too costly for the amount, or rather lack of amount, it had achieved.

Regulatory Framework Program staff were absorbed into various other branches within CASA, and industry participation in regulatory development continued through the establishment of a 'Standards Consultative Committee' and its associated sub-committees.

December 1999 saw another initiative, the Regulatory Reform Program launched, with the stated objectives being the development of a complete suite of regulations.  

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85 Ibid 10.
86 Ibid. The revised rules were to be developed using set criteria, which determined that the new regulations were to be:
• focused on safety;
• justifiable;
• clear, concise and unambiguous;
• enforceable;
• consistent with Australia's international obligations;
• harmonized with overseas requirements where possible;
• outcome based vs prescriptive;
• based on risk management principles;
• cost beneficial;
• representative of a 'systems' approach to safety; and
• allowing for delegation to industry where appropriate.

87 Ibid 11.
88 Ibid.
of aviation regulations to replace those that currently existed. In effect it represented a continuation of the formal processes that took place under the old Regulatory Framework Program, but this time apparently, to a designated plan. The completion date was set at December 2001 although it was acknowledged that this might be 'subject to change'. It came as no surprise to the aviation industry that change for a completion date for the Regulatory Reform Program did indeed happen, first to September 2002, and then to April 2003.

In February 2006 the then CEO, Bruce Byron, announced that the Regulatory Reform Program was to be refined. As had been first suggested nine years ago in the early days of the Regulatory Framework Program, two tiers of legislation, the Civil Aviation Act and the Civil Aviation Safety Regulations, would replace the current three tiers of legislation, which included as the third tier, the Civil Aviation Orders. The two tiers would now be supported by material designed to guide the aviation industry on how to comply with the regulations and the Act. This supporting guidance material was to be written in easy-to-follow technical language rather than legal language. It would also allow flexibility as to how the aviation industry was expected to comply with the rules:

This means we can make the regulations shorter, with a clear focus on safety outcomes, while leaving the detail about compliance to the supporting material. …

The supporting material will consist of an Acceptable Means of Compliance, advisory circulars and other documentation as required.89

At the same time Mr Byron said that CASA would be establishing a simpler process for developing the new regulations, it would maintain a high level of consultation with the aviation industry. This would apparently be achieved by the formation of small industry and CASA teams working together to develop the supporting material for each set of regulations. The teams would start with the safety outcomes CASA needed to achieve and from those work out the

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best and most practical ways of delivering safety results.\textsuperscript{90} The planned completion date was 2007. However in an address to the Aviation Law Association of Australia and New Zealand in March 2007, Mr Byron gave no indication as to when the regulatory reform process may be concluded. He did however enunciate the guiding principles, which he saw as important if the regulatory reform process was to work towards clear safety outcomes, as distinct from concentrating on the way those outcomes may be reached. His 'new' guiding principles were for regulations that were to be:

- Based on known or likely safety risks
- Drafted to specify the safety outcome required, rather than detailed requirements to achieve that outcome
- Within a two tier framework - the Civil Aviation Act and the Civil Aviation Safety Regulations, supported by advisory and guidance material where needed.\textsuperscript{91}

Government concern about the slow pace of reform resulted in the establishment of a 'Taskforce' in April 2007 to assist the then Minister for Transport and Regional Services, the Hon Mark Vaile and Mr Byron, to set 'key directions and priorities for aviation regulatory reform for the next five years' \textsuperscript{92} The taskforce was chaired by Dr Alan Hawke and delivered its findings on 17 December 2007. The terms of reference were:

- Recommending the best practice safety regulatory model for Australia;
- Identifying priorities for the Government’s future regulatory reform programme, including:
  - Preparing a status report on progress of the regulatory reform programme to date;
  - Assessing whether the priorities and focus of the programme are currently adequate;
  - Reviewing the timeframe for completion of the regulatory reform programme, with the view to concluding the programme by the end of 2008; and
- Examining the consultation arrangements between industry and the Government’s aviation agencies and recommending improvements.\textsuperscript{93}

\textsuperscript{90} Ibid.
\textsuperscript{92} Department of Transport and Regional Services, Commonwealth of Australia Aviation Regulation Review Taskforce: Report on Activities and Findings (17 December 2007).
\textsuperscript{93} Ibid 1.
The taskforce noted that it was under Mr Byron's guidance that CASA developed its current 'risk based' approach to its policies and regulation. These in turn led on to the emphasis on formulating outcome-based regulations, which allow for safety outcomes to be reached via multiple or various pathways. This was in contrast to the previous method of a traditional 'prescriptive' approach to regulation where the specific process and procedures were spelt out exactly and there were set requirements. It was argued that the 'outcome-based' safety approach allowed industry the flexibility to use what it considered the most appropriate system and procedures to meet the safety outcomes required by the regulations.\(^94\)

The taskforce endorsed the outcome-based approach, saying that it should be the basis of 'on-going reform of Australian aviation safety regulation and oversight'.\(^95\) At the same time it acknowledged the frustration industry felt, that the regulatory reform program was not achieving its desired completion in a reasonable time. The reality of having two systems in place at the same time led to confusion and compounded uncertainty about which system to apply in specific circumstances.\(^96\) The taskforce urged CASA to be realistic in its projected timeframe for completion of the regulatory review and further urged the recruitment of addition drafters from the Office of Legislative Drafting and Publishing to assist in speeding up the process.\(^97\)

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\(^94\) Ibid 2. The outcome-based regulatory framework was to consist of:
- Outcome-based Regulations;
- Technical Standards;
- Acceptable Means of Compliance; and
- Guidance Material.
Outcome-based Regulations involve the implementation of relatively simple and brief regulations that express high-level safety outcomes. Technical Standards include requirements that, for the purpose of clarity and effective administration, are best contained outside the regulations. Acceptable Means of Compliance set out acceptable methods of demonstrating compliance with outcome-based regulations. Authorisation by the regulator is assured if an industry applicant follows the relevant Acceptable Means of Compliance. The applicant retains the ability to propose alternatives for consideration should they so wish, provided those alternatives would achieve the required safety outcome. Guidance Material provides suggestions, explanations and amplification of a regulation's policy intention.

\(^95\) Ibid 3.

\(^96\) Ibid:
The delays have also lead to increased reliance on using the CAOs as a third tier of legislation to address more urgent safety matters and to permit earlier implementation of some of the outcomes of regulatory reform, in advance of publishing the new CASRs (for example to require airline safety management systems well in advance of the ICAO deadline of January 2009).

\(^97\) Ibid 5.
However despite the best of intentions, as at September 2008, the proposed ‘reform’ of the regulations, had not yet been completed. It was still, after 12 years and countless dollars in expenditure, a ‘work in progress’. One person with an intimate knowledge of the process is Peter Ilyk, a lawyer with 17 years experience in civil aviation regulation, and the former General Counsel for CASA. Mr Ilyk presented a detailed submission to the recent Senate Inquiry into the administration of CASA and specifically drew attention to what he termed ‘CASA’s failed Regulatory Reform Program’. He stated quite simply that one of the major problems in CASA’s regulatory development is that there is too much input coming from too many avenues. This he sees as stemming from the current CEO's policy of 'industry partnership', together with the need to avoid criticism at any cost. ‘One of the problems with the consultative process is that the input from industry is provided by technical experts with particular vested interests, not policy developers’. This results in consultation being directed at the content of the regulations rather than on planned policy.

The abysmal lack of progress of the reform of the regulations was an issue of particular concern and received considerable attention in the 2008 review of the Senate’s inquiry into CASA’s administration. A significant number of submissions to the inquiry expressed concern regarding the lack of progress and suggested that the aviation industry was losing patience with the whole process. One submitter described it as moving at a 'glacial pace'. There were calls from a number of submitters, who expressed frustration with the process to date, for CASA to prioritise the remaining parts necessary to complete the reform and set firm deadlines for a conclusion to the work. Concern was also expressed about the cost involved. Mr Carmody in his

98 Senate Standing Committee on Rural and Regional Affairs and Transport, Commonwealth of Australia, Administration of the Civil Aviation Safety Authority (CASA) and related matters, Submission No. 31 (September 2008) 32.
99 Ibid 33.
100 Senate Standing Committee on Rural and Regional Affairs and Transport, Commonwealth of Australia, Administration of the Civil Aviation Safety Authority (CASA) and related matters, (September 2008) 24.
101 Ibid, Submission 15, from the Aerial Agricultural Association of Australia, 3.
capacity a Deputy CEO of CASA gave evidence to the 2008 Senate inquiry regarding the cost or the Regulatory Reform Program so far as being in the vicinity of $144 Million.\(^{102}\)

### 4.9 The Lockhart River Crash

On 7 May 2005 a Regular Public Transport (RPT), aircraft owned by Cairns-base Transair, carrying 13 passengers and two pilots crashed on approach to the far northern Queensland aerodrome of Lockhart River. The coroner’s inquest found pilot error was to blame for the crash. It found that whilst in cloud with poor visibility, the pilot flew an unstabilised approach at excessive speed and rate of descent, below the minimum altitude allowed in the published procedure.\(^ {103}\)

The Coroner was assisted in his findings by having available the Australian Transport Safety Bureau (ATSB) report of the investigation.\(^ {104}\) This most extensive inquiry, which concluded that the accident was almost certainly the result of controlled flight into terrain, identified a range of contributing and other safety factors relating to the crew of the aircraft. They included Transair’s processes, regulatory oversight of Transair by CASA and instrument approach design and chart presentation.

At the time of the accident the crew was conducting an area navigation global navigation satellite system, (RNAV-GNSS), non-precision approach to a specific runway at the aerodrome.\(^ {105}\) The aircraft had flown from the town of

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\(^ {102}\) Rural and Regional Affairs and Transport Committee, Transcript of Evidence, Administration of the Civil Aviation Safety Authority (CASA) and related matters Canberra, 2 July 2008, 120.

\(^ {103}\) Coroners Court of Queensland, Coronial Inquest into the Aircraft Crash at Lockhart River on 7 May 2005, (17 August 2007).


\(^ {105}\) The term RNAV-GNSS is the Global Navigation Satellite System that is used by the pilots to determine their position using satellite data. It is an instrument approach that provides pilots with lateral guidance to a specific runway, but not vertical path guidance. It was designed in the late 1990s and is used as an alternative to an approach using other navigational aides such as a non-directional beacon (NDB) or an instrument landing system (ILS). The advantage of the RNAV (GNSS) approach procedure in the Lockhart River type scenario is that it allows a runway-aligned straight-in approach to a destination aerodrome via
Bamaga, Queensland, situated on the very northern tip of Cape York Peninsular to Lockhart River, on the eastern coast of the Peninsular, a journey in the Metro airliner of approximately 30 minutes. The weather was poor with low cloud and poor visibility. The crew consisted of two instrument rated pilots, the more senior and 'pilot in command' Brett Hotchin, was 40 years old with 6,000 hours total flying experience at least half of those on the Metro type aircraft. He had not however had any training in multi-crew operations. The second pilot, Timothy Down the 'co-pilot', was 21 years old and far less experienced. He had 650 hours total flying time, with only 150 hours on the Metro aircraft. He also had not had any specific multi-crew training. He had commenced employment with Transair only two months prior to the accident and although he held a multi-engine instrument rating he was, most significantly, not endorsed to make a RNAV (GNSS) instrument approach. There was thus a large difference in age and experience levels between the pilot in command and the co-pilot. Evidence was given to the ATSB of 'difficulties' other co-pilots had experienced with the pilot in command when operating as his 'co-pilot' on previous flights.\(^{106}\)

The ATSB report indicated that evidence strongly suggested that Captain Hotchin was the handling pilot for the fateful flight from Bamaga to Lockhart River. This would be consistent with the company policy for the Captain and first Officer flying sector about, and the First Officer had flown the preceding sector into Bamaga. As the cockpit voice recorder was inoperative during the flight a certain amount of supposition was engaged in to try to determine why the pilot in command had flown the aircraft into the ground. Expert witnesses were examined, including those who were familiar with the 'modus operandi' a series of 'waypoints'. This is said to enhance safety and also saves time when compared with the alternative NDB approach.\(^{106}\)


Two Transair pilots reported that, while operating as co-pilot with the pilot in command, the pilot in command regularly conducted RNAV (GNSS) approaches into Bamaga in IMC (instrument meteorological conditions), for more than a year before he had obtained an RNAV (GNSS) approach endorsement (that is, 3 January 2003). These co-pilots also did not have an RNAV (GNSS) approach endorsement at the time. Another co-pilot reported that the pilot in command had proposed conducting an RNAV (GNSS) approach before either pilot had been qualified but that co-pilot had objected and the approach was not flown.
of Captain Hotchin from having flown with him in the past. The coroner came to the conclusion that Captain Hochin, at some stage during the approach, decided he could 'eyeball' his way through the cloud and become visual, as he had previously described doing whilst giving evidence in a 2002 inquest.

… and so you look for a break in between the – the clouds so you can see a very white light coming through the darkness of the clouds, so you aim for that point and you go aiming for that point and then all of a sudden you notice that you’re enclosed by two cells on either side, but the only thing you can do once you’ve made that decision is keep going straight ahead because you know that at some stage before hand you saw light beyond there.107

On evidence presented to him by other Transair pilots who had operated as co-pilots with Captain Hotchin, the coroner concluded that Captain Hotchin was at times inclined to engage in 'a dangerous departure from appropriate approach procedures'.108

The coroner was critical of CASA’s regulatory oversight of Transair. He considered that the extent of CASA’s assessment of Transair was well documented, however it highlighted a number of inconsistencies between its oversight of the company and its regulatory policies and surveillance guidelines. He considered that CASA should have been in a position to know that all was not well with the company Transair. It overlooked two pieces of information that were in the public domain. The first piece of information relating to newspaper articles had apparently been published locally, indicating that there was an operator in the area who did not have an

107 Coroners Court of Queensland, Coronial Inquest into the Aircraft Crash at Lockhart River on 7 May 2005 (17 August 2007) 29. Captain Hotchin’s evidence obtained from a transcript of an inquest into another aviation fatality that occurred near Thursday Island in 2002. Captain Hotchin had heard radio transmissions by the pilot who died in the 2002 crash and he gave evidence at the inquest that followed in June 2002. His evidence revealed his knowledge of and his flying habits, concerning a number of matters that the coroner in the Lockhart River crash thought relevant.

108 Ibid 31. An analysis of the data on the flight data recorder for a sample of thirty flights undertaken by VH-TFU in April and May 2005 disclosed that when Mr Hotchin was on board higher average speeds were flown at certain altitudes. Of the thirty flights sampled and analysed, Mr Hotchin was pilot in command on ten occasions and the differences in the average recorded speeds at 5,000 feet above aerodrome level, 1,000 feet above aerodrome level, 500 feet above aerodrome level and touch down between Mr Hotchin’s flights and the flights of other pilots were 10 knots, 15knots, 15knots and 8knots respectively.
appropriate Air Operating Certificate who was about to commence a Regular Public Transport into Bamaga and later Lockhart River. The second piece of information was the fact that CASA did not access the inquest and findings of the transcript, into the death of the pilot of the aircraft that crashed on Thursday Island in 2002. ‘Had it done so I would have expected that the evidence given in those proceedings by Mr Hotchin might have caused it to raise a query with Transair about aspects of his flying’.\textsuperscript{109} The coroner highlighted a number of deficiencies he considered relevant in CASA’s surveillance and audit of Transair, as well as drawing attention, on a number of scores, to CASA’s departure from its own procedures.\textsuperscript{110}

Similarly the ATSB was quite critical of the role played by CASA as far as safety oversight was concerned.

\begin{quote}
Given the significance of the problems within Transair, and the amount of interaction CASA had with the operator, it is reasonable to conclude that some of these problems should have been detected by CASA.\textsuperscript{111}
\end{quote}

Chapter six of this thesis will endeavour to look more closely at these criticisms.

One interesting outcome that eventuated from this inquest, was that the coroner was concerned enough about the friction in the relationship he observed during this and several earlier coronial inquests between CASA and the ATSB, that he wrote to the then Minister for Transport and Regional Services, the Hon Mark Vaile, on 12 September 2007 recommending that the Minister undertake a review to assess whether high level intervention was required to ensure ‘that there is a productive, collaborative focus on air safety between the ATSB and CASA’.\textsuperscript{112} The Minister subsequently commissioned a

\begin{itemize}
\item \textsuperscript{109} Ibid 46.
\item \textsuperscript{110} Ibid 53.
\item \textsuperscript{111} Commonwealth Department of Transport and Regional Services, Australian Transport Safety Bureau, Aviation Occurrence Report No. 200501977, (4 April 2007) Collision with Terrain 11 km NW Lockhart River Aerodrome 7 May 2005 VH-TFU SA227-DC (Metro 23) 248.
\end{itemize}
review, which was far reaching and comprehensive considering it had a very limited time frame for completion. It involved examining the relationship between the ATSB and CASA to identify the likely causes of friction between them, including friction evident in the Lockhart River Inquest. It also focused on positive recommendations designed to remove unnecessary impediments legislative and organisational, to both agencies working together in the interests of aviation safety.113

4.10 The Relationship between CASA and the ATSB

The Australian Transport Safety Bureau is an independent division within the Department of Transport, and is Australia’s main agency for all transport safety investigations, including aviation. It is the successor, in terms of aircraft accident and incident investigations, to the Bureau of Air Safety Investigations (BASI). Although formally established in 1999, the Transport Safety Investigations Act of 2003 cemented the independence of the departmental officer responsible for aviation accident and incident investigations.114 The Act clearly states that its object is not to apportion blame in any way, rather it is to improve transport safety through independent investigations of accidents and incidents, to make safety recommendations that draw on the results of those recommendations and publish its results in the interests of safety.115

Each agency has a separate role to play. The ATSB operates independently from the regulator CASA, and the service provider Airservices Australia, however the common goal of both the ATSB and CASA is to contribute to safety.116 They do so in somewhat different ways. The ATSB does so by

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113 Ibid 4.
115 Ibid, subsection 7(1).
116 Report to the Minister for Infrastructure, Transport, Regional Development and local Government, ATSB/CASA Review 2007 (21 December 2007) (‘The Millar Report’) 20: CASA advised the Review that it directly oversees and conducts active surveillance of over 850 Australian Air Operator Certificate holders, as well as more than 650 Certificate of Approval holders and approximately 90 parts manufacturing organizations. In the licensing area alone, CASA’s Personnel Licensing Education and Training (PLET) Group manages more than 12,000 aircraft on the aircraft register and issues licences and medicals for around 6,000 licensed aircraft maintenance engineers, 37,000 pilots and 1,200 Air Traffic Controllers. This year, PLET will have conducted over 30,000 individual transactions with members of the aviation community in terms of flight crew licences, aviation medicals, Aviation Security Identification Cards, and endorsements and ratings. CASA also provided more than 1000 individual safety presentations to aviation groups large and small over the past 12 months.
producing independent accident and incident reports and safety recommendations from which it is hoped important safety lessons for the future can be learned. In part, CASA does so by drawing on the information contained in the ATSB’s investigation reports and the safety recommendations that accompany the reports. CASA is the agency that has the ability to bring about change, to make a difference to safety outcomes, through a wide range of devices at its disposal. However the ATSB can only improve safety to the extent it influences others to act.117

From CASA’s perspective, the Civil Aviation Act requires CASA to regard the safety of air navigation as ‘the most important consideration in the exercise of its powers and the performance of its functions’.118 However as part of this, the Act states that one of CASA’s functions is ‘co-operating with the Executive Director of Transport Safety Investigation in relation to investigations under the Transport Safety Investigation Act 2003 that relate to aircraft’.119 Apparent rifts in this cooperation as observed by the coroner in the Lockhart River accident investigation,120 was what led to the 2007 Review of the relationship existing between the two agencies.

Questions were asked as to why such a rift had occurred. Was there for example, any overlap between the roles of the agencies and the adequacy of their working arrangements? Or was it simply that although co-operation and co-ordination in the interests of aviation safety is to be expected from both agencies, there will ‘from time-to-time be legitimate differences of opinion between them, sometimes creating tensions’.121 The fact that such tensions will

117 Report to the Minister for Infrastructure, Transport, Regional Development and local Government, ATSB/CASA Review 2007 (21 December 2007) (‘The Millar Report’) 24: While CASA is able to bring about change or make a difference to safety outcomes through the wide range of levers at its disposal – the ATSB can only improve safety to the extent it influences others to act.

118 Civil Aviation Act 1988 (Cth). s 9A(1).


most probably exist was not in itself seen to be a matter of concern. What was of concern was the manner in which those differences were dealt with by each agency. The terms of reference of the Review called on it to look at what legislative and organisational obstructions could possibly be present to deter either CASA or the ATSB from doing so in a constructive manner.

The Review made reference to the strong 'no blame' policy culture that exists in relation to accident and incident investigations. As a long-standing policy in the aviation industry internationally, it is one to which Australia subscribes and is an approach which is embedded in much of the Transport Safety Investigation Act. The ATSB has quite extensive investigative powers. Although the Act explicitly states that it is not an object to lay blame during its investigations, or to provide a means for determining liability, or assist in any court proceedings between parties nevertheless parties affected by an accident can use the findings in investigation reports to clarify the circumstances of a particular accident. Thus they may be assisted in forming their own views as to whether criminal or civil liability action should be taken. It follows that the ATSB needs to be especially careful about the way in which its findings are expressed in its reports, and similarly in any media comment that might be required in the reports.

The Review stressed the obvious fact that both agencies have as their main purpose that of increasing and supporting aviation safety. If the ATSB diligently prepares its reports or makes safety recommendations that CASA does not act upon, the ATSB will make very little contribution to aviation safety. Its ultimate goal must therefore be to work with CASA together with other members of Australia's aviation safety system to ensure that its reports are relevant and that its safety recommendations are acted upon. For its part too, CASA needs to engage actively with the ATSB during its investigations and be prepared to provide expert advice and assistance where necessary.

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122 Transport Safety Investigations Act 2003 (Cth), subsection 7(3).
124 Ibid 24. The review also suggested that CASA should:
Both agencies acknowledged to the Review that closer co-operation between them was desirable. Why then had areas of tension developed? The Queensland State Coroner in the Lockhart River accident coronial inquest had commented that the tensions he detected between the ATSB and CASA went well beyond the constructive tension one would expect in such a situation. Although the day-to-day relationship between the two agencies seemed to be working well, the Review identified tension at the management level, especially in relation to information sharing. Speculation on why this had occurred included the differing expectations about each other's roles and the manner in which ATSB investigation reports had been publicised and CASA had responded.\textsuperscript{125}

During the investigation of the Lockhart River crash the ATSB had briefed CASA in confidence, on aspects involving potential operational safety undertaken by Transair, the operator of the aircraft. CASA wanted to use the information given to it by the ATSB to support an application to the Federal Court to immediately suspend Transair's Air Operator's Certificate. This it wanted to do on the basis that the information provided by the ATSB evidenced 'a serious and imminent risk' to air safety.\textsuperscript{126} The ATSB felt that CASA should not use the information it had provided, but rather it should have undertaken a parallel investigation and independently collected the evidence it required to place before the Court. CASA was thus not able to use the information the ATSB had provided in legal proceedings before the

\begin{itemize}
  \item co-operate fully with ATSB investigations by providing information required for the investigation in a timely fashion;
  \item co-operate fully with the ATSB by providing timely responses to the ATSB when asked for comment;
  \item make available sufficient time and resources to respond meaningfully to safety issues identified by the ATSB in its reports and safety recommendations; and
  \item seriously consider, and where appropriate follow, the ATSB's safety recommendations, careful to ensure that, where it decides not to take up a safety recommendation, it discusses its reasons with the ATSB and that its public response is in terms appropriate to a healthy relationship between the two agencies.
\end{itemize}

\textsuperscript{125} Ibid 27.
\textsuperscript{126} Civil Aviation Act 1988 (Cth), s 30DB.

Serious and imminent risk prohibition

The holder of a civil aviation authorisation must not engage in conduct that constitutes, contributes to, or results in a serious and imminent risk to air safety.
Also during the inquest CASA’s lawyers attacked the ATSB’s investigation methodology alleging, unintentional bias. The Coroner subsequently found such claims to be without substance and he rejected many of CASA’s submissions. Adding fuel to the fire was the fact that when the final report was released it contained comments in its conclusion that were highly critical of CASA. These critical comments did not appear in the body of the report. CASA had been consulted over the draft of the report but not the press release.

Overall however, the Review concluded that although at the senior level it appeared the relationship between the ATSB and CASA had deteriorated it did seem clear that each recognised that they need to devote more time to fostering their relationship and the review thought that they had each taken some positive steps forward in this regard. The Review concluded with a series of recommendations designed to assist both agencies.

### 4.11 The 2008 Senate Inquiry into CASA's Administration

The Senate Standing Committee on Rural Affairs and Transport resolved on 29 May 2008 to hold an inquiry to consider the administration of the Civil Aviation Safety Authority. This, so it stated, confirmed its long-standing interest in the administration of CASA.

In 2003 under the guidance of the newly appointed CEO, Bruce Byron, CASA embarked upon an extensive program of reform ‘involving all elements of its organisational and regulatory structure’. The committee followed this program of reform closely through successive Senate Estimates processes and said it ‘has become increasingly concerned at the slow pace of change within the organization the extent to which this appears to have had an impact on

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128 Ibid 29.
129 Ibid 73-81.
130 Senate Standing Committee on Rural and Regional Affairs and Transport, Commonwealth of Australia, Administration of the Civil Aviation Safety Authority (CASA) and related matters (September 2008) 9.
CASA’s ability to meet its regulatory responsibilities. Thus the inquiry set out to assess the effectiveness of administrative reforms undertaken by CASA’s management since 2003.

In 2003 the organisational structure was changed substantially. Prior to Mr Byron’s term, CASA’s organization structure was based on three functioning groupings. They were Aviation Safety Compliance, Aviation Safety Standards and Aviation Regulatory Services. Mr Byron chose to remodel CASA to align it more closely, so he said, with the way industry operates via operationally focused groups. These groups were now:

- Air Transport Operations
- General Aviation Operations
- Manufacturing
- Certification and New Technologies (now Airworthiness Engineering)
- Personnel Licensing, Education and Training

This structure brings together technical experts into groups which ensure people and resources are used most effectively. These changes coincided with a move away from the previous management committee decision making structure to one in which each senior manager is personally responsible and accountable to the Executive for the decisions they make and for conducting appropriate consultations in relation to these decisions.

Mr Byron emphasised the planned and structured nature of the changes he had made since taking on the role of CEO in 2003. He considered the changes he implemented to be … ‘well thought through and painstakingly implemented. The result is an improved organization structure, processes and responsiveness to industry’.

From responses received from the 61 submitters representative of both individuals, organizations and aviation companies, it was apparent that, although a few agreed that there had been significant improvements within CASA ‘the majority of submissions identified areas of concern’, some of

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131 Ibid 3.
132 Ibid 7.
133 Ibid. Submission 37, Civil Aviation Safety Authority 4.
134 Senate Standing Committee on Rural ad Regional Affairs and Transport, Commonwealth of Australia, Administration of the Civil Aviation Safety Authority (CASA) and related matters (September 2008) 5.
135 Ibid 7.
which were of a very serious nature. From Qantas down, criticisms of CASA’s reform program emanated from all sectors of the aviation industry. The ‘big end of town’ well represented by Qantas, was critical that the changes implemented seemed to lack planning and direction, they had been poorly put into practice and had some unintended consequences. Virgin Blue told the committee that:

As a result of the administrative reforms undertaken since 2003, CASA has become more responsive to the Australian aviation industry and its processes and procedures are more transparent to the industry.

However it also went on to say that in its opinion, management reforms had not filtered down to frontline staff and argued that further work would be required to ‘ensure the industry interface is consistent with management’s intent’.

Some industry organizations, notable the Association of Professional Engineers, Scientists and Managers Australia, and the Australian Maintenance Repair and Overhaul Business Association were more critical of the reforms. The latter group describing the changes as superficial and costly, stating that the aviation industry is still waiting for proper reform. From the perspective of the subject of this thesis, of particular interest are the submissions that touch on CASA’s safety compliance enforcement system.

On the positive side industry in general, seemed to be supportive of CASA’s change in its regulatory approach to the management of operational safety. This was especially so in its implementation of a ‘safety management systems’

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136 Ibid. See especially the submission of the former General Counsel for CASA Peter Ilyk in submission number 31.
137 Ibid 8. For example Qantas’s submission; number 35: Qantas expressed concern that the current governance structure has implemented three additional layers of management between field office managers and the CEO. Qantas stated that, in its experience, this provides greater potential for inconsistency in the application of CASA policy and legislation.
138 Ibid, submission number 38, 2.
139 Ibid. Virgin Blue submission number 38, 2.
140 Ibid. Australian Maintenance Repair and Overhaul Business Association; submission number 39. 4.
approach to the management of safety risks.\(^{141}\) It is here that quite a fundamental change had been instigated. It is one, which involves a risk-based approach to determining the priorities to which CASA decides to allocate industry surveillance resources. A continuing theme in CASA's reinforcement for its operational change in this area has been that it believes that responsibility for management of safety risks is fundamentally an operator's responsibility.

The Australian General Aviation Administration made reference to opposition to the change from what it described as sections of the industry that are finding it hard to adapt to a non-prescriptive regulatory system.\(^{142}\) On the negative side to this operational change, came criticism of CASA employees who were charged with putting this change into effect, when they, according to the Australian General Aviation Administration organization, 'can think only in terms of the old prescriptive methods'.\(^{143}\)

The Australian and International Pilots Association (AIPA) had a more worrying criticism. It told the committee that confidence in CASA's safety compliance enforcement system has been significantly undermined by the manner in which the organisational reforms were being implemented. This, so they said, was a result of CASA's failure to enforce industry compliance with safety regulations. The AIPA made it clear that they did not oppose the change to outcome based regulatory models as such. Rather they stressed the point that within what they termed 'safety sensitive environments', competition policy must be balanced by 'regulatory vigilance' and must also be 'backed by

\(^{141}\) An explanation of CASA's reformed 'safety management systems' approach as it appears on CASA' web site is:

What CASA does is to make sure the airlines and other air operators have the right systems and procedures in place to manage safety and risks, to achieve the best possible levels of safety. If an airline has the right training and checking systems for their pilots, the flight crew can be expected to perform to the required standards. If an airline has robust systems to control maintenance, work on their aircraft can be expected to meet the correct standards. CASA makes it clear to the aviation industry that safety is not just complying with the rules - it is commitment individuals and organizations must make to achieving practical outcomes in every-day operations.


\(^{142}\) Senate Standing Committee on Rural and Regional Affairs and Transport, Commonwealth of Australia, Administration of the Civil Aviation Safety Authority (CASA) and related matters (September 2008) 12.

\(^{143}\) Ibid.
sufficient resources for safety compliance if existing standards are not to be undermined.144

In essence the Association was in favour of the regulatory changes undertaken and stated that they accepted that the government had the right to push forward with its liberalising aviation economic policy that economic deregulation had brought about. However such competition policy must be harmonized with regulatory oversight and their submission inferred that at present this is not happening. They considered that CASA has not yet demonstrated that it possesses the necessary independence from industry, had the necessary compliance enforcement systems, or corporate governance standards needed to meet this challenge.

They claimed that their concern is evident in CASA’s reluctance to conduct enforcement action when breaches of the law are brought to their attention. This was so particularly in relation to the most powerful industry groups. They gave examples from the Pilot, Licensed Aircraft Maintenance Engineer, and Cabin Crew representatives who had all experienced the frustration of bringing regulatory issues to the attention of CASA, only to find that 'action was either not taken, excessively delayed or ineffective'.145

There were a number of submissions to the inquiry that were critical of the lack of progress of the Regulatory Reform Program and called for CASA to prioritise the remaining parts, and set firm deadlines for their completion.146

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144 Ibid. The Australian and International Pilots Association; submission no. 48, 3.

In the case of pilots, since 2005 AIPA has been providing CASA with documentary evidence of breaches to flight crew fatigue legislation and calling for the law to be enforced in the interest of public safety. However, despite the substance of AIPA’s complaint being confirmed by the Industry Complaints Commissioner Michael Hart, CASA has consistently refused to act in relation to these breaches.

146 Senate Standing Committee on Rural ad Regional Affairs and Transport, Commonwealth of Australia, Administration of the Civil Aviation Safety Authority (CASA) and related matters (September 2008) Appendix 1. For example submissions from the aircraft Owners and Pilots Association, submission no. 6; Mr R Benke, a former CASA employee, submission no.8; the Aerial Agricultural Association of Australia, submission no. 15; Qantas Airways Ltd, submission no.35, and the Aviation, Maintenance, Repair and Overhaul Business association, submission no. 39.
One area that seemed to have most submitters in agreement was, that it was important that the government reintroduce a Board structure back into the authority. The committee, in its final recommendations did indeed strongly recommend the re-establishment of a small Board to sit between the CEO and the Minister.\textsuperscript{147}

Perhaps one of the most important areas to come under scrutiny in this inquiry in relation to the subject matter of this thesis has been that coming under the heading of the 'effectiveness of CASA's governance structure'.\textsuperscript{148} Evidence was given by a number of former employees of CASA about whom the committee issued the not unexpected proviso that 'on occasion criticism from former staff members, particularly in the context of sometimes acrimonious departures by those staff members, are tinged with bitterness and may not be safely relied upon'.\textsuperscript{149} However the committee singled out the evidence of Peter Ilyk, the former general counsel for CASA to be exempt from such a proviso, and this is a most important point. For Ilyk's critical evidence of CASA as he observed and experienced it under Mr Byron's leadership was described as being 'quite disturbing'.\textsuperscript{150} His evidence will be analysed in much more detail in chapter six of this thesis, nevertheless some small discussion, especially as regards Mr Ilyk's credibility, is warranted in the context of this chapter.

First of all Peter Ilyk's credentials to understand the current enforcement strategies of CASA are considerable. He was employed by the Authority from 1989 until 2006, with the last eleven years as CASA's General Counsel. Mr Byron obviously thought very highly of his abilities. The following extract is from a lengthy reference given by Mr Byron describing Mr Ilyk's abilities, in support of his nomination as the Australian Representative on the Council of ICAO, and attests to this:

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First of all Peter Ilyk's credentials to understand the current enforcement strategies of CASA are considerable. He was employed by the Authority from 1989 until 2006, with the last eleven years as CASA's General Counsel. Mr Byron obviously thought very highly of his abilities. The following extract is from a lengthy reference given by Mr Byron describing Mr Ilyk's abilities, in support of his nomination as the Australian Representative on the Council of ICAO, and attests to this:
\end{quote}

\textsuperscript{147}\textit{Senate Standing Committee on Rural ad Regional Affairs and Transport, Commonwealth of Australia, Administration of the Civil Aviation Safety Authority (CASA) and related matters (September 2008) 44.}

\textsuperscript{148}\textit{Ibid 40.}

\textsuperscript{149}Ibid 41.

\textsuperscript{150}Ibid.
I regard Peter as an astute and experienced senior executive who exhibits high
standards of integrity and professionalism. He is a clear thinker with a rational and
reasoned approach to complex issues …
He has consistently shown himself to be fully committed to the interests of CASA …
He is an active contributor to internal corporate planning strategic sessions and I have
come to respect his judgement on matters of strategy and issue analysis …
My confidence in Peter's integrity and understanding of corporate governance
principles is perhaps best illustrated by the fact that in addition to his line management
responsibilities in Legal Services. He has been my senior advisor on matters of
governance …
Peter's long experience at senior levels in CASA and its predecessor have given him a
comprehensive understanding of the issues, politics and complexities of the Australian
aviation industry.\footnote{Ibid 41.}

Apart from such a glowing epistle from Mr Byron, the committee noted that
they had also had the opportunity of observing Mr Ilyk's performance before
Senate Estimates and other Senate Inquiries. As a result, his evidence was thus
considered of the calibre that the committee must and did, take seriously.

Mr Ilyk expressed his deep concern that despite his warnings to Mr Byron, he
considered the reform program was ignoring the evidentiary lessons of the
past, in particular the findings of the Monarch Airlines Coronial Inquiry in
1994,\footnote{Coroners Court of New South Wales, Coronial Inquest into Deaths resulting from air crash
of Monarch Airlines Aircraft at Young of 11 June, 1993, (July 1994).} the Seaview Air Royal Commission in 1996,\footnote{Commonwealth of Australia, Commission of Inquiry into the Relations Between the CAA
Authority of Aquatic Air Pty Ltd trading as South Pacific Seaplanes (October 2000).}
His argument and concerns revolved around the 'dangers of regulatory capture'. In support of his argument he presented some
very convincing evidence that the current 'industry partnership' relationship
CASA has, with those it is regulating, is substantially flawed. According to
Mr Ilyk's view, regulatory capture is the end result of CASA's current new
governance arrangements. Despite the very compelling submission by Mr Ilyk
on his perception of the failure of CASA's current governance arrangements,
the committee did not address in its report the substance of his argument; -
that is the possibility of the regulator being now in the position it virtually was in the early 1990s. The concept that there may be some truth in Mr Ilyk's 'compelling evidence'\textsuperscript{155} that CASA is in the position of being 'captured' by those it regulates and being seemingly blind to the dangers such 'capture' may present was not really addressed. Reference was made in passing to Mr Ilyk's clear enunciation of evidence pointing to CASA's 'capture' by industry, however this was primarily dealt with briefly under the heading of 'CASA as a partner with industry' and glossed over in relation to the real substance of Mr Ilyk's thrust.\textsuperscript{156}

Chapter six of this thesis deals with this aspect of the 2008 report in much more detail. It involves an analysis of Mr Ilyk's evidence and findings, as they appear in his submission to the inquiry.

\textbf{4.12 The 2008 'Green Paper' on a proposed Aviation Policy}\textsuperscript{157}

Released on 2 December 2008 the government's 'Green Paper' on aviation was described by the Minister for Transport in his press release as, 'the plans to secure Australia's aviation future'. It was designed to provide the first step in developing a comprehensive aviation policy that has been much sought after by the aviation industry for some time.\textsuperscript{158}

Included in the submissions received, of particular interest in the context of this thesis, was the view from some of the smaller operators that CASA focuses too much on its enforcement role and not enough on working with industry to achieve safety outcomes. They commented that an over-reliance by CASA on its enforcement powers could have the effect of exacerbating

\textsuperscript{155} Senate Standing Committee on Rural and Regional Affairs and Transport, Commonwealth of Australia, Administration of the Civil Aviation Safety Authority (CASA) and related matters (September 2008) 41.
\textsuperscript{156} Ibid 35.
financial hardship for smaller aviation businesses. They also commented on what they considered to be inconsistencies in the application of policy and regulations by CASA field officers. This was put down to a range of contributing factors, which included varying skill sets, the number of layers of management between field officers and the CEO, and the operation of the current delegation process.  

The main changes that the paper heralded, from the point of view of aviation safety regulation were:

- The proposed establishment of a small five-member board to oversee the Civil Aviation Safety Authority as part of a move to strengthen the governance of the regulator. Thus the power of the CEO as far as policy making is concerned, would need to pass the scrutiny of a board, rather than the CEO being directly responsible to a very busy Cabinet Minister, as currently the case. This decision on the part of the government is the reversal of the move made in 2002 to abolish the previous CASA board. The new board will be expected to operate at a strategic level to support CASA's regulatory and safety oversight role, but 'not blur the clear lines of authority and accountability for day to day decisions'.  

- Some attempt, yet unspecified, regarding the flaws voiced by CASA in their submission about the routine application of the 'automatic stay' provisions of the current legislation. This provision has, according to CASA, had the effect of 'nullifying its ability to suspend or cancel the authorisations of operators found to have fallen well below an acceptable level of safety'. It was felt that some amendments in 2003 to the Civil Aviation Act limited CASA's capacity to take firm regulatory action. Now regarded to some extent as inappropriate in the safety regulatory framework, it was implied in the Green Paper that this area would be looked at and remedied.


160 Ibid 56.

161 Ibid 59.
• A strengthening of the Civil Aviation Authority's powers to inspect and regulate overseas airlines. The paper commented on the fact that recent experiences had ‘exposed inadequacies in Australia's safety regulations’, particularly the ability to suspend or cancel the operations of an airline found to have fallen below what the Australian regulator considered acceptable safety standards:

There is also a need for CASA’s regulatory oversight of foreign-based operators flying within Australia to be reviewed, arising from concerns about CASA’s ability to satisfy itself that all operators flying into Australia are receiving adequate safety oversight outside Australia. The Government intends to explore whether CASA’s capacity to take a broader range of issues into account when considering whether to issue a foreign AOC needs to be expanded.162

• Efforts to improve the safety reporting system by putting into place a range of mandatory reporting requirements.

• CASA being given the necessary legal powers to deal decisively with operations falling short of safety standards. Expanding CASA's powers to investigate and obtain information is seen as a way of obtaining this objective.

• Evaluating CASA's penalty provisions to provide a balanced and effective range of responses to breaches. This may include substantially increasing penalties where it is considered appropriate, together with revised disclosure provisions.

The use of Safety Management Systems (SMS), by airlines was applauded as a modern day approach to managing safety risks. It was felt that the implementation of this approach led to an acknowledgement that aviation operators have a fundamental responsibility for managing safety that goes beyond simple compliance with rules. Comment was made that for its part the regulator, CASA, needs to be confident that 'it has the capacity to monitor and check the quality of SMS through ongoing surveillance and regular targeted auditing'.163

162 Ibid.
163 Ibid 53.
It was noted that CASA was following a global trend in aviation safety regulation in the move to 'outcome based' regulation, and away from the former detailed 'prescriptive based' regulation.

Comment was also made in this paper about the 'dual role' expected of CASA. That is being required to work constructively on a day-to-day basis with the industry it regulates, and also needing to take firm regulatory action against industry where it is deemed necessary to ensure safety.

The Aviation Green Paper is the precursor to the development of the final White Paper on Australia’s 'Aviation Policy' anticipated to be released in the later half of 2009. The White Paper it is hoped, will serve to bring all aspects of aviation policy into a single progressive statement.
CHAPTER 5

REGULATION THEORY AND STRATEGIES OF ENFORCEMENT

5.1 Introduction

This section endeavours to explain current regulatory theory in preparation for an analysis and application of that theory to everyday operational aspects of Australia's aviation regulator. Primarily it leads on to explore various strategies of enforcement that are pursued by regulatory bodies. It is presented in preparation for an evaluation and analysis of those pressures or influences that may have existed in the past in Australian aviation regulatory history, and may have guided the aviation regulator into choosing certain strategies of enforcement over others. It looks at how such pressures or influences can lead to certain strategies being preferred and evaluates the ultimate effect this may have on 'safety'. In particular this section looks at the theories revolving around compliance with and enforcement of, safety regulation. It is specific in its choice of different regulatory theories, bearing in mind that the subject matter, being safety in all its aspects, is the core 'business' of the aviation regulator.

Discretion, its implementation and exercise, is an important part of the world of the aviation regulator. It deserves some thought and analysis in the context of this thesis and this too is undertaken in this chapter.

In conclusion the literature concerning 'risk management' is looked at very briefly, as this now forms a considerable part of the current policy directions of the Civil Aviation Safety Authority. It does so because at times in the literature describing 'risk management' it is tempting to interpose the term 'regulation' and see the two as almost interchangeable.¹

5.2 Regulation Defined

Before beginning this overview of regulatory theory it is considered important
to ask the question 'what actually defines a 'regulator', and how exactly is
'regulation' itself defined? A regulator, although sharing many characteristics
with other public and private organizations displays some very significant
differences from other organizations. What makes the regulator different is
that the regulator is primarily in the business of imposing and ensuring
compliance with obligations on frequently, a reluctant participant. A trend
appeared to develop in Australia in the early years of the 1990s, just post
deregulation, which referred to those being 'regulated' as 'customers' of the
regulator. On a practical reality based level, it is difficult to imagine an airline
or maintenance organization being a 'happy customer'. One waiting with
enthralled anticipation for yet another surveillance visit from the regulator
because they were so 'delighted' with the last one. A 'happy customer' is more
likely to be one who has got through the surveillance visit 'this time' without
the regulator's inspectors picking up any contraventions of the regulations that
the 'customer' knows could have been detected! As Commissioner Staunton
clearly explained in the Seaview Inquiry in relation to the regulator viewing
those in the aviation industry as its customers, it is the fare paying public who
are the 'customers' of the regulator and they have a right to expect the
regulatory body will protect their safety. The regulator is in the 'business' of
imposing and ensuring compliance with obligations and this should be kept at
the forefront of all discussions and analyses of the concept of 'regulation' in
the field of aviation safety.

'Regulation' is somewhat difficult to define with any clarity and precision. In
its narrowest sense it is a set of authoritative rules accompanied by a

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There is no commonly accepted definition for the term risk - neither in the sciences nor in public
understanding … the term 'risk' is often associated with the possibility that an undesirable state
of reality (adverse effects) may occur as a result of natural events or human activities … Risk is
therefore both a descriptive and normative concept … [and] carries the implicit message to
reduce undesirable effects through appropriate modification of the causes or, through less
desirable, mitigation of the consequences … Risk management refers to the process of reducing
the risks to a level deemed tolerable by society and to assure control, monitoring and public
communication.

2 Commonwealth of Australia, Commission of Inquiry into the Relations Between the CAA
mechanism, usually a public agency, for monitoring and upholding compliance with those rules. This is referred to as the 'command and control' model.\(^3\) It has over time acquired a variety of meanings from the very narrow to the very wide. However it is overall a system of 'control' and a more expansive functional approach to such a definition is:

Any control system ... must by definition contain a minimum of three components ... there must be some capacity for standard-setting, to allow a distinction to be made between more of less preferred states of the system. There must also be some capacity for information-gathering or monitoring to produce knowledge about current or changing states of the system. On top of that must be some capacity for behaviour-modification to change the state of the system.\(^4\)

Expanding a little further the renowned lawyer and economist Anthony Ogus, in the preface to his tome on 'Regulation' described the central meaning of regulation as a 'sustained and focused control exercised by a public agency over activities that are valued by a community'.\(^5\)

Yet another regulatory theorist, Julia Black, sees regulation not so much in its 'control' mode but in an interactional mode. She describes it in its pragmatic form, not as a product of legislators or those who write regulatory rules, but 'rather it is the product of interactions between regulators, regulatees, and the wider community interested in the regulatory process'.\(^6\)

Defining regulation from a legal perspective in the 'aviation safety' field, we can view it as an instrument used by the state to achieve the community's collective goals. These in relation to aviation can be seen as travelling by air in assured safety. The law in this context is seen as authoritative rules that are 'backed by coercive force, and exercised by a legitimately constituted (democratic), nation-state'.\(^7\)

The history of regulatory theory in modern industrialized states over the last three decades in particular, has evolved during a time of considerable change taking place in the shifting relations between the state and the market. There has been liberalization of the post-war welfare state in industrialized Western democracies, in pursuit of values and goals loosely associated with market competition.\(^8\)

Consequently there is a very wide range of literature dealing with 'regulation' in law and social science in all its facets. This thesis however is concerned with the legal perspective on regulation and within this broad sweep different regulatory strategies are characterized as they can be seen to fit the aviation industry.

The various theories of regulation discussed below can in a sense, be viewed as competing and sometimes overlapping theoretical frameworks that try to explore and explain the relationship between regulatory laws and various social groups who are participating in and are affected by the regulatory process.\(^9\)

### 5.3 Current Theories of Regulation

The various theories of regulation that have multiplied considerably in the last three decades are all composed of a set of hypothesis or propositions about why regulation emerges, who are the participants taking part and the typical patterns of interaction between these regulatory participants. On the whole the regulatory theorists have divided them into three main categories:

1. Public interest theories
2. Private interest theories, and
3. Institutionalist theories.

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\(^{8}\) Ibid 21.

\(^{9}\) Ibid 8.
The common thread running through these three categories is a concern to uncover the processes that lead to the adoption of a particular regulatory regime. The relationship between the categories could be described in a number of ways. Broadly however the public interest theory places 'an emphasis on the goals, functions and values that justify regulation'. They attribute to legislators responsible for the design and implementation of a regulation a wish to pursue collective goals with the aim of promoting the general welfare of the community. On the other hand private interest theories are concerned with explaining 'why regulation emerges and why it takes the forms it does'. They are largely explanatory in nature and are concerned with explaining how and why regulation emerges and why the regulatory process and its outcome take a particular shape and form. Institutionalist theories 'focus on the process of how regulatory institutions work'. They are more inclined to focus on the way in which the economic and political systems communicate, or possibly fail to communicate, with each other.

The regulatory theories chosen for discussion have been selected because they attempt to explain, albeit in a very brief manner, some of the differences between the three classes of theories mentioned above and because they have a relevance to the topic of this thesis. Aviation regulation can be seen to contain elements (in varying degrees), from all three categories and these elements will be delineated in the following theoretical discussion.

A wide array of instruments and techniques are available to the regulator in the pursuit of regulating behaviour. An analysis of such 'instruments' is outside the scope of this thesis, save perhaps to make the pertinent comment that the legal framework of regulation has been effectively described as 'the enforcement officer's basic toolkit'.

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10 Ibid 75.
11 Ibid 9.
12 Ibid.
5.4 Public Interest Theory

Public interest theories of regulation show a desire and aim to pursue collective goals that promote the general welfare of the community. This class of regulatory regime can be further divided into those concerned with obtaining regulatory ‘goals’ in terms of economic efficiency and those which include other political goals.

In the case of aviation, the question can be posed as to what is the purpose of aviation regulation? The bottom line for Australia's aviation regulator is safety. To transport persons and freight from point A to point B in a safe, comfortable, effective and efficient manner for all concerned in the journey itself and for the safety of all persons in communities on the ground over whom an aircraft in flight will pass.

The economic version of public interest theory rests on the assumption that regulation is a response to 'market failure' or certain 'imperfections' in the market place. Correction of these 'market failures' or 'imperfections' increases the communities' general welfare and is therefore in the public interest.

One of the foremost contemporary proponents of this economic based public interest theory of regulation is the British lawyer Anthony Ogus. Ogus uses economic theory to explore the reasons why governments regulate. He is convinced that conventional approaches to public law have failed to address some issues in regulatory behaviour. He looks beyond the institutional dimension of public law, how those powers controlling behaviour are allocated between different public and semi-public authorities and how the exercise of these powers may be 'constrained' by principles of accountability. He points out that public law is not only about preventing the abuse of power. It is also about choosing the legal forms that go towards achieving the desired goals of collective choice.

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For example the agreed objective of the regulator of aviation safety is primarily to ensure that the safety standards of air operators, maintenance facilities and associated bodies are such that individuals travelling from point A to point B can be assured they will arrive at point B comfortably, relaxed and in one piece. Ogus critically compares the legal instruments that are available or can be devised to achieve this objective. He makes a definite distinction between what he terms 'social regulation' and 'economic regulation'. He looks at the emergence of regulation as a response to market failure because regulation should pursue the goal of achieving economic efficiency.

In relation to aviation safety Ogus would place the public interest justification for social regulation as tending to centre on two types of market failure with consumer choice being at the heart of 'allocated efficiency'. Consumers exercising their expressed preferences for the 'safest airline' will, in our aviation example, lead market behaviour. There are two inherent assumptions in this model. The first is that the decision makers, customers of the airline, have adequate information about the alternatives available to them, including the consequences to them of exercising choice in different ways, and secondly that they are capable of processing the information they have received in a satisfactory way. A significant failure of either assumption may set up a case for regulatory intervention. In the extremely complex world of aviation safety, consumers have little chance of obtaining what theorists refer to as 'perfect information', and if by some chance they did, only the most technically savvy would be able to process such information in an adequate way. The case for 'regulatory intervention' is, in this example, therefore achieved. Regulation is justified because the regulatory regime can do what the market cannot.

The political based public interest theories of regulation look at things from a somewhat different standpoint. One such leading proponent of the public interest theory is the prominent American lawyer Cass Sunstein. He is a strong

15 Ibid 38.
16 Ibid 30.
defender of public interest regulation in the modern role of the state. He considers that we should strive for 'a better match between the problem calling for governmental controls and the particular strategy chosen to resolve that problem' and we should always attend to 'complex systemic effects' of regulation. He favours the view that collective action is what is needed to combat an inherently conservative common law ideology, which serves to protect private markets and administrative autonomy. He favours a process of a coming together in government as helping the population and leadership to rise above self-interest and better pursue the public interest. His style is quite interventionist in its pursuit of social justice. He acknowledges that economic efficiency is an important goal of government and that government can be a source of inefficiency, however he argues that government intervention is necessary in a wide variety of contexts to overcome inefficiencies and the conservative biases of the private market.

Whilst Sunstein's approaches to justifying regulatory intervention are based on certain political philosophical goals and values, he also relies on the assumption that political systems define the content of collective agreement about what is 'good' in political, social, and economic life. His view that regulation can legitimately pursue visions of 'good' values is somewhat controversial, given the frequency of moral disagreement and multiplicity of values that characterise modern societies.

### 5.5 Private Interest Theory

A central aspect of private interest theories is the assumption that regulation emerges from the actions of individuals or groups who are motivated to maximise their self-interest. As such regulation may or may not promote the public interest, but if it does, it is a coincidence. These theories gained some prominence at the time of the rise of political ideologies favouring deregulation, which in the aviation industry in Australia gained much momentum during the 1980s, culminating in substantial economic

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18 Ibid 110.
deregulation of the industry in 1990. They stress the ease with which 'regulatory failure' and 'regulatory capture' occur.\textsuperscript{20} They also stress the tendency of regulation to benefit narrow special interests rather than promoting collective welfare.\textsuperscript{21} This theory fits in well with the events immediately following de-regulation of the aviation industry in the early 1990s when 'regulatory capture' was well identified by various inquiries, and self-regulation if only of a limited nature was seen to fail.

An early proponent of the private interest theory was George Stigler who, in 1971 put forward the theory, that 'as a rule regulation is acquired by the industry and is designed and operated primarily for its benefit'.\textsuperscript{22} He noted:

\begin{quote}
[That two] alternative views of the regulation of industry are widely held. The first is that regulation is instituted primarily for the protection and benefit of the public at large or some large subdivision of the public … The second view is essentially that the political process defies rational explanation'.\textsuperscript{23}
\end{quote}

Stigler examined the effects of regulation and attempted also to understand its causes. He queried the frequently held belief of his time that governments regulate industries to reduce the harmful effects of monopolies. He presented and gave evidence for his 'capture theory' in his famous 1971 article 'The Theory of Economic Regulation', and argued that governments do not end up creating monopolies in industries by accident, rather they regulate at the request of producers who 'capture' the regulatory agency and use regulation to prevent competition.\textsuperscript{24} He went on to enumerate the characteristics of the political process that allowed this to happen.\textsuperscript{25} In the political decision making process, it will be interest groups who exercise political influence, as opposed to individuals. Politicians aim for re-election and as such can be 'manipulated'

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\textsuperscript{20} Bronwen Morgan and Karen Yeung, An Introduction to Law and Regulation (2007) 43: Regulatory capture happens when officials within regulatory institutions who are charged with promoting collective welfare develop such close relationships with those they regulate that they promote the narrow interests of this group instead of the public interest of the broader community.
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\textsuperscript{21} Ibid.
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\textsuperscript{23} Ibid 3.
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\textsuperscript{24} Ibid.
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\textsuperscript{25} Ibid 3-21
\end{flushright}
by organized industry. He concluded that regulation is not directed at the
correction of market failures, 'but at setting up income transfers in favour of
the industries in exchange for political support'.

Private interest theories evolved and multiplied over the next few decades
following Stigler's innovative view. Some criticised and disagreed
vehemently with Stigler, however on the whole as they evolved, sometimes
exhibiting many variants of his theory, they mostly came to stress both
regulatory failure and the tendency of regulation to benefit narrow special
interests rather than to promote collective welfare. That is until an
innovative view put forward by Stephen Croley in 2007. Croley argues that
regulatory agencies do not play the role that many public choice theories
usually assign to them. He claims that contrary to much modern-day public
choice critics, regulatory agencies are able to resist the demands of special
interests and can regulate on behalf of the public. His theory offers a new
alternative account of government regulation, which he calls the
'administrative process account'. In this he claims that regulatory agencies do
not systematically deliver 'benefits' to concentrated interests. Under certain
conditions they will regulate to advance social welfare. His main argument
is that regulatory agencies do have a great deal of autonomy. This existence of
autonomy undermines classic public choice theory, which is inclined to treat
regulatory agencies as a representative of the legislature.

Croley's innovative hypothesis aside, private interest theories as a whole
illustrate the role of law as having both common ground with and differences
from, their role in public interest theories. In common both class of theories

26 Johannes den Hertog, Public and Private Interests in Regulation: Essays in the Law &
27 On this theme see: Sam Pelzman, 'Toward a More General Theory of Regulation' (1976) 19
Journal of Law and Economics 211.
Richard Posner, 'Theories of Economic Regulation' (1994) 5 Bell Journal of Economics and
Management Science 335.
28 Stephen P Croley, Regulation and Public Interests: The Possibility of Good Regulatory
29 Ibid 295.
30 For a detailed critique of Croley's hypothesis see: Elizabeth Magill, 'Temporary Accidents?'
(Working Paper No 82, University of Virginia Law School, Public Law and Legal Theory
tend to assume that law, in the sense of democratically enacted rules, is a means of securing collective outcomes. However unlike public interest theories, private interest theories challenge in a more sustained manner the concept that outcomes promote collective welfare.  

A further difference in the two is that private interest theories tend to be more prescriptive, whilst public interest theories favour highlighting the goals that the law should ideally be assisting. Also in similar vein public interest theories tend to have a somewhat 'rosy' view of human nature giving considerable weight to the notion that such regulation can harness public-spirited desires to pursue the public interest. The third category of regulatory theory that will be discussed below, that of 'institutionalist theory' is to some extent a blending of the two and can be seen as an attempt to combine the aims of the previous two categories.

5.6 Institutionalist Theory

This class of theories contains an assorted group that can be considered as having the common features of being 'rule-based' in that they have a formal organization such as that found in regulatory agencies and corporations. They tend also to have particular common norms and routines, such as risk-analysis, cost-benefit accounting systems and elements of advocacy standards. Although 'rule-based' they tend to downplay law's role in directly controlling the pursuit of regulatory goals. The regulatory theoretical analysts Morgen and Yeung delineate three rather different examples of institutionalist theories which they label as 'Tripartism', 'Regulatory Space' 'and 'Systems Theory' respectively. It is submitted that Australia's Civil Aviation Safety Authority fits most appropriately into the first of these theories. This is because the strategies of 'responsive regulation' in the first theory discussed, appear to have some potential in addressing the tension between coercion and persuasion, and between strategies of 'enforcement through legislation' and 'education for attitude change' that form such a large part of CASA's regulatory agenda.

32 Ibid 53.
5.6.1 Tripartism

Prominent in this field of categorization is the approach taken by Ayres and Briathwaite.\(^{33}\) These two theorists take a stance, which blends public and private interest approaches in a way that highlights strong institutional forces. At the same time they retain a definite focus on the participants in the 'game' by focusing on how an analysis of the costs and benefits that accrue to players in the regulation game can under certain conditions produce public interest outcomes.\(^{34}\) The basic premise of this theory is that 'the features of regulatory encounters that foster the evolution of cooperation also encourage the evolution of capture and corruption'.\(^{35}\) It follows on that solutions to the problems of capture and corruption may inhibit the evolution of cooperation.\(^{36}\)

Tripartism itself has been defined as 'a regulatory policy that fosters the participation of public interest groups in the regulatory process in three ways'.\(^{37}\) First, it grants the public interest groups and all its members access to all the information that is available to the regulator. Second it gives the public interest group 'a seat at the negotiating table' with the regulatory authority when 'deals are done'. Third the policy gives the public interest group the same standing to sue or prosecute under the regulatory statute as the regulator.\(^{38}\)

The Civil Aviation Safety Authority fulfils the first two criteria very well. It consults continuously with industry in the form of the Aviation Safety Forum, (ASF), an advisors group with members drawn from and calling on a wide spectrum of aviation knowledge. The role of the ASF is to advise the CEO on strategic matters and through the CEO impart strategic advice directly to the

\(^{33}\) Ian Ayres and John Braithwaite Responsive Regulation: Transcending the Deregulation Debate (1992).


\(^{35}\) Ian Ayres and John Braithwaite Responsive Regulation: Transcending the Deregulation Debate (1992) 54.

\(^{36}\) Ibid 54. Such solutions include 'limiting discretion, multiple-industry rather than single-industry agency jurisdiction, and rotating personnel'.

\(^{37}\) Ibid 55.

\(^{38}\) Ian Ayres and John Braithwaite Responsive Regulation: Transcending the Deregulation Debate (1992) 58.
Minister. Similarly the Standards Consultative Committee, (SCC), composed of an across the board selection of industry representatives meets and consults regularly with CASA on, among other things, regulatory reform and operationally based aspects of the industry. Below these two industry groups are a series of smaller selective industry linked groups working on a wide range of industry associated regulatory and operational matters.

The above approach of Ayres and Braithwaite aims to blend both public and private interest assumptions about human nature. In it they argue that a particular institutional design, namely that of 'tripartism', can create a system of checks and balances that tie together private interests to work in favour of the public interest.\(^{39}\)

They think that the most effective regulation provides a framework, which facilitates a high proportion of cooperative compliance in response to some form of persuasion. This must be supported by high expectations of appropriate but inevitable enforcement. The suggestion is that this is best delivered by an 'enforcement pyramid' which offers a range of sanctions of increasing severity from which to select a response appropriate to the degree of infringement. Under the 'pyramid' model a climate of compliance is encouraged. It rests on the assumption that the cooperation of the majority as 'good citizens', yet it also demonstrates the ability to deal effectively with any infringements in the non-compliant group.\(^{40}\)

A typical pyramid framework could consist at the base, of some form of educational campaigns, information brochures, helpful advice and disclosure of the consequences of non-compliance. The next step up the pyramid could consist of monitoring and checks escalating up to the next level of more intrusive auditing and investigations. At each of these different levels penalties and the costs for failing to co-operate increase until at the apex of the pyramid the final penalty may be, for example in the case of CASA, the

\(^{40}\) Valerie Braithwaite, 'Ten Things You Need to Know About Regulation and Never Wanted to Ask' (RegNet Occasional Paper No.8, Regulatory Institutions Network Research School of Social Sciences Australian National University Canberra ACT, 2000) 6.
removal of a licence or the removal of an Air Operators Certificate. Most of
the activity of the regulatory authority should occur at the base of the pyramid.
The idea underlying this framework is that a regulatory authority that is
legitimate and is engaging seriously with the democratic will of the people,
does not in most instances, need the coercion at the top of the pyramid to
achieve compliance.\textsuperscript{41}

In addition Ayres and Braithwaite argue that regulatory agencies are often best
able to secure compliance when 'they are benign big guns'.\textsuperscript{42} The larger the
'big stick' they carry the more likely they will be able to 'speak softly'. It is
ironic in a sense that they claim the bigger and more various are the sticks,
then the greater the success regulators will achieve by speaking 'softly'.
However the more sanctions and these 'big sticks' can be kept in the
background, the more regulatory behaviour of regulatees is 'rational and
unitary'.\textsuperscript{43}

Of prime importance to Ayres and Braithwaite is the evolution of co-
operation, corruption and capture in the 'regulatory game'. It is the latter
element 'capture' that these theorists see as fundamental to their hypothesis.
They turn to findings in the work of Grabosky and Braithwaite's 1986 study of
96 Australian business regulatory agencies for support.\textsuperscript{44} This study found that
agencies were more likely to have a co-operative or non-prosecutorial
regulatory practice when they regulated:

\begin{itemize}
  \item i) Smaller numbers of client companies;
  \item ii) A single industry rather than diverse industries;
  \item iii) Where the same inspectors were in regular contact with the same client companies;
\end{itemize}

\begin{footnotes}
\item 41 Ibid 7.
\item 42 Ian Ayres and John Braithwaite Responsive Regulation: Transcending the Deregulation
\item 43 Ibid.
\item 44 Peter Grabosky and John Braithwaite Of Manners Gentle: Enforcement Strategies of
\end{footnotes}
iv) Where the proportion of inspectors with a background in the regulated industry was high.\(^{45}\)

These findings were interpreted as support for the notion of formal law ‘increasing as relational distance between regulator and regulatee increases, and more ambiguously, as support for capture theory.’\(^{46}\)

Another regulatory theorist, Valerie Braithwaite, in discussing the above theory stresses the important ‘psychological aspect’ of implementing a responsive regulatory model. It must be partly technical and partly psychological. With a delightful feminine approach to her husband’s theory, she sees any good regulator as having the willingness to take on board what they have in common with mothers and parish priests … that is the capacity to ‘cajole, persuade, and sometimes coerce’ others into doing the right thing.\(^{47}\)

### 5.6.2 Regulatory Space

The second example of the ‘institutionalist’ approach is called ‘regulatory space’. This theory emphasises a place where regulation occurs, almost in a kind of physical arena that influences the practices that happen within it. This leads to less emphasis being placed on individuals and groups and the outcomes they hope to achieve. It is characterised by moving away from the previous theory discussed, which delineated ‘public’ and ‘private’ interests and viewed them in opposition with each other, towards examining how the actions and intentions of regulatory actors are entrenched in larger systems and institutional dynamics. In this theory there are two important central ideas. The first is ‘the limited relevance of law and formal public authority within a regulatory space’.\(^{48}\) The second is that:

Regulatory outcomes might not align with the predictions of private interest theory, because history, national culture and organisational dynamics, (such as standard

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\(^{45}\) Ian Ayres and John Braithwaite Responsive Regulation: Transcending the Deregulation Debate (1992) 55.

\(^{46}\) Ibid.

\(^{47}\) Valerie Braithwaite, ‘Ten Things You Need to Know About Regulation and Never Wanted to Ask’ (RegNet Occasional Paper No.8, Regulatory Institutions Network Research School of Social Sciences Australian National University Canberra ACT, 2000) 7.

operating procedures of large institutions), may shape the regulatory dynamics of a particular policy sector in ways that the combined interests of the different actors would not.\textsuperscript{49}

Leading proponents of the 'regulatory space' theory are the British regulatory theorists Hancher and Moran.\textsuperscript{50} They emphasise a fact sometimes overlooked by other theorists that 'regulation occurs in particular places and therefore place matters … and the most important delineation for place is provided by the boundaries of the nation state.'\textsuperscript{51} They are also keen to point out that much of our regulatory theory leans towards American thinking on the subject, principally because much of the literature on regulation in the English language is largely American inspired.\textsuperscript{52} This is relevant in a number of ways but particularly so when looking at the differences produced by British and American attitudes to the relevance of litigation in the regulatory process. They contrast the detailed rules and adversarial enforcement common in the United States with the discretionary guidelines and co-operative functioning, which characterises so much of British regulation.\textsuperscript{53}

The Hancher and Moran approach tends to emphasise the complexity and contingency of how regulation emerges. Basically they see it as being quite concrete and grounded in history, formal institutions and detailed attention to power dynamics. However they also like to imagine regulation as taking place in a space in which different regulatory schemes are operating simultaneously. Changes may occur in who occupies this space at any one time, but if one set of regulatory influences lessen, this merely changes the relationship between the occupants of this space.\textsuperscript{54}

\textsuperscript{49} Ibid.
\textsuperscript{51} Ibid 283.
\textsuperscript{52} Ibid 273.
\textsuperscript{53} Ibid 284.
\textsuperscript{54} Ibid 276, 277.
Hancher and Moran put forward the proposition that regulatory space as a whole should be made the subject of regulatory policy. This approach serves to remove the axis of the state as a source of regulation, and points to the role that can be played by a whole host of regulatory schemes:

Economic regulation of markets under advanced capitalism can thus be portrayed as an activity shaped by the interdependence or powerful organizations who share major public characteristics. In the economic sphere no dividing line can be drawn between organization of a private nature and those entitled to the exclusive exercise of public authority.\(^{55}\)

Fundamental to these two theorists’ belief is a central theme. It is that regulatory policy is unlikely to be effective if it fails to acknowledge the fact that ‘regulatory space’ is a terrain in which the state must compete for control of regulation with other regulatory entities. For example the aviation safety regulator finds itself in constant dialogue with such authorities as Airservices Australia,\(^{56}\) and the Australian Transport Safety Bureau,\(^{57}\) to name just two such entities.

5.6.1 Systems Theory

In contrast to the somewhat concrete regulatory theory of Hancher and Moran the ‘system theory’ analysts are more abstract in their focus. For example when ‘public choice theorists’ are looking at utilities regulation they are likely to go about it by investigating the ways in which the regulated industry lobbies regulatory agencies and the legislature, in order to secure regulatory benefits. Conversely in the same situation ‘systems theorists’ would be more likely to

\(^{55}\) Ibid 275.

\(^{56}\) In 1995 the ‘service provider’ component of the former Civil Aviation Authority was split from the ‘safety’ component and two new statutory bodies were formed; the Civil Aviation Safety Authority and Airservices Australia. The latter became responsible for air traffic control management, provision of aeronautical data, telecommunications, navigational services and aviation and fire-fighting services, with the former being responsible for aviation safety in all its many facets.

\(^{57}\) The Australian Transport Safety Bureau is an independent statutory agency, the aviation arm of which investigates aviation accidents, incidents and safety deficiencies. It works closely with the Civil Aviation Safety Authority and recently has been the subject of a parliamentary enquiry into its relationship with this authority. See; Report to the Minister for Infrastructure, Transport, Regional Development and Local Government, ATSB/CASA Review 2007 (21 December 2007) (‘The Millar Report’).
concentrate on the way in which the economic and political systems communicate, or fail to communicate, with each other.\textsuperscript{58}

It is a theory not just of regulation, but also of 'society' building on biological scientists' accounts of how living organisms self-regulate and how they relate to the environment whilst doing so. The reference to biology seems at first instance a little mysterious. However essential to this theory is the understanding that self-regulation is the starting point for recognizing how systems create order. It is an arrangement of applying empirical observations about biological systems to social settings.\textsuperscript{59} One of the central findings of the 'systems theory' is that systems all tend to be 'closed spaces' in that they have a series of operations, and a classification of language that is only understandable to those who speak the language of the system and are aware of its mechanism. The legal system itself is a perfect example of such a 'closed space'. It uses the language of doctrinal analysis and legal precedent to analyse situations 'by reference to a code that labels outcomes as either legal, or illegal'.\textsuperscript{60}

System theory is sceptical about the traditional approaches to regulation based, as they are, on the assumption that legal commands will shape the behaviour of 'economic and political' participants to produce certain outcomes. It is inclined to view the pecking order found in the legal authority as an external irritant to the economic system. It is more inclined to present the law as essentially self-restraining as a 'social practice that regulates self-regulatory mechanisms, rather than regulating the substance of a particular issue',\textsuperscript{61} … such as aviation safety.

A prolific proponent of 'systems theory' is the German lawyer and sociologist Gunther Teubner. In one of his earlier works in 1986, 'Dilemmas of Law in the Welfare State' he presents regulatory law as a social practice that regulates self-regulatory mechanisms, rather than looking at it in the way it is

\textsuperscript{59} Ibid.
\textsuperscript{60} Ibid.
\textsuperscript{61} Ibid 70.
traditionally presented as regulating the substance of a particular issue - such as safety.\textsuperscript{62} This work is a good example of those regulatory theories classified as institutionalist approaches. However it is presented at an extremely abstract level and shows the laws contribution to institutionalist theories of regulation as being 'the resolution of inter-systems conflict by procedural regulation' which is not just a matter of fostering a dialogue between the regulatory participants, but is also understanding that regulatory participants operate in 'semi autonomous social sub-systems'.\textsuperscript{63}

Central to Teubner's theory, which he has in common with the previous two examples of institutionalist theorists is the 'digging out' of the image of law as being an 'umpire' in the regulatory process. Thus there is a down playing of the law's role in directly controlling the pursuit of regulatory goals and the introduction of an umpiring image appearing as an important element in law's facilitating dimension.\textsuperscript{64}

\textbf{5.7 Strategies of Enforcement}

Regulatory compliance and enforcement has been the subject of much empirical research and socio-legal analysis in the past 30 years. This latter day research has advanced considerably since its early beginnings in the 1970s when it was dominated by a narrow 'command and control' model, and enforcement was caught up in the 'punish or persuade' debate.\textsuperscript{65} Early studies discussed these two opposing extreme swings of the pendulum … should regulatory authorities seek compliance through advising and persuading those they are regulating to comply with standards, or by punishing them for not doing so?\textsuperscript{66}

In this brief overview of enforcement strategies the above traditional model of compliance and enforcement is discussed because it still has some relevance

\textsuperscript{62} Gunther Teubner, Dilemmas of Law in the Welfare State (1986).
\textsuperscript{63} Ibid.
\textsuperscript{65} Anne Broughton, Regulatory Compliance and Enforcement: An Annotated Bibliography (Prepared in part fulfillment of the requirements of a Masters of Laws Graduate Seminar), University of Calgary 2002).
to Australia's aviation safety regulator. This will become apparent in chapter six of this thesis when the application of enforcement theories are applied to recent inquiries and cases.

In addition the 'responsive regulation' shift from the 'compliance and deterrence' strategies, which first appeared in the mid 1980s and went on to achieve some prominence in the early 1990s are discussed. There is special emphasis on the Australian study of Ayres and Braithwaite, referred to previously in the 'tripartism' section of the discussion on different regulatory theories.67

Finally the relatively 'new' regulatory theory that has been labelled 'smart regulation' is discussed. This began to evolve in the latter half of the 1990s and presents a comprehensive approach to the design, implementation and enforcement of regulations. It is particularly concerned with the use of 'incentives' as regulatory instruments. Although not yet as relevant to the analysis that will occur in chapter six, as the previous two categories, it is included because it could hopefully have a part to play in future aviation regulatory reform in Australia.68

5.8 The Traditional Model of Compliance and Enforcement

One of the foremost proponents of the traditional model of compliance and enforcement is the British lawyer and sociologist Keith Hawkins.69 He chose for his field of study in 1984, the regulation of water pollution and looked at the part played by the criminal law in the daily routine of protecting water quality and at the nature of the discretion involved in enforcing the law. His study, at this time, was innovative in that it moved away from the familiar role of looking at 'enforcement' as one dealing with police work, and shifted the focus to social and economic regulation and its associated issues of compliance.

His thesis embodied the concept that 'law enforcement demands a moral as well as a legislative mandate'.\textsuperscript{70} He made it clear that although his study was, in practical terms, about the implementation of legal rules to protect the natural environment of rivers, flora and fauna, 'the study is also about enforcement agents and organizations and the ways in which they respond to their social and political environments'.\textsuperscript{71} By taking what was at this time a different approach from the traditional police-linked role of enforcement behaviour and conduct, he examined enforcement, which was directed to activity whose moral status was less than clear. In doing so he broadened the concept of enforcement to emphasize the question of 'compliance'. Viewed from the 'compliance' perspective he claimed that a highly selective use of the formal processes of law enforcement emerged more clearly as a valuable resource for enforcement staff and their regulatory agencies.\textsuperscript{72}

Although Hawkins's thesis dealt with the question of 'water pollution', the principles it illustrated have come to be seen as having relevance in a far wider variety of regulatory fields, including I submit that of aviation safety. Hawkins described two distinctive enforcement 'styles', the first he called a 'compliance' approach and the second a 'sanctioning' approach.\textsuperscript{73} The 'compliance' strategies describe a cooperative, problem solving approach that takes place in an ongoing working relationship between the regulator and the regulatees. The objective of this approach is to achieve, or at least approximate, conformity with regulatory requirements with penal sanctions being used only as a last resort. In this context penal sanctions are viewed as a failure of the regulatory system to achieve compliance. 'Sanctioning' or 'deterrence' strategies on the other hand describe an arm's length regulatory style. This is one in which regulatees are obliged to meet regulatory requirements, or face the prospect of quite punitive sanctions which are typically of the prosecution kind.

\textsuperscript{70} Ibid xiii.
\textsuperscript{71} Ibid.
\textsuperscript{72} Ibid.
\textsuperscript{73} Regulatory theorists also refer to the 'sanctioning' approach as a 'deterrence' approach. The use of the word 'deterrence' has, in later works, become more of the accepted classification for the term.
In concert with these two major systems or strategies, Hawkins speaks of a conciliatory style of enforcement as characteristic of a 'compliance strategy' and a penal style as characteristic of a 'sanctioning strategy'. The latter style is accusatory and adversarial and the former acts more to prevent a harm rather than punish an evil. Although these two strategies appear as distinct opposites, Hawkins describes them as shifting points on a continuum. What is central to the 'sanctioning' strategy is the concern for the application of punishment for breaking a rule and thus possibly doing harm. Conformity with the law may result as a consequence of this but conformity is not the main issue. The main preoccupation is with achieving conformity to a rule or standard when confronted with a problem. It is relatively easy to exact a legal sanction by means of the legal process when a rule is broken. However the aim of the compliance strategy is one that prevents the harm in the first place. It wants to act against retribution and uses recourse to the legal process only as a last resort. However for 'compliance' to be successful some positive accomplishment is frequently required, not just merely refraining from the act.

The particular style of a compliance strategy is conciliatory; it relies on bargaining to achieve conformity with a fixed rule. A problem is something that is seen as negotiable as far as future obedience to standards is concerned. With the ultimate aim of responding to a problem and negotiating future conformity to certain standards comes the objective of preventing harm by accumulation. Thus any retribution, in the form of penal sanctions is seen to be inappropriate. Success in a compliance system comes as a result of negotiation, which is designed to prevent future misconduct.

The compliance end of the spectrum has decisions seen as being controlled by the parties themselves, usually in private intimate negotiations, which rely on bargaining not adjudication. At the other end of this spectrum the deterrence

75 Ibid 4.
end, any enforcement relationships between the parties are seen as being compressed and abrupt, devoid of any of the 'incremental approach' that is part and parcel of the compliance end of the spectrum.\textsuperscript{76}

Hand in hand with this traditional model goes the theory of 'capture'. Why does the above model sometimes go 'so wrong', as is demonstrated over and over again in the Seaview Inquiry?\textsuperscript{77} Why do so many regulatory agencies, (not just in the aviation industry), prefer a strategy of compliance that can seemingly lapse into situations where the strategy fails abysmally. Regulators have looked to the 'capture theory' as one possible explanation. Although it may be considered somewhat 'old fashioned' in modern day regulatory theory terms, because it is referred to time and time again in chapter six of this thesis, a brief explanation is required.

One of the earliest modern day proponents of the 'capture' theory was Marver Bernstein.\textsuperscript{78} In 1955 he described 'capture' as occurring when 'the mores, attitudes and thinking of those regulated comes to prevail in the approach and thinking' of those doing the regulatory oversight.\textsuperscript{79} Why does it occur? Theorists have pondered on a variety of possible reasons, an early one being the 'revolving door' phenomenon. This comes about when regulators who formerly worked in the regulated industry, take up jobs with the regulator of that industry. Theoretically the revolving door syndrome should also work in the opposite direction, with industry acquiring workers from the regulator. In practice however studies have found that there is little evidence of a movement of personnel from regulating agencies to industry. The movement is most commonly in the opposite direction. Grabosky and Braithwaite noted in their study of 96 regulatory agencies in Australia, that a majority of inspectors and investigators came from the industry into the employ of the regulator and movement vise versa was extremely small.\textsuperscript{80}

\textsuperscript{76} Ibid 5.
\textsuperscript{77} Commonwealth of Australia, Commission of Inquiry into the Relations Between the CAA and Seaview Air (1996) Vol 1, 2. ('The Staunton Report')
\textsuperscript{78} Marver Bernstein, Regulating Business by Independent Commission (1955).
\textsuperscript{79} Ibid 83.
\textsuperscript{80} Peter Grabosky and John Braithwaite, Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies 198.
When regulators have been recruited to work as inspectors in the regulated industry, the 'capture' theory argues that they are more likely to identify with the interests of the industry they have previously been involved with, albeit on the other side of the fence. In the vise versa case, which admittedly occurs far less frequently, it is argued that those working for the regulator may not wish to jeopardise their possible future employment prospects in the industry, and therefore 'go easy' on any non-compliance.\(^{81}\)

In the Australian study of Grabosky and Braithwaite the revolving door theory to explain 'capture' as it relates to regulatory authorities was rejected. In its place they suggested an hypothesis which they termed 'rational distance' to explain why regulators tend to favoured a compliance strategy and whilst doing so can become mislead. They found that when inspectors of a regulated industry were in frequent contact with the same people in the industry they were less inclined to use formal sanctioning implements such as 'punishment' for non-compliance and more inclined to veer towards the opposite end of the spectrum and 'go easy' on the offender. It is arguable however that Grabosky and Braithwaite's 'relational distance' hypothesis, defined another way, is simply a wider version of the capture theory. In this instance it really depends on how 'capture' is defined. Other regulatory theorists, such as Anthony Ogus have given the concept of 'capture' a much broader definition bringing in the threat of appeal to a court, or the threat of political lobbying by industries, as relevant factors in the regulator's choice of a strategy of compliance.\(^{82}\) Here there is a risk that the enforcement officer's decision will be overturned and the thought of appearing as a witness in the courtroom is not one an inspector necessarily relishes. The possibility that a decision of the inspector will be set aside is very relevant in the context of the Civil Aviation Act. Here an application for review of one of CASA's regulatory officials is allowed to the Administrative Appeals Tribunal, where matters are reviewed on their

\(^{81}\) William Gormley, 'A Test of the Revolving Door Hypothesis at the FCC' (1979) 23 American Journal of Political Science 665. (This study tested both static and dynamic models of the 'revolving door' theory as it related to data obtained over a 20-year period from the United States Federal Communications Commission).

merits. From the regulatory official's point of view this exposes him or her to a greater risk that the decision under review could be varied, or set aside, than would be the case if only judicial review were permitted.

5.9 Responsive Regulation

A conceptual shift from the compliance and deterrence strategy of Hawkins and other traditional proponents of his strategy is that offered by those regulatory theorists who lean towards 'responsive regulation'. Responsive regulation suggests that regulators should have a range of compliance and enforcement tools so that they may respond contingently, depending on a regulatee's most recent regulatory conduct. Thus they are able to respond cooperatively to those regulatees who offer themselves as being 'obliging', and punitively to those regulatees who are behaving in a noncompliant manner. One of the earliest models of 'responsive regulation' was that of the leading political scientist John Scholz, who in his early works described a 'tit for tat' strategy. This is where the regulatee optimises long-term benefits by forgoing short-term opportunities. Here the regulator begins each relationship in a cooperative, flexible fashion and resorts to punishment only if and when the regulatee clearly turns away from cooperating. Once the regulatee starts to cooperate again then the regulator does too.

The empirical research of Ayres and Braithwaite follows on from Scholz's early work by demonstrating that sociological considerations also support the 'tit-for-tat' strategy. Their initial analysis, which builds on two generations of regulatory critiques shows that early regulatory cooperation is always the preferred approach, that is until a regulatee transgresses and fails to comply in a particular instance. However inherent in this approach is that once rebuked,

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83 The Administrative Appeals Tribunal's powers are unlike the Federal Court's powers, where the later can only undertake a judicial review. In contrast the Tribunal can, affirm, vary, or set aside the decision under review. Alternatively it can make a fresh decision in substitution for the decision under review, or it can remit the whole matter for reconsideration in accordance with any directions or recommendations it may decide to make. See Administrative Appeals Tribunal Act 1975 (Cth) s 43.

a regulatee's ongoing efforts to then comply should be met with prompt 'regulatory forgiveness'.

The concept of 'capture', that is where regulators are 'captured' by those they are supposed to regulate, which formed an important part of early regulatory studies, is looked at in new light by the Ayres and Braithwaite research. The old concept that as a result of 'capture', levels of enforcement and protection would be inadequate, was in the light of their experience reassessed to state that capture in their eyes is not 'the predominant regulatory problem'. They came to the conclusion that what is needed is more effective regulation. Effective regulation does not necessarily mean more rules and they acknowledge that the legalistic enforcement of rules of uncertain values and relevance often triggers lengthy litigation. They found that strict regulatory regimes can be counterproductive, whilst undermining the potential cooperation that most regulatees are willing to offer. Their research highlighted 'the need to transcend the intellectual stalemate between those who favour strong state regulation of business and those who advocate deregulation'. They proposed four policies that they believed presented more flexible methods for avoiding both 'capture' and regulatory unreasonableness. They are described here because they present as examples of 'responsive regulation' whereby they are flexible enough to acknowledge differences amongst the behaviour of different regulatees and on the other hand flexible enough to grant regulators the discretion to treat individual regulatees differently if required.

1. The Benign Big Gun. Make sure that regulatory agencies have a range of options that allows them to behave in a cooperative fashion but also provides a strong marginal deterrent for every level of transgression, extending to the most severe.

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85 Ian Ayres and John Braithwaite, Responsive Regulation: Transcending the Deregulation Debate (1992) 5.
86 Marver Bernstein, Regulating Business by Independent Commission (1955) 82. In 1955 Bernstein described capture as arising where 'the mores, attitudes, and thinking of those regulated comes to prevail in the approach of thinking of many of the regulatory officials'.
87 Ian Ayres and John Braithwaite, Responsive Regulation: Transcending the Deregulation Debate (1992) 70.
88 Ibid 3.
2. Republican Tripartism. Encourage the empowerment of citizen, consumer, and worker groups affected by regulation so that they can both monitor the performance of the agencies and supplant them when they are derelict.

3. Enforced Self-Regulation. In selected cases, establish programs in which corporate officials have partial responsibility for setting their own standards and for establishing internal units to monitor compliance with those standards. Make the monitors criminally liable for failing to report serious non-compliance.

4. Partial-Industry Intervention. Regulation need not be industry wide. Some of the potential costs of regulation may be avoided by more targeted efforts, which can make use of the interplay between competitive and regulated sectors.  

As a method to achieve responsible regulation they emphasize the importance of 'understanding private regulation - by industry associations, by firms, by peers and by individual consciences - and how it is interdependent with state regulation.' They believe that the 'benign big gun' concept confuses those who argue that persuasion and punishment are incompatible.

When scholars point to an agency like OSHA, (Occupational Safety and Health Administration), to conclude that punishment and persuasion are incompatible, they have not understood the foregrounding of cooperation and backgrounding of punishment that benign big guns can accomplish.  

The policy of 'republican tripartism' fosters the participation of public interest groups in the regulatory process. In doing so they argue that from industries' point of view, public interest group keenness, seen as the force driving the regulatory body to adopt unreasonable regulation can be moderated by giving the public interest groups more influence. Conversely with more involvement in the process the public interest groups can come to understand that their demands for legalism can push industry into a defensiveness, which can in turn obstruct the exact progress the public interest groups want.

89 Ibid 3.
90 Ibid 3.
91 Ibid 49.
92 Ibid 59.
Perhaps Ayres and Braithwaite's most lasting contribution is their ‘enforcement pyramid’.\(^{93}\) This is a model of a regulatory tool that includes a broad base of cooperative measures such as persuasion, regulatory advice and technical consultations, which seem ideally suited to an aviation safety regulator. Where ongoing non-compliance occurs a range of increasingly punitive measures come into play. These can begin as warning letters through to civil and criminal sanctions and ultimately to the apex of the pyramid where ‘regulatory capital punishment’ sits. In the case of aviation the withdrawal of a licence or air operators certificate would be the ultimate ‘regulatory capital punishment’ sanction. Reversing back down the pyramid a regulatee's efforts to comply are met with regulatory de-escalation down the pyramid, back to such co-operative strategies as 'persuasion'.\(^{94}\) Interestingly Ayres and Braithwaite also suggest that the more punitive the ultimate sanctions available to the regulator are, at the apex of the pyramid, then the more likely it is that regulation would occur at the base of the 'enforcement pyramid' through a co-operative working relationship between the regulator and the regulatees.

Possibly 'responsive regulation's' main shortcoming is that it does focus on a two-party type regulation, which involves only the regulator and the regulatees. There is no room for the significant and legitimate roles of other regulatory stakeholders, for example public participation by private citizens and non-government organizations. Also it does not take into account the inevitable influences of other commercial participants such as industry associations and the fact that business, even the aviation business, has now to operate in increasingly competitive environments. 'Smart regulation' may indeed offer some answers to this void.

### 5.10 Smart Regulation

As a concept smart regulation began to evolve in the latter half of the 1990s. Although in practice reliance on 'command and control' regulation remains

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\(^93\) Described on page 169 of this thesis.

\(^94\) Ian Ayres and John Braithwaite, Responsive Regulation: Transcending the Deregulation Debate (1992) 75.
one of 'smart' regulation's earliest proponents, the lawyer and sociologist Neil
Gunningham, thought that there was a growing concern that something
effectively better than the traditional form needed to be devised and utilized.\textsuperscript{95}
In pursuing his quest for 'smart' regulation he was inspired by the work of
Aryes and Braithwaite. He particularly liked the manner in which they
emphasised the contributions of enforced self-regulation. This is a process
whereby regulatees develop their own compliance programs, which are
subject to approval by the relevant regulatory authority.\textsuperscript{96} He also favoured
what he calls 'regulatory republicanism', which is where an enlightened
private sector and an informed public can, through participation contribute
productively to the regulatory process.\textsuperscript{97} Gunningham built on the work of
Ayres and Braithwaite. In addition he built on the broader literature on legal
pluralism to which the Ayres and Braithwaite work is related.

Initially 'smart regulation' emerged and developed in the field of
environmental regulation. However certain principles it espoused and the
comprehensive approach to the design, implementation and enforcement of
environmental regulatory requirements can be enlarged to have a wider sphere
than that of its original source of involvement. Whilst not all the innovations
and insights that have emerged from a radical re-conception of the roles of
environmental regulation have broad application to other fields many of them
do. There are certain aspects of environmental regulation that have surprising
similarities with aviation safety regulation. For example the aviation safety
regulator cannot be in every aircraft maintenance organization, on all airfields
and in multiple pilot training establishments at once. The aviation regulator
must, as does the environmental regulator, build up a certain amount of trust,
concepts of fairness, and the existence of a 'culture' of safety with those
working in the industry, to ensure the 'right' approach to safety is undertaken
even when the regulator is not there to view each action at close quarters. The

\textsuperscript{95} Neil Gunningham and Peter Grabosky, Smart Regulation: Designing Environmental Policy (1998) 1.
\textsuperscript{96} CASA currently uses a tailored version of this concept whereby AOC holders are required
to draw up and present their own 'safety system manual', which must be presented and
approved by the regulator.
\textsuperscript{97} Neil Gunningham and Peter Grabosky, Smart Regulation: Designing Environmental Policy (1998) 11.
regulator's resources are necessarily limited in aviation safety regulation, as indeed they are in environmental regulation.

The traditional model of regulation is that of a bi-partite process involving government and business with government acting in the role of regulator and 'business' as regulatee. However a considerable amount of latter day empirical research shows that there are regulatory forms that involve in the process more than just two players. The role of government in this 'regulatory pluralism' context is that of a facilitator of self and co-regulation rather than regulating directly. Regulatory agencies harness institutions and resources residing outside the public sector to advance their policy objectives in specific concrete situations. As espoused by Gunningham, the design principles, involved in 'smart regulation' centre on a 'tripartite and interactive enforcement pyramid'. This pyramid is arranged to make sure that both commercial and non-commercial third parties can participate in regulatory compliance and enforcement activities.

Although environmental regulation has proved a popular field for the current thought that has gone into trying to design more efficient and effective regulation over the past decade, Gunningham, in his most recent paper on regulatory reform, looks beyond the environmental field and sees some hope in what he labels as an emergence of 'regulatory reconfiguration' across the general regulatory spectrum. He proposes five different regulatory frameworks, through which he claims a better understand his 'regulatory reconfiguration' theory may be achieved. Of the five, that of 'reflexive

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101 Ibid 4-10.

The five different frameworks are:
i) Reflexive Regulation
ii) Regulatory Pluralism
iii) Environmental Partnerships
iv) Civil Regulation and Participatory Governance
v) Ecological Modernisation and the ‘Greengold Thesis’
Reflexive regulation, which uses indirect means to achieve broad social goals, has according to its supporters, a much greater capacity to come to terms with increasingly complex social arrangements than the 'command and control' traditional method. The complexity of society outgrows the possibilities of the legal system to shape the complexity into a form fitting to the goal-seeking direct use of law. A concrete example of this can be seen in the Three Mile Island nuclear accident in Pennsylvania America in 1979, with near meltdown happening where one cause of failure was that operators simply followed rules, without any capacity for strategic thinking. As events unfolded that were not covered by any specific rule they had no capacity to interpret the situation, and respond accordingly. Interestingly as a result of this accident, a shift in regulatory behaviour occurred in the nuclear industry in an endeavour to plug the holes in the regulatory oversight that it was felt had exacerbated the damage. Known in regulatory literature as 'meta risk management' it is perhaps best described as the risk management of risk management. The result of the Three Mile Island nuclear accident has been held up in regulatory literature as a successful example of a shift in regulatory behaviour that has itself resulted in measurable safety enhancement to the nuclear industry. Transposed to the aviation safety regulator this could possibly be a cost-effective and responsive regulatory strategy, at least when viewed in the context of a complex risk environment such as aviation.

Thus it can be said that 'reflexive regulation' is more procedure orientated rather than directly focusing on a prescribed goal. It aims at designing self-regulating social systems by establishing standards of organization and procedure. This can be viewed as a form of 'risk management' whereby the

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102 Ibid 4.
103 Ibid.
104 John Braithwaite 'Meta Risk Management and Responsive Regulation for Tax System Integrity' (2003) 25 (1) Journal of Law and Policy 2. Within a decade safety related automatic shut-downs of nuclear plants (SCRAMS) fell from seven per unit, per year to an average less than one per year in the U.S. and then in the next decade fell to 0.1 per year'.
105 Ibid.
regulator rather than regulating directly, risk-manages the risk management of individual enterprises. After the Three Mile Island nuclear accident a safety regime was established for the nuclear power industry whereby regulation ceased to be primarily about government inspectors checking compliance with rules, but more about encouraging the industry to put in place safety management systems that were then examined by regulators. CASA is currently engaged in a similar exercise where rather than regulating prescriptively, it is drafting its new round of regulations in an outcomes-based mode, with the goal being to establish processes of internal self-regulation to monitor and control safety outcomes.

5.11 Strategies of Enforcement and the Role of Discretion

Discretion forms a vital part of the armoury of the aviation safety regulator. Each day at every turn from the officer in the field up through the ranks to the CEO some form of discretion is constantly being exercised. Defined in a wide sense, 'discretion' really means having the freedom to choose between courses of action. When an individual is given discretion, they are given a certain freedom to make the 'right' choice between different courses of action.¹⁰⁶

Chapter six of this thesis will, through reference to relevant inquiries and cases, be looking at how aviation safety officers exercise discretion in carrying out their various oversight functions, how they construct definitions of compliance and how they decide what to do in instances of non-compliance. The aim of such analysis is to identify patterns or trends, what role should there be for the exercise of sanctions or what role for non-sanctioning responses to non-compliance? All those involved in the regulatory process will be exercising some form of discretion. Discretion is a central and inevitable part of the legal regulatory process.¹⁰⁷

In the regulatory sense we rely on the person to whom the legislature has granted the power of 'discretion' to act in an appropriate manner. So the

choices such a person makes are in some way expected to be the 'correct' ones. Thus in a sense discretion is intimately linked to 'trust'.

However 'discretion' as applied to 'rules' is operating in a complex relationship. The more rules that exist and the more precise these rules are, they work to curb the freedom of choice between courses of action the decision maker may have. In a bureaucratic organization, (such as CASA), there is always the concern that discretion may lead to unpredictability and inconsistencies based on officials' personal partialities. Hence, the attempts to manage discretion. This management itself is fraught with difficulties revolving around the choice of the legal framework used and the organizational practices and internal cultures of the regulatory authority concerned. Implicit in the concept of management of discretion is the assumption that through appropriate rules it can be controlled, directed, limited or otherwise structured. It seems therefore to follow that the more rules there are and the more precise manner in which these rules are constructed then the less freedom there is to choose between different courses of action. This however, is not necessarily so. It does not follow that the more rules there are the less discretion there is and vise versa.

Because rules and discretion operate in a complex interrelationship how decision makers make decisions is only partly determined by rules. Other factors entering the decision maker's equation are the organizational norms and practices in existence, past experiences, their personal relationships and their own perceptions and attitudes. All these play a part in affecting how decisions are made. Therefore the presence of a particular rule does not of itself mean that the rule will be the only, or even main factor, the decision maker is bound by in his or her ultimate decision. Bureaucratic and

109 Ibid 2.
organizational norms will be present and continue to operate together with various economic and political pressures and social and moral norms.\textsuperscript{111}

The British sociologist Dr Julia Black believes that assuming discretion can be managed by confining its exercise to certain participants and limiting the way in which those participants utilize the discretion they are given, is not only ambitious, it is also misguided.\textsuperscript{112} She goes on to expand this concept to say that the idea that some legal participants involved in the regulatory process can be completely deprived of discretion is erroneous. She believes that all those involved in the regulatory and legal process will be exercising discretion. It must be central to the legal process because of the 'broad grants of authority to legal and administrative officials to attain broad legislative purposes' is simply the hallmark of current regulatory law.\textsuperscript{113}

At the same time discretion is inevitable because the application of rules together with their 'translation into action' involves both interpretation and choice.\textsuperscript{114} We can talk about who should have the authority to make the final decision as to a rule's application but it is not possible to confine the exercise of the discretion to certain types of decision maker,\textsuperscript{115} or to particular levels within any one organizational hierarchy.\textsuperscript{116}

\begin{quote}
Every person at every level who is involved in considering whether particular practices should be seen to be in conformity with the law and what should happen if they are not is exercising discretion, no matter how precise the rule seems to be that they are applying, and no matter how rigorous the checks are on their decision.\textsuperscript{117}
\end{quote}

\textsuperscript{113} Ibid 3.
\textsuperscript{114} Denis J Galligan, Discretionary Powers (1986) 1.
\textsuperscript{115} For example courts, tribunals or regulatory agencies
\textsuperscript{117} Ibid.
As a consequence, in dealing with different strategies of enforcement as they evolve and are put into practice in varying degrees from time to time, it is important to be alert to the presence of discretion and of the fact that it cannot be eliminated, nor can it be easily structured or confined by rules. Thus the focus should be on how those enforcing regulations use the discretion they inevitably have, in the daily exercise of their enforcement functions.

It is important to draw attention here to the use of discretion that occurs at the 'grass roots' level in CASA. The 'street level inspectors' are vitally important for the enforcement process as they act as its 'gatekeepers'. It is their decisions that decide 'what activities to inspect, what evidence to examine, what inferences to draw, and what action to take' to ensure how non-compliant regulatees are brought into line, or alternatively left alone to continue to act in a non-compliant manner.\textsuperscript{118}

Understanding how officials exercise their discretion in undertaking their various functions is central to an understanding of how a regulatory system operates. Regulation is not a product of those who write the regulatory rules, rather 'it is the product of interactions between regulators, regulatees, and the wider community interested in the regulatory project'.\textsuperscript{119}

Similarly in understanding the word 'discretion' in the regulatory context, the term 'compliance' can also be a difficult matter of interpretation. It can be much more than simply not conforming to a rule. It can involve a greater stretching into matters of interpretation both of rules and facts and it too, like the exercise of 'discretion', can involve choice. The rule itself may not be central to the definition of compliance that officials construct. They may have a view of full compliance of a particular state of affairs they are aiming


towards achieving, which may be above the legal minimum and is in accordance with the purpose of the rule, rather than its letter.120

The term 'compliance' is frequently bandied about in a plethora of contexts in statements from regulators, (including CASA), from the CEO of the organization down. However enforcement is not simply about gaining compliance with the law, it is also about determining what actually constitutes compliance. Compliance has thus been characterised as a process rather than an event.121

5.12 The Practical Dilemma of the Aviation Safety Regulator
As becomes evident in the forgoing discussion, there are roughly two 'mental models' of government regulation that can be seen to dominate any understanding of regulatory enforcement or implementation process. The first views regulation as a 'legal process'. As such it looks at regulations as authoritative legal norms which, when contravened, lead to some form of retribution. The second model sees regulation as a 'social process'. It is one that emphasises problem solving and a remedial response to contraventions.

The subject of aviation safety is a highly emotive one in itself. Applying the two 'mental models' above, places in a nutshell, the dilemma faced by the aviation safety regulator. The legislative model reflects the historical side of the criminal law in shaping the regulatees' response to non-conforming behaviour. However in contrast to the criminal law the standards articulated and enforced by the aviation safety regulator are not necessarily well established norms, representing long accepted standards of wrongful behaviour. Effective regulation in this field will require a blend of rules and inducement, threats and education, toughness in certain situations and compromise in others, in short whatever will best persuade the regulatees to co-operate.

120 Bridget Hutter, Compliance: Regulation and Enforcement (1997) 81.
121 K Hawkins, Environment and Enforcement (1984)
Some regulatory violations the aviation safety regulator may encounter do overstep long established norms of criminal behaviour.\textsuperscript{122} The concern is that much empirical evidence suggesting that 'the co-operation seeking approach' always improves regulatory effectiveness can easily get out of hand unless adequate checks and balances, and most importantly 'awareness' of the danger are not constantly reinforced. The Seaview Inquiry is ample evidence that in the hands of gullible, overly busy, or politically vulnerable, regulatory officials a problem solving enforcement style can degenerate into death dealing carelessness.\textsuperscript{123}

Thus to deter opportunism on the part of the aviation industry there may indeed be a place for strict enforcement and severe punishment. Chapter six of this thesis now goes on to explore, through a detailed examination of relevant inquiries and cases over the last 20 years, the particular strategies of enforcement favoured by the regulatory authority, and how such choices may be seen to impact on safety.

\textsuperscript{122} For numerous examples of such transgressions see: Commonwealth of Australia, Commission of Inquiry into the Relations Between the CAA and Seaview Air (1996) Vol 1, 2. ('The Staunton Report').

\textsuperscript{123} Ibid.
CHAPTER 6

AN ANALYSIS OF PARLIAMENTARY AVIATION INQUIRIES

6.1 Introduction

The following chapter is concerned with examining and analysing relevant Parliamentary Inquiries and Reviews that have taken place since deregulation of the aviation industry in 1990 and the formation of the Civil Aviation Authority in 1988. It combines with this analysis, an overview of reported aviation cases that have come before the Administrative Appeals Tribunal and Federal Court in the twenty-year period from 1988 until 2008. It looks at the strategies of enforcement pursued by the regulatory authority during this time, as deduced from evidence presented at these inquiries and cases. The examination that follows is an attempt to discern trends that could show what pressures or influences could lead to certain strategies being preferred over others and the possible effect specific strategies of enforcement may have had on safety. It also looks at what pressures or influences may become apparent that could have led to certain strategies being preferred over others. The ultimate aim of such an analysis is to determine what effect this may be seen to have on the strategies of enforcement adopted by the regulator, and the manner in which the regulator has gone about its job of ensuring aviation safety.

As far as an analysis of the cases is concerned this chapter looks at the reported cases in the light of how they support, or do not support, what may be discerned as the possible enforcement strategy of the time. It includes cases dealing with commercial pilots' licences and the maintenance of fixed wing aircraft. It excludes matters dealing with private pilots' licences and the maintenance and operation of helicopters and hot air balloons. The evidentiary facts are briefly described, together with the reasons for the Tribunal or

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1 Civil Aviation Act 1988 (Cth).
Court's decisions, leading to whether or not any discernable enforcement strategy trends are apparent.

As far as the Tribunal is concerned, in the twenty-year time span studied there have been 115 reported cases involving the Civil Aviation Authority and its successor the Civil Aviation Safety Authority analysed, together with 31 Federal Court cases. The cases have been examined and those found to be most relevant are included in the discussion below. However to present a comprehensive analysis all cases reported within the time span are listed in Appendix 3, with a short notation depending on their relevance to the hypothesis of this thesis.2

The first section, 1989 - 1995 involves the period of time immediately following deregulation up until a year after the separation of the 'commercial' and 'safety' areas of the regulatory authority that occurred on 1 July 1995 and the publishing of the Seaview Inquiry in September 1996.3

Section two covers the years from 1995 until 2003 involving the period immediately following the formation of the new statutory authority the Civil Aviation Safety Authority. It also encompasses the period involving the aftermath of the effect of the 'Seaview Inquiry' and the publication of the ARCAS Report in 2000.4

Section three deals with the years from 2003 until 2008, being the five-year period during which Mr Bruce Byron was CEO of the Authority and as such, introduced far-reaching changes into the operation of the Authority's enforcement strategy. It also covers the latest Parliamentary Committee report

2 See Appendix 3.
3 Commonwealth of Australia, Commission of Inquiry into the Relations Between the CAA and Seaview Air (1996) Vol 1 & 2, ('The Staunton Report'). The 'Seaview Inquiry' and the 'Staunton Report' are one and the same report. The terminology 'Staunton Report' was officially given to the report, being named after the Commissioner who conducted the inquiry. However later, colloquially, it was frequently referred to as the 'Seaview Inquiry'.
4 Commonwealth of Australia, Senate Rural and Regional Affairs and Transport Legislation Committee, Administration of the Civil Aviation Safety Authority: Matters Related to ARCAS Airways (2000).
on the Authority covering the period of Mr Byron's management of the organization.\(^5\)

In reality not a great many reported cases have come before the Tribunal in the time frame under examination and so it may be argued, that few real trends can be discerned from them alone in relation to the regulator's favoured enforcement strategies. However when the analysis of these cases is seen together and merged with trends seen in an analysis of the various inquiries that took place over the same time span, it is submitted that a clearer picture begins to emerge.

A number of cases that are brought before the Administrative Appeals Tribunal have to do with ascertaining if the decision that is the subject of the case is actually a 'reviewable decision' within the meaning of the legislation. The Tribunal does not possess a general power to review decisions made under Commonwealth legislation. Its power to review a decision is dependent on there being an Act, or a legislative instrument providing for an application to the Tribunal, for the review of that decision. Thus s 31(2) of the Civil Aviation Act 1988 provides that application may be made to the Tribunal for the review of a 'reviewable decision'. This term is defined by s 31(1) of the Act as meaning:

\[\text{(a) a refusal to grant or issue, or a cancellation, suspension or variation of, a certificate, permission, permit or licence granted or issued under this Act or the regulations; or}
\]

\[\text{(b) the imposition or variation of a condition, or the cancellation, suspension or variation of an authorisation, contained in such a certificate, permission, permit or licence.}\]^6

Provision is made in the Civil Aviation Act 1988 for an automatic 'stay' of a decision of the Authority, provided there is no serious or imminent risk to safety, to suspend or cancel an operator's licence, permit or certificate for an alleged breach of the Act or Regulations.\(^7\) A number of the cases described,\(^8\)

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\(^{5}\) Commonwealth of Australia, Senate Standing Committee on Rural and Regional Affairs and Transport, Administration of the Civil Aviation Safety Authority (CASA) and related matters, (September 2008).

\(^{6}\) Civil Aviation Act 1988 (Cth) s 31(1).

\(^{7}\) The automatic stay is made pursuant to s 9A of the Civil Aviation Act 1988. This does not apply in every case. Section 31D of the Act states that the Civil Aviation Safety Authority
that come before the Administrative Appeals Tribunal deal with an application for a 'stay' of the decision of the Authority, pending a final hearing by the Tribunal. This involves the Tribunal in the exercise of discretionary powers and differently constituted Tribunals have taken different approaches to the exercise of this power. Frequently the review proceedings in the Tribunal involve an application to review a decision of the Authority to suspend or cancel a range of licences, permits or certificates, or alternatively vary conditions attached to any of this range of instruments.

Under s 31A of the Act certain decisions of the Authority, which are reviewable by the Administrative Appeals Tribunal are automatically stayed for five days. If an application is made to the Tribunal against such a decision within the five-day stay period, the 'stay' is kept in place for up to a further 90 days. This provides a licence or certificate holder with a five-day stay period, within which time an appeal of the Authority's decision can be made to the Tribunal. If the aggrieved party does so successfully, the stay is extended to 90 days from the date on which the licence or certificate holder was notified of the decision of the Authority. The 90-day stay is intended to provide an opportunity for the matter to be considered by the Tribunal. The provisions of s 31A apply to decisions under the Act or Regulations where the Civil Aviation Safety Authority is required to give a 'show cause' notice. Although some disputes are resolved by the Tribunal within that time frame, if it looks as if the 90 day period will expire before the case can be heard, the applicant can ask the Tribunal to order a further stay until a hearing can be scheduled. Broadly speaking, the Tribunal may order a 'stay' where it believes it is appropriate to do so, having regard to the interests of anyone affected by the review. An order under the section can only be made if the Tribunal is 'of the opinion that it is desirable to do so after taking into account the interests of

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2 The Tribunal's power to order a stay is provided for in s 41(2) of the Administrative Appeals Tribunal Act 1975. It is intended to exercise the power 'for the purpose of securing the effectiveness of the hearing and determination of the application for review'.
3 Administrative Appeals Tribunal Act 1975. Section 41(2).
4 Civil Aviation Regulations 1988, Part 16 provides some instances for a show cause notice.
any persons who may be affected by the review'. In the aviation regulation context such review proceedings by the Tribunal usually involve applications to review decisions of the Authority suspending or cancelling a range of licences, permits or certificates, or possibly varying conditions attaching to those instruments that have been issued under the Civil Aviation Act or Regulations.  

In 2003 specific provisions were inserted into the Act to deal with the situation where CASA considers that there is a serious and imminent risk to air safety. This enables the regulator to immediately suspend particular authorizations. When CASA has to take this action certain conditions are imposed upon it. One such condition is that CASA must apply to the Federal Court within five days in order for the suspension to have continuing effect.

In analysing the cases, of particular interest are the actual facts of the cases, tied in with seeking to explore just how the regulatory authority is seen to have exercised its powers of enforcement in each particular case. Therefore in the context of this thesis the Administrative Appeals Tribunal cases are more helpful, as the Federal Court's powers are limited to judicial review. The Administrative Appeals Tribunal on the other hand can make decisions; each decision must relate to a prior decision, the decision under review. In remaking the original decision, or a substituted decision replacing the original decision, the Administrative Appeals Tribunal may exercise all the powers

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13 Civil Aviation Act 1988 (Cth) Division 3A, s 30DC.

14 The introduction of those legislative provisions and the policy reasons for them were discussed by a Full Court in Civil Aviation Safety Authority v Boatman (2004) 138 FCR 384 and referred to by Madgwick J in Civil Aviation Safety Authority v Boatman [2006] FCA 460. The new provisions were introduced in part to ‘address the perception in aviation circles that CASA was somehow judge, jury and executioner’.

15 The Federal Court cannot review the merits of a decision. Rather it is limited to determining whether the decision maker has acted fairly within its designated power and according to law. So in effect the Federal Court can deal with challenges to the power of the Authority regarding a decision it has made and any lack of procedural fairness that may have occurred, but is not able to address the broader fairness consistency or policy implications of the decision. The Administrative Appeals Tribunal on the other hand has the power to review the decision on its merits. From the perspective of this thesis, where detailed description of facts and events can be important to future analysis, this means that much greater detail pertaining to the Authority's enforcement procedures appear in the reporting of cases before the Tribunal.
and discretion that are conferred on the original decision-maker, in this instance the aviation safety regulator. Thus in effect, it stands in the shoes of the regulator.\textsuperscript{16} The analysis of the facts in the cases seeks to determine if any discernable trends occur that show a leaning towards a 'compliant' or 'deterrent' strategy of enforcement, first of all by the Authority and secondly if the trend exhibited in the case is followed by the Tribunal in the exercise of its discretion. This is not always easy to determine from any one particular case, however over time it is submitted, discernable trends begin to emerge.

\section*{6.2 Section 1:}
\textbf{Inquiries and Reviews 1989 - 1995}

As stated in the introduction to this thesis, the catalyst for the research was the findings in the inquiries into aviation safety that came out of the Monarch Airlines and Seaview Air crashes, of the mid 1990s. Described in the historical section in this thesis,\textsuperscript{17} the behaviour of the regulatory authority of this time erred towards the 'compliance' end of an enforcement strategy spectrum. This was very evident in the senior branches of the Authority. Both the Seaview Inquiry and the Plane Safe inquiry were extremely critical of the approach taken by the regulatory authority.\textsuperscript{18} Thus one of the most important inquiries from the point of view of this thesis is that of the Seaview Air Inquiry of 1996.\textsuperscript{19} Following the crash three months earlier of an aircraft owned by Seaview Air, the Commission of Inquiry was set up in December 1994. The Commission's report was tabled in Parliament in 1996.\textsuperscript{20}

\textsuperscript{16} Administrative Appeals Tribunal Act 1975. Section 43(1).

For the purpose of reviewing a decision, the Tribunal may exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision and shall make a decision in writing:

(a) affirming the decision under review;
(b) varying the decision under review; or
(c) setting aside the decision under review and:

(i) making a decision in substitution for the decision so set aside; or
(ii) remitting the matter for reconsideration in accordance with any directions or recommendations of the Tribunal.

\textsuperscript{17} See chapter 2 of this thesis, section 2.11.


\textsuperscript{19} Commonwealth of Australia, Commission of Inquiry into the Relations Between the CAA and Seaview Air (1996) Vol 1 & 2, (The Staunton Report).

\textsuperscript{20} See chapter 2, section 2.11.2 of this thesis for a description of the Seaview Air crash.
The Commission analysed the behaviour of the regulator in the years immediately following deregulation of the industry and concluded that the application of policies of 'graduated responses' undertaken by the regulator at the time, had lead to the adoption by the Authority of 'weak' enforcement procedures that permitted some operators to get away with quite serious breaches of the regulations.

The Commission drew attention to the persistent area of tension that existed in the past and continues to exist in the world of the aviation regulator in Australia. This is the marrying of two distinct roles that the regulator is charged with performing pursuant to the Act. In the area of safety regulation, officers perform a number of very different functions and these functions have the potential to conflict with one another. They provide a service, in that they issue licences, approvals, permits and concessions. They also provide advice and education to aviation industry operators. But of course these same officers are also the regulators. They must police the observance by the aviation industry of standards that have been set. Where standards are not met they must take appropriate action, and that action might itself involve prosecution.21

The Seaview Inquiry used the terminology 'institutional timidity' to describe the state of affairs the Authority found itself in during the turbulent days of the early 1990s. It spoke of the extent to which outside pressures, that is legal, political, industrial and managerial, may have impinged on the ability of officers of the Authority to take the necessary decisive and forceful action required of them in a regulatory role. It described this happening as 'institutional timidity' and considered that such a description was a most accurate one. It is, so the Seaview Inquiry went on to say, a description of an environment which existed at that time in which the CAA officers may have been wary of making particular decisions because of the shift in regulatory

21 See chapter 7 of this thesis. Page 342 suggests a comparison with other regulatory agencies exploring how they deal with this quandary, and page 347 note 4, suggests possibilities for future research on the subject.
philosophy that was apparent in the workings of the upper echelons of the Authority since deregulation.\textsuperscript{22}

A number of factors had come together in the early 1990s that resulted in the change of policy within the Authority that veered it towards thinking of itself as a 'service provider' in a deregulated business world first and a regulator second. This was not of course what it stated its priorities to be, however what was said by those in charge and what actually happened in practice, certainly did point in this direction.

In August 1990 the Government had decided that the concept of 'user pays' should be applied in the area of safety regulation. It therefore abandoned the exemption for certain aspects of safety regulation created in the Bosch Report of 1984.\textsuperscript{23} The background to the abandonment of the safety regulation exemptions was the acknowledgement by the Government that some 15 years on from the Bosch Report, the provision of aviation services was an expensive area that it required the industry to help fund. Previously in October 1983 the Government commissioned an Inquiry into Aviation Cost Recovery.\textsuperscript{24} In broad terms the Inquiry recommended the gradual introduction of the 'user-pays' concept to aviation services. It acknowledged however, that in the area of regulatory services special conditions do apply.

The report had divided regulatory services into three broad functions of setting, implementing, and enforcing standards. The setting of standards involved the establishment of required knowledge or specifications that had to be met. Implementing standards involved applying the standards by issuing licences or inspecting facilities. Enforcing standards involved surveillance of operators and facilities to ensure continued compliance with standards and taking corrective action where necessary. The Inquiry went on to make the following recommendations:

\begin{itemize}
\item \textsuperscript{22} Commonwealth of Australia, Commission of Inquiry into the Relations Between the CAA and Seaview Air (1996) 3.
\item \textsuperscript{23} Independent Inquiry into Aviation Cost Recovery (1984) Aviation Cost Recovery (Henry Bosch, Chairman) 260.
\item \textsuperscript{24} Ibid.
\end{itemize}
'Costs associated with setting and enforcing standards for regulatory services should not be recovered'.\textsuperscript{25}

'Full cost-recovery should be pursued for costs associated with implementing standards for regulatory services'.\textsuperscript{26}

Significant events had occurred since the Bosch report handed down its recommendations. Deregulation had begun and the Civil Aviation Authority was accorded the status of a Government Business Enterprise. The then Chairman of the CAA, Mr Dick Smith, a successful businessman and one who was used to achieving success through efficient financial management, described the significance of the change in glowing terms:

During the year the CAA became a fully-fledged Government Business Enterprise. This status gives us greater flexibility to organise our affairs in a more businesslike way and in a manner best suited to delivering our services effectively and efficiently.\textsuperscript{27}

Along with the user-pay changes came the expected reduction in Government funding for the Authority. The 1989-90 Annual Report for the Civil Aviation Authority described the consequences of the new measures:

In the August 1990 Budget the Government announced that from November 1991 the annual $73 million safety regulation payment will be phased out. The costs of safety regulation will therefore need to be progressively met directly by the aviation industry.\textsuperscript{28}

The process that followed was quite dramatic for the Authority. It had to reshape the management structure, reduce the size of the organization, reduce the cost of running the Authority and 'develop a more commercial approach to day-to-day business'.\textsuperscript{29}

The consequences too were dramatic. To the dismay of much of the staff, Mr Smith included the following fact in the CAA's 1990-91 Annual Report:

\textsuperscript{25} Ibid. Recommendation 103.
\textsuperscript{26} Ibid. Recommendation 104.
\textsuperscript{27} Civil Aviation Authority Annual Report 1989-90, 2.
\textsuperscript{28} Commonwealth of Australia, Commission of Inquiry into the Relations Between the CAA and Seaview Air (1996) 91.
\textsuperscript{29} Civil Aviation Authority Annual Report 1990-91, 3.
The CAA was formed in July 1988 with a transfer of 7194 people from the Department of Transport and Communications. A detailed Review of Resources in the first half of 1991 showed that only half that number will be required by 1995.\textsuperscript{30}

From this it would be reasonable to conclude that if the staff were to be reduced by half this could mean that less would get done, or alternatively what did get done would be less well done than previously. Understandably such a drastic action would need considerable staff retraining and lead to a plummeting of staff morale. In starting to look at reasons why things began to go awry in the early years of deregulation, the employment uncertainty that was within the Authority at this time must have had an unsettling effect on practically all staff members. Together with such changes went a subtle and sometimes not so subtle, change in philosophy. The CAA's future was seen to be linked to a 'successful' industry. Those the CAA was seen to be regulating were now referred to as 'customers'. Comments in the Review of Resources briefing document issued to CAA managers in May 1991 referred to the core values of the Authority as making 'the most efficient use of resources for the benefit of our customers'.

This may indeed have been a satisfactory philosophy for certain areas in which the CAA was providing a service to the industry. However the briefing documents made it quite clear that the area of 'safety regulation' was also included. Managers were given instruction in the following vein:

Safety Regulation and Standards Division is a customer orientated team, providing consistent, timely and effective regulatory functions, at a minimum cost, to foster a safe and viable industry.\textsuperscript{31}

Again in the CAA Annual Report of 1990-91 the CEO Mr Frank Baldwin said: 'In reviewing the CAA's basic planning we decided that the CAA must be customer-orientated'.\textsuperscript{32} Such customer orientation required minimising costs, as the CAA's running costs were now to be ultimately paid by the

\textsuperscript{30} Civil Aviation Authority Annual Report 1990-91, 3.
\textsuperscript{31} Commonwealth of Australia, Commission of Inquiry into the Relations Between the CAA and Seaview Air (1996) 93.
\textsuperscript{32} Civil Aviation Authority Annual Report 1990-91, 9.
aviation industry. In the same statement in the Annual Report of 1990-91 Mr Baldwin went on to identify a number of strategies designed to reduce the cost of aviation services. They included 'emphasising the importance of the customer needs, customer service and the cost of the service we provide', together with 'the need to be more transparent to customers'.

As part of the process of reducing costs three distinct changes were introduced. There was a change from the labour-intensive system of surveillance, which had been termed 'quality control' to a new system called 'quality assurance'. Under the 'quality control' approach the CAA was directly involved in supervising the implementation of standards by the industry. Under the 'quality assurance' approach responsibility for compliance with standards was placed directly on the industry subject to the CAA's audit and surveillance.

The second change that occurred was a discrete shift to 'self-regulation' by the aviation industry. This revolved around the new concept of a 'partnership with industry'.

It was widely recognised within the aviation community that airline management has a central role in maintaining the safety of airline operations at high levels. A key element in the CAA's partnership with industry is the promotion of the concept that safety management is a major responsibility of the airlines themselves.

Hand in hand with the concept of self-regulation was the concept of minimal intervention by the CAA. The corporate objective of the CAA was stated to be:

Impose the minimum of regulatory constraint and associated costs to the aviation industry consistent with maintaining a high level of safety, and develop as far as possible the concept of self-administration by industry of safety requirements, with oversight by the CAA.

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33 Ibid 8.
34 Commonwealth of Australia, Commission of Inquiry into the Relations Between the CAA and Seaview Air (1996) 93.
35 Civil Aviation Authority Annual Report 1990-91, 33.
The third change was that the CAA was to shed certain functions in favour of industry representatives taking them on. There were to be designated representatives of industry who would become 'delegates' of the CAA for the purposes of issuing licences, endorsements and other authorisations.36

Some employees of the Authority met these quite drastic changes in the regulatory philosophy of the Civil Aviation Authority with plain dismay. One employee, Mr Rick Fisher, wrote a telling and insightful letter to the CAA's monthly newsletter 'Safety Valve' just after their announcement. He said:

Most of us in Safety Regulation have in the recent past heard the "Executive" view of our relationship with industry. To my mind this is quite at variance with that of Safety Regulation technical staff, and in that generic term I include pilots, surveyors and engineers. The executive view is exemplified by "Civil Aviation News" in the banner-quote; "A newsletter for our aviation industry partners." I would suggest that very few, if any Safety Regulation staff see the industry as even a customer (that other upper management saw), much less as a partner. We see our customer/partner as being the Australian public and their Parliament.37

Mr Fisher went on to suggest that the CAA executive should reflect on why laws regulating human societal activity are framed in the first place. 'Surely it is because human nature will always take the line of least resistance.'38

Mr Fisher's views and opinions however fell on deaf ears. The concept of those being regulated, now being considered as 'customers' of the Authority, was pursued vigorously by both Mr Dick Smith the Chairman and Mr Baldwin the Chief Executive Officer. The enormity of the changes being undertaken by the Authority are perhaps best illustrated by a letter sent on 31 May 1991 by Mr Baldwin to his managers promoting the 'reforms' that were being actively pursued within the Authority. Titled 'Strategies for the Future CAA' it stressed the necessity for the Authority to respond to the needs of its customers:

36 Commonwealth of Australia, Commission of Inquiry into the Relations Between the CAA and Seaview Air (1996) 94.
37 Ibid 94.
38 Ibid.
The CAA must base its planning on what its customers need. We cannot pursue technical excellence for its own sake. It must be relevant to achieving the quality of service our customers require.

As the CAA moves to charge our customers the full cost of our services it will be important that we eliminate activities which do not add value to those services. It is proposed that support for activities which do not add value would be discontinued.

We must get managers and staff as close as possible to the customer. It is proposed that the size of the Canberra office be reduced and field office staff relocated to airports.\(^\text{39}\)

The Seaview Inquiry pointed out quite clearly and unequivocally that locating managers 'as close as possible to customer' might have the advantage that the managers will get to know their operators well but the flip side of this is the danger of 'capture'. The managers might get to know their operators too well and regard them as friends. Such friendships could serve to emasculate the regulator.\(^\text{40}\) This was exactly the situation that the Commission found had occurred with the relationship between the regulator and Seaview Air.

\section*{6.2.1 Regulatory Capture, as highlighted in the Plane Safe and Seaview Inquiries}

The concept of 'capture' was discussed in a theoretical sense in chapter five of this thesis.\(^\text{41}\) Now the phenomenon will be looked at in a practical sense linking it directly to the lead up to the tragedy that claimed nine lives in the Seaview Air crash.

The Commission of Inquiry found that those it was purporting to regulate had indeed captured the regulator, the Civil Aviation Authority. The Plane Safe Inquiry went a step further when it said, 'the Civil Aviation Authority was

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\begin{itemize}
  \item \(\text{\textsuperscript{39}}\) Ibid 94.
  \item \(\text{\textsuperscript{40}}\) Ibid.
  \item \(\text{\textsuperscript{41}}\) See chapter five of his thesis at page 181.
\end{itemize}
never captured by the aviation industry. On the contrary, the regulator offered itself as a willing captive’. 42

A further interesting comment is included in the Plane Safe Report when it is discussing to whom the regulator should really be accountable. The Commission of Inquiry had been asked to make comments on the draft of the Civil Aviation Legislation Amendment Bill which was designed to split the former combined services and regulatory functions of the Civil Aviation Authority into two separate statutory authorities. In this case it was dealing with comments that appeared in the wording of a particular paragraph of this bill. Apparently specific wording in the bill made reference to ‘promoting the highest possible levels of accountability within CASA and for CASA’s dealings with other bodies’. The Plane Safe Committee who had been asked to provide input not only into the content but also into the wording of the bill expressed its concern at the ‘very real danger … of regulatory capture’. This it said would happen if the regulator is, or is seen to be, 'accountable' to industry. On such recommendation the clause was deleted from the bill. The May 1995 report on the two aviation bills said that CASA should be accountable to the Minister, the Parliament, the courts and to no one else. 'To go further is to muddy the water'. 43

What then is 'regulatory capture' as discussed in the context of the Plane Safe and Seaview Air Inquiries? How does it commence and what are the danger signs? Volumes have been written over the decades on the topic and what follows is a short fundamental version, taken from much of this literature to explain its existence in the aviation regulatory scene.

At the first level of capture the regulator (CASA), permits the regulated to breach the law (the regulations) that the regulator is responsible for upholding. At the second level the regulator assists the regulated to avoid the regulatory consequences after the breach of the regulations has occurred. At the deepest

43 Ibid 21.
level the 'capture' may have become so complete that the regulator may assist the regulated to defeat the regulatory scheme it is supposed to be upholding.\textsuperscript{44}

In the Seaview Inquiry the Commissioner used the term 'capture' on a number of occasions. It was used to describe the influence on an officer's behaviour regarding friendships with operators. The Commissioner's explanation of this point fits the 'relational distance' hypothesis proposed by Grabosky and Braithwaite.\textsuperscript{45} The aviation regulator fits well into the circumstances that these two regulatory theorists describe where capture is readily effected. The preconditions include where only one industry is being regulated, --- the aviation industry. It includes the situation where the regulator is part of a larger organization and there is significant and frequent personnel contact between the regulator and the regulated.

The Seaview Inquiry asked the question: why was the regulator, the Civil Aviation Authority as an organization, apparently timid about taking strong action when obvious breaches of the regulations were occurring? It referred to the policy of 'graduated response' that was in operation in the Authority at the time. This can be likened to the 'enforcement pyramid' of Ayres and Braithwaite. As these two authors proposed there are a number of disincentives to prosecution in the first instance. The 'compliance' response of education and counselling is less taxing on the officer concerned and on the organization generally, than enforcement. This is so whether it is prosecution or administrative action. It is recognised that prosecution and suspension are serious initiatives and likely to affect the livelihood and reputation of the individual or operator concerned. The officers of the Authority are primarily drawn from the industry. They themselves are likely to have been in the shoes of the person they are about to admonish in some way for committing a breach. They may then 'identify' in a sense with the individual who committed the breach.

\textsuperscript{45} Peter Grabosky and John Braithwaite Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies (1986). See also page 179 of this thesis.
However the policy of 'graduated response' had been in force in the newly formed Civil Aviation Authority since its beginning in 1988. The author of an internal memorandum quoted in a matter before the Administrative Appeals Tribunal in 1989 and analysed further below, gave evidence that the Authority's policy was to 'exhort encourage and cajole rather than to take more stringent action'.

The Seaview inquiry considered that the key to the CAA’s attitude seemed to lie in the concept of 'graduated response'. They heard evidence from Mr Bryant who at the time was the Manager of the North East Region of the Authority. He said that:

In 1989 to 1990 Dick Smith introduced the policy of a graduated response. The focus under this policy was to work in partnership with industry via a graduated response of education and counselling with administrative or prosecution action against the operator or chief pilot used as a last resort.

To attribute the policy to Mr Smith was not however quite correct. Mr Smith did not take up his position as Chairman until February 1990. Evidence was given about a memorandum written some months before, on 21 September 1989 by Mr Jorm, in the Administrative Law section of the CAA regarding a matter that was currently before the Administrative Appeals Tribunal. His memorandum outlining the history of the matter Mr Jorm said:

In this case there has been a history of failure to conform to the approved system of maintenance. There had been repeated conferences, counsellings and warnings to no avail. The company had been placed on "probation" by its AOC's being renewed for only very limited periods. In short, everything possible had been done to have the company conform.

In continuing with his description of evidence he had given to the Tribunal his memorandum went on to say:

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47 Commonwealth of Australia, Commission of Inquiry into the Relations Between the CAA and Seaview Air (1996) Vol 1, 103.
At a very early stage in proceedings I was questioned by the Tribunal on the CAA's 'step lightly approach'. I found it impossible to explain why, if there were problems with the company's system of maintenance, the Authority issued AOC's at all. I explained it was policy to exhort, encourage and cajole rather than to take more stringent action and in this case only minimum action had been taken in relation to the AOC's. I explained further the aim was to assist operators to conform to safety requirements and not to jeopardise their commercial viability. I have found myself in a similar position in license suspension and cancellation cases. I have pointed out that there have been repeated warnings, counselling etc, before the step of suspension or cancellation was taken. The question is then asked why, if the behaviour was so aberrant had we not prosecuted at earlier stage. If we hadn't prosecuted then we must have considered the acts trivial. If they were trivial then there was no basis for suspension or cancellation.\footnote{Ibid 104.}

The Seaview Inquiry analysed Mr Jorm's memorandum on this point and offered a possible explanation. It considered that the apparent willingness to overlook quite serious breaches was given impetus by industry being declared a 'partner' of the CAA. The word 'partnership' implies co-operation. Prosecution, cancellation or suspension of a licence, certificate, or authority are hardly the actions of a partner, rather they represent acts of 'hostility'.\footnote{Ibid.}

The 'partner', became the 'customer'. Officers were encouraged to become 'customer orientated'. It was not then very far away from moving towards the commonplace commercial adage that 'the customer is always right'.\footnote{Ibid.}

All in all the Seaview Inquiry was most uncomplimentary in its criticism of the 'graduated response' approach taken by the CAA. They considered the term 'ambiguous'. They said it might refer to the graded nature of the compliance and enforcement options, some being more drastic than others. Or it might refer to a sequence that an officer should follow when confronted by a breach. The distinction was seen to be important. If the term were simply alerting officers to the variety of options, then there was no inhibition in the way of proceeding directly to prosecution or suspension if the circumstances warranted it. If however a sequence was being identified, as it was stated the term implied, then an officer might very well feel obliged to begin with
education and counselling before resorting to enforcement. There was support for both views before the Seaview Inquiry.\textsuperscript{51}

The first view was evidenced by a document that had been circulated within the Authority in October 1990 by the Group General Manager of Safety Regulation. It was entitled Enforcement and Investigation --- Use of Counselling. The document included the following:

In my 'open letter' to pilots distributed with the last issue of the Aviation Safety Digest I invited people to contact me if they considered they were not getting a fair go from the CAA. Not surprisingly, I have received a certain amount of mail in response to that invitation, not all of which has complained of unfair treatment. A common area of complaint is the allegation that prosecution action has been initiated without there having been any or a reasonable degree of counselling beforehand.

The same document went on to state that:

It is very important that before resorting to prosecution we discuss the circumstances with the alleged transgressor and provide counselling. This is not to say that having counselled the person we should not proceed to prosecution. However, no recipient of a summons arising from a brief provided to DPP by an officer of Safety Regulation Group must be able to claim in truth that he or she has received no counselling.\textsuperscript{52}

How does the above then fit in with regulatory theory of the time? In their book on 'responsive regulation' in 1992 Ayres and Braithwaite, of the 'enforcement pyramid' fame, had advocated an approach to designing regulatory legislation and practices in which they developed a model where a 'climate of compliance' was encouraged. This was achieved by assuming the cooperation of the majority as 'good citizens' while at the same time demonstrating the ability to deal effectively with those who committed infringements. In their view the most effective regulation provides a framework, which facilitated a high proportion of willing compliance in

\textsuperscript{51} Ibid 107.
\textsuperscript{52} Ibid.
response to persuasion, supported by high expectations of appropriate but inevitable enforcement.53

It is submitted that this is conceivably what the newly formed Civil Aviation Authority was trying to achieve, even if perhaps it was unaware of the current regulatory theory of Ayres and Braithwaite. Certainly if there is any reference to this or any other regulatory theory in the documents of the time, it is surely not acknowledged as such.

In November 1992 the Acting Manager of the South East Region issued a document entitled 'Policy Advisory' suggesting strongly a sequence to be followed by officers. It said:

There are 4 steps in the way we should be getting our message across:
(a) Communicate. Do this courteously;
(b) Educate. Do this helpfully;
(c) "Regulate". This is the point when we need to become assertive, not rude; and
(d) "Decapitate". This is the last option only when all else fails do we consider taking suspension or prosecution action. This is not to say we don't but it should be our very last option.54

It was therefore clear that the enforcement policy, as at the end of 1992, was that officers of the Authority must begin with compliance, and end with enforcement; - a true Ayres and Braithwaite enforcement pyramid style strategy of enforcement. Theoretically it should have worked well. Practically in the light of the Monarch and Seaview Air disasters it did not. Those driving matters from the top had, in 1992, begun to hear some disquieting reports regarding the Authority's modus operandi. In early March 1992 there was a perception that the changes in the Authority may have gone too far. The Minister, receiving information from various quarters both inside and outside of the Authority, became aware of disquiet with the way enforcement procedures were being undertaken. He established an independent forum under Mr Beale, to look into the matter. After consultation with industry and

53 Ayres, Ian, and Braithwaite, John, Responsive Regulation: Transcending the Deregulation Debate (1992) 19. See also pages 180 - 182 of this thesis. 
54 Ibid 108
other interested parties the Beale forum reported in August 1992. It made the following interesting statement that seemingly shows that there was an awareness that the Authority was leaning just a little too much towards placating and satisfying industry and in doing so, perhaps losing sight of its prime function:

Many hold the view in the aviation industry and the CAA that industry is the Authority's major client. Whilst this view is understandable given a majority of the CAA's costs are recovered from the industry, it tends to obscure the fact the Authority's primary responsibility in its regulatory activities is the protection of the travelling public, the flight and cabin crew using aircraft and those under the flight path of aircraft. The Forum acknowledges, of course, that in fulfilling this responsibility effective consultation with industry is essential.55

The CAA's Annual Report for 1991-1992 was issued two months after the Beale forum report on 15 October 1992. It too reflected the same changes in the CAA's focus, or at least it gave formal recognition to a shift in policy from the top. Under the title 'Client Focus', it said:

Becoming more efficient, appropriately managing our finances, and being geared for results are not ends in themselves. They are simply the means to providing excellence in service to our clients --- the travelling public and the aviation industry.56

6.2.2 The Difficulty of Reconciling User-pays with Effective Regulation

A continuing thorn in the side of the aviation industry was the question of 'cost recovery' and the Government's decision in 1990, to depart from the principles of 'exemptions' to be applied to the aviation industry outlined in the Bosch Committee Report of 1984.57 After considerable lobbying from industry the Government agreed and stated in its 1992 Budget, that it would 'reconsider' the recovery from the aviation industry of the cost of funding safety regulation.

55 Commonwealth of Australia, Commission of Inquiry into the Relations Between the CAA and Seaview Air (1996) 97.
56 Ibid.
Time continued on and little actually happened. The CAA Board continued to be lobbied by an irate aviation industry and in April 1993 it made representations on behalf of the industry to Government. As a result of these representations the Government agreed to investigate alternative means of raising the revenue to finance the cost of safety regulation.\(^{58}\) Claims persisted in the aviation industry that safety had been compromised by the changes introduced by the Review of Resources. The CAA Board Safety Committee commissioned yet another report, this time specifically into the operation of the Safety Regulation and Standards Division of the Authority.\(^ {59}\)

The Terrell Report, as it was labelled, was short. It stated that its highest priority was to address the future funding of the Civil Aviation Authority.\(^ {60}\) Its report delivered in March 1993 included the following comment:

> There is also a widely held view that the focus of the Division's activities should be the protection of the public and those within the industry. The reference to the industry as a customer is divisive and confusing. As a corollary, there is a general view that the Division should be in a Department of State. There is almost universal opposition to the concept of self funding being applied to surveillance arbitrarily imposed.\(^ {61}\)

The Terrell report, as the Parliamentary Committee in Plane Safe described it, occurred during a particularly stormy period of the CAA 'when perception and prejudice, mistrust and misrepresentation was the currency of the aviation safety regulator'.\(^ {62}\)

A 'steering committee' and three working groups were established to implement the report. The membership of the working groups consisted of the CAA, union and industry representatives. Referring to this report and its implementation in its 1992-93 annual report the CAA said the 'process

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\(^ {58}\) Commonwealth of Australia, Civil Aviation Authority Annual Report 1992-93, 17.

\(^ {59}\) Civil Aviation Authority, Report of the Study Group Addressing Concerns Regarding the Operation of the Safety Regulation and Standards Division, (The Terrell Report), (12 March 1993).


\(^ {61}\) Commonwealth of Australia, Commission of Inquiry into the Relations Between the CAA and Seaview Air (1996) 100.

\(^ {62}\) Ibid 98.
resulted in identification of a number of changes needed to redress perceptions that safety standards may have been compromised by the pace and extent of reform in the safety regulation area’. The steering committee also recognised the need to clarify what was 'policy' in the CAA and who was responsible for formulating it.

6.2.3 The CAA's Enforcement Policy - Contradictory and Confusing?

In September 1993 Mr Macionis who was the head of the Aviation Safety Regulation division and who had been put in charge of defining the CAA's 'policy' issued a memorandum headed 'Regulation Policy'. After general statements on the importance of 'policy' he went on to say quite pointedly that:

> Once the policy is expressed in legislation (e.g. the Act, the Regulations or Orders) the Directorate staff cannot choose to ignore the legislative requirements or substitute what they may believe to be a more appropriate policy. Similarly, industry must comply with the regulatory policy that is expressed in legislation or face possible enforcement action. Accordingly, any standards, conditions, qualifications etc which are considered to be mandatory in the interests of the safety of air navigation must be incorporated into legislation if they are to be enforceable and become part of the Authority's regulatory policy.  

This certainly seemed clear enough. Yet in moving forward a little in time on 11 October 1994, shortly after the Seaview Air crash the General Manager, Finance and Administration gave his understanding of the policy of the Authority in a somewhat different manner, one that suggested a specific sequence was to be followed:

> My understanding of our safety regulation approach is that we consider that detected breaches of regulatory compliance should give rise to counselling, education and assistance to bring the operator up to standard, with punitive action being resorted to only when that process has been unsuccessful. My understanding is that successive heads of Safety Regulation … have considered that this approach is likely to be more

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64 Commonwealth of Australia, Commission of Inquiry into the Relations Between the CAA and Seaview Air (1996) 109.
effective in enhancing safety performance, than would be an approach of immediate punitive action of breaches as detected.\(^{65}\)

What then was the officer in the field to make of these two different statements? The Aviation Safety Surveillance Program Manual of 1994 and the Enforcement Manual of 1995 attempted to set out more precisely the way these officers should proceed when confronted with a breach. In each document there is still the emphasis on the 'graduated response' that begins with compliance and ends with enforcement.

The Aviation Safety Surveillance Program manual under the heading of 'policy' says: 'The Authority's policy is to encourage voluntary compliance with the Act and Regulations. Where this is not achieved, a graduated approach to enforcement should be adopted'. It goes on to add that: 'Where non-compliance is detected the primary aim is remedial action. This may be accomplished by any, or a combination of actions, such as education, counselling and re-examination.'\(^{66}\) Again it seems to display a typical Ayres and Braithwaite 'enforcement pyramid' style, strategy of enforcement. The statement ends with these words:

In every case the action taken will be that which is considered to best achieve compliance. While aviation safety will be the paramount consideration, the Authority will be absolutely intolerant of flagrant and deliberate offences against the legislation.\(^{67}\)

In similar vein the Compliance and Enforcement Manual of 1995 sets out the compliance and enforcement philosophy expected of its officers:

Once safety regulations are in effect the Authority must provide for the education and guidance needed by the industry and the public, in order to ensure the effective implementation of those regulations. The importance of this step … cannot be over-emphasised.\(^{68}\)

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\(^{65}\) Ibid 108.
\(^{66}\) Ibid.
\(^{67}\) Ibid.
\(^{68}\) Ibid 109.
The manual then followed up with the following instruction, which seemed to be having rather a 'bet each way' and in reality, did not give a practical clear instruction to its officers. Given the history of the 'graduated-response policy' such officers must by now have been somewhat 'gun-shy' when it came to enforcement action:

While compliance can be compelled where necessary, civil aviation safety depends primarily on voluntary adherence by the aviation industry to regulatory requirements. Only where the efforts of education and counselling for achieving voluntary compliance have failed, or where there is a clear intentional breach of the regulations, should formal enforcement action be undertaken.\(^{69}\)

The 'Macionis memorandum' of September 1993 referred to above, had this to say on the situation in which a discretion was 'conferred upon the Authority':

Where regulatory policy is incorporated into legislation it may allow the Authority some degree of flexibility in the application of a regulatory requirement by providing discretion to the decision maker. In such cases the decision maker must exercise his or her own judgment in making a decision. In each case the decision maker needs to consider the facts of each case before him or her.\(^{70}\)

All in all one can only say that the instructions coming from the Authority to its officers in the field in the first half of the 1990s must have been confusing. It is worth in this context of looking at the position of one officer, who apparently thought the statements of Mr Macionis in his memorandum, signalled a structured return to the CAA's role as regulator. This is because the position he found himself in as he attempted to carry out his regulatory role, gives an excellent insight into the workings of the Authority in the early 1990s, the conflicts in an operational sense that were present in relation to enforcement strategy and the unfortunate effect 'institutional timidity' had on aviation safety.

The Seaview Inquiry looked in some depth at the circumstance surrounding the behaviour of one of the field officers of the Authority, Mr Bob Hoy,

\(^{69}\) Ibid.
\(^{70}\) Ibid 110.
working as District Airworthiness Manager at the 'grass roots' level in the Coffs Harbour region of New South Wales. He was an officer of considerable experience who had dealings with Seaview Air prior to the crash of one of the company's aircraft en route to Lord Howe Island on 2 October 1994. Mr Hoy had in fact recommended Seaview Air's suspension as early as 13 January 1994. This recommendation was ignored by Mr Hoy's superiors and the inquiry made the finding in its report that it considered that 'an examination of the treatment of Mr Hoy and the disregard for his advice, is capable of furnishing insight into what was wrong with the CAA at that time'.

Prior to examining the facts surrounding Mr Hoy's interaction with Seaview Air, the Inquiry examined in some detail Mr Hoy's method of oversight in relation to two maintenance organizations that came within his area of supervision. This is described in some detail here because it is submitted it encapsulates in quite graphic form, the essence of an enforcement strategy present in the Authority in the early 1990s. This is a strategy that had come to lean too far towards the 'compliance' end of the enforcement strategy spectrum, which in the very high-risk area of aviation safety can and did, lead to catastrophic results.

The first example concerned a Licenced Aircraft Maintenance Engineer, referred to a Mr B, in the Inquiry's report. Mr. B was the proprietor of an aviation maintenance organization situated at Port Macquarie, a town within Mr Hoy's area of supervision. Under this maintenance business's Certificate of Approval it was responsible for the activities of an additional company (company D), situated at Kempsey, a town nearby.

In July 1992 Mr Hoy called on Mr D at Kempsey. He inspected an aircraft that was in the process of being repainted by the company. During the inspection Mr Hoy noted several things regarding the manner in which the repainting was taking place that constituted, in his opinion, a breach of the regulations. He concluded that his observation constituted a not insignificant

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71 Ibid 20. See also chapter 5, page 187 of this thesis for comments on the role of 'discretion' as it could have applied to this example.
breach and he needed to take some form of enforcement action. He wrote to Mr B from the company at Port Macquarie, who was ultimately responsible for overseeing the correct procedures in the matter, saying he required Mr B to sit for a written examination on Airworthiness Administration in a particular area pertinent to the alleged breach.72

Mr B replied immediately in writing disputing the facts alleged by Mr. Hoy. Mr B also obtained a legal opinion from a Sydney Queen's Counsel, to back up his defence. Mr. Hoy was unyielding and reaffirmed his view of the matter. Mr B then turned to Mr Hoy's superior, the General Manager of the CAA, sending him a letter of complaint about Mr Hoy.

As it turned out the section of the maintenance manual on which Mr B had relied upon and which he had supplied to the Queen's Counsel for an opinion, was grossly out of date. It also applied to a different model of aircraft than the one being repainted. Mr Hoy was proven correct in that he was using the correct up to date manual, and Mr B and the Queen's Counsel, to whom Mr B had supplied the out of date and incorrect manual, were wrong.

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72 Ibid 236. On 16 July 1992, Mr. Hoy called on Mr D at Kempsey. He described what he observed in a report to Mr Edwards on 4 September 1992:

During a liaison visit to (Company D) on 16th July I noted a PA28-161 VH-UFY was in the process of being repainted. The stabilator and rudder were fitted and evidence of over spray indicated they had been repainted in situ. In addition, (it) pointed out that both the front and back propeller spinner plates (were) badly cracked. (It) was indicated these would be replaced by Mr B when he came over from Port Macquarie to balance, fit and rig the flight controls and make the appropriate certifications.

Mr Hoy then examined the aircraft's log book. He formed the following view:

The log book review indicated that no certifications had been made covering the fitment of the propeller spinner backing plates. In addition, the method of balancing the Stabilator was not in accordance with the relevant chapter of the Piper Service Manual.

On 29 October 1992 Mr Hoy wrote to Mr B saying:

Entries in the aircraft log book confirm you were the certifying LAME responsible for this maintenance.

The maintenance included a complete strip and repaint of the aircraft, together with the fitment of a new propeller spinner backing plate.

Subsequent investigations reveal that during the maintenance, the stabilator was not removed and balanced in accordance with the manufacturers requirements.

In the same letter Mr Hoy, having established a breach, set out the form of enforcement action he considered appropriate:

The above demonstrates a lack of knowledge by you of the legislative requirements when carrying out aircraft maintenance.

As a Delegate of the Civil Aviation Authority, pursuant to Civil Aviation Regulation 33(1), I require you to sit for a written examination on Airworthiness Administration Code AA.
The matter however did not rest there. Following Mr B's complaint to the General Manager of the CAA a conference, to be held between the CAA and those representing Company B, was organized. This included Mr Edwards, the Regional Airworthiness Manager and hence Mr Hoy's immediate superior. At the conference his superior, overruled Mr Hoy. He decided that Mr B would not be required to sit the examination. Instead there would be counselling conference held in Brisbane to ensure that Mr B was 'fully aware of his responsibilities'. Thus Mr Hoy's superior had chosen the soft option of education rather than enforcement.

The inquiry stated that this was a prime example of 'the institutional timidity, which had emasculated the CAA'. The Inquiry claimed that Mr Hoy was right, yet his superior did not support him. He had alerted Mr Edwards in advance that the situation was not an isolated one, saying: 'This is just the tip of a wider problem re Mr B as the holder of a Certificate of Approval.'

It would seem from the above comment that Mr Hoy was possibly aware of other compliance problems with Mr B's operation. Otherwise why would he make the comment that this was 'just the tip of the iceberg'? He seemingly was following what he considered to be the correct enforcement strategy. Mr Edwards on the other hand, despite having been made aware of possible other concerns regarding Company B's operation, took the 'graduated response' approach, possibly following enforcement policy advice as referred to above, that was coming from the top ranks of the CAA at the time.

As a result of the difficulties company D at Kempsey had created for Mr B, the latter decided to sever its formal link with Mr D at his Kempsey organization. In the circumstances Mr Hoy wrote to Mr D, reiterating that his organization no longer come under Company B's Certificate of Approval. This had the effect that any maintenance performed by Company B at the Kempsey works would be in contravention of both the Civil Aviation Act and the Civil

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73 Ibid 238.
74 Ibid.
75 Ibid 240.
Aviation Regulations. At the same time Mr Hoy helpfully enclosed with this notification a copy of an application form and copies of relevant statutory provisions.

Mr Hoy had previously written to Mr D in similar terms in December 1991 when Mr D had been contemplating applying for a Certificate of Approval in his own right, for his stripping and repainting business. It was noted by the Commission of Inquiry that the job of stripping and repainting an aircraft was one that involved considerable skill and knowledge. It could not in any way be compared with say, stripping and repainting a car. The activity needed to be covered by a Certificate of Approval granted to a person engaged in the maintenance of aircraft, which included painting and stripping and was governed in strict form by the regulations.

In the context of painting and stripping there was no established trade qualification published. However Mr Hoy made his own enquiries seeking help from another colleague as to what would be needed to form the basis to satisfy the Authority in fulfilling an application for a Certificate of Approval in the circumstances where the stripping and repainting of aircraft were involved. He sent a letter to Mr D setting these out. Mr D's reply proved totally inadequate and unsatisfactory to Mr Hoy in that the information given was insufficient to meet the requirements of the regulations.  

Seaview Air, through its maintenance business arm known as Coffs Aero Maintenance claimed that it had also suffered at the hands of intimidation by Mr Hoy. Mr Gibbins, at the time acting in the position held by Mr Edwards, that of Regional Airworthiness Manager, then proceeded to investigate the matter. The Seaview Inquiry examined this investigation in some detail. It concluded that what is essence came out of this investigation was the act that Mr Hoy took, in insisting on following the regulations as they were clearly set out, plainly challenged something deeper in the view of his superior.

76 Specifically this was regulation 30(2)(b) which set out the relevant qualifications and experience of the person applying for the Certificate of Approval and also the experience of the applicant's employees. This in effect meant providing details of trade courses completed and 'on the job' training.
concerning the proper construction of the regulations. Mr Hoy held a particular view of the role a regulator should fulfil and the enforcement standards that should be adhered to. Sometimes his view, as in this instance proved to be 'inconvenient' to industry, which was now viewed as the customer. The result was that Mr Hoy was castigated for his rigidity.

At the end of hearing evidence from both sides the Seaview Inquiry formed the view that Mr Hoy's treatment by his superiors was an 'illustration of the institutional timidity' that had emasculated the CAA. It went on to confirm that in its opinion the facts in the two matters described above, demonstrated the extent to which a 'customer is always right' mentality had penetrated some levels of the Authority's management. In the first example management had overruled Mr Hoy's choice of education, which was an examination, in favour of a less taxing option to the operator, that of a talk in which he would be reminded of his responsibilities.

The Seaview Inquiry concluded that for Mr Hoy to be accused of 'rigidity of approach' when in reality he was simply acting, as he was entitled to act as a regulator, was unjustified and unfair. This was, so the Seaview Inquiry decided, an example of 'the era of keeping the customer happy'. It followed on from this attitude that it would then take seriously any complaint, however trivial, because it came from a customer. Had the Authority at this time swung so much towards pleasing the customer, had it in the words of the regulatory theorist Malcolm Sparrow 'gone customer service mad' and was substituting customer satisfaction for accomplishing its mission?

A study of the literature on regulatory theory indicates that the Authority's behaviour in the de-regulated environment of the time was not all that unusual. Initially one may be inclined to wonder, as did the Seaview Inquiry, after the Monarch Airlines and Seaview Air crashes of 1993 and 1994 and

77 Commonwealth of Australia, Commission of Inquiry into the Relations Between the CAA and Seaview Air (1996) 246.
their subsequent investigation, how the Authority could have 'got it so wrong'. It is submitted that regulatory theory and an explanation of enforcement strategy may provide some of the answers.

One of the few empirical studies in this area, that of Grabosky and Braithwaite, after studying 96 regulatory agencies around Australia, concluded that litigation or any kind of adversarial confrontation with the industry being regulated, was undertaken only as a last resort. A strategy of cooperation with industry was by far the first preference.\(^{80}\) The preferred strategy was one of persuasion and cooperation rather than confrontation.

Capture theory was described briefly in chapter five of this thesis. Now it is looked at and analysed in greater depth in an effort to see if it supplies any answers as to why the regulators in the CAA leant so heavily towards a compliance strategy of enforcement, to the point that in the end, certainly as far as the Monarch Airlines and Seaview Air crashes were concerned, safety was compromised.

The Authority was dealing with a very 'high risk' area. There are no second chances in aviation; if things 'go wrong' they often do so with incredible speed and catastrophic results. It is an industry where the risk factor may be more akin to mine safety, or safety in the nuclear industries.

A number of themes emerge from the analyses of both the cases and the inquiries of the post de-regulation era. The aviation industry is extremely complex and demands on both the regulator and the regulatees are often contradictory in nature. This is evident for example in the above description of Mr Hoy's predicament, described in the Seaview Inquiry, in dealing with what he considered to be a breach of the regulations, where he had received quite confusing instructions as to exactly how he should pitch his enforcement strategy. Finding a breach, he had aimed for what he considered to be the correct level of 'compliance' in the circumstances. His superiors however,

\(^{80}\) Ibid 183-218. See also page 180 of this thesis for comments on 'responsive regulation'.
considered this to be too 'severe' and he suffered the indignity of being overruled by those above him in the hierarchy of the Authority. He was confused, thinking he had acted correctly, his superiors were confused wondering why he had taken such a high-handed stance when the enforcement strategy in their opinion said otherwise and the industry, caught in the middle was confused. The enforcement strategy seemed to be one of 'be less intrusive', but also 'be more effective'. Be kinder, gentler, but don't of course let any retrogrades get away with anything. Be responsive to the industry but ensure you are not 'captured' by it.

Of course unchangeable conflicts are part and parcel of regulatory practice. To the aviation industry regulators seem all too often, 'nit picky' and unreasonable, unnecessarily adversarial, unable to apply discretion sensibly and ineffective in achieving their goals.\textsuperscript{81} The factual evidence in the cases displays this belief over and over again.

\textbf{6.2.4 Reported Cases: 1988 - 1995:}

Seven cases have been described in some detail during the 1988 - 1995 period.\textsuperscript{82} They tend to show a 'firm' approach at the start of the period under discussion, although there are really too few cases demonstrating this approach to show a definite trend. There is a tendency towards a 'compliant' approach by the Civil Aviation Authority to breaches of the Act, Regulation and Orders at the end of the period.

\textbf{Re Aquatic Airways Pty Limited and Civil Aviation Authority (1989)\textsuperscript{83}}

After the passing of the Civil Aviation Act 1988, one of the earliest cases to come before the Tribunal was that of Re Aquatic Airways Pty Limited and Civil Aviation Authority. In September 1989 the Tribunal heard an application from Aquatic Airways for a stay of a decision by the CAA pursuant to section

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\textsuperscript{82} All cases analysed are listed in Appendix 3. Only those cases considered most relevant in the manner in which they reveal the factual situation the regulator was dealing with, have been discussed in detail in the body of the thesis.
\textsuperscript{83} Re Aquatic Airways Pty Limited and Civil Aviation Authority (1989 AAT 201 (1 September 1989). Hon Justice R N J Purvis, Presidential Member, conducted the hearing in Sydney.
41 of the Administrative Appeals Tribunal Act. The Civil Aviation Authority had refused to renew an air operator's certificate for one of Aquatic Airways' Nomad aircraft.

The application for a 'stay' in this case is interesting because of the light it throws on the approach of the Tribunal at this time, in regard to the balancing on one hand allegations of non-compliance with certain regulations still yet to be formally heard, together with the economic considerations to Aquatic Air of being deprived of the use of its aircraft in commercial activities. As well the Tribunal had to take into consideration the possible risk to safety that may eventuate if the aircraft were used.

Aquatic Airways was a small New South Wales airline operating flights between Rose Bay, Palm Beach and Newcastle. It pleaded that without the use of the aircraft in question whilst waiting for the full hearing to come before the Tribunal, it would be unable to conduct its commercial operation, particularly on the regular public transport routes. It argued further it would suffer irreparable harm to its reputation as a commercial scheduled airline, 'resulting in lack of public confidence as well as financial detriment and the likely closure of its operations and dismissal of employees'.

In this hearing all the facts leading up to the Authority's decision to refuse to renew the air operator's certificate for the Nomad aircraft are not given. Thus it is not possible to determine exactly how the Authority was applying its enforcement policy in this instance. Apparently the Authority entered into correspondence with Aquatic Airways commencing on 20 June 1989 in which it gave warning of a suspension or cancellation of the certificate if the company did not attend to certain matters that were of concern to the Authority. The Tribunal did not consider it necessary for this particular hearing to go into the details of the correspondence save that it appeared that

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84 Section 41 of the Administrative Appeals Tribunal Act sets out the powers available to the Tribunal when, as often happens with aviation cases, the applicant in a case yet to be heard, applies to the Tribunal for suspension of a particular action the regulatory authority may have taken until the full matter can be heard by the Tribunal.

85 Re Aquatic Airways Pty Limited and Civil Aviation Authority (1989 AAT 201 (1 September 1989) paragraph 6.
Aquatic Airways had not complied fully with undertakings that it had given to the Authority. Thus on the facts as alluded to in the application for a 'stay', we cannot really conclude one way or the other as to whether or not the Authority adopted a compliant or deterrent approach to dealing with the alleged failures by the company to 'comply' with its requests. We may however assume from the evidence that Aquatic Air had not been fully compliant with the regulations and had agreed by way of undertakings to rectify that situation. It had therefore been given a 'chance' by the Authority to become compliant. The Tribunal saw fit to refuse the request for a stay, highlighting that matters of safety and aircraft maintenance outweighed financial and other considerations.

Thus the Tribunal had no hesitation in coming out on the side of safety. Although certain matters of fact were in contention and yet to be heard in the future, the Tribunal summed up its decision to refuse a stay on 'safety' grounds by saying:

> It is my view at this time that the application for review should proceed to a hearing on its merits as soon as is possible and as is reasonably convenient to the parties. I do not consider that the relief sought by the applicant by way of a stay is one that is appropriate to be made at this time, in that the matters raised by the parties and clearly in issue, pertain to the safety of individuals and in the context of the appropriate conduct of a commercial airline. These facts outweigh the financial and other considerations.\(^{86}\)

It was considered that the consequences upon Aquatic Air, in a commercial sense, of its activities being curtailed or restricted pending a final determination of the application for review was a relevant but not an overriding consideration. The Tribunal agreed that the submission on the part of the Authority, that the obligation resting upon it pursuant to the provisions of the Civil Aviation Act, to consider the primacy of safety over commercial consideration was a paramount factor to be taken into account.

\(^{86}\) Ibid, paragraph 22.
Here we have the Tribunal agreeing not issue the 'stay' requested, and thus in the short term backing the decision taken by the Authority. The facts in this case are not enunciated, other than the statement that Aquatic Air had been non-compliant with certain regulations. Without the facts it is difficult to say if the Authority's actions were lenient or harsh. However the case is mentioned here, as it is an example in the early years of deregulation, of the Tribunal backing up the decision of the Authority rather than giving the applicant, Aquatic Air, the benefit of the doubt.

**Burns and Civil Aviation Authority (1989)**

In the case of Burns and Civil Aviation Authority heard by the Tribunal in October 1989, the facts when examined tend to show that the Authority took a 'compliant' view of breaches of the regulations until severe circumstances forced it to do otherwise. To a limited extent the Tribunal agreed with the Authority on one score and in so doing reduced the suspension of Burn's licence to a lesser period, but disagreed on the question of the Authority revoking Burn's Chief Pilot's approval, stating that previous breaches of the regulations should not have been taken into consideration as the Authority had done, in making that decision.

The facts of the case were that Burns held a commercial pilot's licence. The Civil Aviation Authority suspended this licence for six months, as a result of alleged breaches of the regulations. These breaches came to light after a

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87 Re Trevor Terrence Francis Burns and Civil Aviation Authority (1989) AATA 223 (19 October 1989). R C Jennings QC, Deputy President and J H Wilson, Member conducted the hearing in Hobart.
88 Re Trevor Terrence Francis Burns and Civil Aviation Authority (1989) AATA 223 (19 October 1989) paragraph 7.
89 See Appendix 4 for an explanation of the duties and obligations of a Chief Pilot.
90 The suspension was made pursuant to Regulation 269(1) of the Civil Aviation Regulations which provides:

269. (1) Subject to this regulation, the Authority may, by notice in writing served on the holder of a licence or certificate, vary, suspend or cancel the licence or certificate where the Authority is satisfied that one or more of the following grounds exists, namely:
(a) that the holder of the licence or certificate has contravened a provision of the Act or these Regulations, including these Regulations as in force by virtue of a law of a State;
(b) ....
(c) that the holder of the licence or certificate has failed in his or her duty with respect to any matter affecting the safe or efficient navigation or operation of an aircraft;
(d) that the holder of the licence or certificate is not a fit and proper person to have the responsibilities and exercise and perform the functions and duties of a holder of such a licence or certificate; or
Piper Navajo aircraft exploded and caught fire outside the Hawker Pacific hanger at Sydney Airport on 25 June 1988. The two passengers in the aircraft at the time fortunately suffered no injuries. They, and the pilot Trevor Burns, managed to exit the aircraft safely and Hawker Pacific employees standing nearby were able to swiftly extinguish the fire.

Burns had just flown the aircraft from Hobart to Sydney on the morning of the day of the explosion. It had been refuelled approximately one hour before the explosion occurred, just as Burns was attempting to start the engine. Four days after the explosion Burns was advised by the Civil Aviation Authority that his licence was suspended pending investigation of the accident. On 9 August he was asked to 'show cause' why his licence should not be suspended, varied or cancelled. On 17 August he was asked by letter to note that additional details should have been included in the Authority's letter of 9 August. In particular was the announcement that the Authority was considering revoking Mr Burns's Chief Pilots Approval on the basis of paperwork irregularities going back to January 1988. This was considered as one of the grounds for the cancellation or suspension of his commercial pilot's licence. 91

Evidence was given that Burns had known for some time that leaks were present in the fuel system of the aircraft that caught fire, dating from the time the aircraft first arrived in Hobart in November 1987. Evidence confirmed that it was common knowledge to the re-fuelers at Hobart airport, that because of the likelihood of fuel leaking from the aircraft from the right hand main tank, this tank was not to be filled to capacity.

91 Re Trevor Terrence Francis Burns and Civil Aviation Authority (1989) AATA 223 (19 October 1989) paragraph 22. In particular the letter stated one of the details being omitted in the letter of 9 August as;

(e) that the holder of the licence or certificate has contravened, a direction or instruction with respect to a matter affecting the safe navigation and operation of an aircraft, being a direction or instruction that is contained in Civil Aviation Orders.

(c) the revoking of your Chief Pilot approval following your operation of VH-DRE on 30 January and 31 January 1988 when the aircraft was not included on your company's charter licence, and the aircraft lacked a valid Certificate of Airworthiness; also the failure to record details of a number of flights in your Pilots logbook, Flight Crew Duty Sheets on (sic) the Aircraft Maintenance Release.
In a similar vein two re-fuelers at Sydney airport told the Tribunal that on the day of the explosion, Burns instructed them not to fill the right outboard tank too much as 'there could be a possible leak'. The defect was not at any time noted on the maintenance release and the aircraft had over a period of time continued to be flown by Burns with instructions being given to re-fuelers (by Burns), not to fill the leaking tank to capacity. On the day of the explosion the re-fueller at Sydney airport had noticed a fuel leak coming from under the wing. When it did not stop fuel was syphoned out of the tank until the leak settled down and from the outside it appeared to have stopped.

The Tribunal found on the facts that there was adequate evidence that Burns was well aware of the fuel leak and that he had been for some time. He was also found to be aware that the fuel/water drain cock on the right inboard fuel cell was inoperative, to the point that a check for contamination of the fuel could not be carried out. Burns denied to the Civil Aviation Authority that he had any knowledge of a leaking fuel tank or a faulty fuel drain. He had come to the attention of the Authority on two previous occasions, and he had a history of non-compliance with the regulations. The Civil Aviation Authority, in suspending his commercial pilots licence for six months, had taken this history into account.

The Tribunal stated that it did not consider that the previous matters that occurred in 1976, 1981, and January 1988 had any significant bearing on the present issue. However they did decide that there had been no justification for a decision by the Authority to cancel Burns’s Chief Pilot Approval.

Taking this fact into account the Tribunal affirmed the suspension of Burns’s commercial pilot licence but reduced the time of the suspension. The Tribunal found that the Authority had not been justified in taking into consideration the

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92 Pilots are required at the start of each day and after any refuelling, to check the fuel for water contamination. This is done using a small simple instrument known as a fuel drain and takes only a moment of time. It is a very effective method of checking for any water contamination in the fuel.
cancelling of Burn's Chief Pilot's Approval in March 1988. The Tribunal therefore varied the decision under review by reducing the period of suspension of his licence, from six to four months, to take effect from the date of the Tribunal's decision.

The legal issues revolved around the knowledge by Burns of his breaches of various Air Navigation Regulations that related to him being aware of the existence of defects in the aircraft and being so aware, the failure of his responsibility to enter the defects on the maintenance release.

The evidence in this case suggests that the Authority took a somewhat 'lenient' view of the breaches of regulations committed by Burns prior to the fire. Leaking fuel in an aircraft, especially when the pilot has prior knowledge of the leak must, even on common sense grounds, be considered a most serious situation. In this instance the Authority, backed up also by the action of the Tribunal could be said to bend towards a compliance strategy of enforcement. In the exercise of its discretion the Tribunal took an even more lenient view of the facts. It made reference to the circumstances in which it said it was aware of the 'severe financial penalty' the decision imposed on Burns. It considered

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93 Re Trevor Terrence Francis Burns and Civil Aviation Authority (1989) AATA 223 (19 October 1989) paragraph 34.

In our opinion there was no justification for a decision to cancel the applicant's Chief Pilot Approval and accordingly it would be unjust to take that cancellation into consideration when determining the consequences which should follow from the explosion of 25 June.

94 Air Navigation Regulations 1988

49F. Where the owner, the operator or a flight crew member of an Australian aircraft (a) becomes aware of the existence of a defect in the aircraft; or (b) becomes aware that the aircraft has suffered damage that in the opinion of the owner, the operator or the flight crew member is major damage, he shall enter on the maintenance release, or other document approved for use as an alternative to the maintenance release for the purposes of this regulation, an endorsement signed by him setting out the particulars of the defect or damage, as the case may be.

124. (1) An aircraft shall not be operated in a negligent manner or in a reckless manner so as to be likely to endanger life or the property of others.

(2) An aircraft shall not be flown in such a manner or in such circumstances as is or are likely to cause avoidable danger to any person or property (including animals) on land or water or in the air.

225. (1) An aircraft shall not commence a flight unless evidence has been furnished to the pilot in command and he has taken such action as is necessary to ensure that -...

(g) the aircraft is safe for flight in all respects.

241. (1) At the termination of each flight, or in any urgent case, during the currency of the flight, the pilot in command shall report, in the manner and to the persons specified by the Secretary, all defects in the aircraft, aerodromes, air routes, air route facilities or airway facilities which have come to his notice.

315A. (2) A person shall not do any act likely to create a fire hazard endangering an aircraft or an aerodrome.
that his long flying career had induced 'a state of complacency concerning the existence of defects in aircraft that could well have led to disaster'. Yet it still saw fit to reduce the penalty of the suspension from six to four months.

Millar and Civil Aviation Authority (1990)\textsuperscript{96}

In 1990 the Tribunal delivered extempore reasons for a somewhat severe decision that seemed to show a 'deterrent' approach to what was a very serious breach of regulations. This was the case of Millar and Civil Aviation Authority and involved the suspension of a pilot's Commercial Pilot's Licence and Air Operator's Certificate for an indefinite period.\textsuperscript{97} The CAA had indicated that the suspension would remain in force until investigations into certain irregularities could be completed.

The facts of the case were that on 1 October 1989 the pilot, Brenton Millar, had conducted a flight from Yulara to Alice Springs in the Northern Territory. Prior to leaving Yulara the pilot had experienced problems relating to the retraction of the undercarriage of the aircraft. This had resulted in him having to return to Yulara after take off. He satisfied himself upon returning to the Yulara airstrip that he could fly safely on to Alice Springs with two passengers on board. Whilst taxing for take-off, the pilot radioed Alice Springs authorities that he was now proceeding to Alice Springs with the undercarriage locked down. By the time Millar was airborne the Senior Operations Controller advised him that he would need to obtain a 'permitted unserviceability' or a 'dispensation' from the Authority to fly to Alice Springs. The Senior Controller instructed the pilot to return to Yulara. The pilot then advised Alice Springs that he believed the battery might have boiled and that he was proceeding on generator power. Shortly after the communication from the Senior Operations Controller in which he had been advised to return to Yulara, the pilot advised that all operations were normal, the undercarriage was up and the generator was charging normally. Despite instruction to the

\textsuperscript{95} Re Trevor Terrence Francis Burns and Civil Aviation Authority (1989) AATA 223 (19 October 1989) paragraph 58.
\textsuperscript{96} Miller and Civil Aviation Authority [1990] AATA 619 (17 August 1990). Heard in Adelaide before Deputy President B H Burns, Senior Member Miss W J F Purcell, and Member Mr G Brewer.
\textsuperscript{97} Ibid.
contrary from the Senior Operations Controller the pilot continued the flight and ultimately landed at Alice Springs.

The Tribunal heard and accepted evidence from Mr Williams, a licensed aircraft maintenance engineer and concluded that the journey undertaken by the pilot in the circumstances described, was clearly unsafe and the pilot was in breach of the regulations. Mr Williams's evidence was accepted in preference to that of Mr Miller, the pilot under suspension. In addition on 6 December 1989, just after Mr Miller was served with a notice from the Authority suspending his commercial pilot's licence, he conducted a flight from Coober Pedy in the South Australian outback to Adelaide, being well aware at the time of the suspension that was in force.

The Tribunal set aside the decision of the Authority under review, that is the suspension of Mr Miller's Commercial Pilot's Licence and Air Operator's Certificate for an indefinite period. It substituted instead that Mr Miller's Commercial Pilot's Licence would be cancelled for a period of 15 months from 29 September 1989, and in addition that the cancellation of his Air Operator's Certificate would stand.

The legal issues surrounding this case involved serious breaches of the Civil Aviation Act and the Civil Aviation Regulations. The action of the CAA in the face of such breaches would suggest a 'firm' approach to non-compliance. However it must be taken into account that the pilot's actions in disobeying the instructions of the Senior Controller and without obtaining the required dispensation from the Authority, undertaking a flight whilst his pilot's licence was suspended were most serious. He was given no second chances and although the Tribunal varied the decision of the Authority, giving it a finite end rather than being open-ended, the variation applied still involved a substantial penalty.

98 Civil Aviation Act 1988 (Cth). s 27(6).
99 Civil Aviation Regulations 1988 (Cth). reg 269. reg 233(1)(g)
Re Darren McPherson and Civil Aviation Authority (1991)  

On 14 February 1991 the Tribunal sitting in Melbourne, considered the case of a young commercial pilot Darren McPherson, who had been involved in an accident when the twin engine Cessna he was piloting, was totally destroyed, crashing into a row of trees 865 feet above sea level just north east of Wonthaggi, on 27 October 1989. The aircraft was on a charter flight from Essendon to Port Welshpool in Victoria. There had been six passengers on board, all of whom survived the crash. Six weeks after the crash, on 19 December 1989, the Civil Aviation Authority suspended the pilot's commercial and Private Pilot's licences for a period of 18 months. The application before the Tribunal was for a review of this suspension.

A stay of the suspension had been made on 22 December 1989 on an undertaking given by the pilot's counsel that McPherson would not conduct flights under instrument flight rules. On 23 October that order was varied to permit McPherson, when under the supervision of a suitably qualified instructor, to conduct training and test flights again under instrument flight rules to enable him to renew his multi engine command instrument rating. Factual evidence before the Tribunal painted the picture of a keen young man, extremely enthusiastic in relation to his occupation as a professional pilot, who had not fallen foul of the regulatory authority in any way until this unfortunate accident.

The flight in question was being conducted under instrument flight rules for which the pilot was well qualified. The weather was poor, however Mr McPherson had seemingly prepared himself well for the flight. The Tribunal

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100 Re Darren McPherson and Civil Aviation Authority [1991] AATA 33 (14 February 1991). Sitting in Melbourne the Tribunal was composed of B M Forrest, (Deputy President), A Argent, (Member) and G Brewer, (Member).
101 Ibid paragraph 2.
102 The suspension was made by a delegate of the CAA under Regulation 269 of the Civil Aviation Regulations which reads:

269(1) Subject to this regulation, the Authority may, by notice in writing served on the holder of a licence or certificate, vary, suspend or cancel the licence or certificate where the Authority is satisfied that one or more of the following grounds exists, namely:

(a) that the holder of the licence or certificate has contravened, a provision of the Act or these Regulations, including these Regulations as in force by virtue of a law of a State;

(c) that the holder of the licence or certificate has failed in his or her duty with respect to any matter affecting the safe or efficient navigation or operation of an aircraft;

accepted that Mr McPherson had breached a number of regulations regarding flight under instrument conditions and that such breaches ultimately lead to the crash. However in weighing up all the evidence before them and balancing factors personal to Mr McPherson and the hardship to him against those of public safety, the Tribunal varied the decision to a suspension of the pilot's commercial licence for a period of six months from the date of the decision. This effectively brought the date of his suspension up to the beginning of August 1991 — two months longer than the original 18 months suspension issued by the Civil Aviation Authority.

McPherson immediately lodged an appeal to the Federal Court against the Administrative Appeals Tribunal upholding the decision of the Civil Aviation Authority to suspend his licence. He sought at the same time an order from the Court for a stay of the decision of the Tribunal. His argument was that if the stay was granted by the Federal Court pending his appeal to the Court, such a stay would have the effect of staying the decision of the Civil Aviation Authority, thereby allowing him to resume flying. It was asserted that to do otherwise would effectively mean that the suspension would have run its course before the appeal was heard and McPherson would thus suffer hardship.

The presiding judge, Ryan J, had no hesitation in rejecting the application for a stay. In his decision he asserted that there is a manifest public interest in

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104 McPherson's breaches of the relevant regulations were deemed to be as follows: Regulation 172 set out the strict height requirements to be followed whilst operating under instrument flight rule as McPherson was doing at the time of the crash. Contravention of this regulation constituted grounds for the suspension of his licence:

- (a) (when on an Instrument Flight Rules flight) flying the aircraft at a height of less than 1000 feet above the highest obstacle located within 5 miles of the aircraft in flight, thereby contravening CAR [Civil Aviation Regulation] 178.
- (b) conducting the flight in meteorological conditions where the flight visibility was less than 5000 metres and the aircraft could not be flown at a distance for more than 600 metres horizontally and 500 feet vertically from cloud, thereby not complying with Visual Flight Rules (VFR), as specified in CAR 172.

It was claimed by the Authority that McPherson also breached regulation 148 dealing with the flying of an aircraft in a negligent manner:

148(1) An aircraft shall not be operated in a negligent manner or in a reckless manner so as to be likely to endanger life or the property of others.


106 Ibid paragraphs 2 - 5 per Ryan J:

2. Even if I had been able to conclude that the applicant had a reasonable prospect of success, on one or other of the questions of law which he apparently seeks to raise, I would have been
ensuring that judgments as to the fitness of a person to fly passengers for reward should be made by those with the technical knowledge and experience to make an informed assessment of the risks involved. This he considered had been achieved in the hearing before the Tribunal. He said it would require a strong prima facie demonstration that a decision to suspend such a license was totally unreasonable, in the sense of being without foundation in fact or law for the Federal Court to override, even temporarily, the view of the Civil Aviation Authority or the Tribunal composed as they were of members with special expertise in the aviation area.

This case would tend to again show a 'firm' enforcement strategy on the part of the Authority. It was the pilot's first breaches of the regulations, albeit serious ones, and the Tribunal and Federal Court in reality, backed up the Authority's decision.

Re Ronald F McInerney v Newman Air Charter Pty Ltd v Civil Aviation Authority (1992)107

Heard in the Federal Court Perth, before French J, this case involved the judicial review of a decision by an officer of the Authority to cancel the chief pilot's approval for Mr Ronald McInerney, who was the Chief Pilot and Managing Director of Newman Air Charter Pty Ltd. The cancellation of the approval had the direct result of grounding Newman Air Charter because it could not operate without a chief pilot.

re ¡stent to grant a stay which had the effect of allowing the applicant any interim license to fly as a commercial pilot.

3. There is a manifest public interest in ensuring that judgments as to the fitness of a person to fly passengers for reward should be made by those with the technical knowledge and experience to make an informed assessment of the risks involved.

4. In my view it would require a strong prima facie demonstration that a decision to suspend such a license was totally unreasonable in the sense of being without foundation in fact or law for this Court to override, even temporarily, the view of the Civil Aviation Authority, or the Administrative Appeals Tribunal constituted as the present tribunal partly was by members with special expertise in this area.

5. As I have already indicated, the present applicant has not given such a demonstration. I am also inclined to discount the inconvenience to the applicant which a refusal of a stay will entail, because of the prospect that this court can afford a hearing of this application within a matter of 2 or 3 weeks, if the applicant so desires. Counsel for the respondent have indicated the readiness of their client to facilitate an expedited hearing within that time frame.

The application for review relied on two grounds. The first was that the Civil Aviation Authority did not have the power to make the decision:

(a) as to whether the conditions of an Air Operators Certificate have been met and/or (b) to cancel a Chief Pilot's Approval once given.

The second was that the Authority did not have the power to cancel Mr McInerney's Chief Pilots Approval, as the power to carry out such an act was not delegated to the particular officer of the Authority who issued notification of the cancellation. The application was dismissed, but it is the facts of the case that are of particular interest in the context of this thesis. Although they do not reveal the actual transgressions made by Mr McInerney, they do show the Authority giving him adequate opportunity to become compliant and avoid the consequences of cancellation of his Approval.

The facts were that Mr McInerney's company Newman Charter Pty Ltd was issued with an Air Operator's Certificate pursuant to s 27 of the Civil Aviation Act 1988 on 6 February 1990. This authorised the use by the company of aircraft for charter purposes and other specified aerial work. Certain conditions applied to the Certificate. This Certificate replaced a previous Certificate, which had been issued on 13 September 1989 and one to which apparently a rather 'chequered history' was attached. French J did not consider it necessary to go into this 'chequered history' save for reiterating the particular conditions that were attached to the earlier Certificate of Approval. Mr McInerney had given his written approval of the particular

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108 Initially there were three grounds, however the ground claiming that there had been a breach of natural justice in the making of the decision was abandoned at the hearing.


110 Ibid paragraph 2. The conditions were:

1. In conducting operations under the authority of this Certificate, the holder is to comply with the provisions of Civil Aviation Orders, sections 82.0 and 82.1. etc.
2. The responsibilities specified for you as chief pilot are those detailed in paragraphs 1.1, 1.2 and 1.3 of appendix 1 of Civil Aviation Order 82.0. This approval is granted subject to providing

111 Ibid paragraph 3. These conditions were:

Mr Ronald Frank McInerney holder of Commercial Pilot Licence No. 179156 is hereby approved as the Chief Pilot of Newman Air Charter Pty Ltd.
conditions the Authority had imposed by a letter of 30 November 1989, which
had been imposed as a result of the assessment of his performance in relation
to the position of Chief Pilot as being 'marginal'.

Mr McInerney's approval as Chief Pilot was reissued on 16 January 1991 with
the former conditions remaining the same. Problems (unspecified) apparently
arose early in 1991 between Mr McInerny and the Authority, the latter
claiming 'deficiencies' in the operation of the company discovered during
surveillance of the company by officers of the Authority. Mr McInerney was
advised of these 'deficiencies' and told by a letter of 15 May 1991 that they
required rectification, and an 'Air Service Organization ' inspection would be
carried out on 11 June 1991 to ensure that the noted deficiencies had been
attended to satisfactorily. The inspection confirmed that all deficiencies had
not been rectified and Mr McInerney was given a chance to explain his
reasons before any action was taken by the Authority to suspend or cancel his
approval as Chief Pilot.112

me with your written acceptance of the responsibilities of a chief pilot as stated above. Also your
written acceptance of the conditions detailed in Newman Air Charter's Air Operators Certificate
3. You are also granted approval to:
   (a) conduct twin engine training and checking of Newman Air Charter pilots on the
      understanding that you will provide me with details of any planned endorsement flights to enable
      an officer of this Authority to test the product, if possible, within a reasonable time;
   (b) operate to Koolan and Cockatoo Islands as pilot in command;
   (c) train and approve Newman Air Charter pilots to operate to Koolan and
      Cockatoo Islands.
4. The approvals at 3(a) (b) and (c) above are granted subject to your written
   acknowledgement to me of the need to take particular care when exercising the privileges
   granted by the approvals. The need to take particular care is due to the Examiners of Airmen
   involved having assessed your performance as being marginal.

112 Ibid paragraph 5. By a letter from the Authority of 11 July 1991 Mr McInerney was
advised:
   As a result of the surveillance leading up to the abovementioned inspection and your subsequent
   failure to expediently rectify those deficiencies, facts and circumstances exist which lead me to
   the opinion that your performance as Chief Pilot is no longer of an acceptable standard. The
   evidence I have before me warrants consideration being given to suspension or cancellation of
   your Chief Pilot Approval under the provisions of CAO 82.0.
In relation to an opportunity to explain or refute the Authority's allegations the letter went on
to say:
   There may be facts and circumstances which you wish to place before me in refutation or
   explanation of these matters. Accordingly, before any action is taken to suspend or cancel your
   approval as Chief Pilot of Newman Air Charter I hereby offer you the opportunity to show cause
   by (sic) why this action should not be taken. Should a written reply not be received by close of
   business on 22 July 1991 I shall be obliged to reach a decision based upon the evidence I have
   available to me.
Mr McInerney replied saying he had not been able to find the letter of 15 May 1991. He set out what he described as answers to the Authority's questions, which the Authority subsequently considered unsatisfactory and advised Mr McInerney so by a letter dated 29 July 1991. This letter went on to advise that Mr McInerney’s Chief Pilot's approval was cancelled, stating that his performance was not of an acceptable standard for such a position, and his lack of co-operation and failure to take timely action to correct identified deficiencies was unacceptable.

It is submitted that the facts in this case tend to show a 'compliant' approach by the Authority to breaches exhibited by the chief pilot Mr McInerney. He was given warning and specific instructions, as to where he was in breach of the regulations. He chose to ignore the warnings and failed to respond to correcting deficiencies as listed by the Authority. The court upheld the decision of the Authority and dismissed Mr McInerney's application.

In 1993 there were only two reported cases to come before the Administrative Appeals Tribunal, and none of relevance in the framework of this thesis, before the Federal Court.

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113 Ibid paragraph 6. The letter stated:
Following a review of all the facts and circumstances in this case including your reply, I have decided that your performance as Chief Pilot of Newman Air Charter is no longer of an acceptable standard. The evidence available before me shows that you have failed to satisfactorily exercise your responsibility as Chief Pilot for the maintenance of the operational standards of Newman Air Charter and have seriously failed to properly exercise the same responsibility for supervision of operations at your Broome base. Accordingly I have decided to cancel your approval as Chief Pilot of Newman Air Charter.
The letter went on to set out various findings on material questions of fact that were relevant to the grounds of cancellation:
I therefore conclude that you have failed in your responsibilities as a Chief Pilot as defined in CAO 82.0 and that your performance is not of an acceptable standard. I also conclude from your lack of co-operation and failure to take timely action to correct identified deficiencies that a period of suspension would not be appropriate. Consequently I hereby cancel your approval as Chief Pilot of Newman Air Charter issued on 16 January 1991 with effect from and including 1 August 1991.
10. I remind you as the holder of Air Operators Certificate No. WA 277 that operations of Newman Air Charter from any base, including Newman and Broome, after 31 July 1991 without a Chief Pilot will be illegal and a breach of section 27 of the Civil Aviation Act.

114 See Appendix 3. The case of Roy Frederick Griffiths, Grif-Air Helicopters Pty Ltd and Civil Aviation Authority [1993] AATA 274 (27 August 1993), where the Tribunal took a similar 'firm' approach in refusing the applicant's request for a 'stay' to that which the Federal Court had taken on appeal in McPherson v Civil Aviation Authority [1991] FCA 941 (14 March 1991). Also in Re Darren McPherson and Civil Aviation Authority, discussed at page 232-234, where Ryan J took a firm stance on the question of granting a stay.
In similar vein to the year 1993, there was only one reported case of significance fitting into the criteria of this thesis. The case of Robin Louis Nominees Pty Ltd and Civil Aviation Authority came before the Administrative Appeals Tribunal in July 1994. It involved a review by the Tribunal of the Civil Aviation Authority's decision to cancel the authorization of a Certificate of Approval for an aircraft maintenance company situated at Lovely Banks, a small aerodrome near Geelong, Victoria.

The main issues in the case were four in number:
1. Whether the facilities and equipment available were adequate to satisfy the requirements such a Certificate of Approval required;
2. Whether there was a system of quality control in place;
3. Whether authorized persons representing the Civil Aviation Authority were able to inspect the facilities, and
4. Whether Mr Ellis, the managing director of Robin Louis Nominees Pty Ltd, was able to continue to satisfy the conditions under which the Certificate of Approval was issued.

Mr Ellis first received his Certificate of Approval on 13 May 1982, when he was trading as Gold Crown Aviation. When Gold Crown Aviation ceased operation, the certificate was varied to activities requested by Mr Ellis on 20 March 1991. He was issued with a new Certificate of Approval three days later. The regulation to which the certificate of approval at this time were subject was Regulation 31(2C),

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115 Robin Louis Nominees Pty Ltd and Civil Aviation Authority [1994] AATA 194 (12 July 1994). Heard in Melbourne before B M Forrest, Deputy President, A Argent, Member, and J T.C Brassil, Member.
117 Ibid paragraph 8. Under this Certificate approval was given for:
   (1) Maintenance of aircraft except that major inspections and repairs or modifications which require substantial disassembly and maintenance for which a maintenance release is to be issued are limited to unpressurised, piston engine powered aeroplanes with a maximum take-off weight not exceeding 2750kg.
   (2) Maintenance of aircraft components limited to airframes components of those aircraft listed in 1 above but excluding fibre reinforced plastic structural components.
118 Ibid paragraph 10. Regulation 30(2C) states that:
   A certificate of approval is subject to:
The Civil Aviation Authority gave evidence that maintenance organizations were audited within six months of a Certificate of Approval being issued or varied and were after that inspected annually. In accordance with this audit a number of letters were written to Mr Ellis in May 1992, November 1992 and January 1993. These letters concerned Mr Ellis' inability to be present at Lovely Banks airfield on advised times and dates, so that inspections could be carried out on his maintenance operations and systems of quality control.

Attempts to inspect the maintenance facility were made by two of the Authority's delegates in early March and again in early April. The hanger doors were found to be unlockable and windows broken. The place was, so they reported, completely deserted. The hangar did not contain equipment, which could be used for maintenance of aircraft and there was no sign of maintenance manuals, aircraft records or work being carried out. There were several ultra-light aircraft in the hangar and several aircraft parked outside the hangar. Some of these aircraft belonged to Mr Ellis. Corroborative evidence as to these facts came from a Senior Airworthiness Inspector and Mr Moss, an investigator with the Authority, both of whom were present on the attempted April 1993 inspection of the facilities. Mr Ellis was in breach of regulations 30(4) and 30(4A) relating to regular inspections of a maintenance facility by the Authority.119

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119 Ibid paragraph 13. Regulation 30(4) stated that:

An authorised person may, at any time, for the purpose of ascertaining whether the activities to which a certificate of approval relates are being carried on in a satisfactory manner:

(a) inspect any aircraft, aircraft component or aircraft material;
(b) inspect any process or systems carried on by, any records maintained by or any documents in the possession of, the holder of the certificate of approval in connection with the activities to which the certificate of approval relates;
(c) conduct any tests that the authorised person considers necessary; and
(d) require the holder of the certificate of approval to furnish to the authorised person such evidence as the authorised person requires:
In his defence Mr Ellis claimed that he no longer owned Lovely Banks airfield and when maintenance was done at the airfield he employed a licensed aircraft maintenance engineer. Tools and equipment for maintenance were stored at a property nearby, and only taken to the airfield when required. He agreed he had no system of quality control in operation. Mr Ellis had an ongoing dispute with the Civil Aviation Authority regarding his purchase of a Beechcraft Queenair aircraft in 1990 but this dispute was not considered relevant in the current proceedings.

After the series of failed attempts to visit the maintenance facility by the Civil Aviation Authority a 'show cause' letter was sent to Mr Ellis on 22 June 1993. Mr Ellis did respond to the 'show cause' letter within the 28 day period required, however the evidence and argument he put forward were not sufficient to satisfy the Authority and his Certificate of Approval was duly cancelled.

The main ground for the cancellation was that the Authority was unable to gain access to the site to inspect the facilities and equipment that were considered necessary for carrying out aircraft maintenance. There was no system of quality control, and Mr Ellis refused to give authorised Civil Aviation Authority personnel, details of the facilities he had at his disposal. The Tribunal affirmed as correct the decision of the Civil Aviation Authority to cancel Mr Ellis's Certificate of Approval for maintenance of aircraft.

(i) of the qualifications and competence of the holder or of the qualifications and competence of the employees of the holder; or
(ii) of the facilities at the disposal of the holder.

(4A) The holder of a certificate of approval must give to an authorised person the evidence required under paragraph (4)(d).

120 Paragraph 22 sets out the grounds for this cancellation of the Certificate of Approval, which were given in the letter of 1 November 1993. They were that:
(a) the facilities and equipment necessary for carrying out the maintenance were not available;
(b) there was no system of quality control;
(c) Mr Ellis refused to give authorised (CAA) persons details of the facilities at his disposal;
(d) CAA persons were unable to inspect the facilities available to Mr Ellis; and
(e) the applicant fails to continue to satisfy the conditions under which the Certificate of Approval was issued.
The Authority had acted on non-compliance with the regulations, but not until it had given Mr Ellis a number of opportunities to comply with their requests. Mr Ellis's answer to his 'less than co-operative' manner, was that his organization had been subject to sixteen years of surveillance by the Civil Aviation Authority and its forerunners and he considered that the long running dispute he had with the Authority over his purchase of a Beechcraft Queenair aircraft in late 1990 was in part, one of the reasons the Authority kept 'pursuing' him.

It is submitted that the actions of the Authority in this case, where a series of opportunities were given to Mr Ellis to comply with regulations it was alleged he had breached, tend to suggest an enforcement strategy favouring the compliance rather than the deterrence end of the enforcement spectrum.

Moores Airspray Pty Ltd and Civil Aviation Safety Authority [1995]121
This case, heard in the Administrative Appeals Tribunal in August 1995, centred around the review of a decision of the Civil Aviation Authority to reject the application to re-issue an Air Operator's Certificate in respect of Moores Airspray, a small agricultural aviation business operating out of Innisfail in far north Queensland. The decision was made because it was alleged breaches of the Act, the Regulations and the Orders had occurred. These breaches related in particular to low flying, unlawful wing repair and certain aviation related convictions recorded in the local Magistrates Court at Innisfail. Without an Air Operator's Certificate Moores Airspray was effectively grounded and could not conduct its business. The Tribunal saw fit to set aside the decision of the Authority and remit it back for reconsideration according to directions given by the Tribunal.

The precipitating factual evidence did establish that in a number of respects Moores Airspray had failed to comply with certain provisions of the Civil Aviation Act, its Regulation and Orders that related to safety. Four occasions

of very low flying were cited. All alleging that an aircraft belonging to the
company had in January, April and May 1995, flown at 'a height lower that
350 feet above terrain within 100 metres horizontally, of an occupied building,
without prior approval of the occupant'. In one of these instances it was
alleged that the aircraft flew in such close proximity to a horse and rider that it
startled the horse who shied rearing and fell backwards injuring the rider quite
seriously.

The Tribunal heard quite conflicting evidence from the pilots concerned and
various witnesses on the ground regarding each allegation of 'low flying'.
After examination of this evidence the Tribunal concluded that in relation to
the 'low-flying' incidents a technical breach of the Civil Aviation Orders had
indeed been committed.

Mr Anthony Moore, the chief pilot and company director, was convicted and
fined on 7 March 1995 in the Magistrates Court at Innisfail on seven charges
of giving false statements in respect to total time in service on maintenance
releases for company aircraft. In addition on the same date Mr Moore, was
convicted, fined and charged with five counts of giving false statements in
respect to daily certification on maintenance releases. Of most concern to
the Civil Aviation Authority regarding these charges was the under-statement
of hours flown by the aircraft operated by Mr Moore, and the impact this
under-statement would have upon the due discharge of the regulatory
requirements of maintenance service on the aircraft at the end of each 100
hours of flying.

122 Ibid paragraph 11. This action was contrary to Civil Aviation Order 20.21.3.2.
123 Civil Aviation Orders section 20.21.3.2.
124 Moores Airspray Pty Ltd and Civil Aviation Safety Authority [1995] AATA 225 (11
August 1995) paragraph 45. These seven offences involved mis-statement or under-statement
of hours flown by aircraft in respect of which the maintenance release documents had been
issued. They were in breach of Regulation 43 of the Civil Aviation Regulations 1988, and the
prosecution of the offences was instigated by the Civil Aviation Safety Authority.
125 Ibid paragraph 46. This involved Mr Moore signing certain entries in the maintenance
release in the section reserved for the signature of the pilot who flew the aircraft on the
particular day. Mr Moore had signed in the gaps when he was not actually the pilot who flew
the aircraft and who should have signed. He pleaded guilty.
On the question of the convictions the Tribunal was impressed with the manner in which Mrs Moore, also a director of the company, had managed the running of the office, including maintenance releases and paperwork since the date of the convictions on 7 March 1995. The Tribunal assessed Mrs Moore as being a competent and thorough Manager and said it was satisfied that she 'is capable of complying with the provisions of the Act, Regulation and the Civil Aviation Orders, that relate to safety'.

The Tribunal set out the following conditions that primarily related to low flying. It required Moores Airspray to obtain the consent of all occupiers of buildings in the vicinity of its operations that may be affected in any way by its operations prior to conducting the low flying operations. The consent was to apply for a period of six months from the date it commenced, and if the building occupier wished to revoke consent previously given then a period of 48 hours notice was required. Moores Airspray was also required to keep adequate records of such correspondence relating to the notice given, received, and if necessary revoked. The records were to be kept for 12 months and be made available for the Authority's inspection if requested.

Again the Authority seems to have exhibited a somewhat 'compliant' approach to the breaches Moores Airspray had committed over a period of time until in the end it decided to act. The Tribunal appears to have taken an even more 'lenient' approach giving the company a 'second chance' to prove itself as a responsible operator, becoming compliant with all aspects of the legislation where it had failed in the past.

**6.2.5 Summary of the period 1988 - 1995**

Wrapping up the first time-span under discussion in the newly de-regulated environment, it would seem that although the Authority may have initially taken steps to provide a 'strict' form of regulation, it rapidly lapsed into one 'of manners gentle' as a very compliant approach emerged.

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126 Ibid paragraph 58.
Looking at the behaviour of the regulatory authority as reported in the Seaview Inquiry one could be forgiven for thinking that the 'graduated response' had turned into a 'negligent response'. An analysis of the cases during this period does not support this view. The facts as they appear in the cases show the Authority taking, at the outset of investigation on discovering one or more breaches of the regulations, a 'graduated response' approach to the breaches, often until it exhausted its patience and acted when non-compliance continued to occur.

The case of the cancellation of the licence of the young pilot who crashed his twin engine Cessna into a row of trees on take off is possibly the exception to the above statement.\textsuperscript{127} However the facts in this case showed a physically dangerous situation and are different enough to distinguish it from other cases studied during the period. They show the Authority acting in a firm deterrent manner on the first breach by the young pilot, where as a result of his actions, six passengers narrowly avoided death or serious injury. The Tribunal did vary the suspension time of the cancellation of the pilot's licence from the 18 months imposed by the Authority to a period of six months from the date of the Tribunal's decision. This had the practical effect of extending the actual time of the cancellation by two months.

\section*{6.3 Section 2: Inquiries and Reviews 1996 - 2003}

After the turmoil of the early 1990s and following on directly from the critical parliamentary inquiries of this period,\textsuperscript{128} one might expect to see a strengthening of the resolve of the Authority to take on board the recommendations of these inquiries. It could also be expected that this may have the effect of leading the Authority into adopting a more 'deterrent' approach to its enforcement strategy, as had been strongly recommended by the inquiries. If so it should be reflected in the cases and the main inquiry of the time into 'ARCAS Airways'. But this was not necessarily the so. The stated

\textsuperscript{127} Re Darren and Civil Aviation Authority [1991] AATA 33.

enforcement policy of the Authority following the two major inquiries of the mid 1990s was that of 'graduated enforcement' with education and counselling being the recommended starting point for breaches of the regulations.\textsuperscript{129} It was a typical 'Ayres and Braithwaite' pyramid approach to regulation.\textsuperscript{130} This did not always follow through in the evidence of enforcement strategy as shown in the reported cases. In fact it was towards the latter stages of this time period that isolated examples of a more 'deterrent' approach on the part of the Authority became apparent.

\textbf{6. 3.1 The ARCAS Airways Investigation and Allegations of 'Institutional Timidity within CASA'}\textsuperscript{131}

The Parliamentary Inquiry into the small New South Wales regional airline ARCAS Airways that took place in the year 2000 was enlightening in providing examples of the Authority's enforcement strategy half a decade on from the stringent and critical 'Seaview Inquiry'. The Inquiry was instituted following revelations that came out in evidence given in budget estimates in the Senate that ARCAS Airways had concealed from CASA, unofficial defect books regarding each of the three aircraft it operated. These defect books were concealed for at least three, and probably six years and were only discovered following a 'tip off' and the subsequent execution of a search warrant of ARCAS' premises by CASA investigators in February 1999.

At the end of the Parliamentary Inquiry into ARCAS Airways, the Committee came up with four recommendations for the aviation regulator.

Recommendation number three suggested that:

\begin{quote}
CASA take steps to recommit itself to strong action through prosecution or suspension of those operators who deliberately breach maintenance, airworthiness and reporting and recording requirements, thereby compromising air safety.\textsuperscript{132}
\end{quote}

\textsuperscript{130}Ian Ayres, and John Braithwaite, Responsive Regulation: Transcending the Deregulation Debate (1992).
\textsuperscript{131}Report of the Senate Rural and Regional Affairs and Transport Legislation Committee, Administration of the Civil Aviation Safety Authority Matters Related to ARCAS Airways (October 2000) xiii. Pages 116 - 118 of this thesis give a description of the facts surrounding this report.
Hence we see a Parliamentary Inquiry taking a reactive response and recommending in the strongest of terms that the aviation regulator abandon its 'compliance' approach to enforcement and revert to a 'deterrent' approach.

The concerns raised by this committee relating to CASA's administration of ARCAS Airways echoed the similar concerns raised following investigations into the Monarch and Seaview Air accidents. The appropriateness of the actions of certain of the Authority's officials and the 'diligence and propriety' with which they discharged their responsibilities was severely criticised by the Inquiry.

Also we again see reference by the Inquiry into what they term the 'institutional timidity' operating within CASA. The ARCAS Inquiry cited on a number of occasions the views of Mr Staunton, the Commissioner in the Seaview Air Inquiry speaking in critical terms against officers of the Authority who through 'institutional timidity' refrained against taking strong action for transgressions by the aviation industry. They found that in dealing with ARCAS Airlines, CASA management had displayed a partial acceptance of unsafe practices and breaches of the Civil Aviation Regulations, despite recommendations to the contrary by subordinate officers. The question of 'regulatory capture' was yet again raised in this inquiry. It is a theme that occurs in all three sections of this chapter and is discussed below.

6.3.2 Regulatory 'Capture'

Regulatory theory has at times described a spectrum of regulatory enforcement behaviour as being likened to a swinging pendulum. The current literature describes this phenomenon in a variety of ways. It can be described as

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132 Ibid xiii
133 Ibid 36:
What were plainly serious breaches, including, in one case, an apparent fraud in respect of the renewal of an instrument rating, were never referred to prosecution. Indeed, this illustration and others suggested that the CAA was afflicted by an institutional timidity against taking strong action for transgressions by the aviation industry.

134 Ibid 38
enforcement versus voluntary compliance, or deterrence versus compliance or enforced compliance versus negotiated compliance. Regardless of how it is phrased, one style revolves around formal precise rules and is viewed as adversarial and punitive, whilst the opposite end of the spectrum is seen as softer, results orientated, more trusting, using the tools of persuasion and negotiation to achieve its ends.

When applying the above to the aviation industry the following pattern emerges. As the aviation industry grew in the early years and was regulated for the first time there was the implementation of fixed rules, which were accompanied by credible threats of aggressive enforcement action. This usually provided a quick way of bringing about the desired change in behaviour. However over time increased complexity in the industry inevitably led to more and more rules evolving. Not only did the rules increase in number they also become more complex.\(^{135}\) The regulator tried to keep its regulations up to date as technology advanced, by adding to them. Eventually the rule-based system became top heavy and this top heaviness turned into an economic liability. Some sympathy for the regulated industries began to grow and the regulator started to lose respect as its authoritarian stance alienated the industry and the cry of 'reform' started to appear from an industry that considered itself to be 'overregulated'. At the same time as economic deregulation of the industry,\(^{136}\) a growth in aviation activity occurred and the advent of a more 'compliant' regulator began to become apparent. This is the point at which the danger of 'regulatory capture' started to appear as far as the Australian aviation safety regulator was concerned.

At the close of inquiries such as the Seaview Air Inquiry, the Plane Safe Inquiry and more recently the Parliamentary Inquiry into the Administration of the Civil Aviation Safety Authority and related matters, recommendations are made as to how those conducting the inquiries think that matters could be improved for the regulator. Virtually no reference is made in such


\(^{136}\) Commencing in 1990. See chapter 2, sections 2.9 and 2.10 of this thesis.
recommendations as to the importance of identifying and formulating methods of dealing with the regulatory theory of 'capture'.

Are there then explanations that can assist in understanding why the aviation regulator would tend towards a 'compliance' strategy and place itself in danger of being 'captured' by the industry it is regulating?

1. Perhaps the first relevant explanation is the penalty that will inevitably result from adopting a 'sanctioning' strategy and how that penalty will affect the livelihood of the individual concerned. With the suspension or cancellation of licences or Certificates of Approval goes the likely probability that the individual will lose his or her source of income. 137 Because of the very specialist and technical knowledge that an officer of the Authority must necessarily have, a large number of the officers are drawn from the ranks of the industry. It is therefore more than likely that such an officer will be inclined to 'identify' with those individuals they are overseeing. When it comes to a choice of taking away a 'fellow' professional's income, the officer concerned is more likely than not, to put him or herself in the position of the person with whom he or she is remonstrating. It is perhaps understandable that such a drastic action is avoided if at all possible. The actions of Mr Paull, analysed so thoroughly in the Seaview Inquiry, give an ample example of such an occurrence. 138 Although it does seem logical that this would be the case, one empirical study done in the United States in the early 1990s backs this proposition up very strongly. 139 It found that the appointment of former employees of a regulated industry to a regulatory authority increased the likelihood of decisions favourable to the regulated industry, such as whether to impose a sanction for a breach or to go for a 'softer' option such as 'education' or 'counselling'. 140

137 This point is noted in the Seaview Inquiry: Commonwealth of Australia, Commission of Inquiry into the Relations Between the CAA and Seaview Air (1996) 102.
138 Ibid
140 Ibid 668.
2. A second relevant explanation concerns the harm, which may arise from a breach of the regulations. Where the harm is seen to be very direct and visible, using a sanctioning strategy is easy for an officer. However where the opposite occurs using a sanctioning strategy can become morally problematic.\(^\text{141}\) This is particularly well illustrated in studies on enforcement that have concerned environmental pollution.\(^\text{142}\) It is however equally applicable to aviation, where a cumulative effect of breaches of the regulations can end up in disaster. Again the Seaview Inquiry gives adequate examples of the ultimate cumulative effect, of overlooking individual breaches of the regulations, on the industry.

3. A third explanation is that sanctions open the door to the likelihood of the person sanctioned, appealing to the Administrative Appeals Tribunal or the Federal Court. Thus a concern associated with legal action may be cost, as litigation is expensive both in terms of time and money. There is a risk that the Authority's decision will be overturned, or at least as far as the Tribunal is concerned altered and field officers may prefer to avoid appearing in the witness box. It is not a pleasant experience and if an education or counselling track will avoid it and also offer a low-cost, low-risk alternative, then it may well be seen as the way to go.

4. The fourth explanation is that the aviation industry really needs to obtain information from the industry to help it carry out its functions. If there is cooperation with the industry this significantly lowers the cost of obtaining this information.\(^\text{143}\)

5. The fifth explanation involves political pressure. Formal political pressure may be initiated by complaints by industry or to senior management or an investigating officer's superior. Mr Hoy's predicament minutely examined by the Seaview Inquiry is an excellent example of where members of industry were able by appeal to Mr Hoy's superiors to successfully reverse his

\(^\text{142}\) Ibid 118.
\(^\text{143}\) Ibid 5.
decisions to sanction.\textsuperscript{144} Political pressure may also occur when a disgruntled industry associate takes his grievance to a Member of Parliament. The Seaview Inquiry details an example of a complaint to a Member of Parliament in this vein. Mr Abberton, the Administrative Manager of the North East Region in 1993 was subjected to an internal inquiry instigated by the General Manager and conducted by the Manager of Corporate Security. It had arisen out of an incident where Mr Abberton had seen reason to take punitive action against a pilot who was the son of an operator in Darwin. The pilot had flown an aircraft with knowledge that it had a faulty part, which affected the aircraft's airworthiness. Mr Abberton gave evidence before the Seaview Inquiry that the operator had complained to his local Member of Parliament regarding the 'punitive' action and the Member of Parliament then went to see the Authority, who in turn went to see the chief executive and managing director of the Authority. His superiors did not back up Mr Abberton's actions despite the obvious seriousness that the facts displayed.\textsuperscript{145} Mr Abberton was subject to an internal inquiry during which nothing untoward was uncovered and the eventual prosecution of the pilot did proceed. No doubt such action would have Mr Abberton thinking twice before taking sanctioning action again and therefore would operate as an inhibition to his taking prosecution action in the future, in any similar circumstances.

6. A sixth explanation is that Australian regulatory executives generally trust business as socially responsible and willing to abide by the law. In current economic terms some form of trust really has to be a constant in the whole

\textsuperscript{144} Commonwealth of Australia, Commission of Inquiry into the Relations Between the CAA and Seaview Air (1996) 236-247.
\textsuperscript{145} Ibid 104. The incident was described in these terms:

Question: What was the nature of that particular incident?
Answer: To my recollection it was the son of the operator who was in Darwin. He had an aeroplane that had a faulty part. He was told to wait there until the part could be got for the aeroplane. He decided to ignore that advice and flew from Darwin to Cairns. To get there he had to shut down one engine because if he kept the other engine going this part would've destroyed the engine, and landed at Cairns airport. As a result of that we went straight to punitive action because if that's not a serious safety matter ... nothing is.

Mr Abberton then described how the internal inquiry had come about:
In this particular instance there was political representation in the Cairns area from the local Member of Parliament about the fact that we were being very horrible to this poor operator and it's his livelihood that we're mucking up, and all this sort of --- so that's were it started. They then personally went to see Roser and Cooper at that stage and the first we get to know about it is a gentleman by the name of Peter Beaver is going to do an investigation into why we took this action against this particular operator which I, at that time, was surprised about.
regulatory equation. Grabrosky and Braithwaite came to this conclusion in their study of regulatory agencies in Australia. They also found that regulatory authorities that dealt mainly with big business, tended to be non-prosecutorial and regulatory authorities that dealt with a cross-section of small and large companies showed reluctance to take on major companies.

A major limitation in the empirical research available in the existing literature is that there are few quantitative studies of regulator enforcement in which the individual inspector is the unit of analysis. Thus studies such as that undertaken by Grabrosky and Braithwaite that include a substantial number of regulatory agencies are of a kind that may determine whether a sensible bureaucratic structure can make a difference. However they cannot determine whether individual inspectors reflect their previous work experience, personal confidence or background traits into decisions that they make about enforcement.

6.3.3 Anecdotal Evidence from an Aviation Journalist

Several submissions to the most recent Parliamentary inquiry into the Civil Aviation Safety Authority will be referred to and discussed in section three of this chapter. This has been done because although these submissions may not contain specific empirical data they do, in a descriptive mode, serve to give examples of the regulators enforcement strategies as viewed from the 'grass roots' level. Naturally opinions and information sourced from those who come to the attention of the regulator need to be viewed with an appropriate amount of scepticism at times. However it is considered that this is a valuable source of information that cannot be totally ignored in the context of this thesis.

149 Commonwealth of Australia, Senate Standing Committee on Rural and Regional Affairs and Transport, Administration of the Civil Aviation Safety Authority (CASA) and related matters, (September 2008).
Of particular interest is the submission of Paul Phelan, a long standing Australian aviation journalist, who has the advantage of having had constant dialogue with aviation industry identities at all levels for the past 20 years. Mr Phelan updated for the 2008 Parliamentary inquiry into CASA, a previous work he had published on the regulation of Australian general aviation and low capacity airline transport in 2000. This publication, dealt specifically with the question of 'enforcement' and why, according to him, it was failing. As is not unusual various submissions to the 2008 Parliamentary Inquiry were from some very disgruntled CASA regulatees. However, Paul Phelan's submission was somewhat different. His submission is referred to at this point in the thesis because it provides some detailed anecdotal type evidence of enforcement action taken by CASA during the period under discussion.¹⁵⁰

Anecdotal evidence must of course be approached with some caution, it is neither tried nor tested, however in the context of this thesis it provides just another explanation in attempting to discern trends that may be apparent in the aviation regulator's enforcement strategy over a period of time.

In 2000 Mr Phelan distributed to a wide range of people in the aviation industry a lengthy paper on the regulation of Australian general aviation and low capacity airline transport. This was entitled 'Enforcement - Why is it Failing'? His submission to the 2008 Parliamentary Inquiry included much information contained in his 2000 paper and referred to the period prior to 2000, which has some usefulness for this section. However it is the more up to date observations and comments, on the evolution of CASA's enforcement strategy under the current CEO Bruce Byron that is particularly informative because it demonstrates the evolution of the enforcement strategy to what it has become in 2008.

Mr Phelan considered that the Civil Aviation Safety Authority's handling of its enforcement responsibilities since coming into being in 1995, until the year 2003, had seriously degraded Australia's safety climate by 'generating

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mounting mutual distrust and antipathy between industry and regulator'.\textsuperscript{151} He further stated that in his opinion until 2003, there had been more confrontation and less mutual respect and cooperation between the regulator and the aviation industry than had ever existed in the history of aviation regulation in Australia. Furthermore the confrontation was made worse by what Mr Phelan described as 'gross and growing deficiencies' in the delivery of regulatory services. This had the effect of fettering the conduct of aviation businesses because there was the fear that the apparent abuse of regulatory processes by CASA could shut down a business immediately without recourse to due process.\textsuperscript{152}

The paper gives examples of case studies that Mr Phelan considered to be fraught with flawed processes. He emphasised similar outcomes in each of these cases that identify several aspects of the enforcement process, which were common to each event. These 'case study' examples have not reached the Administrative Appeals Tribunal or the courts because inevitably, the small aviation business suffers financially and cannot continue long enough to fund the legal representation to 'take on' CASA in the Tribunal or the Federal Court.

A number of the case studies highlighted by Mr Phelan, all of which take place prior to 2000, displayed a bungling and at time vicious attitude by the regulator to small industry operators. Of course only one side of the case is presented, that of the aggrieved operator. The facts in the case studies may indeed be true, without the facts having been tested as they would be in a Court or Tribunal, it is hard to say. What does seem to emerge from these case studies is that at the time they occurred --- in the latter years of the 1990s, CASA appeared to be taking a very firm stance with any non-compliance with the regulations that it happened to come across. These were the years

\textsuperscript{151} Ibid 5.
\textsuperscript{152} Mr Phelan was not suggesting that this was indeed a fact. Rather he was emphasising that the practical manner in which the enforcement processes were enacted within the regulatory authority at this time were so complicated, confusing and incomprehensible that misunderstanding was bound to occur.
immediately after the publication of the scathing inquiries of Seaview Air,\textsuperscript{153} and Plane Safe.\textsuperscript{154} Thus these were the years when the regulator having just been severely criticised in the inquiries, could be expected to be swinging towards the 'deterrence' end of the enforcement strategy spectrum. Anecdotally Mr Phelan's case study examples only partially back up the findings of the Administrative Appeals Tribunal cases of this time. The regulator was being firm in its approach to even minor compliance breaches, however as we shall see in the cases described below it still appeared to commence at the base of the 'enforcement pyramid' with education, counselling and giving 'second chances' until pushed to bring out the 'big guns' by the continuing non-compliance of the particular operator with which it was dealing.

Mr Phelan highlighted in his paper the extreme enforcement action available to CASA that he claimed constituted an 'abuse of process' which occurs when an Air Operator's Certificate is suspended on the recommendations of a flying operations or airworthiness inspector. His argument was that there was no test of the proposition that an 'immediate safety threat' existed. So when such enforcement action has been taken, the only recourse available to the operator was the Administrative Appeals Tribunal.\textsuperscript{155} Mr Phelan believed that CASA was prone to repeating the word 'safety' as often as possible and lent heavily during its representations to the Administrative Appeals Tribunal, that its safety obligations under section 9A of the Act compelled it to suspend a particular Air Operator's Certificate, and that it would therefore be acting unlawfully if it did not.

In this process Mr Phelan claimed there was effectively no test of the basis of the CASA decision. The justification simply says: 'We believe there is an

\textsuperscript{153} Commonwealth of Australia, Commission of Inquiry into the Relations Between the CAA and Seaview Air (1996) Vol 1 & 2, ('The Staunton Report').


\textsuperscript{155} Although glibly explained by Mr Phelan this is not quite correct. He has left out a step. Under section 31D of the Civil Aviation Act the Authority may suspend an operators approval with immediate effect if it is satisfied there is a 'serious and imminent risk to safety'. The Authority must then apply to the Federal Court within five days to request an extension of time for the suspension to enable it to make all necessary inquiries.
immediate threat to air safety, therefore we are obliged to suspend the certificate'. The operator is thus put to heavy financial disadvantage by the loss of cash flow and ongoing financial commitments. In some cases Mr Phelan has knowledge of operators who have survived the process and have eventually had the Air Operator's Certificate restored. In other cases he has been aware of the action having driven the operator out of business.

Mr Phelan claims none of the allegations have been adequately tested in court, and thus the Civil Aviation Safety Authority has filled the roles of policeman, judge, jury and executioner without ever having brought its allegations to trial. Although operators who are suspended have access to the Administrative Appeals Tribunal which has the power to stay CASA's decision, and have the opportunity to put their case to CASA before any long term decision is made, Mr Phelan makes the point that CASA normally hires a $3,000 a day Queens Counsel to shore up its decision and the small operator with limited financial backing has little chance against such odds. He gives seven detailed case studies during the late 1990s period, to back up his propositions that CASA is being 'heavy-handed' and unreasonable in targeting small operators. As these are untested and anecdotal only, they cannot be given a great deal of weight on their own. However when looked at in the general scheme of things in the late 1990s they do point to a regulator behaving in more of a 'deterrent' mode than seemingly prevailed in the early part of this decade.

Mr Phelan concluded his submission to the 2008 Parliamentary Inquiry by reiterating that the current CEO Bruce Byron inherited a 'chaotic situation' when he took over from the previous Director, Mick Toller in 2003. He believed that Mr Byron's five years in the job resulted in considerable reforms in the enforcement area and that there had been a steady improvement in the

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157 Ibid.
158 Committee on Transport, Communications and Infrastructure, Commonwealth Parliament, Plane Safe Inquiry into Aviation Safety: the Commuter and General Aviation Sectors, (1995). See the Plane Safe Inquiry for scathing comments regarding the 'compliant' approach the then regulator had towards the aviation industry.
manner in which CASA handled its enforcement responsibilities. However Mr Phelan also believed that senior CASA management continue to have their reform efforts frustrated by the 'embedded "culture" which remains within the organization'.

Various critics of the regulator, including in this example, Mr Phelan, frequently comment upon the jargon of referring to the 'culture' within the aviation regulatory environment as being at fault, or the cause of 'problems' within the Authority. The terms usually used, as in this case, are in a derogatory fashion and tend to conjure up the impression that individuals within CASA are all beavering away to make things as difficult as possible for those they are 'regulating'. It is hard to pin this concept down with any firm evidence of its implied debilitating influence.

In support of his criticisms Mr Phelan quoted a survey of CASA staff satisfaction with their employment, which was conducted by an independent firm in 2002 and reported on in CASA's 2002-03 Annual Report. Of those who responded (78% of the total number of CASA staff), only 59% expressed 'overall satisfaction'. Furthermore 55% were satisfied with respect to 'recognition of efforts' and the 'executive providing a sense of purpose and direction'. Less than 50% were satisfied with CASA being able to 'attract and retain capable employees'.

Mr Phelan's comments do back up the 'swing of the pendulum' towards a 'deterrent' approach to enforcement by the regulator. But as they are anecdotal and basically untested, they can only have minimal relevance in the overall assessment of the Authority's enforcement strategy over the twenty-year period examined.

6.3.4 Reported Cases 1996 - 2002

Cases covered during this period are those immediately following the

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159 Senate Standing Committee on Rural and Regional Affairs and Transport, Commonwealth of Australia, Administration of the Civil Aviation Safety Authority (CASA) and Related Matters, (September 2008), Submission number 26, by Paul D Phelan, 29 June 2008.

thorough and critical inquiries of 1995,\textsuperscript{161} and 1996.\textsuperscript{162} The regulator had been strongly criticised for its lack of oversight and poor regulatory practices during these inquiries and one might therefore expect to see a more 'deterrent' approach to regulation in the light of the recommendations and criticisms these inquiries contained. There are some examples in the cases tending towards a 'deterrent' approach, however overall the cases examined do not reflect a definite 'swing of the pendulum' away from the Authority's more favoured 'compliant' mode of operating. The evidence in the cases studied in the period, would tend to support the view that the regulator, regardless of what criticism may have been dealt to it over the use of previous compliance based enforcement strategies, still favoured this approach rather than a more forceful or deterrent approach.

\textbf{Richards Aviation Services and Civil Aviation Safety Authority (1996)}\textsuperscript{163}

One of the first aviation cases of interest in the context of this thesis that came before the Administrative Appeals Tribunal after the formation of the Civil Aviation Safety Authority was that of Richards Aviation Services and Civil Aviation Safety Authority in November 1996.

Richards Aviation Services was a maintenance company based at Jandakot in Western Australia. The managing director of the company, Mr Colin Richards, was a licensed aircraft mechanical engineer who had been involved in the aviation industry since 1963, setting up his own business Richards Aviation Services in 1987. The Civil Aviation Authority issued him with a Certificate of Approval in June 1993, which permitted him to carry out maintenance on fixed wing aircraft with a maximum take off weight not exceeding 5700 kilograms and helicopters with a take off weight not


\textsuperscript{162} Commonwealth of Australia, Commission of Inquiry into the Relations Between the CAA and Seaview Air (1996) Vol 1 & 2, (‘The Staunton Report’)

exceeding 2000 kilograms. Most of the company's work involved maintenance of twin engine fixed wing aircraft used for charter.

Of interest in the 'background' explanation were comments from the Tribunal regarding the enforcement strategy of the Authority at this time. It stated that:

CASA attempts to obtain compliance by a graduated method beginning with education; then informal counselling, to explain a non-compliance with a regulation; formal counselling, when there has been a more serious contravention; and examination, when it appears that knowledge and skill is not commensurate to the licence or certificate held.\(^{164}\)

The Tribunal was asked to review a decision of a delegate of the Authority to cancel, as of 19 August 1996, Richards Aviation Services Certificate of Approval to operate as a maintenance facility.\(^{165}\) On 22 August 1996 Richards Aviation Services applied to the Administrative Appeals Tribunal for a review of this decision. Five days later on 27 August 1996, on the request of Richards Services, the Tribunal granted a stay. In total, ten reasons relating to contravention of the regulations regarding maintenance work carried out on two aircraft, were given as grounds warranting consideration by CASA for the suspension or cancellation of Richards Aviation Services 'Certificate of Authority'.

CASA had issued two 'show cause' notices to Richards Aviation Services on 15 July 1996 and 18 July 1996. A further 'show cause' notice was issued on 26 July 1996 replacing the first two 'show cause' notices because it was found that the signatory to those letters did not have the delegation to issue such notices. The Authority considered that Mr. Richards' responses to the 'show

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\(^{164}\) Ibid, paragraph 7.

\(^{165}\) The cancellation of the Certificate of Approval was made under Civil Aviation Regulation 269(1) which reads:

Subject to this regulation, CASA may, by notice in writing served on the holder of a licence or certificate or an authority, vary, suspend or cancel the licence, certificate or authority where CASA is satisfied that one or more of the following grounds exists, namely:

(a) that the holder of the licence, certificate or authority has contravened, a provision of the Act or these Regulation, including these Regulations as in force by virtue of a law of a State; (b) that the holder of the licence, certificate or authority fails to satisfy, or to continue to satisfy, any requirement prescribed by, or specified under, these Regulations in relation to the obtaining or holding of such a licence or certificate or an authority.
cause' notices were not satisfactory, and this led to the cancellation of his Certificate of Approval on 19 August 1996 and the subsequent stay order. Quite extensive evidence was given and examined by the Tribunal regarding each alleged contravention of the regulations. The Tribunal came to the conclusion that it found, to its reasonable satisfaction, that all CASA's allegations made in the 'show cause' of 26 July 1996 were proven.

Despite this finding the Tribunal chose to vary the decision of the Authority to cancel the Certificate of Approval for Richards Aviation Services, and substitute instead a suspension of the certificate for six months from 7 January 1997 until 7 July 1997. Implementation of this decision was further delayed for six weeks to allow Mr Richards time to try and make arrangements, which would allow present work he had on hand to be completed in his hanger or elsewhere.

The Tribunal acknowledged that the breaches of the regulations as proven did amount to contraventions of a serious nature. However they took into account Mr Richard's poor state of physical and emotional health as a contributing factor to the breaches that occurred during the same time span. They also took into account that length of time Mr Richard's company had been in operation without serious proven contravention prior to 1995 and the effect on the number of people he employed if the business were to cease operations completely.

This case is an example of the 'graduated response' strategy, as in the Ayres and Braithwaite enforcement pyramid model that was adopted by the new Civil Aviation Safety Authority after its formation in 1995.166 The Authority here is leaning towards the compliance end of the enforcement spectrum, with the Tribunal taking an even more 'lenient' view and injecting some compassion into their finding to vary the decision of the Authority.

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166 Ian Ayres, and John Braithwaite, Responsive Regulation: Transcending the Deregulation Debate (1992).
Ian Reginald Wall (Trading as South East Coast Air Services) and Civil Aviation Safety Authority (1998) 167

This case involves an application to review a decision by the Civil Aviation Safety Authority to cancel the charter authorisation contained in Mr Wall's Air Operator's Certificate. The Tribunal saw fit to vary the decision of the Authority, and substitute in its place that the charter authorisation attached to the Certificate be suspended for six months.

1  It is submitted that the facts in this case tend to illustrate a very 'firm' approach in the enforcement strategy of the Authority at this time. So much so that the Tribunal, although finding certain regulations had been breached, saw fit to comment that the decision of the Authority to cancel the charter authorisation went further than was necessary to preserve safety.168

Mr Wall operated a small charter business, South East Coast Air Services, using a single engine aircraft and operating out of Canberra. His Air Operator's Certificate authorized him to conduct charter operations. This he did in his single engine Cessna 172 aircraft. The Civil Aviation Regulations specifically forbid charter operations carrying fare-paying passengers, to be undertaken in a single engine aircraft whist conducting a flight under Instrument flight Rules (IFR).169

This is exactly what the Authority claimed Mr Wall did and was caught out in a ramp check of 5 January 1998 when piloting his single engine Cessna 172 aircraft from Moruya on the New South Wales coast, to Canberra. He carried one passenger. The weather conditions at the time were such that the flight had to be conducted under Instrument Flight Rules and the flight plan he filed indicated that this would be so and that in addition it was to be a 'private

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168 Ibid paragraph 25.
169 Civil Aviation Regulation 175A A single engine aircraft must not be flown under the IFR except in the following operations (a) private operations; (b) aerial work operations; (c) charter operations that do not involve carrying passengers for hire or reward.
flight'. An officer of the Civil Aviation Safety Authority met Mr Wall on arrival at Canberra and conducted a ramp check. Mr Wall advised him that the flight was a 'private category' flight. The officer took evidence from the one passenger, a Mr Norton and ascertained that Mr Norton had hired and paid Mr Walls to fly him from Moruya to Canberra the previous day at an agreed fee of $150.

The Authority sent a letter to Mr Wall on 26 June 1998 asking him to provide reasons why his Air Operator's Certificate should not be cancelled, in the light of certain facts and circumstances relating to the fight he undertook on 5 January 1998 as had been set out in the letter. Mr Wall's provided his explanation to the Authority by a letter of 3 August 1998 and by way of further submission to the Authority at an informal conference on 7 August 1998. In both the letter and at the informal conference he attempted to deny the suggestion that he had breached the regulations by conducting a charter flight under instrument conditions in a single engine aircraft, by indicating that the flight was conceived as a private cost-sharing flight. The Tribunal rejected this explanation and concluded that there was no satisfactory evidence upon which one could conclude that the flight was a private operation as defined in the regulations. Rather the Tribunal concluded that all the circumstances of the payment pointed to a routine business transaction being undertaken.

The Tribunal stated that the legal basis for the Authority to cancel Mr Wall's Air Operator's Certificate did indeed exist. In addition the power to 'suspend or cancel' a specified authorisation contained in the air Operator's Certificate was given further impetus by subsection 28BA(3) of the Civil Aviation Act. However section 9A of the Act states that in exercising its powers and performing its functions the Authority must regard the safety of air navigation as the most important consideration.

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170 The letter confirmed the findings of the 'ramp check' carried out by an officer of the Authority on 5 January 1998. Basically these were that Mr Walls had breached Civil Aviation Regulation 175A, which places restrictions on IFR flights by single engine aircraft. One of those restrictions was that a single engine aircraft must not be flown under the IFR on charter operations involving the carriage of passengers for hire or reward.

171 Civil Aviation Regulations (Cth) 1988, regulation 2(7A).
This is not to say that safety is the only criterion to be observed. It is not appropriate for a power to suspend or cancel to be exercised by way of punishment. If it is exercised at all, the party whose rights are affected may see it as punishment. Nevertheless the principal motivator must be the preservation of safety of air navigation. In my view a decision to cancel the charter authorisation goes further than is necessary to preserve that safety.\textsuperscript{172}

The Authority chose to exercise the power it had to 'cancel' rather than use the less drastic power of 'suspension'. The Tribunal queried whether this was, in the circumstances the preferable decision?\textsuperscript{173} It drew attention to the fact that this appeared to be an isolated incident albeit a clear breach of the regulations that did not show by itself, evidence of a possible risk to air safety in the future. It acknowledged that Mr Wall had attempted to conceal by various means the breach, which would most probably have gone undetected save for the occurrence of a random check by the Authority.

The Tribunal concluded that the preferable decision should have been to suspend, not cancel the charter authorisation of Mr Wall's Air Operator's Certificate for a period of six months. The Tribunal varied the decision of the Authority under review by substituting for the cancellation a provision that the charter authorisation was to be suspended for six months from 24 August 1998.\textsuperscript{174} The firm actions of the regulator, as shown in the facts in this case, appear to be at variance with the compliant attitude displayed in other reported cases coming before the Tribunal during this period in the late 1990s. Mr Wall had apparently not crossed swords with the regulator at any other time, yet his treatment in relation to his first offence was somewhat 'hard'. The facts as outlined in the case, do not offer any explanation as to why the Authority took this approach on this particular occasion.

\textsuperscript{172} Ian Reginald Wall (Trading as South East Coast Air Services) and Civil Aviation Safety Authority [1998] AATA 783 (1 October 1998) paragraph 25.

\textsuperscript{173} Ibid.

\textsuperscript{174} The decision to cancel Mr Wall's charter authorisation was made on 24 August 1998 and the effect of it was not stayed under section 41 of the Administrative Appeals Tribunal Act. Thus the Tribunal reasoned that the six-month suspension should operate from that date.
Michael Russell Mark Broadbent and Civil Aviation Safety Authority (1999)\textsuperscript{175}

Michael Broadbent was seeking a review by the Tribunal of a decision by the Civil Aviation Safety Authority to cancel his commercial pilot's licence. The question involved in the decision was whether or not Dr Broadbent could be considered a fit and proper person to hold a pilot's licence. The hearing was protracted, taking in all 17 days to complete.

Some background explanations to the case under discussion are necessary to fully understand the position of the Civil Aviation Safety Authority was faced with in this matter. Dr Broadbent was a specialist general surgeon by profession and had previously come to the notice of the regulator on several occasions. At the time of the hearing he had also been a professional pilot for approximately 28 years. He had experience in the Royal New Zealand Air Force and at one time in his career had set out to undertake astronaut training. His history exhibited a deep involvement in medical and aviation matters, including aviation medicine and commercial flying operations within his own companies and businesses. He had extensive qualifications and experience in both defence and civil aircraft. He demonstrated to the Tribunal that he was an experienced pilot with that experience embracing propeller, jet and helicopter aircraft. However Dr Broadbent had come to the attention of the regulator and been involved in hearings before the Administrative Appeals Tribunal and Federal Court on previous occasions. In 1990 and 1991 what was later described as his, 'somewhat cavalier approach to the regulation of civil aviation' had been noted in past hearings.\textsuperscript{176} To be precise in Dr Broadbent's opinion that he was 'always right' and the Authority or Air Traffic Control alleging a breach of the regulations, was 'always wrong' was an ever-occurring theme in his defence, even when faced with strong evidence to the contrary.

In 1994 Dr Broadbent again came to the attention of the regulator when he was involved in an incident at Tindall Airbase in the Northern Territory. He

\textsuperscript{175} Michael Russell Mark Broadbent and Civil Aviation Safety Authority [1999] AATA 970 (20 December 1999). Heard in Brisbane before K L Beddoe, Senior Member.\textsuperscript{176} Ibid paragraph 9(h).
apparently landed on a runway, which had a displaced threshold sign that he ignored and was subsequently reported by the ground controller at the air base. At the conclusion of the same flight from Darwin to Coolangatta he again transgressed by committing the very serious error of entering controlled airspace without the appropriate clearance. There was no suggestion that there was any imminent danger from collision of aircraft or any other mishap because of the violation, however this was not the first time Dr Broadbent had violated controlled airspace. With this, as on a previous occasion, he attempted to lay the responsibility for the offence on someone else's shoulders. Dr Broadbent admitted that up to the time of the hearing he had been involved in four violations of controlled airspace, which occurred in June 1994, January 1995, March 1995 and December 1996. The Tribunal considered that with such a history the indication was that similar violations could indeed occur in the future.

The Tribunal found that on the balance of probabilities Dr Broadbent as the holder of a commercial pilot's licence was no longer a fit and proper person to have the responsibilities and exercise and perform the functions and duties of such a licence.

The cancellation and refusal to renew a pilot's licence can be viewed as a seriously punitive step by the regulator appearing at or at least near, in contrast to the previous case discussed, the top of the Ayres and Braithwaite' enforcement pyramid. However Dr Broadbent was not a 'first offender'. His previous breaches of the serious offence of violating controlled airspace and still retaining his licence, would tend to indicate that the Authority had shown considerable leniency in the past, but were not prepared to extend such leniency in the face of further breaches by someone who certainly should have known better. An example of the 'graduated response' in action until strict punitive action was eventually activated when it was obvious the 'softer' action was not bringing about the desired 'compliant' response.

177 Ibid paragraph 24.
178 Ayres, Ian, and Braithwaite, John, Responsive Regulation: Transcending the Deregulation Debate (1992). See pag 183 of this thesis for an interpretation of the 'enforcement pyramid' as it relates to aviation regulation.
Re Coral Sea Airlines Pty Ltd and Civil Aviation Safety Authority (1999)\textsuperscript{179}

The 1999 case of 'Re Coral Sea Airlines Pty Ltd and Civil Aviation Safety Authority', heard in the Administrative Appeals Tribunal is dealt with in some detail because it is submitted, it is a good example of the enforcement strategy of the Civil Aviation Safety Authority erring on the side of 'compliance' rather than 'deterrence' in its application of the rules it had a duty to administer.

On 7 December 1998 the Civil Aviation Safety Authority cancelled the Air Operators Certificate of Coral Sea Airlines Pty Ltd. This had the effect of grounding Coral Sea Airline's operations as a charter operator in and around the Torres Strait, in the north of Australia. The company commenced its aviation operations in August 1996, flying as a charter airline throughout the islands of the Torres Strait and mainland Australia.

On 21 October 1998 one of the aircraft operated by the company crashed into the sea on approach to Horn Island. It was carrying four passengers and fortunately there were no serious injuries, however investigation by the Bureau of Air Safety Investigations (BASI), found that the aircraft had run out of fuel and had an unserviceable fuel gauge that was covered with adhesive tape. Evidence given at the BASI investigation established that if the operations manual had been adhered to, the pilot would have been alerted that the aircraft was dangerously short of fuel at its last point of departure. The Civil Aviation Safety Authority then initiated a thorough surveillance of Coral Sea Airlines' operations.

On 30 October 1998 a delegate of the Civil Aviation Safety Authority suspended the company's Air Operators Certificate for a period of 28 days. This suspension was to take effect in five days time. It was based on inadequacies and breaches of the regulations found as a result of the surveillance operation.

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\textsuperscript{179} Re Coral Sea Airlines Pty Ltd and Civil Aviation Safety Authority [1999] AATA 329 (17 March 1999). Heard in Brisbane before Deputy President Dr Gerber.
On 3 November 1998 the company applied to the Administrative Appeals Tribunal requesting a stay of this suspension pending a hearing of an application to review the suspension order. The Tribunal granted the stay on 4 November 1998, and the hearing was set down for 26 and 27 November 1998. However on 25 November the Authority took further action notifying the company of its proposal to now cancel its Air Operators Certificate. The notification to the company gave it seven days to show cause why its Air Operators Certificate should not be cancelled. The notification also set out a lengthy history of alleged breaches of the Act and regulations. The Civil Aviation Authority became aware of a serious mechanical incident suffered by an aircraft operated by the company during the stay period granted on 4 November in relation to the order initially suspending the company's Air Operators Certificate. The show cause notice referred to this serious incident.

The company responded to the show cause notice on 30 November 1998 and dealt with each alleged breach of the Act and regulations. The delegate of the Authority then issued a notice of cancellation of the company's Air Operators Certificate on 7 December 1998. It was this decision that was the subject of the review. In dealing with the company's response to the show cause notice the delegate of the Authority concluded that:

I am not satisfied that the operations conducted under your AOC can be conducted in safety. I am satisfied that there are systemic problems which cannot be remedied by an isolated remedial action such as replacing the current Chief Pilot, Anthony Ardilino with William R Shoobridge.  

The company's Air Operators Certificate was then cancelled as from 7 December 1998. The company lodged two further stay applications both of which were refused by the Administrative Appeals Tribunal.

The list of alleged breaches for which non-compliance notices were issued was considerable. The breaches were broken up into manageable groups.

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180 Ibid, paragraph 7
having identifiable headings for presentation to the Tribunal. The severity of the breaches ranged from technical breaches, to the more serious breach of operating an aircraft without a valid maintenance release. They also included breaches relating to the crash of the aircraft that ran out of fuel on 21 October 1998, failure to record details on maintenance releases, overloading of aircraft, the experience and competency of pilots and unauthorised Regular Public Transport flights. The Authority criticised the management structure of the company. It drew attention to the 'incident' involving a 'major defect' in one of the company's aircraft that was not reported to the Authority, as it should have been. This incident on 23 November 1998, involved a mechanical problem that occurred whilst the stay of the suspension period granted by the Administrative Appeals Tribunal was in force.

Extensive evidence was received from Mr Mostafa, the managing director of the company and Mr Gill, the chief engineer for Aircraft Technicians Australia, who was involved in the maintenance of the company's aircraft when they first began to operate. Mr Gill claimed that he witnessed the 'overnight' expansion of the operation of Coral Sea Airlines after it took over the operations and infrastructure of the demised charter business Wingz North. His opinion was sought by the Tribunal on each of the defects found in the company's aircraft that had come to the notice of the Authority.\textsuperscript{181} The list was very extensive and Mr Gill's evidence detailed and long.

One past and one possible future chief pilot gave evidence, together with several relevant employees of the Authority who had been involved in the extensive investigation into the many alleged breaches of the maintenance regulations.\textsuperscript{182}

The evidence of Mr Earnest Dalgliesh, the District Airworthiness Manager responsible for airworthiness matters in far North Queensland indicated that Mr Dalgliesh had occasion to deal with Coral Sea Airlines well prior to the

\textsuperscript{181} Ibid, paragraphs, 92-111.
\textsuperscript{182} Ibid, paragraphs, 112-132
fuel starvation accident on 21 October 1998. He had first met the managing director Mr Mostafa, midway through 1996 before the company was granted an Air Operators Certificate. He found Mr Mostafa at this time to be cooperative and enthusiastic about compliance with the Authority's requirements during this initial interview. Mr Mostafa readily agreed to become the Certificate of Registration holder for all of the aircraft that the company would operate in the future.

However early enthusiasm did not translate into long term diligence, with Mr Mostafa being resident in Victoria and spending only part of his time at the company headquarters in North Queensland. Mr Dalgliesh said that Mr Mostafa failed in the undertaking he had given to him as his business expanded and he operated aircraft, which were not held by him as the Certificate of Registration holder. Furthermore the company had come to the notice of the regulator as early as 1 February 1997 when Non Compliance Notices had been issued against it.

Mr Barr, a flying operations inspector with the Cairns district office gave the date as 24 January 1997, when he first issued a Non Compliance Notice to the chief pilot of Coral Seas Airlines. The response given by the chief pilot was satisfactory and no further action was taken on this notice at this time. However Mr Barr's evidence then went on to list a long line of breaches of the regulations that formed the basis of Non Compliance Notices that were issued to Coral Seas Airlines under his authority. From all of his investigation into the operation of the airline Mr Barr concluded that the airline was heading in the wrong direction. He considered that the combination of regulatory breaches and insufficient record keeping illustrated that the business was

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183 Ibid, paragraphs 133-146.
184 Ibid, paragraph 137.
185 Ibid, paragraph 149.
186 Ibid, paragraph 152.
being conducted in an unsafe manner. Mr Dalgliesh similarly, expressed his concern in allowing Coral Seas Airlines to operate under its old Air Operators Certificate. If so he said, the Air Operators Certificate was reinstated then the regulator 'will continue to have a lack of control over the company with respect to its maintenance operations'. Further evidence was taken from a flying operations inspector Mr Farquharson, employed by the Civil Aviation Safety Authority's Cairns District Office. Much of his evidence concerned 'overweight departures' of Coral Sea Airlines aircraft; in fact there were 18 findings in a short space of time in mid 1998. At the conclusion of the hearing the Deputy President of the Administrative Appeals Tribunal, Dr P Gerber, had little doubt in refusing to reinstate Coral Sea Airline's Air Operators Certificate. He ended his long summing up with the statement that Coral Seas Airlines is 'yet to set in place a commitment to a culture in which public safety predominates over everything else'.

This case amply demonstrates a 'compliance' strategy of enforcement practiced by the Authority at this time. Employees of the Authority based in northern Queensland were well aware that this operator was not abiding by the regulations as he should, however it took a major incident, in the form of an aircraft belonging to the company running out of fuel and crashing into the sea before firm action was taken. It was simply good luck that there was no loss of life in the ditching accident, it could very easily have ended in a far more tragic way.

**Paggi (trading as Paggi's Aviation) and Civil Aviation Safety Authority (2000).**

In 2000 the case of Lino Paggi trading as Paggi's Aviation came before the Tribunal. It involved a review of the actions of the Authority who had cancelled the Air Operator's Certificate of this small operator. It also focused

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187 Ibid, paragraph 153.
188 Ibid, paragraph 139
189 Ibid, paragraph 163.
190 Ibid, paragraph 189.
191 Paggi (trading as Paggi's Aviation) and Civil Aviation Safety Authority [2000] AATA 348 (3 May 2000). Heard in Perth before Mr T E Barnett, Deputy President, and Mr A Argent, Member.
on the operator's non-compliance with a number of Airworthiness Directives, and flying aircraft without a valid Maintenance Release.\textsuperscript{192} It is of particular interest in the context of this thesis because of the approach the officers of the Authority took to 'enforcement procedure' and the comments from the Tribunal on their approach.

Paggi's Aviation was a small aviation company operating out of the relatively remote community of Carnarvon, in Western Australia. Paggi's Aviation had been in business since 1973 and operated four aircraft. Staff consisted of the owner of the company, Mr Lino Paggi, who had held a commercial pilot's licence for 32 years and one other pilot. The main issue under consideration was whether the Authority was justified in cancelling Mr Paggi's Air Operators Certificate on 26 January 2000, with the cancellation taking effect from 31 January 2000.

The Authority presented a very long list of evidence of breaches of the regulations stretching over a two-year period. In particular the Authority claimed that Mr Paggi had carried out maintenance on his aircraft that under the Civil Aviation Regulations he was unauthorised to undertake. Some of this maintenance, such as removing and refitting a propeller had been of a serious nature. There was also focus on Mr Paggi's non-compliance with a number of Airworthiness Directives and flying aircraft without a valid Maintenance Release.\textsuperscript{193}

CASA's investigation had been extensive. It carried out audits on all Paggi's Aviation aircraft documentation, physical inspections and enquiries, together with taking into consideration Mr Paggi's response to their Show Cause letter of 22 October 1999. A CASA investigator Mr McLaws, who gave evidence on CASA's behalf, said that he was aware of the Authority's Enforcement Manual and the term 'graduated enforcement' however it was not his

\textsuperscript{192} When a maintenance task is completed by an authorised person, that person signs a document stating that the maintenance has been performed in accordance with the applicable airworthiness requirements. This document is referred to as the maintenance release. See Civil Aviation Regulations 1988 (Cth) regs 43-50.

impression that education or any informal or formal counselling of Paggi's Aviation was intended.\textsuperscript{194} In the summing up of the evidence, the Tribunal noted that in this case CASA had not taken the steps of a graduated enforcement process as given in the current Compliance and Enforcement Manual. Instead the process had been:

The audit of the Senior Airworthiness Inspector of July 1999, the investigations of a CASA Investigator in September 1999, the Show-Cause notice of 22 October 1999, the applicant's response dated 3 November 1999 to the Show-Cause notice, an informal conference on 24 November 1999 and finally, the cancellation of the AOC on 26 January 2000.\textsuperscript{195}

The Tribunal found that the whole procedure adopted by Mr Paggi 'fails to measure up to the standard expected of a charter operator'.\textsuperscript{196} Some of the contraventions by Mr Paggi were considered serious breaches that compromised safety, especially those that related to the removal and replacement of the propeller, the removal and replacement of the undercarriage actuator, and the removal of the nose wheel assembly and the replacing of it incorrectly.\textsuperscript{197} The Tribunal went on to say that the frequent failure to comply with the Airworthiness Directives demonstrated an unacceptable disregard of the regulations. The fact that Mr Paggi appeared not to realise the seriousness of the breaches, nor to accept the need for compliance, was of considerable concern. The Tribunal rejected many of Mr Paggi's explanations regarding the breaches and did not accept the truthfulness of his evidence in matters of critical importance to air safety. His defence of the allegations consisted mostly of denying them, or accusing others of giving false evidence.\textsuperscript{198}

Counsel for Mr Paggi submitted that CASA had not followed its own policy of 'graduated response' and had offered no counselling or education to help Mr Paggi adapt his attitude and procedures to bring them into compliance with the

\textsuperscript{194} Ibid, paragraphs 24-26.
\textsuperscript{195} Ibid, paragraph 46.
\textsuperscript{196} Ibid, paragraph 61.
\textsuperscript{197} Ibid, paragraph 78.
\textsuperscript{198} Ibid, paragraph 80.
Act. The Tribunal agreed that this did seem to be so however it was apparent that CASA decided that the breaches alleged were so serious that it should proceed directly to a formal investigation and possible prosecution. It was open to CASA to try a more educational approach but in this case the early discovery that Mr Paggi had changed a propeller and carried out other significant illegal maintenance, persuaded it to take the more drastic response.

There was some evidence so the Tribunal found, that CASA had been reorganised in an attempt to tighten up and increase the effectiveness of its regulation of air safety. Having found that Mr Paggi committed breaches in the circumstances described, the Tribunal then considered whether or not cancellation of his Air Operators Certificate was the correct decision or should a period of suspension have been substituted instead. The Tribunal found that a period of suspension was not appropriate and confirmed that the cancellation of Mr Paggi's Air Operators Certificate should stand.199

This case is particularly interesting in the way the CASA officials tackled what were considerable breaches of the regulations. Although only one example and not a lot of weight can be put on just this one case, it does point to the preference for a 'deterrence' move along the spectrum of enforcement strategy. Interesting also that the decision of the Administrative Appeals Tribunal backed up the firm response of CASA to serious breaches of the regulations. This action occurred without any major 'incident' or 'accident' as has been displayed in previous cases where firm action to cancel an operator's Air Operators Certificate has occurred.

Mark Allen trading as Jackaroo Aviation and Civil Aviation Safety Authority (2000).200

Further evidence of a move towards the 'deterrence' end of the spectrum of enforcement strategy is found in the case of Mark Allen trading as Jackaroo Aviation and Civil Aviation Safety Authority in October 2000.

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199 Ibid, paragraph 83.
This case involved CASA’s decision not to renew the Air Operators Certificate for Jackaroo Aviation. The Tribunal heard the application to review this decision on 25 October 2000, by which time Jackaroo Aviation had been effectively ‘out of business’ since its previous Air operators Certificate expired on 29 September 2000.

Mr Allen commenced operating Jackaroo Aviation in August 1995. It had two operational bases, with four aircraft based at Mt Isa in Queensland and one at Cessnock in New South Wales. Mr Allan himself lived in Wahroonga in Sydney but he attended Cessnock every day whilst in Sydney and one half of his time was spent at Mt Isa. A ‘mature’ full time chief pilot supervised the running of the Mt Isa base subject to Mr Allan’s overall control.201

An unfortunate number of events and delays on CASA’s part regarding the sending of the relevant ‘Show Cause’ letter to Mr Allan had resulted in Mr Allan receiving the letter only the day prior to the expiry time given to him to reply. The ‘Show Cause’ letter itself set out a long list of mostly minor ‘paper work’ type breaches of the regulations with possibly the most serious being the fact that Mr Allen who was the person listed as the ‘Chief Pilot’ had allowed his multiengine command instrument rating to lapse.202

The Tribunal addressed each and every one of the listed breaches, which totaled 16 in all, and concluded that no real challenge had been brought against Mr Allen in relation to Jackaroo Aviation’s suitable procedures and practices. They found that some of the breaches were indeed proven, however they considered that evidence suggested that Mr Allen was well capable of complying with the regulatory provision in the future, ‘particularly those that relate to safety and competence of persons’.203

The Tribunal took into account that due to the management delays that occurred in CASA, Mr Allan had not been given adequate notice of the

201 Ibid, paragraph 37.
202 Ibid, paragraph 32. Mr. Allen renewed his multiengine instrument rating on 15 October 2000.
203 Ibid, paragraph 42.
matters that principally concerned the regulator and had not been given an opportunity to attend to them before the expiry of the notice not to renew his Air Operator's Certificate came into effect. The Tribunal therefore decided to set aside the decision of CASA and in its place remitted the matter back to CASA with a direction that an Air Operator's Certificate should be issued to Mr Allen for a period of six months. It was argued that by going down this avenue Mr Allen would have an opportunity to satisfy the regulator that adequate systems were in place, and other requirements cited in the 'Show Cause' notice were met before the renewal of the Air Operator's Certificate was again considered in six months time.

Leaving aside the administrative problems within CASA, which led to Mr Allen being denied adequate time to address the allegations of breaches listed in his 'Show Cause' notice, the evidence does seem to suggest that at the end of the year 2000, CASA was now leaning well towards the 'deterrence' end of the enforcement strategy spectrum.

**Ord Air Charter Pty Ltd v Civil Aviation Safety Authority (2000)**

This case involved an application by Ord Charter Pty Ltd to the Federal Court for a review of a decision made by the Civil Aviation Authority to refuse to issue Ord Air Charter with an Air Operator Certificate pursuant to s 28 of the Civil Aviation Act 1988. In addition to the substantive application, the Court also had before it a motion by the Civil Aviation Safety Authority pursuant to s 10(2)(b)(ii) of the Administrative Decisions (Judicial Review Act) 1977, that the Court refuse to grant the application. Both the motion and the application were heard together.

It is submitted that this case demonstrates a 'compliant' attitude on the part of the Authority towards quite a long history of non-compliance with the Civil Aviation Act and Regulations. Actual concrete instances of specific non-compliance are not given in the report. What is apparent however is that the

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Authority made repeated reference over a period of several years to the inability of Mrs Reid as managing director, to satisfactorily carry out regulatory compliance as required by the Authority.

The facts of the case were that Ord Air Charter commenced operations as a charter, regular public transport and flying training operation in 1971. The flying operations were carried out mainly in the remote east Kimberley region of Western Australia. Routes involved servicing a number of remote Aboriginal communities and pastoral stations. At the time of incorporation in 1971 the company's directors were Mr Peter Reid and his wife Maxine Reid. Mr Reid was killed in an accident in the mid 1980s and Mrs Reid took over running the company after her husband's death.

In the years since 1995, the Civil Aviation Safety Authority had reason to raise concerns with the company about non-compliance with the Civil Aviation Act and Regulations. However despite these concerns the Authority continued to re-issue an Air Operator Certificate to the company. The last such Air Operators Certificate was issued on 22 January 1999 with an expiry date of 31 January 2000. In January, May, June and July of 1999 the Authority conducted audits of the log books and maintenance records of two of Ord Air Charter's maintenance control manuals. As a result of these audits a 'show cause' letter was sent to the company's Maintenance Controller on 8 November 1999, asking why his approval as the Maintenance Controller should not be suspended or cancelled. That was replied to on 22 November. As it had done in previous years the company, on 15 December 1999, applied for the issue of another Air Operators Certificate. However on 17 December the Authority cancelled the approval of the company's Maintenance Controller with an explanatory letter of some sixteen pages in length giving detailed reasons for the cancellation.

The Authority's Area Manager sent a further 'show cause' letter to the company on 28 January 2000 giving notice of facts and circumstances, which in the opinion of the Area Manager should result in a refusal by the Authority to issue the Air Operator's Certificate sought. The letter was addressed to Mrs
Reid and gave twenty-eight days to give a response. It also invited Mrs Reid to participate in an informal conference. This invitation Mrs Reid accepted, and the conference took place on 31 January 2000. After this conference further correspondence occurred, including a letter from Mrs Reid expressing her intention to resign from the position of managing director of the company. This was a significant action as much of the non-compliant concerns the Authority had were considered to emanate from Mrs Reid's overbearing and controlling personality.205

Despite this action the Authority decided not to re-issue the requested Air Operators Certificate and advised the company of the decision on 23 March 2000. The company lodged an application to review this decision in the Administrative Appeals Tribunal on 31 March 2000 and also, on 11 April 2000 filed an application for an order of review of the decision in the Federal Court. Thus there were two sets of proceedings instituted by the company to review the same decision. Finally at the eleventh hour, just prior to the company's case proceeding before the Administrative Appeals Tribunal, Mrs Reid instructed her solicitor to abandon the case before the Tribunal and proceed with the action on foot in the Federal Court.

Turning to the legal issues involved before the Court, four grounds for review were identified, with a substantial overlap occurring between the grounds. They were:

205 Ibid paragraph 36. Mr Stewart McAlister, the Authority's Acting General Manager, General Aviation Operations Branch, Compliance Division described Mrs Reid's personality and how it impinged on the day-to-day activity of the company in the following terms in his letter of 23 March 2000:

Over many years CASA has witnessed the strength of Mrs Reid's personality affecting several of the company's chief pilots. Indeed, because of her assertive character, her former, long-standing role within Ord Air, and also her relationship with you (she is your mother-in-law) I believe that under these circumstances it is highly likely she would influence you, or would be able to influence you, in the course of your duties. For the same reasons, I also think it is highly likely that she would influence, or would be able to influence, both the only other director of the company who is her father and the secretary of the company who is her son. Furthermore, I believe it is highly likely that she would influence, or would be able to influence, the shareholders of the company, all of whom are directly related to her.

Mrs Reid has been assessed by CASA as being primarily responsible for the former, long-standing compliance problems of Ord Air. Therefore, any potential she may now have to influence the directors, the secretary and the shareholders of Ord Air is, in my opinion, sufficient grounds to prevent CASA from being satisfied that Ord Air is capable of complying with the Act, the regulations and the Civil Aviation Orders.
1. Natural Justice.\textsuperscript{206}

It was contended that a breach of the rules of natural justice occurred in connection with the making of the decision. There were three sub-grounds of this ground, namely:

i) The decision was made by reference to a pre-determined rule or policy to reduce the total number of Air Operators Certificates, which were to be issued or to eliminate 'marginal operators' from the civil aviation industry.

ii) The decision was made without giving real or proper consideration to 'the merits of the reasons' described in the decision.

iii) Failure to give the company a fair opportunity to consider and to answer the Authority's concerns about the perceived influence of Mrs Reid and the inferred effect of that influence upon Ord Air Chief Pilots and other holders of operational positions.

In relation to these grounds the Court found that a review of the evidence did not support the existence of a 'policy' as had been asserted, or that the decision made by the Authority was for any improper purpose. In contrast the Court thought that the evidence showed a history of concerns on the Authority's part, with the company's non-compliance with the requirements of the civil aviation legislation. The evidence also showed that the Authority was, at each of the important stages of the decision-making process, prepared to grant the Air Operators Certificate providing that it was satisfied that the company was capable of complying with the relevant legislation.\textsuperscript{207}

2. Improper Exercise of Power, in particular the taking into account matters, which were said to be irrelevant.\textsuperscript{208}

Such matters were:

- the family relationship between the directors, secretary and shareholders of the company and Mrs Reid;
- the identity of the shareholders of the company;
- the 'assertive nature' of Mrs Reid;
- alleged compliance problems occurring in 1995;

\textsuperscript{206} Ibid Paragraphs 23.
\textsuperscript{207} Ibid paragraph 32.
\textsuperscript{208} Ibid paragraph 54.
• alleged compliance problems not relating to safety or the competence of persons ' to do anything that would be covered by the AOC'. \textsuperscript{209}

The Court found that the Authority did take these matters into account and that they were not 'irrelevant considerations'. It was clear from the evidence that Mrs Reid had been the Managing Director of the company for many years and during this time the Authority had raised with her on many occasions its concerns about the company's failure to comply with the legislation. That included events, which led up to the cancellation of the approval of the company's Maintenance Controller, and the failure to comply with the statutory requirements concerning aircraft maintenance, both matters relating to safety.

3. Error of Law.
This was identified as being the application of what was said to be a predetermined policy. \textsuperscript{210}

4. No Evidence. \textsuperscript{211}
It was contended on behalf of the company that there was no evidence of Mrs Reid's assertive nature, or that her 'assertive nature' had influenced the management of the company or had affected several of the company's Chief Pilots. In rebuttal, the Authority presented concrete evidence of Mrs Reid's unacceptable influence over the Chief Pilot's area of control in the company.
The first was a letter from a Mr Peter Callil dated 30 April 1998. At the time he was employed as Ord Air Charter's Chief Pilot. It said:

\begin{quote}
During my time here I have consistently been undermined by Maxine in my attempts to assert some form of control over the pilots or engineers, even the apprentices, in an effort to establish a workable level of discipline. This was necessary since I was finding it difficult to command the level of respect worthy of a Chief Pilot. \textsuperscript{212}
\end{quote}

\textsuperscript{209} Ibid.
\textsuperscript{210} Ibid paragraph 83. This ground was dealt with in the discussion on natural justice.
\textsuperscript{211} Ibid paragraph 84.
\textsuperscript{212} Ibid paragraph 40.
The second piece of evidence came from a telephone interview the Authority conducted with Mr Christopher Gallivan on 4 August 1998. Mr Gallivan had taken over from Mr Callil as Chief Pilot of the company. This evidence was from an investigator at the Adelaide district office of the Authority and said:

Gallivan stated his authority as chief pilot was constantly undermined by the Director Ms Reid who rejected any suggestions of improvement. He sighted (sic) the following as examples of interference by the Company Director and the general conditions and attitudes within the company: 213

The Court decided that over the years there was sufficient evidence in administrative law terms, that the Authority had witnessed the strength of Mrs Reid's personality affecting several of the company's Chief Pilots. Despite the changed arrangements with Mrs Reid resigning from her formal positions in the company there was according to the Authority and agreed by the Court sufficient evidence to show that she was in fact still playing a significant role in the operations of the company. The Authority had given the company ample opportunity to address those concerns.

From the standpoint of this thesis it is submitted that the actions of the Authority in this case displayed a long standing 'compliant' attitude to the transgressions of Ord Air Charter Pty Ltd. Eventually with no real change in the operation of the company the Authority lost patience and weighing up the safety aspects of the whole picture decided, that without significant change occurring in the company it had no other option than to end its former 'compliant' approach and refuse to renew the company's Air Operator Certificate.

**Sydney Harbour Seaplanes Pty Ltd and Civil Aviation Authority (2001).** 214

The case of Sydney Harbour Seaplanes Pty Ltd and Civil Aviation Authority, heard 8 February 2001 would tend to support a 'firmer' deterrent approach to

213 Ibid paragraph 41.
enforcement than the above case 'Ord Air Charter’ illustrates. It involved the
Tribunal's review of a decision by CASA, on the advice of one of its
delegates, to refuse to renew the Air Operator's Certificate of Sydney Harbour
Seaplanes, as of 31 October 2000.

The company was established in 1993 and since that date Mr Robert Britten
had held the positions as its Chief Pilot and general manager, in addition to
being a director of the company. The company's aircraft consisted of four De
Havilland Beaver floatplanes each capable of taking seven passengers. They
operated as a regular public transport and charter service between Rose Bay in
Sydney Harbour and Newcastle Harbour, and between Rose Bay and the
Anchorage Resort on Corlette at Port Stephens north of Newcastle.

The regular public transport services involved four return trips per day to and
from Newcastle and one return flight per day to and from Corlette, Monday to
Friday inclusive. In addition to these services Sydney Harbour Seaplanes
conducted charter services involving 200 to 300 passengers per week. From
these activities the average daily monetary returns was given at between
$4000 to $6000, and the company employed 15 full-time staff.

CASA issued two 'Show Cause' notices to the company, which contained
allege deficiencies in its operations. These were discovered by CASA as a
result of periodic audits and scheduled and unscheduled surveillance
conducted over a period between July 1998 and October 2000. Many of the
deficiencies referred to were the subject of aircraft survey reports and non-
compliance notices issued by CASA officials at various times over that
period. Not all of these deficiencies produced serious safety implications,
however the Tribunal considered that taken overall they did show some
recurring and disturbing themes.

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215 Ibid, paragraph 10. The first of the 'Show Cause' notices was issued on either 31 March
1999 or 31 May 1999. There was some uncertainty about the precise date. The second 'Show
Cause' notice had a direct relationship to the first notice and was issued by CASA
immediately prior to the cancellation of the Air Operator's Certificate on 31 October 2000.
The most serious breaches concerned breaches of flight rules or incidents. They were mostly those affecting safety and concerning pilots employed by the company. These included low flying in January 1999; jumping from the wingtip of an aircraft in February 1999; colliding with a yacht on take-off on 24 August 2000; and making a heavy landing on 23 September 2000. The last two incidents were considered the most serious and they had occurred during charter operations. No injuries resulted from either incident but on the latter occasion the pilot was dismissed. The Tribunal concluded that the nature of these incidents suggested that Sydney Harbour Seaplanes pilots were either not trained, or not adequately trained, in regard to the safe operation of the aircraft they were called on to fly. The company's chief pilot, Mr Britten, was the person directly responsible for pilot proficiency training. He acknowledged that he had taken a number of actions designed to remedy the situation following each of the noted incidents involving his pilots. These actions included counselling, dismissal and further training in various flight and related procedures. Nevertheless, incidents of increasing gravity continued to occur.

The Tribunal in assessing Mr Britten in his capacity as Chief Pilot, considered that his handling of various matters relating to the 'safety' aspect of his operation as giving 'rise to serious doubts about his capacity and judgment'.\footnote{Ibid, paragraph 95.} They also formed the opinion that Mr Britten was a person who was prepared to take short cuts where necessary to get around the regulations applicable to Sydney Harbour Seaplanes operations. They gained the impression that Mr Britten's organization was not an organization with a firmly entrenched safety culture, which was in turn communicated to all of the personnel involved in both the maintenance and flight areas of the company. Rather the impression gained was one of an organization responding as best it could after the event, to various problems and crises of increasing magnitude. The Tribunal affirmed the decision of CASA not to renew the company's Air Operator's Certificate because the organization 'has not demonstrated that it has suitable procedures
and practices in place to control its operations and ensure that they can be conducted in safety.\textsuperscript{217}

This action by CASA and the subsequent upholding of their action by the Tribunal, do indicate a firmer stance by the regulator than had previously been demonstrated in the mid 1990s. A stance that could perhaps be said to veer more towards exhibiting a shift towards the 'deterrence' end of the enforcement strategy spectrum, than was seen to exhibited at the time of the Monarch and Seaview disasters in the previous decade.

6.3.5 Concluding thoughts on the period

The period immediately after the establishment of the new statutory body the Civil Aviation Safety Authority appears as a time of considerable turbulence and uncertainty for the regulator, especially in relation to its enforcement strategy. Although the official policy seemed to be one of a typical 'Ayres and Braithwaite' graduated response,\textsuperscript{218} the cases tend to reveal a swing between a definite deterrent approach and an equally definite compliant approach throughout this time. Consistency in enforcement practice, on a national level, is not present.\textsuperscript{219} The main inquiry studied, that of ARCAS Airways in 2000, is quite critical of what it sees as a compliant approach. Yet there is the example of the Administrative Appeals Tribunal in Paggi's Aviation commenting that the Authority had been seemingly reorganised in an attempt to 'tighten up', and increase the effectiveness of its regulation of air safety.\textsuperscript{220} In other words the approval of the Tribunal for a tighter more deterrent approach. The anecdotal evidence of the aviation journalist Paul Phelan points directly towards the emergence of a more deterrent approach following the reports on the Monarch and Seaview air crashes, but this evidence to a certain extent is an variance with the facts as they are minutely examined by the Administrative Appeals Tribunal in the reported cases of the time. It is difficult to pinpoint why such differences in the approach of the Authority to

\begin{footnotesize}
\begin{itemize}
\item[217] Ibid, paragraph 98.
\item[218] Ian Ayres and John Braithwaite, Responsive Regulation: Transcending the Deregulation Debate (1992).
\item[219] See page 346 of the thesis, - a perception of inconsistency in the enforcement policy.
\end{itemize}
\end{footnotesize}
its decision making exists. Possibly the variance is simply an illustration of uncertainty in a whole range of areas, that can be seen in an industry regulator reeling from sever criticism of its modus operandi in the first few years following deregulation.

6.4 Section 3: Inquiries and Reviews 2003 - 2008

This final section deals with a period of considerable change, leading to some relative stability in the Civil Aviation Safety Authority at the commencement of the twenty-first century.

The 'Senate Inquiry into the Administration of the Civil Aviation Safety Authority (CASA) and Related Matters' gives a good insight into the enforcement strategy favoured and pursued by the aviation regulator in 2008. The period from 2003 to 2008 witnessed some constancy at the top of the administration, with the CEO Mr Bruce Byron, serving out his full five years in this historically difficult position. During this time he oversaw the restructuring of CASA’s enforcement policy with a number of new innovative features. His term in office was marred by one major accident, that of the crash of a Metroliner at Lockhart River in May 2005, with the loss of 15 lives.

6.4.1 The 'Swing of the Pendulum' and the Senate Inquiry in 2008.

The 2008 Senate Inquiry into the Civil Aviation Safety Authority and related matters raised concerns about whether CASA was 'too close' to the industry it was supposed to regulate. It follows that a suggestion that it was 'too close' translated into the perception that 'it was not overseeing the safety regulations as it should'.

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221 Commonwealth of Australia, Senate Standing Committee on Rural and Regional Affairs and Transport, Administration of the Civil Aviation Safety Authority (CASA) and related matters, (September 2008).
222 See chapter 4, page 118 of this thesis.
223 See page 137 of this thesis for a description of the Lockhart River crash.
224 Commonwealth of Australia, Senate Standing Committee on Rural and Regional Affairs and Transport, Administration of the Civil Aviation Safety Authority (CASA) and related matters, (September 2008) 35-37.
The decision of CASA to operate as a 'partner' with the aviation industry and allow airlines more latitude in overseeing their own safety issues was highlighted by some in the submissions to the Inquiry, as a worrying trend. Of particular interest in the context of this thesis, is the fact that the report singled out the evidence of former CASA legal counsel, Mr Peter Ilyk. In particular it noted his references to shortcomings evident in the Authority in ignoring the lessons of findings of previous probes into the regulator, such as the Monarch Airlines, Seaview Air and ARCAS Airways inquiries. In his submission to the Inquiry Mr Ilyk had a great deal to say regarding the enforcement strategy of CASA in 2008.\textsuperscript{225} Specifically he concentrated on the issue of 'capture' and the dangers he foretold for the Authority in relation to its current policies of becoming 'partners' with the aviation industry.

Mr Ilyk claimed that since 2003 there had been a dismantling of CASA's traditional regulatory role. This was based on the premise that CASA needed to be seen to be working in concert with industry and be a valued partner of industry.

Prior to the Monarch and Seaview accidents the industry had complained that the regulator was 'too harsh, did not work in partnership with industry' and failed to provide customer service. The coroner's investigations of the Monarch and Seaview accidents took the opposite view. Both found that the regulator was too lenient and had gone too far towards a 'customer' relationship with industry'.\textsuperscript{226}

Not everyone was in agreement with the findings of the Monarch and Seaview Inquiries. The Aircraft Owners and Pilot's Association journal in 2001 headed a very critical article relating to the enforcement policy of the Authority at that time titled 'Little Tin Gods Run Rampant'. Mr Ilyk quoted from it in his submission saying:

\textsuperscript{225} See page 150 of this thesis for an account of Mr Peter Ilyk's credentials.
Mr Ilyk also drew attention to the fact that the Senate Inquiry into ARCAS Airways had similarly endorsed the findings of the Monarch and Seaview inquiries.

Mr Ilyk expressed great concern that CASA seemed in 2008, to have forgotten the lessons of the past. This was because he perceived emerging again, the concept of 'industry partnership' as being a dominant feature of the regulator. He considered this approach to be at variance with CASA's role, which should be that of regulating safety. He made reference to regulations being 'ridiculed' as being unsophisticated and crude and drew attention to the emotive terminology now used in a derogatory sense, such as CASA not now being a 'nanny regulator'. In this sense he was quoting Bruce Byron in October 2006 saying 'CASA must no longer be seen or act as a 'nanny-regulator'.

He made the point that CASA should not be accountable to the industry it is meant to regulate. Legislatively the Civil Aviation Act 1988 does not require CASA to be a partner with the industry. CASA was not created to promote the aviation industry; rather it was created to oversee aviation safety by discharging its regulatory function in the public interest.

Mr Ilyk backed up his concerns with credible evidence. He referred in the first instance to the CASA Board's response to the Senate findings in the ARCAS Airways inquiry in 2000. The Board made it clear, in support of the

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227 Commonwealth of Australia, Senate Standing Committee on Rural and Regional Affairs and Transport, Administration of the Civil Aviation Safety Authority (CASA) and related matters, (September 2008) 11. Peter Ilyk, Submission number 31. 228 Ibid 17.
recommendations made by the Senate Committee that it made an absolute priority the job of taking strong action against operators who deliberately breached regulations and in doing so jeopardised safety.\textsuperscript{229}

With the coming of Mr Byron into the role of Chief Executive Officer in 2003 and the implementation of his particular philosophy of the regulator being in partnership with industry, came what Mr Ilyk considered the very likely practice of the regulator being 'captured' by industry as it had been in the past. He considered that the new 'partnership policy' heavily promoted by Mr Byron flew in the face of regulatory theory and philosophy. He quoted a series of statements by Mr Byron, which he had taken from CASA's own publications and media statements.\textsuperscript{230} He said these revealed the extent of the regulatory capture that had already occurred under the current arrangements.

\textsuperscript{229} Report of the Senate Rural and Regional Affairs and Transport Legislation Committee, Administration of the Civil Aviation Safety Authority Matters Related to ARCAS Airways (October 2000) xiii.

\textsuperscript{230} Senate Standing Committee on Rural and Regional Affairs and Transport, Commonwealth of Australia, Administration of the Civil Aviation Safety Authority (CASA) and related matters, (September 2008). Mr Peter Ilyk, submission number 31.

Bruce Byron - 2005 … “the modern aviation industry does not need a heavy-handed and prescriptive regulator…”

Bruce Byron - 25 October 2005 … the most effective means of achieving a positive safety outcome involves the development of a more co-operative working relationship between the regulator and the safety-focused members of the aviation industry... In some senses the relationship is a ‘partnership’, with both parties, the regulator and the industry, having a common safety goal, and in a position of mutual dependence in the achievement of that goal. It only becomes a real partnership if the regulator and the industry can work together in an atmosphere of professionalism and mutual respect, and not as protagonists.

Bruce Byron - 2005 … Rather than seeking to catch people breaking the rules, we would rather they remedy their operations, if necessary, before we get to them. They have a safer operation, we have a simpler audit, and prosecution is minimised.

Bruce Byron – October 2006 … “CASA must no longer be seen or act as a ‘nanny-regulator’”

Bruce Byron 2006 … Yet in the past there has been a mindset, both within CASA and some people in the industry, that safety was primarily the concern of the regulator and the regulations. For some years safety and operational professionals have recognised that this mind set is flawed and naïve… Never the less, many people are still focusing on compliance with the regulations ...

In short, CASA will not be knocking on your door armed with the regulations and a plan to dig around until breaches are found. If shortcomings in your safety systems are found, CASA will help you to improve through safety education and support, although you will have to do the hard work to reach acceptable standards ... However, the watchdog will be taking a far more sophisticated approach to achieving safety outcomes: one that will reduce unnecessary burdens on the aviation industry, while working towards an even better air safety record in Australia.

Bruce Byron - November 2006 … an unsettling trend in some quarters is for a purely punitive approach following an aircraft accident...

Bruce Byron -31 January 2007 … the watchdog will be taking a far more sophisticated approach to achieving safety outcomes: one that will reduce unnecessary burdens on the aviation industry, while working towards an even better air safety record in Australia.

Bruce Byron -November 2007 … that is the regulator's task, to encourage industry to take that role rather than focus purely on regulatory compliance - is something that has really been dear to my heart for some time.
In further support of his statements Mr Ilyk enunciated the particular characteristics that he believed a captured organization exhibits. He gave examples of how CASA had fallen again into the trap of being 'captured' by the industry, with particular reference to the policy of linking the regulator to being a 'partner' with industry. Quoting a speech from Mr Byron saying:

One of my highest priorities is to work towards establishing the best possible professional working relationship between CASA and the aviation industry and also between myself personally and industry players.

Each month I meet with about ten aviation organizations or individuals to listen to a range of perspectives relating to CASA and its functions. There is an open invitation for you to participate in that process.  

At the same time Mr Ilyk claimed Mr Byron assiduously avoided speaking with his own officers and avoided visits to CASA staff. Quoting from a former senior manager in relation to changes within the Authority he said:

...Staff usually got word about the substance of them (that is any that had substance) from the industry first. Byron was rarely seen by staff and he would avoid the field offices and spend most of his time with industry. It was my job to pass on communications to Regional staff about changes as they unfolded. This was an uneasy thing for me to do because I was getting printed briefing notes to talk to without any briefing myself.

The communications/briefings appeared to me to be spin doctoring without any substance or any plan.

Amongst other examples of 'capture' Mr Ilyk highlighted, was the fact that the 'captured organization' invariably ran public relations articles claiming a course of continuous improvement. CASA continually provides justifications for its new 'partnership policy'.

All in all Mr Ilyk's arguments that CASA has forgotten the lessons from all the coronial and parliamentary enquiries into aviation safety in the past may

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231 Ibid 23.
232 Ibid 22.
233 Ibid. See Appendix 3 page 47.
indeed be true. Or perhaps we are just witnessing the regulatory cycle of enforcement strategy pendulum swing, so well documented in regulatory literature and it is simply too early in the deregulated environment to make such assumptions. On the other hand a definite 'swing' permeating over the whole Authority may not in reality be present. So far the cases prior to 2003 have failed to show such a swing with any certainty.

6.4.2 CASA's Current Enforcement Policy

Regardless of Mr Ilyk's arguments outlined above, CASA's current enforcement policy in theory at least is, it is suggested, an attempt to put into action what regulatory theorists would label 'responsive regulation'. This approach enables officers in the field to vary their stance on non-compliance as they deal with different issues. In some areas a rigorous enforcement approach may be called for, whilst in other areas better outcomes may be achieved by treading more softly.

In addition the current enforcement policy, incorporating the amendments made to the Civil Aviation Act 1988 in 2003, which came into effect on 21 February 2004, claims to present a better balanced set of enforcement tools available to CASA officers, while at the same time providing greater procedural fairness in relation to their decisions. The new policy and legislative enforcement tools given to the Authority were said to be consistent with a risk-based approach to safety management.²³⁴

²³⁴ See page 118 of this thesis for a detailed description of CASA's current enforcement policy.

In introducing the bill into Parliament in 2003 the then Minister for transport and Regional services, John Anderson, described it in these terms:

The Bill also introduces new enforcement measures, which will provide CASA with a wider range of enforcement tools to better match the regulatory action to the seriousness of the breach. These measures will help to ensure that justice is not only done but seen to be done by providing a range of options for CASA to vary, suspend or cancel aviation authorisations such as licences and Air Operators Certificates. This is consistent with a risk-based approach to safety management.

The new enforcement measures do not in any way dilute CASA's powers to act when there is a serious and imminent risk that could jeopardise safety. It is important that CASA has sufficient power to act quickly in such cases, and the community would expect nothing less. I am confident that these new enforcement measures will strike the appropriate balance … between enhancing natural justice and maintaining CASA's powers to take action on safety breaches.

I am genuinely delighted today to be able to introduce this series of bold measure which will retain CASA as a robust, independent safety regulator, build on the strengths that it has established but at the same time ensure increased fairness for the aviation industry and build a greater degree of trust and confidence between industry and the regulator.
The 'graduated sanctions' approach, or 'graduated responses' to non-compliance used by the Authority in the past and equally inbuilt in the 'new' enforcement policy present extraordinarily complicated organizational questions. To gain the benefits of regulatory responsiveness the Authority needs a system for examining different situations, thinking about the range of possible responses, selecting one of these responses and implementing it. Whilst doing this it must all the time, have staff fully aware of the decisions made and the consequences for their actions. This reverts back to the central question of how the Authority should structure its uses of discretion. The more tools and tactics the Authority learns to use, the more complicated this question becomes. Take for example the case of the Authority's inspector Mr Hoy, and his method of dealing with breaches of regulations in regard to a particular maintenance facility that is described on page eighty-two of this thesis. Mr Hoy's interpretation of the appropriate graduated response to the situation was somewhat different to that of his superior. What was then demonstrated was a very confused Mr Hoy thinking he was exercising his discretion in the correct manner, only to be reprimanded by his superiors and later vindicated by the Parliamentary inquiry that followed. This example, together with the example given in the Seaview Inquiry,235 (again involving the same officer, Bob Hoy), serve to highlight where whole 'customer orientated' enforcement procedure seems to come off the rails.

It is all very well for those formulating how the legislated enforcement guidelines should be put into action, but there seems to be little understanding of the merits and limitations of customer service when applied to regulatory and enforcement functions. In the aviation regulatory context the person the regulator most often encounters directly, is frequently not paying for the 'service', does not want the 'service' and will not necessarily be pleased by it. There is an inherent danger in the thought that the application of the 'customer service' concept in the regulatory sphere can have interpretations that may

result in emulating the private sector's treatment of customers, which will in
turn lead automatically to an improvement in the Authority's governance.

Regulators, according to one regulatory theorist, will not progress in this
sphere until they adopt a broader vocabulary, so that they can think not only in
terms of customers but also of stakeholder, citizens, objects or targets of
enforcement, beneficiaries, taxpayers, and society.\textsuperscript{236} There are certain aspects
of customer service practiced by business that a regulatory authority such as
CASA can indeed take on board. These are such things as timeliness,
technical competence courtesy and respect. Indeed CASA's current
enforcement policy does incorporate such ideals.\textsuperscript{237}

There is also the recognition that CASA should not permit any 'customer
orientation' to lead to exclusion or neglect of enforcement capacities. Frontline
officers such as Mr Hoy have in the past discovered that senior managers are
inclined to care more about 'conflict minimization' than 'mission
accomplished' and when this happens morale in the Authority plummets and
experienced investigators leave.\textsuperscript{238} Balancing and integrating customer service
with mission accomplished is one of the central challenges for CASA in the
present day 'deregulated and user-pay' environment. A danger in the past has
perhaps been to view the two components of this balancing act as one and the
same thing. Paying insufficient attention to customer satisfaction from
CASA's point of view, especially when it is speaking of the industry as a
'customer' and being in 'partnership' with it, may result in the regulator being

\textsuperscript{237} In the foreword to CASA's Enforcement Manual it is stated that CASA must use its powers
in a way that is, and is seen to be, fair, firm and consistent.
To be effective, CASA's enforcement procedures must be fair, reasonable and consistent, and
must be perceived as being fair by those subject to regulation. This does not and should not,
imply an unwillingness to apply the full force of statutory sanctions where warranted. It does
encompass the right of a person to objective, even-handed consideration of all the circumstances
surrounding any breach before action is taken. It also requires officers to make every effort to
understand a person's position and take it into account, as well as to let the person know of
CASA's position. There should not be a rigid adherence to precedent without due regard to
unusual circumstances.
Compliance and enforcement actions need to be applied as consistently as possible. However,
officers must consider each case individually in order to determine an appropriate compliance or
enforcement action. They should feel free to recommend actions that, in their professional
judgement, will appropriately serve the purposes of CASA's safety mandate.

CASA's enforcement manual is available at:
\textless www.casa.gov.au//rules/action/index.htm\textgreater
\textsuperscript{238} Ibid 64.
seen as heavy-handed, unresponsive and providing low-quality service. This is a message that is constantly reverberating through Australia's aviation safety regulator and one that it would appear the current CEO Mr Bruce Byron, has tried to solve.

It is perhaps fruitful at this point to refer to the latest Parliamentary inquiry, which was in part an assessment of Mr Byron's five years as head of the Authority and the effectiveness of administrative reforms that had been undertaken by CASA's management since 2003. In particular Mr Byron's approach in which he advised considering CASA in the role of a 'partner' with industry, such approach bringing as it has been stated above, strong criticism from CASA's former legal counsel Mr Peter Ilyk. Mr Byron's view in this area is perhaps best summed up in his own words as quoted in the Report:

> In the past there has been a mindset, both within CASA and some people in the industry, that safety was primarily the concern of the regulator and the regulations. For some years safety and operational professions have recognised that this mindset is flawed and naïve…

> This blinkered view grew up in the early days of aviation when the regulator did indeed hold-the-hand of industry whenever safety issues had to be addressed.  

The 2008 parliamentary committee noted that the concerns raised by some witnesses to the inquiry that CASA's 'partnership' approach is based on models in other jurisdictions that have been found to be flawed. They emphasised their concern, given Mr Byron's frequent reference to the concept of 'partnership with industry' in his staff communications and his numerous public statements. The committee concluded that it had no doubt that the United States FAA 'partnership' model had some considerable influence on Mr Byron's views on how he perceived CASA's role using a similar model.

In his response to criticisms, whilst giving evidence to the 2008 parliamentary committee Mr Byron defended strongly his stance in relation to seeing the role

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239 Senate Standing Committee on Rural and Regional Affairs and Transport, Commonwealth of Australia, Administration of the Civil Aviation Safety Authority (CASA) and related matters, (September 2008) 36.
240 Ibid 36.
of the regulator as a partner with industry. He was at pains to point out that his
definition of being an effective safety regulator involved not only being
efficient, but also having good relations with industry and being accountable.
He said this involved clarifying the roles of the safety regulator and the
industry in the way they delivered safety, to encourage industry to take
appropriate responsibility for safety outcomes. As part of this approach much
greater emphasis was placed on encouraging industry to develop safety
management systems that helped address the risks of their own operations, 'as
the aviation industry must take responsibility for day-to-day safety risks'.

Mr Byron took the opportunity whilst before the Senate to outline his
approach to managing future risks in the aviation industry. His approach in
some ways could be likened to 'risk management of risk management', known
in regulatory terms as 'meta risk management'. It also has elements of Neil
Gunningham's 'reflective regulation' claiming, as it does, to achieve broad
socially acceptable goals, with a much greater capacity to come to terms with
increasingly complex social arrangements than the traditional 'command and
control' method.

Mr Byron explained that in the current complex world of the aviation safety
regulator it became clear to him, after he had been at the organization about a
year, that structural changes in the manner in which the regulator went about
its job were definitely needed. He had to start to 'look over the horizon' at a
significantly changing industry and canvass that industry about what they
think the emerging risks will be in the future.

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241 Senate Standing Committee on Rural and Regional Affairs and Transport, Commonwealth
of Australia, Administration of the Civil Aviation Safety Authority (CASA) and related
matters, (September 2008) 55. Evidence given by Mr Bruce Byron.
242 John Braithwaite 'Meta Risk Management and Responsive Regulation for Tax System
Integrity' (2003) 25 (1) Journal of Law and Policy 2. See page 186 of this thesis for a more
detailed description of the theory.
243 Neil Gunningham, 'Regulatory Reform Beyond Command and Control' (Paper presented
on Earth System Governance: Theories and Strategies for Sustainability at the Amsterdam
244 Senate Standing Committee on Rural and Regional Affairs and Transport, Commonwealth
of Australia, Administration of the Civil Aviation Safety Authority (CASA) and related
matters, (September 2008) 85. Evidence given by Mr Bruce Byron.
Questioned about his usage of the term 'nanny-regulator', a term severely criticised by Mr Peter Ilyk, the former legal counsel to CASA, Mr Byron said that it was descriptive of a regulator who holds industry's hand and tells the industry it is regulating what they have to do every step or the way. 'With the aviation industry, the variables and risks in aviation are so great and so varied that a regulator could not keep up with all that'. Mr Byron believed that in an industry such as aviation, that has variables and risks so great then there is no other option but for the industry itself to manage its risks. He said he believed this notion is implicit in the Civil Aviation Act.

To illustrate the point that it is the operator who has the best insight into what risks there are present in the environment in which he is operating, Mr Byron gave the example of how the former CAA used to conduct surveillance on the airlines. This system required a CAA flight operations inspector to conduct surveillance on say a Qantas flight, by actually occupying a control seat as a pilot and flying as part of the operating crew. This was to ensure that the operation was being conducted in accordance with its manuals and to inspect every aspect of the flight. It was a perfect example of an 'inspectorate mentality' and an example of a 'nanny regulator'.

In contrast to the old CAA method of regulation, the new CASA regulator under Mr Byron's guidance was described as being a balanced regulator, in the sense that it had confidence in the industry to identify its risks and to have appropriate balances and checks in place to manage them. Furthermore the current CASA was deemed to be a regulator who expected that an aviation organization would go about conducting its business through 'procedure, process, structure, systems and organisational control'.

On the part of the regulator, this would be followed up by a sample of audits, a systems audit and also the occasional operational surveillance. This was to check that whatever the intent of the system was to produce, it was actually working. Getting that balance right was where Mr Byron stated that his new regime of regulation was going. This was despite the fact that he was still troubled by

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245 Ibid 87.
what he termed his difficulty in bringing about a 'change in culture' in the organization.

Certainly there have been a number of drivers for the changes that we have been effecting. But, underneath that, I have always been aware, as an industry person, that -- and when I took this job everybody came at me from all angles with this ---'You've got to change the culture in the organization' …

I used a number of directives in my first few months about changes that I wanted - things like risk-based auditing and that sort of stuff --- and I struck an enormous amount of resistance to some of those changes, I took a little while to get things moving.246

A transition does seem to be taking place under Mr Byron with the formatting of the regulations now veering away from their former prescriptive mode and becoming 'outcome' based.247 It was pointed out to the Inquiry that as part of the 'balancing act' required during this transition three key areas were being focussed upon. There were an aviation organization's competency, its systems and its capacity, with the latter area having a financial slant to it.248

Mr Byron made it very clear in his verbal statements to the Inquiry that he considered CASA, under his tutelage, was now moving from, as he put it 'a purely nanny type regulator' to one that is prepared to adapt in a bigger picture. He said:

We are never going to get rid of looking at compliance with the minimum regulatory requirements, but for some operators, if they are prepared to take a far more mature approach and develop a safety management system approach then, as part of our

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246 Senate Standing Committee on Rural and Regional Affairs and Transport, Commonwealth of Australia, Administration of the Civil Aviation Safety Authority (CASA) and related matters, (September 2008) 36. Evidence given by Mr Bruce Byron.
247 Ibid, Submission 37, from the Civil Aviation Safety Authority.
CASA has also introduced new guiding principles for regulatory development. The new regulations focus on safety risks and safety outcomes, and will be supported by acceptable means of compliance and guidance material. Outcome-based legislation specifies what safety outcome is to be achieved, rather than dictating how that outcome is to be achieved. While the preference is for outcome-based requirements, prescriptive regulations will still be adopted where prescription is necessary in the interests of safety.
248 Ibid, Submission 37, 6, from the Civil Aviation Safety Authority.
CASA is actively adopting a risk based approach to oversight surveillance and entry control, enabling CASA to target high areas of risk, and assess each surveillance and entry control process specifically for each operator rather than taking a ‘one size fits all’ approach.
oversight mix, in addition to checking compliance with the regulations we will also have a look at how effective their oversight program is, using a mix of both.  

At the time Mr Byron took over as CEO of CASA in 2003 the organization was in his opinion, an excessively prescriptive regulator and heavy handed in the wrong areas. He thinks that five years on, this situation has been corrected. CASA as a regulator is 'heavy handed' where necessary, but new consultative techniques put into place with the co-operation of industry have restored the 'balance' using a 'safety outcome' approach. This regulatory technique is used unless there is a clear, demonstrated, black-and-white need for prescription on a particular issue.

6.4.3 Reported Cases 2003 - 2008

Andrew Brazier and Civil Aviation Safety Authority (2004)

The facts and circumstances surrounding Andrew Brazier's case tend to show a somewhat determined application regarding the enforcement strategy utilized by CASA, during the early part of this decade. In this case we see the regulator leaning towards the deterrence end of the enforcement spectrum.

Mr Brazier was a licensed aircraft maintenance engineer. On 2 July 1999, he was granted a Certificate of Approval to commence an aircraft maintenance engineering business. This business traded as Andrews Aircraft Maintenance and was based at Cessnock in New South Wales. Two notices issued by CASA, both dated 5 May 2003 were involved in this case. The first notice advised Mr Brazier that CASA had cancelled his aircraft maintenance engineer's licence, and the second notice varied Mr Brazier's Certificate of Approval.

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249 Senate Standing Committee on Rural and Regional Affairs and Transport, Commonwealth of Australia, Administration of the Civil Aviation Safety Authority (CASA) and related matters, (September 2008) 89. Evidence given by Mr Bruce Byron.  
250 See footnote 247.  
251 Andrew Brazier and Civil Aviation Safety Authority [2004] AATA 313 (26 March 2004). Heard in Sydney before Mr E Fice, Member.  
252 Civil Aviation Regulations 1988 (Cth) reg 30.  
253 Civil Aviation Regulations 1988 (Cth) reg 269.
The following conditions were added to Mr Brazier's Certificate of Approval:

(a) That Mr Brazier not be appointed, or act as, chief engineer for Andrews Aircraft Maintenance; and

(b) That Mr Brazier not seek to influence Andrews Aircraft Maintenance chief engineer in technical matters relating to his performance of that function.

According to CASA the action was taken because Mr Brazier had consistently breached the regulations. These various breaches indicated to the regulator that Mr Brazier represented a 'culture of non-compliance' in relation to his work. As a result of this CASA considered he was not a fit and proper person to exercise the privileges of an aircraft maintenance engineer's licence.

The detection by CASA of a series of breaches pertaining to maintenance standards occurred over quite a short period of time. A CASA air safety auditor was involved as part of an assessment team considering the renewal of a chief pilot's licence in the same vicinity as Andrews Aircraft Maintenance in November 2002 and by chance observed maintenance irregularities in the maintenance organization run by Mr Brazier. As a result of these observations and more detailed investigations, 'show cause' notices were issued to Mr Brazier asking why his Certificate of Approval should not be varied, suspended or cancelled under regulation 269. He was given until 31

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254 Civil Aviation Regulations 1988 (Cth) regs 269, 30.
256 Ibid, paragraph 16.
257 Ibid, paragraph 17.

On Monday, 4 November 2002, Mr Arnold, in Mr Brazier’s presence, inspected the aircraft logbooks and work sheets relevant to maintenance conducted by AAM on VH-XMA. Mr Arnold noted a number of discrepancies in the certification of completion of various aspects of maintenance. He then removed the logbooks and work sheets in respect of VH-XMA, as well as the logbooks and work sheets relevant to aircraft VH-HJK, VH-OZM and VH-BYG. Inspection of those records also revealed a number of discrepancies. In fact, Mr Arnold was so concerned with the perceived multiple breaches of regulations in respect of the five aircraft records inspected that he was instrumental in causing CASA to issue notices pursuant to reg 269(3) ("show cause notice"). Notices under this sub-regulation are required to be given to permit the holder of a licence or Certificate of Approval to show cause in the time specified by CASA in the notice, why the licence or Certificate of Approval should not be varied, suspended or cancelled under reg 269.

257 Ibid, paragraph 17.
January to answer the notices. He responded in writing and in addition he attended a conference with CASA on 6 March 2003.

After considering all the evidence provided both in writing and in person by Mr Brazier, CASA made the decision that aircraft maintenance purportedly carried out and certified by Mr Brazier did not meet the minimum standards as set out under the regulations. However when CASA issued him with a further notice dated 5 May 2003 it was to advise him that his Certificate of Approval would now be varied, not cancelled. This was because Mr Brazier had taken steps to ensure that future maintenance activities would be conducted in a manner that would comply with the regulations, and also the fact that Mr Brazier's own aircraft maintenance engineer's licence had now been cancelled.

Factual evidence given in this case was long, very detailed and exhaustive. The Tribunal offered the opinion that perhaps more disturbing than the lack of attention to compliance with the regulations by Mr Brazier was the fact that he maintained, in the face of compelling evidence to the contrary, that he had done nothing wrong. Among the long list of non-compliance occurrences, both major and minor, the Tribunal found that there were five identified occasions on which improper maintenance was done on aircraft either by Mr Brazier himself, or by an employee of Mr Brazier's maintenance organization for whom he was ultimately responsible. All of these incidents gave rise to serious safety concerns. In addition there were a number of other breaches of a lesser nature, however when put together with the more serious breaches the Tribunal found that they disclosed a pattern of behaviour which amounted to a far more serious situation than merely systemic problems.258

Claiming systemic problems within the Andrews Aviation Maintenance organization had been the main thrust of Mr Brazier's argument in defence of his non-compliance with the regulations. The evidence demonstrated that this was not correct. The Tribunal had no doubt in coming to the conclusion that

258 Ibid, paragraph 199.
safety was compromised on a number of occasions by Mr Brazier's action and it was quite fortunate that no accident had occurred.

In its final summing up the Tribunal agreed with the actions taken comparatively swiftly by CASA, in particular the varying of the conditions attached to Mr Brazier's Certificate of Approval which had the effect of permitting him to participate in the maintenance organization, but only under the supervision of another fully qualified Chief Engineer. Such a compromise minimised the financial impact on Mr Brazier whilst at the same time ensuring that maintenance would be conducted to the standards set by the Regulations.

It would seem from the evidence in this case that once non-compliance was detected by CASA the regulator moved quite quickly to put its enforcement strategy into effect. CASA's actions were supported by the findings of the Tribunal. Mr Brazier had argued that cancellation of a licence or authority should only be taken where there were consistent and repetitive breaches of the regulations. The Tribunal rejected this submission and it went on to affirm as correct the actions of the regulator.

**Cape York Airlines Pty Ltd and Civil Aviation Safety Authority (2004)**

On 8 July 2004 the Tribunal heard the case of Cape York Airlines Pty Ltd and the Civil Aviation Safety Authority. This case involved a 'stay' of the decision made by the Civil Aviation Safety Authority, not to renew the chief pilot approval for Arthur Williams the chief pilot of a small airline company based in northern Queensland. On 30 June 2004 several weeks before his approval as chief pilot was due to expire, CASA cancelled the chief pilot's approval for Mr Williams, who was at the time the chief pilot of Cape York Airlines. CASA then gave Mr Williams a further extension of the Approval that was due to expire at midnight on 7 July 2004, advising at the same time that no further extensions would be given.

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Cape York Airlines could not carry on business without a chief pilot and it followed that the airline would be grounded if the decision in relation to Mr Williams were not stayed. That is, grounded at least until a replacement chief pilot acceptable to the regulator could be found.260

The facts of the case were that notice was given to Mr Williams by CASA of its intention to cancel his chief pilot's licence on 16 June 2004. The notice itself took up 29 pages and detailed a series of concerns about the conduct of the airline's operation whilst Mr Williams had been chief pilot.

The decision to cancel his approval was made by CASA after Mr Williams had been given 'show cause' notices on 19 December 2003 and 26 March 2004. From that date on, Mr Williams's status as chief pilot had been kept alive by a series of 'short term' approvals from CASA. The final extension of time allowed Mr Williams to remain as chief pilot during the period 30 June 2004 until 7 July 2004. CASA's delegate explained in his letter of 25 June 2004 to Mr Williams, that he had decided to 'extend the time of the effective date of cancellation of your Chief Pilot approval'.261 This wording caused some confusion for the Tribunal as what they did, was not extend an already existing approval, but issued a fresh approval … apparently the fourth approval issued to Mr Williams that year. The delegate concluded his letter saying:

I further advise you that CASA will not allow any further extension of time and Cape York Airlines will require an approved Chief Pilot in place for operations to continue beyond midnight 7 July 2004.262

It was therefore obvious that CASA would not entertain any further applications from Mr Williams and his days as chief pilot with the airline were over.

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260 Ibid, paragraph 2.
261 Ibid, paragraphs 7-8.
262 Ibid, paragraph 8. Decisions in relation to a chief pilot's approval are not subject to an automatic stay under s 31A of the Civil Aviation Act 1988.
In considering the evidence as set out in the 'show cause' notices the Tribunal was troubled by the sheer volume of CASA's concern. If the allegations were correct there must be, it stated, serious systemic problems that required urgent and vigorous action. However the Tribunal was given to understand by CASA that continued operations did not pose a risk to safety in the short term.

CASA's counsel pointed out a number of incidents that had occurred during the course of a year. These included a 'bogging' incident whereby one of Cape York Airline's aircraft became bogged and the replacement aircraft took off in questionable circumstances. There was a 'ditching' incident off Green Island in which an aircraft ended up in the water. There was another incident where one of the airline's aircraft 'strayed' into controlled airspace near Cairns.\textsuperscript{263} Furthermore the airline had operated for a time without a check pilot. As this airline conducted regular public transport operations this was considered to be quite a serious breach and indicative of a lax approach to the regulations.

Interestingly, although giving recognition to the regulator's concerns about safety, the Tribunal came down on the side of the chief pilot and granted a stay of 30 days to enable the airline to identify and recruit a suitable replacement as chief pilot.\textsuperscript{264} 'Prima facie' on the one hand the case reveals a questionable exercise of discretion on the part of the regulator to prosecute in the first place. On the other hand the incidents outlined in the evidence cannot realistically be termed minor incidents,\textsuperscript{265} and yet this is the interpretation seemingly put on them by the AAT who were very accommodating in granting the requested stay.

Therefore in this case it seems that the evidence of the 'show cause' notices on which CASA eventually decided not to renew the chief pilot's approval, coupled with the series of 'incidents' outlined to the Tribunal, does demonstrate an enforcement strategy tending towards a more lenient and thus compliant mode. The case came before the Tribunal again after the expiration

\textsuperscript{263} Ibid, paragraphs 36-37.
\textsuperscript{264} Ibid, paragraph 40.
\textsuperscript{265} Ibid. In particular the bogging incident, the ditching incident and straying into controlled airspace.
of the 30-day stay period, with Cape York airlines requesting an extension of
the stay. This was granted and CASA did not oppose the application, nor did it
express any fresh concerns about safety issues.  


This case is a further example of CASA favouring the 'deterrence' end of the
enforcement spectrum, as exhibited in dealing with a series of breaches of the
regulations committed by a commercial pilot, Darren Cole, flying for a small
charter operation he owned and controlled in Western Australia.

Although the Tribunal heard the case in October 2004, the decisions for which
a review was requested actually occurred much earlier, in May and June of
1999 and June and July of 2000. No explanation was given in the case as to
the reasons for the long time gap before Mr Cole sought a review of CASA's
various decisions.

The Tribunal affirmed CASA's decision to:

i) Cancel Mr Cole's Commercial Pilot Licence as of 27 June 2000.

ii) Refuse as of 21 July 2000, to reissue an Air Operators Certificate to Mr
Cole (trading as 'Kookaburra Air').

iii) Cancel the approval of Kookaburra Air's appointment of Mr Cole as its
Chief Pilot, as of 31 July 2000.

There were five relevant matters that had come to CASA's attention over a
twelve-month period commencing in May 1999 and stretching into July 2000.

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266 Cape York Airlines and Anor and Civil Aviation Safety Authority [2004] AATA 832 (6
August 2004).
267 Darrel Mowbray Cole and Civil Aviation Safety Authority [2004] AATA 1092 (18 October
2004). Heard in Perth before Associate Professor S D Hotop, Deputy President, and Mr E
Fice, Member.
Each of these five matters played a part in CASA making the decisions it did in June and July of 2000.268

1. The first matter related to a return flight Mr Cole made transporting passengers to a mine between Jandakot Airport in Western Australia and 'The Granites' goldmine in the Northern Territory, in a small twin-engine six-seater aircraft on 2 December 1999.

After this flight CASA, on being tipped off by a rival operator, examined the flight data records in both the aircraft maintenance release and pilot's log book as to the pilot's exact flight and duty times for the flight and found out that these had been exceeded. Mr Cole was therefore in breach of the regulations relating to the number of hours he was able to work as a pilot, without taking the prescribed amount of rest time. To make matter worse, CASA found that he had deliberately attempted to conceal those breaches by making false written entries in the maintenance release document and in his pilot's log book. In addition Mr Cole knowingly exceeded the time before overhaul period on both engines in the aircraft used for that flight.269

CASA seems to have stuck strictly to the rules in relation to this matter. Mr Cole had been found to be in breach of the regulations and he was admonished for so doing by having his commercial pilot's licence cancelled. Here CASA seemingly exhibited a strong 'deterrence' approach to its enforcement strategy.

2. The second matter involved a flight from Jandakot Airport to Perth Airport, and a flight from Perth Airport to Barrow Island, on 22 January 2000. Mr Cole piloted both flights.

CASA alleged that Mr Cole did not plan the flights in the correct manner in accordance with the Regulations. He had an incorrect 'flight level' on one of the legs and had not taken adequate notice of the meteorological conditions for the Visual Flight Rules section of the planned flight. In addition Mr Cole

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268 Ibid, paragraph 1.
had not entered on the maintenance release an endorsement regarding the aircraft undercarriage gear door defect, which CASA claimed was in breach of regulation 50 of the Civil Aviation Regulations.  

3. The third matter related to Mr Cole entering a number of flights in his pilot's logbook during May and June of 1999 as being conducted under the Instrument Flight Rules. At the time the flights were undertaken Mr Cole did not hold a current instrument rating. He had in effect simply allowed his instrument rating to lapse and had not bothered to renew it. So whilst he did not have the appropriate instrument rating endorsement on his pilot's licence, Mr Cole had undertaken several flights in 'instrument conditions' and was thus in breach of the regulations.  

4. The fourth matter involved alleged errors, inconsistencies and false entries in Mr Cole's flight and duty records. In December 1999 CASA examined the flight and duty records for Mr Cole's company Kookaburra Air and noted that on at least eight occasions Mr Cole had recorded flight time in his pilot's log book, but that there was no corresponding entry in his flight and duty records. The Tribunal found that Mr Cole had acted in contravention of both the Civil Aviation Orders and the Civil Aviation Regulations.  

5. The fifth and final matter considered by the Tribunal concerned Mr Cole piloting a return charter flight between Jandakot Airport and Shark Bay on the coast of Western Australia on 14 July 2000. The problem with this flight was that Mr Cole's Air Operator's Certificate had expired on 31 March 2000 and his commercial pilot's licence had been cancelled on 27 June 2000.

Conflicting evidence was placed before the Tribunal as to whether it was Mr Cole or another pilot who was actually the 'pilot in command' for this flight,

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271 Ibid, paragraph 126.
272 Subsection 1.3 of Civil Aviation Orders number 48 requires a holder of a commercial pilots licence, who is engaged in charter work, to account for all private flying in his or her flight and duty time records. The failure to do so constitutes a contravention of regulation 216 of the Civil Aviation Regulations 1988 (Cth). This regulation requires an operator to 'maintain current records of the individual flight times of the members of the operating crews employed by the operator'.

and whether it was a commercial or a private flight. After hearing detailed evidence the Tribunal found that it was inconclusive as to whether Mr Cole had acted as 'pilot in command' for the flight in question. It did find however that the flight was indeed a 'commercial' flight, and Mr Cole had breached Civil Aviation Orders in permitting another pilot who did not meet the minimum requirements to fly that particular aircraft in a commercial operation and to act as 'pilot in command' whilst lacking the minimum requirements.  

As such, overall Mr Cole had been found to be in breach of the Act, the Regulations and the Civil Aviation Orders as had been claimed by CASA. The Tribunal affirmed CASA's decision to cancel Mr Cole's commercial pilots licence, not to reissue his Air Operator's Certificate and cancel his appointment as Chief Pilot for Kookaburra Air.

**Aerolink Air Services Pty Ltd and Civil Aviation Safety Authority (2004).**  
As previously stated in the introduction to this section, the Administrative Appeals Tribunal has much wider powers than that of plain judicial review. In December 2004 this was demonstrated in the case of Aerolink Air Services who sought a review of the conditions imposed by the Civil Aviation Safety Authority on its Air Operators Certificate.  

The facts of the case and style of the conditions imposed by CASA suggest a leaning towards the 'deterrence' end of an enforcement strategy spectrum, in contrast to the more 'compliant' example in the above case.

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273 Civil Aviation Orders 82.1 subsection 4.1(b)  
274 Civil Aviation Act 1988 (Cth) Section 27(2)(b) and Section 27(9).  
Civil Aviation Regulations 1988 (Cth) reg 206(1)(b)(i)  
(b) Charter purposes, being purposes of the following kinds:  
The carriage of passengers or cargo for hire or reward to or from any place, other than carriage  
In accordance with fixed schedules to and from fixed terminals or carriage under a special flight  
permit under regulation 21.97 of CAR 1998 or under a permission to fly in force under sub-regulation 317(1).  
Civil Aviation Orders 82.1  
275 Aerolink Air Services Pty Ltd and Civil Aviation Safety Authority [2004] AATA 1288 (3 December 2004). Heard in Sydney before Mr M D Allen, Senior Member.  
276 Ibid.
CASA had been concerned about the ability of Aerolink's Managing Director Mr Danny Ryan, acting in his capacity as a pilot. The matter of the company's Air Operators Certificate had been before the Tribunal twelve months earlier. In the intervening time CASA sent a letter to Mr Ryan on 29 July 2004, imposing two conditions on his current Air Operators Certificate. They were:

(i) It is a condition of this AOC that Danny Ryan (Aviation Reference No.527619) does not occupy a control seat on any commercial flight authorised by this AOC.

(ii) It is a condition of this AOC that Danny Ryan (Aviation Reference No.527619) does not perform any maintenance on aircraft operated pursuant to this AOC.\footnote{Ibid, paragraph 3.}

Briefly the reasons set out by the letter for the imposition of these conditions was that CASA had reservations about the actions and influence Mr Ryan had on the operations of the company. In particular CASA thought that there was a strong possibility that he would influence and direct the actions of any employed pilot, while that pilot was flying with him and do so in a way so as to compromise air safety. Furthermore CASA considered that Mr Ryan had 'an incomplete understanding of maintenance certification requirements for aircraft involved in commercial flying'.\footnote{Ibid, paragraph 5.}

The Tribunal looked at the evidence placed before it and concluded that CASA had been too harsh in its assessment of Mr Ryan. It did not accept that the first condition imposed was either necessary or appropriate. It therefore directed CASA to delete this condition. In coming to its conclusion regarding the first condition the Tribunal gave considerable weight to the evidence of the Chief Pilot of Aerolink, Mr Bartlett, who stated that he made it clear to his pilots that they acted in accordance with Civil Aviation Regulations and they as the pilot, had final authority as to the manner in which the aircraft was operated.\footnote{Ibid paragraph 7.} The Tribunal considered that if CASA still had reservation regarding Mr Ryan and his alleged behaviour, then CASA should take those reservations up directly with the Chief Pilot. In relation to the second
condition, the Tribunal found that different considerations applied. There was
evidence before the Tribunal that Mr Ryan had endorsed an aircraft's
maintenance release claiming that it was airworthy, when it in fact it had a
defect that required remedial action before it was flown. Mr Ryan's approach
to the aircraft's defect in this situation demonstrated an attitude, so the
Tribunal thought, that he would on occasions not strictly adhere to directions
or requirements 'as they appeared in Civil Aviation legislation'. Thus the
Tribunal remitted the second condition back to CASA with the direction that
the Air Operator's Certificate issued to Aerolink on 29 July 2004 be varied by
deleting both conditions one and two and substituting in lieu of both
conditions one conditions which stated:

It is a condition of this AOC that Danny Ryan (Aviation Reference No.527619) does
not perform any maintenance on an aircraft when that aircraft is being operated
pursuant to this AOC.

Thus the Authority had taken quite strict enforcement action towards the
'deterrence' end of the enforcement spectrum that, in this case, did not meet
with the agreement of the Tribunal. It was not revealed in the case exactly
how the regulator had formed the opinion that Mr Ryan was an overbearing
managing director. Reference was made to evidence of breaches of the
regulations in an earlier case, when the regulator rejected Mr Ryan's original
application for an AOC. There is inconsistency in the deterrent approach the
regulator had taken in the Aerolink Air Services case when compared with the
more compliant approach in the previously discussed Cape York Airlines case.
There seems no overt explanation for this inconsistency.

280 Ibid, paragraph 10:
If, as alleged by the CASA inspectors, the aileron and rudder trim tabs had excessive movement,
then this would in my view prima facie constitute a major defect in the aircraft. As such it was
incumbent upon Mr Ryan to endorse the aircraft’s maintenance release to the effect that it was
un-airworthy and to have the defect remedied (see sub regulation 47(1) of the Civil Aviation
Regulations). Instead, he took advice from other licensed aircraft maintenance engineers who did
not themselves carry out accurate tests and endorsed the entry in the Maintenance Release as
having been made in error. This demonstrates an attitude that Mr Ryan will, on occasions, not
strictly adhere to directions or requirements in Civil Aviation Legislation.

281 Aerolink Air Services Pty Ltd and Civil Aviation Safety Authority [2003] AATA 1357 (24
December 2003)
Henry Gorman and Civil Aviation Safety Authority (2005). 282

This case tends to herald a 'change in direction' from the previous cases in relation to CASA’s enforcement strategy. Henry Gorman was the chief pilot, owner and operator of an aviation seaplane business, Airfoto Pty Limited, trading as Palm Beach Seaplanes. He operated his business out of Rose Bay in Sydney. The company Airfoto held the Air Operator's Certificate for this business, and Mr Gorman held the chief pilot's approval.

On 20 January 2005 Mr Gorman was the pilot in command of a single engine Cessna 185 floatplane with three passengers on board. While taking off in strong winds of 25 to 28 knots, and when the seaplane was just airborne at approximately 10-15 feet, a powerful gust of wind hit the seaplane on the right side causing it to roll to the left. This resulted in the left wing stalling and caused the left wingtip and nose to strike the water. This action then caused the seaplane to tip over and it settled upside-down in the water. Fortunately neither pilot nor passengers were injured, but the seaplane suffered substantial damage and was subsequently written off by the company's insurers. 283

Understandably CASA was less than impressed with this incident, and decided to cancel Mr Gorman's chief pilot's approval on the grounds that he placed the passengers and general public at risk by conducting the flight in unsuitable weather conditions.

At the same time as the cancellation of Mr Gorman's chief pilot's approval, CASA also cancelled the Air Operator's Certificate held by Airfoto. This was on the grounds that as Mr Gorman was considered personally unfit to hold an Air Operator's Certificate, then the company controlled by him, as a matter of logic, was also unfit to hold an Air Operator's Certificate. CASA subsequently refused to renew Airfoto's Air Operator's Certificate when it would have been due for renewal on 31 August.

283 Ibid paragraph 2.
This case is particularly interesting in the context of this thesis because the facts tend to demonstrate a practical change in CASA’s enforcement strategy. Whereas the previous cases in this section, it is suggested, veered much more towards an enforcement strategy favouring the deterrence end of the spectrum, in this case there are signs of a leaning towards the opposite approach by CASA. Prior to the accident CASA had displayed considerable patience and understanding in dealing with Mr Gorman’s non-compliant attitude. A long history of Mr Gorman’s earlier transgressions was paraded before the Tribunal.  

Mr Gorman was in no way an inexperienced floatplane pilot. He had 20 years flying experience with approximately 6000 hours flight time and had performed approximately 7000 water landings. On cancelling Mr Gorman’s approval to act as chief pilot CASA informed him that it was mainly on the basis of the accident that occurred on 20 January 2005, but the action was also taken with consideration of the relevant enforcement action CASA had taken against him in the past. Briefly this previous enforcement action involved an occasion on 17 March 2001 when Mr Gorman had flown an aircraft below 500 feet over boats on the Hawkesbury River. In addition he was formally counselled by CASA on 14 May 2002 in connection with non-compliance by his company Airfoto between November 2000 and December 2002 regarding sections of the Civil Aviation legislation.  

On 28 January 2005, eight days after the accident on Rose Bay, the acting general manager of general aviation operations for CASA notified Mr Gorman that he was required to undertake an examination to demonstrate that he continued to have the aeronautical knowledge and skills appropriate to his private and commercial pilot licences. CASA was, at the same time, suspending both licences. CASA considered that Mr Gorman had acted in a careless and reckless manner in attempting to take off in winds estimated to be

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284 Ibid paragraph 114.
285 Civil Aviation Act 1988 (Cth). Section 28BD (AOC holder to comply with all requirements of the legislation), s 28BF (AOC activities to be conducted with a reasonable degree of care and diligence), and s 28BE (AOC holder to maintain an appropriate organization with suitable qualified personnel and a sound and effective management strategy).
between 25-28 knots, when the Cessna Pilot Operating Handbook and Airfoto's company operations manual both showed the maximum demonstrated crosswind for the floatplane was just 13 knots.\textsuperscript{286}

Mr Gorman undertook the required test on 7 March 2005 when, under the supervision of one of CASA's Flying Operations Inspector's, Mr Nolan, he successfully passed the examination and the inspector recommended that his two pilot's licences be reinstated. This later led to the Tribunal forming the opinion that Mr Gorman did not lack the requisite knowledge and skills to fly the aircraft, but rather that the accident was caused by Mr Gorman's poor judgment and decision-making. In the final summing up the Tribunal considered that Mr Gorman had been influenced by 'commercial pressures' when making the flight and these had overcome judgements of safety that he should have made.\textsuperscript{287}

In answer to the two 'show cause' notices that CASA issued after the accident, Mr Gorman conceded that he made a poor judgment on 20 January 2005 and he would agree to enter into an enforceable voluntary undertaking to enhance the safety of operations during times of excessive wind and storms.\textsuperscript{288} Mr Gorman also attended a 'show cause' conference with three CASA representatives where he defended his actions on the day of the accident, saying that while the weather was blustery with some storm activity he considered that the conditions were not unsafe for flying.

In coming to its decision to affirm CASA's actions the Tribunal examined in great detail not only the occurrences on the day of the accident but also Mr Gorman's previous history of non-compliance. It made special reference to CASA giving Mr Gorman 'one more chance, only to see him involved in a serious and potentially fatal accident only a matter of weeks later'.\textsuperscript{289}

\textsuperscript{286} Henry Gorman v Civil Aviation Safety Authority [2005] AATA 1036 (19 October 2005) paragraph 5.
\textsuperscript{287} Ibid paragraph 114.
\textsuperscript{288} Ibid paragraph 11.
\textsuperscript{289} Ibid paragraph 114.
In this instance CASA's leaning towards a more 'compliant' end of the enforcement strategy spectrum had not paid off as far as 'safety' was concerned. Fortunately serious injury or death had been avoided in the accident. The detailed examination that took place during the hearing tended to highlight that one may have a technically competent, skilled and knowledgeable pilot in command, yet if he or she was able to be swayed by commercial considerations,\textsuperscript{290} aviation safety can be compromised.\textsuperscript{291}

**Lewis and Civil Aviation Safety Authority and Ors (2005).**\textsuperscript{292}

This case, dealt with the Civil Aviation Safety Authority's cancellation of a Chief Pilot's Approval. Mr Martin Lewis was the pilot concerned. He had worked in the aviation industry for 19 years and held a Chief Pilot Approval for TGS Aviation Services (TGS Aviation), granted to him by the Authority on 24 September 2004. TGS Aviation's Air Operator's Certificate was granted on 1 October 2004.

Between 18 and 22 November CASA officers audited the operations conducted under TGS Aviation's Air Operator's Certificate. The audit noted that TGS Aviation was conducting fare-paying passenger charter operations in single engine aircraft over water between Tooradin and several islands in Bass Strait. Such operations were in breach of the regulations.\textsuperscript{293} Following the audit CASA brought this deficiency to the attention of Mr Lewis by means of a 'Request for Corrective Action'. Mr Lewis responded to this notice and identified the cause of the breach as 'unfamiliarity with Civil Aviation Regulation 258'. Mr Lewis also sent a facsimile to TGS Aviation pilots drawing their attention to the requirements for single engine operations over Bass Strait and he attached copies of the relevant document setting out the

\textsuperscript{290} See page 339 of this thesis for a discussion regarding recommendation for financial audits. 
\textsuperscript{291} Henry Gorman and Civil Aviation Safety Authority [2005] AATA 1036 (19 October 2005), paragraph 116. It followed from the AOC cancellation that Mr Gorman could not be approved or re-approved as chief pilot of the company Airfoto, as the chief pilot classification is specific to a particular AOC holder. 
\textsuperscript{292} Lewis and Civil Aviation Safety Authority and Ors [2005] AATA 1129 (14 November 2005). Heard in Melbourne before Mr E Fice. 
\textsuperscript{293} Reg 258(1) of the Civil Aviation Regulations 1988 (Cth) prohibits flight over water at a distance from land greater than the distance from which the aircraft could reach land if the engine...[in a single engine aircraft] were inoperative.
requirements for such crossings. He went further and included a 'Notice Awareness Record' to be signed by the pilots and he altered the standard domestic flight plan to reflect the correct routes.  

Seemingly Mr Lewis was responding well to the concerns of the Authority. However on 11 February 2005 the Authority conducted a 'ramp check' of the Cessna Caravan aircraft Mr Lewis was about to depart in from West Sale to Flinders Island. There were twelve passengers and their luggage aboard. The aircraft was found to be 90 kilograms overweight. In addition, after the aircraft had off loaded the required amount of baggage and met the requisite maximum take off weight, the track it then took after take off was direct to Flinders Island. This track, undertaken in a single engine aircraft, put Mr Lewis in contravention of the mandatory route prescribed by CASA for such operations.

CASA now began to look more closely at Mr Lewis and the TSG Aviation operation and on 3 March 2005 Mr Lewis received a show cause notice from the Civil Aviation Safety Authority. The notice asked him to show cause why his appointment as chief pilot in respect of the Air Operators Certificate held by TGS should not be suspended or cancelled. Mr Lewis responded to the notice, such response being unsatisfactory as far as the Authority was concerned. CASA then cancelled Mr Lewis's Chief Pilot's Approval and advised him of the cancellation by a letter dated 17 May 2005. A stay of the decision was applied for and granted by the Tribunal on 26 May 2005.

On 20 June 2005 CASA officers inspected the Caravan aircraft at Moorabbin airport. Mr Lewis had just flown the aircraft from Tooradin to Moorabbin with the object of having some maintenance done on the aircraft. The officers inspected the maintenance release and found that two items of maintenance, which were due, had not been certified as having been completed. In these

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295 Ibid, paragraph 11.
circumstances Mr Lewis should have applied for a special permit from CASA to fly the aircraft in that condition. This he neglected to do.

On 27 June 2005 two CASA officers conducted another scheduled audit of TGS Aviation operations. A long series of discrepancies totalling ten in all, were noted during this audit. The Tribunal went through each of these discrepancies and took into account Mr Lewis's not very convincing explanations for breaching the regulations.

CASA contended that Mr Lewis had demonstrated an inability to comply with the basic requirements of aviation legislation. He had overall, a poor attitude to aviation safety and his performance as Chief Pilot of TGS Aviation was below an acceptable standard. The Tribunal agreed with CASA, concluding that CASA’s decision to cancel Mr Lewis's Chief Pilot Approval should be affirmed. The Stay order that was granted on 20 May 2005 was revoked.

An interesting aspect of the case is the manner in which the Mr Fice, the presiding Member, discussed the enforcement strategy of the Authority and how it impinged on the facts in this case. This followed overt criticism by Mr Lewis of the manner in which he said the CASA officers who conducted he ramp check at West Sale attempted to 'trap' him when they failed to warn him that the route he planned to fly to Flinders Island might cause him to breach the regulations.296

The Tribunal set out CASA's functions as enumerated in s 9 of the Civil Aviation Act, drawing attention specifically to the variety of means at the Authority's disposal to fulfil its obligation including:

(a) Developing and promulgating appropriate, clear and concise aviation standards;
(b) Developing effective enforcement strategies to secure compliance with aviation standards; and

296 Ibid paragraph 27. One of the CASA officers concerned denied supposed 'entrapment' and the Tribunal accepted his evidence on the matter. The officer, Mr Baker, stated that when conducting the ramp check he did not notice the planned route was direct to Flinders Island from West Sale, a route that took the aircraft beyond the required distance from land for a 'single engine flight over water' that the regulations required.
(c) Conducting comprehensive aviation industry surveillance, including assessment of safety-related decisions taken by industry management at all levels for the impact on aviation safety.

The Tribunal then went on to state that it was true that CASA's functions included encouraging a greater acceptance by the aviation industry of its obligation to maintain high standards of aviation safety. It was required to do so through safety education and training programmes, accurate and timely aviation safety advice and by fostering awareness in industry management and within the community generally, of the importance of safety in aviation and compliance with relevant legislation. \(^{297}\) Similarly CASA was also required to promote consultation with the aviation industry on aviation safety issues. 'But an important means of conducting the safety regulation of civil air operations is by the development of effective enforcement strategies to secure compliance with aviation standards'. \(^{298}\)

Mr Fice stated that he did not see any conflict between CASA's consultative or educative functions and its enforcement obligations. Ideally, he said consultation and education would precede enforcement, 'but that is not a requirement'. \(^{299}\)

The breaches committed by Mr Lewis were indeed significant breaches and CASA seemingly acted swiftly. It is perhaps evidence of the 'measured firm approach' set in motion by the then current CEO, Mr Bruce Byron. \(^{300}\) This case provides a significant illustration of CASA's modern enforcement policy. It illustrates and gives a practical demonstration, of the 'responsive regulation' theory as espoused by Ayres and Braithwaite. \(^{301}\)

\(^{297}\) Ibid paragraph 25.
\(^{298}\) Ibid.
\(^{299}\) Ibid paragraph 26.
\(^{300}\) See page 288 of this thesis for an explanation of the 'measured firm approach' CASA states that it currently has in place.
\(^{301}\) See page 180 of this thesis for a discussion on 'responsive regulation'.
Polar Aviation Pty Ltd and Civil Aviation Safety Authority (2005).\textsuperscript{302} The case of Polar Aviation heard by the Administrative Appeals Tribunal in March 2006 demonstrates a further example of CASA's enforcement strategy now being well into the 'compliance' end of the enforcement spectrum. Very little in the way of 'facts' were given in the report, however it is mentioned here because of comments made by Senior Member M D Allen, (who heard the case), that reflect on CASA's numerous attempts to act in a conciliatory manner in the face of repeated breaches of the regulations.

More in the way of facts have been obtained from a related case in the Federal Court that came about when in the Civil Aviation Safety Authority made an application to review the Tribunal's decision to stay the cancelling of Polar Aviation's Air Operator's Certificate until the Tribunal heard the case. The Federal Court rejected this application, however it did afford an opportunity to understand more of the factual situation in the context of looking at how it may be relevant to the Authority's enforcement policy.\textsuperscript{303}

Polar Aviation Pty Ltd was a small aviation company in Port Hedland Western Australia owned, operated and controlled by Mr Clarke Butson. Its operations included charter operation, aerial photography, aerial stock mustering and flying training. At the time of this hearing it had been in operation for approximately 22 years.

In chronological order the facts of the case were that Polar Aviation applied in May 2004 for an Air Operator's Certificate to take effect on the expiry of its then current Air Operator's Certificate, which was due to expire in July 2004. On 20 July 2004 CASA sent a letter to Mr Clark Butson, setting out that his Air Operator's Certificate was due to expire on 31 July 2004 and referring to a 'show cause' notice previously sent to the company, regarding the renewal of the Certificate after 31 July 2004. The 'show cause' notice was dated 16 July 2004 and Mr Butson had 28 days to reply. The date to enable the 'show cause' notice...
process to run its course, was extended by the Authority on three separate
occasions of two months each, taking the date for the final extension being
due to expire on 31 January 2005.

On 18 January Polar Aviation lodged an application In the Administrative
Appeals Tribunal seeking review of the Authority's decision of 14 January
2005 which had stated:

In a Show Cause Notice ("the Notice") dated 16 July 2004 you were asked to show
cause why the Air Operator's Certificate W073061 ("AOC"), issued to Polar Aviation
Pty Ltd ("the company") should not be cancelled or suspended.

On the basis of the evidence I have decided to cancel the Air Operator’s Certificate
W037061 ("the AOC") currently held by Polar Aviation. The AOC has been extended
until 31 January 2005. The consequence of this decision is that the AOC shall cease to
have effect beyond that date.

The facts and circumstances that were alleged in the Notice, my findings on those facts
and circumstances, taking into account all the available evidence, and the grounds for
my decision are set out below.\footnote{Polar Aviation and Civil Aviation Safety Authority [2006] AATA 270 (24 March 2006),
paragraph 5.}

The case was first been heard in the Administrative Appeals Tribunal on 5
August 2005. Polar Air had applied for a review of three of CASA's decisions.
The first was CASA's initial cancellation and then refusal to re-issue an Air
Operator's Certificate to Polar Aviation Pty Ltd, the second and third decisions
involved CASA's cancellation of the approval of Mr Butson to act as Polar
Air's Chief Pilot and Chief Flying Instructor. Documents presented to the
Tribunal at this hearing caused it to say that 'the decisions were made after
repeated breaches of safety by Polar Air, and a failure by Mr Butson to fulfil
the duties incumbent on him as Chief Pilot'.\footnote{Ibid 1027.} In addition a further detailed
recitation of the alleged breaches was set out in CASA's 'Statement of Facts
and Contentions' in the matter.

The Tribunal commented on what it called Mr Butson's evidence and
demeanour in the proceedings as being of a 'combative attitude' towards
CASA. He had a resentment toward what he regarded as an 'over zealous'
approach to the auditing of air safety standards applicable to both him and his company.  

The evidence suggests that the regulator was dealing with a somewhat 'difficult' and 'prickly' character in Mr Butson and it had at times bent over backwards to present a conciliatory approach, until in the end it became obvious that breaches were continuing to occur and CASA had no option but to eventually take firm enforcement action. The Tribunal affirmed CASA's action in cancelling Mr Butson's approvals as Chief Pilot and Chief Flying Instructor. However it considered that a condition imposed by CASA in relation to re-instating Polar Air's Air Operator's Certificate was unduly onerous. The Tribunal therefore varied slightly one of the conditions CASA had placed on Polar Air's Operator's Certificate.

The Tribunal commented on the peculiar difficulty apparent in this case being the 'strong and abrasive personality of Mr Butson'. CASA had displayed considerable leniency towards Mr Butson prior to taking affirmative action. Such an approach may have had more success with a less 'abrasive' personality, however it presents some evidence that in late 2005, CASA's enforcement strategy was swinging towards the 'compliant' end of the enforcement spectrum.

**Gross and Civil Aviation Safety Authority and Ors (2005).**

This case, heard in Melbourne before Mr Egon Fice, involved a small flying school situated at Tooradin in Victoria and the decision of the Civil Aviation Safety Authority's to cancel its Chief Pilot's Approval for Mr Anthony Gross. In addition to flying instruction, 'Tooradin Flying School' also carried out joy flights, charter flights aerial work, including photographic work and banner towing. Approximately 90 per cent of the organization's business comprised...
charter work. Mr Gross was both the flying school's chief pilot and chief flying instructor. On 7 March 2005 he received a show cause letter from the Civil Aviation Safety Authority asking why his Chief Pilot approval should not be suspended or cancelled. Mr Gross responded on 1 April 2005. The Authority considered his response unsatisfactory, and on 17 May 2005 CASA informed Mr Gross that it had cancelled his Chief Pilot approval on the grounds that not to do so would constitute a serious risk to air safety.

The facts preceding this action were as follows:

Mr Gross obtained his Chief Pilot Approval for Tooradin Flying School from CASA on 26 August 2003. The Authority conducted an audit of the Tooradin Flying School between 17 and 22 November 2004. During the course of this audit CASA noted a number of regulatory breaches, some more serious than others. The most significant breaches occurred as a result of one of the employee pilots exceeding instrument flight rules weight limits on a Piper aircraft on four occasions between 23 June 2004 and 11 October 2004. A follow up audit on the Air Operators Certificate holder (Mr Balas), for the organization occurred on 9 February 2005. That audit discovered that one pilot, Mr Bulfin, as pilot in command of a Piper aircraft had exceeded the maximum take-off weight for that aircraft, and had operated the aircraft with insufficient fuel for the flight undertaken on 12 occasions within a period of one month. A string of further less serious breaches were noted, culminating in CASA suspending Mr Bulfin's commercial pilot licence on 2 March 2005 pending further testing. His licence was subsequently reinstated.

The serious incident that was the final straw for the Authority's patience occurred on 13 May 2005. Mr Gross was the pilot in command of a Tiger Moth aircraft engaged on a charter flight when the aircraft lost power and ditched into mangroves at the end of the runway shortly after take-off. The

and K F Morrison Pty Ltd and TGS Air Charter Services Pty Ltd. By an Order made on 26 May 2005 both companies were made a party to the application. 311 Gross and Civil Aviation Safety Authority and Ors [2005] AATA 1130 (14 November 2005), paragraph 7. The auditors raised nine requests for corrective action (RCAs), and five audit observations in respect of the charter operations, and four RCAs and five audit observations in respect of the flying school operations. 312 Ibid paragraph 7.
Australian Transport Safety Bureau had not completed a final investigation into the incident at the time of the hearing and Mr Gross and CASA proffered conflicting reasons as to its cause. The Tribunal stated that in the absence of evidence it was not possible to draw any conclusions from this incident.

Since the February 2005 audit there had been no further overloading and under-fuelling problems such as those referred to in the past. This audit noted that the pilots now appeared to be fully complying with the Operations Manual, the Regulations and the Civil Aviation Orders. Mr Gross stated that he now monitored all documents in respect of charter flights to ensure that the calculations were correct. There had been numerous charter flights since February 2005 and the errors previously noted at that time had not been repeated.

The Tribunal concluded that although Mr Gross ran into some difficulty as chief pilot in the past, the issues that caused trouble then, had not recurred. The Tribunal accepted that for a brief period Mr Gross's performance as a chief pilot may have dropped below a satisfactory level, it appeared now that he had taken significant steps in order to remedy the problem. Therefore the Tribunal ruled that CASA's notice of cancellation of his Chief Pilot Approval dated 17 May be set aside and his approval as Chief Pilot be re-instated.\(^{313}\)

**Civil Aviation Safety Authority v Boatman (2006).**\(^{314}\)

Heard in the Federal Court in Sydney and Canberra before Madgwick J. This case is one of a series of six reported cases involving Graeme Boatman and Valerie Kennedy, to come before the Federal Court during 2004 and 2006. It is the only one of the six cases to give the facts that are of particular interest in the context of this thesis.\(^{315}\) The legal issues involved dealt with the new sections of the Civil Aviation Act introduced in 2003, which gave CASA the power to suspend an authorization (such as a pilot's licence), immediately, if it

\(^{313}\) The AAT took a far more lenient view of Mr Gross' non-compliance than did CASA. It was prepared to give him the benefit of the doubt and accept the fact that he had recently made a true effort to comply more assiduously with the regulations.

\(^{314}\) Civil Aviation Safety Authority v Boatman (2006) FCA 460 (28 April 2006). Heard in the Federal Court Canberra and Sydney, before Madgwick J.

\(^{315}\) See Appendix 3 for additional cases.
believed that there was a serious and imminent risk to air safety. Such a suspension concluded at the end of the fifth business day after the holder was notified of the suspension unless within this five-day period CASA had successfully applied to the Federal Court to extend the time of the suspension.

Mr Boatman was a director and shareholder of Boatman Nominees Pty Ltd, trading as Stawell Aviation Services. The company was situated in the Victorian town of Stawell and held an Air Operator's Certificate authorizing it to conduct charter operations. Ms Kennedy was an employee of the company.

Mr Boatman, now aged in his sixties, held a commercial pilot licence endorsed with a condition requiring him, for medical reasons, to have a qualified co-pilot fly with him. He also held a private pilot licence, which enabled him to fly without a co-pilot beside him. He was an extremely well qualified and experienced pilot in relation to bush flying. He had over 12,000 hours of flying experience, mostly in light single-engine aircraft, which had been accumulated over a 40-year period. His particular expertise was with the use of airstrips with difficult approaches, including landings and take-offs on curved strips.

Ms Kennedy had been a student of Mr Boatman and although not as experienced as him had been trained by Mr Boatman in the specialised techniques required for landings into difficult airstrips. She had some four years flying experience, including reasonable experience flying in the outback and in respect of operations from unmade surfaces and marginal areas.

The occurrence that prompted the Authority to act as it did, and suspend both Mr Boatman's and Ms Kennedy's licences took place during a planned three-

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316 The statutory framework was set out and considered, from the viewpoint of constitutional validity, in the first Full Court judgment in this matter Civil Aviation Safety Authority v Boatman [2004] FCAFC 165 (25 June 2004). Sundberg J summarized it thus:

Sections 30DC and 30DE are in Division 3A of the Act, which is headed "Serious and imminent risks to air safety". Division 3A was inserted by the Civil Aviation Amendment Act 2003 (the 2003 Act). Subdivision B, which consists of ss 30DB to 30DD, is headed "Suspension for contravening the serious and imminent risk prohibition".

Section 30DB provides:
The holder of a civil aviation authorisation must not engage in conduct that constitutes, contributes to or results in a serious and imminent risk to air safety.
day charter flight from Stawell to see Lake Eyre in the outback, at a time when somewhat unusually Lake Eyre was full of water. The intention had been to have paying passengers fly in the plane piloted by Ms Kennedy and to have some other private passengers in the aircraft piloted by Mr Boatman. One of those was a student pilot whom Mr Boatman had been training. The two aircraft arrived without incident in Innamincka as planned, in the afternoon of 27 April 2004. They stayed overnight at the hotel there, anticipating a departure the following morning. However their plans were thwarted by heavy rain the next morning making it impossible to make use of the small purpose-built airstrip on the settlement’s outskirts. Later that day Mr Boatman and Ms Kennedy considered taking off from a gravel roadway nearby. This they did the following day after carefully inspecting the roadway and deciding it was suitable.

Mr Boatman had managed to cross swords with local resident, Mr Osborne, who had responsibility for the airfield, when he had sought permission to take down a fence in order to move the aircraft onto the roadway. Despite Mr Osborn's protestations to the contrary Mr Boatman went ahead and removed the fence.

Ms Kennedy took off first, fortunately avoiding Mr Osborne who had decided to cross the road at this precise time. She became airborne some distance into the curved section of the road. Mr Boatman took off next, altering his planned take-off point to avoid any possible confrontation with the angry Mr Osborne. The Court heard evidence from the two pilots and several other witnesses on the ground, the passengers in the planes, together with video footage of the event.

CASA's case was founded on the evidence of Mr South, a CASA officer. He gave a long list of points that indicated to him that the two pilots should not have used the roadway to take off in the manner in which they did. He acknowledged that public roads have been used for take-off and landing of aircraft in medical emergencies and for humanitarian relief, but not by an
operator engaged in passenger carrying operations. He considered that there had been a 'very much increased risk of a crash' with the take-offs in question.

The main issues in the case were whether the Court was satisfied that there were reasonable grounds to believe that either Mr Boatman or Ms Kennedy had engaged in conduct that contravened section 30DB of the Civil Aviation Act. That is conduct that constituted, contributed to, or resulted in a 'serious and imminent risk to air safety'. The Court decided that it did not as they stated that Mr Boatman had assessed the risks involved and in his opinion taking those risks into consideration he believed the take-off was safe. In addition several examples were submitted by CASA of Mr Boatman's previous 'risk taking' but these too were not considered 'helpful' in the Court's consideration of the events at Innamincka with which it was concerned.

CASA had taken a firm approach to what it considered Mr Boatman's 'risky' behaviour. It had used the powers it had acquired under s 30DE of the Civil Aviation Act to effectively ground both Mr Boatman and Ms Kennedy. Thus CASA acted in a 'deterrent' manner in what it perceived as the interests of safety. Having done so it needed to apply to the Federal Court for adjudication of that suspension.

Prior to the substantive issue being heard, the matter was twice before a Full Federal Court, first in relation to the validity of s 30DE of the Act, with the validity of the section being upheld: and secondly, in relation to confusion over consent orders that were not deemed relevant to these proceedings.

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318 Ibid paragraph 150.

As indicated elsewhere, Mr Boatman’s ‘attitude and approach’ to questions of safety are not, in themselves, ‘conduct’ within the meaning of s 30DB. Moreover, there is no satisfactory basis for attributing to Mr Boatman any belief that his take-off at Innamincka was ‘completely without risk’. Mr Boatman put effort and thought into an assessment of what the risks were and how they might be managed. He had the view that his take-off was without readily manageable risk given his capacities. No basis has been shown, despite possible regulatory breaches and some elevation of the risks, and the unorthodoxy of taking-off along a roadway, for viewing that assessment as wrong.

Fawcett and Anor and Civil Aviation Safety Authority (2008).321

Mr Fawcett was the managing director and Chief Engineer of the company Central Aviation Pty Ltd. This case involved a review by the Administrative Appeals Tribunal of decisions communicated to Mr Fawcett and the company by the Civil Aviation Safety Authority on 6 July 2007, to cancel Mr Fawcett's Aircraft Maintenance Engineer's licence and his company's Certificate of Approval. These decisions came on the heel of two incidents, together with certain irregularities found, following audits undertaken by the Authority in 2004 and 2005 that pointed to inadequacies of the systems and procedures of the company.

The Central Aviation aircraft maintenance company was situated at Bankstown Airport near Sydney. Mr Fawcett, who had held an aircraft engineers licence since 1982 took over the company from his father at this time when his father semi-retired and handed over the reins of the business to him. Originally the company had a flying school attached to it and its main work consisted of looking after the aircraft operated by the flying school. The school ceased operations in 2004. With the closure of the flying school Mr Fawcett actively sought other aircraft maintenance business. He was successful in this respect and expanded the company's business to the point where it was maintaining 25 aircraft, including an ill-fated Cirrus aircraft that had crashed shortly after undergoing maintenance provided by Mr Fawcett's company. Prior to the closure of the flying school Mr Fawcett had mainly dealt with the nine or so aircraft belonging to the school.

CASA conducted a scheduled audit of the company on 22 September 2004. The scope of the audit was 'Full Systems', however the audit method was stated to be a sampling exercise and did not claim to be a total systems review.

The sampling provides a snapshot of the system and any deficiencies detected could point to a systemic problem, requiring a total systems review by the operator. The

The audit report noted that the company was a small one-man operation involved in the maintenance of light singles and some light twin aircraft. A number of deficiencies in the operation were found, and because of the small size of the company and the limited scope of work performed by it, the auditor decided to advise these deficiencies in the body of the audit report rather than issue "Requests for Corrective Action".

Two incidents caused matters to come to a head as far as the Authority was concerned. The first occurred on 7 August 2005 when the top rudder hinge bracket on a Partenavia aircraft failed. The pilot noticed the failure after landing. The critical question in relation to that incident was whether the state of the rudder bracket on the aircraft was such that when Mr Fawcett carried out a 100 hourly inspection on the aircraft on 6 January 2005, he ought to have determined that the rudder required replacement or repair.

The 'second incident' occurred on 5 February 2007 when a Cirrus aircraft crashed following engine failure, seriously injuring the pilot and passenger. This aircraft had accumulated approximately seven hours in service after Mr Fawcett had refitted the engine on 24 January 2007. Evidence given made it clear that Mr Fawcett failed to perform the required test of the aircraft's fuel system as required by the manufacturer's approved maintenance data. If he had carried out that test, he would have become aware that a red plastic blanking cap was in place and not a steel blanking cap. This was a serious error.

After the 'first incident', CASA carried out a 'special audit' of the company on 15, 20 and 21 September 2005. The Senior Airworthiness Inspector who carried out the audit, gave a maintenance direction pursuant to Civil Aviation Regulation 38 that directed Mr Fawcett to 'cease all maintenance activities

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322 Ibid paragraph 25.
associated with the Central Aviation Pty Ltd's Certificate of Approval …\textsuperscript{323}

The direction was to remain in place until CASA was satisfied that the company was capable of complying with the conditions of the Certificate of Approval. In particular this involved the company in ensuring that it had current and amended data for the maintenance it intended performing and that the three 'Requests for Corrective Action', issued on the same day, had been satisfactorily dealt with. Mr Fawcett's evidence suggested that he had done his best to comply with CASA's requests. Following correspondence with the Authority part of the restriction was lifted four days later. At the same time Mr Fawcett put in place means of obtaining data for other aircraft he would be expecting to work upon. Importantly he said that he was maintaining hardly any aircraft at that time.

In attempting to comply with the regulations as CASA had requested, Mr Fawcett also enlisted the help of another Licensed Aircraft Maintenance Engineer as a consultant, to prepare the responses and the amendments of the procedures manual before submitting them to CASA. The restrictions were lifted on 20 October 2005.

In essence CASA's main argument for cancelling the company's Certificate of approval was that Mr Fawcett was the sole director of the company and his conduct of the business was 'haphazard, ad hoc and characterised by a lack of system'.\textsuperscript{324} Furthermore he exhibited a failure to understand the importance of quality control and a procedure's manual. Mr Weeks, the regional manager of CASA at Bankstown who recommended the cancellation of Mr Fawcett's licence and the company's Certificate of Approval described the Authority's response to Mr Fawcett's non-compliance as 'graduated'. He said that,

\begin{quote}
Mr Fawcett has exhibited a pattern of behaviour where he has given undertakings that have not been met. CASA has to achieve a safety outcome and has to look at procedures and mechanisms that will effectively manage the exposure levels of risk. The Cirrus incident was the final straw.\textsuperscript{325}
\end{quote}

\textsuperscript{323} Ibid paragraph 66.
\textsuperscript{324} Ibid paragraph 103.
\textsuperscript{325} Ibid paragraph 104.
Mr Weeks referred to a particular 'model' of aviation safety known as the 'Swiss cheese model', which describes the layers of defences that an organization has to put in place in a systemic fashion to ensure that they manage their risk to minimise them and ensure a safety outcome. If the holes, as in the Swiss cheese, line up a latent organisational or system failure will be able to get through and become an active failure. This is precisely what occurred in the Cirrus aircraft accident. This was a typical active failure as a result of inadequate safety defences within the company Central Aviation and Mr Fawcett's work practices, safety culture and safety systems.

The Tribunal noted that in recent years CASA had changed its approach to the regulation of civil aviation. It quoted from a press release of the CEO Bruce Byron stating that CASA must not be seen as a 'nanny regulator', and cannot and should not take complete responsibility for safety outcomes.326

The Tribunal accepted the submission made by CASA that safety of aviation is paramount in the decisions under review. However it took into account that Mr Fawcett was not an untruthful person, but rather one that was a 'practical tradesman' who was not good with paper work and not particularly confident in his own expertise as a Licensed Aircraft Maintenance Engineer. The Tribunal concluded that the appropriate decision was to set aside the reviewable decisions and vary both the licence and Certificate of Approval. As far as the Certificate of Approval was concerned the Tribunal imposed three conditions:327

1. The company was to employ a suitably qualified LAME, other than Mr Fawcett, who was acceptable to CASA, such person to be responsible on a

326 See chapter 4, section 4.11 of this thesis, 'The Senate Inquiry into CASA’s Administration'. This section gives a detailed account of differing views held in the industry, on the subject of CASA's change in its approach to the regulation of civil aviation under Mr Bruce Byron’s leadership. It refers to the derogatory terminology 'nanny regulator' used by Mr Byron on a number of occasions, in the context that industry participants must realise that they are expected to have responsibility for the safety outcomes of their operations.

327 The power to vary comes for the Civil Aviation Regulations s 30 and s 31. Pursuant to s 30(3) three conditions were imposed on the Certificate of Approval.
full-time basis for the supervision and certification of all maintenance activities undertaken at Central Aviation.

2. The Company was to employ an appropriately qualified person acceptable to CASA to undertake audits of the Company's system of quality control at six monthly intervals until such time as CASA determined that such audits were not necessary.

3. The Company was to employ a technical records clerk to maintain the maintenance data necessary for the Company's operations.

In relation to Mr Fawcett's aircraft maintenance engineer's licence the Tribunal imposed one condition. That was, that within six months of the date of the decision Mr Fawcett was to undergo and satisfy a theoretical and practical examination to test his competency to hold such a licence.

This case appears to demonstrate, the current approach of the Civil Aviation Safety Authority to its enforcement strategy, as directed by its CEO, Mr Bruce Byron. It fits in very well with the 'Ayres and Braithwaite' graduated response model discussed in the previous chapter. It is interesting that although the Authority attempted a 'softly, softly' approach initially, when the accident with the Cirrus aircraft occurred and two people were seriously injured, it saw this as the 'last straw'. It then used the 'big stick' that had been in its armoury all along.

**Lip-Air Pty Limited v Civil Aviation Safety Authority (2008).**

This was an urgent application by Lip-Air Pty Limited, its Chief Pilot Mr Scott McKenzie and its Check Pilot Mr Sidney Smith, to the Court for interlocutory relief to put in place a stay of two decisions made by the Civil Aviation Safety Authority.

The decisions sent from the Authority were contained in two letters dated 2 June 2008 to Mr McKenzie and Mr Smith in their capacity as Chief Pilot and Check Pilot respectively.

The relevant history prior to the sending of the two letters was that on 19 March 2008 CASA wrote to the check pilot Mr Sidney Smith asking him to show cause why his approval as check pilot for Lip-Air should not be revoked.

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or varied. The next day, on 20 March 2008, CASA wrote in similar form to the chief pilot of the company, Mr William McKenzie, asking him to show cause why his approval as chief pilot should not be cancelled or suspended. In each case 28 days was granted for a response. The period was subsequently extended further. CASA took the position that the sending of the 'show cause' letters was done as a matter of courtesy, rather than in response to any legal obligation. On 20 March 2008 CASA had also written to the company Lip-Air giving notice in accordance with s 28BA(3) of the Civil Aviation Act that consideration was being given to the suspension or cancellation of its Air Operators Certificate. As at the date of the Federal Court hearing, that is 5 June 2008, the Authority had not taken either step in relation to Lip-Air's Air Operators Certificate. Buchanan J took the view that if the Authority did decide to take either of those courses, that is suspension or cancellation of the Air Operators Certificate, then the operation of s 31A of the Act and the automatic provisions for a stay would come into effect.329

In order for Lip-Air to secure interlocutory relief, it was necessary for it to satisfy the Court that there was an arguable question to be considered in the proceedings, which had been commenced and that the 'balance of convenience' favoured a stay.330 Furthermore after legal discussion Buchanan J noted that the appropriate forum to grant the stay requested was the Administrative Appeals Tribunal and this Tribunal was due to sit at 9.00 am the following day to consider the question.

The legal safety issues involved in this case are interesting because the Civil Aviation Safety Authority went about the mechanisms of their enforcement procedure in a somewhat different way from the usual. The facts and legal issues are covered in the Administrative Appeals Tribunal case of McKenzie.

329 Under s 31A of the Civil Aviation Act certain decisions of the Authority, which are reviewable by the Administrative Appeals Tribunal, are automatically stayed for five days, and if an application is made to the Administrative Appeals Tribunal against such a decision within that time a stay is kept in place for up to a further 90 days. The provisions of s 31A apply to decisions under the Act or Regulations where the Authority is required to give a show cause notice.

and Ors and Civil Aviation Safety Authority, which is dealt with below. The
effect of the mechanisms that CASA had invoked with respect to the chief
pilot and check pilot was to render impossible the continuation of operations
under Lip-Air’s Air Operators Certificate, but without any mechanisms of the
kind provided by s 31A of the Civil Aviation Act being engaged at the same
time. Buchanan J found that the use of those mechanisms, as an alternative to
suspending the Air Operators Certificate was ultra vires.

Buchanan J went on to say that he had formed the view that there was a
sufficiently arguable case to provide respectable support for the limited relief
that he intended to give. He considered that the 'balance of convenience'
clearly favoured maintenance of the status quo, which existed before the
letters of 2 June were sent to Mr Smith and Mr McKenzie. Thus he went on to
grant the injunction requested, but only until 3 pm on the following afternoon,
that of 6 June 2008 when the matter was before the Administrative Appeals
Tribunal.

McKenzie and Ors and Civil Aviation Safety Authority (2008).

Heard in Brisbane before Deputy President P E Hack SC, the application
before the Tribunal was for a stay of two decisions of the Civil Aviation
Safety Authority regarding a Chief Pilot's approval and a Check Pilot's
delegation. The company Lip-Air Pty Ltd employed both pilots.

This was a small aviation company, which offered passenger, freight and
charter services in North Queensland.

The history behind the matter was that in September 2007 the Authority
undertook an audit of the compliance by Lip-Air with the regulatory scheme.
A number of matters arose in the course of that audit that concerned the
Authority. On 19 March 2008 CASA wrote to the check pilot Mr Sidney
Smith asking him to show cause why his approval as check pilot for Lip-Air
should not be revoked or varied. The next day, on 20 March 2008, CASA

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wrote in similar form to the chief pilot of the company, Mr William McKenzie asking him to show cause why his approval as chief pilot should not be cancelled or suspended. In each case 28 days was granted for a response. The period was subsequently extended further. CASA took the position that the sending of the 'show cause' letters was done as a matter of courtesy, rather than in response to any legal obligation.334

In the case of the company, Lip-Air, notice was also given on 20 March 2008, that consideration was being given to the suspension or cancellation of Lip-Air's Air Operators Certificate, or alternatively the imposition of additional conditions on the Air Operators Certificate. A list of non-compliance reasons was given in the notice.335 In relation to Mr McKenzie, the Authority's notice stated that it considered his performance as Chief Pilot to be unacceptable. Included in the list of non-compliance was the fact that he had falsified records to hide non-compliance, he had permitted dangerous goods to be carried and there was evidence of overloading.336 The notice to Mr Smith, as

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334 Under 31A or the Civil Aviation Act certain decisions of CASA, which are reviewable by the Administrative Appeals Tribunal, are automatically stayed for five days, and if an application is made to the Administrative Appeals Tribunal within that time, a stay is kept in place for up to a further 90 days. These provisions as set out in s 31A apply to decisions under the Act or Regulations where CASA is required to give a show cause notice.

335 McKenzie and Ors and Civil Aviation Safety Authority [2008] AATA 651 (25 July 2008), paragraph 3. The notice summarised the concerns of the Authority as being: ... that the company has failed to maintain required standards of compliance in relation to:

(i) its Training and Checking system under Regulation 217 of the Civil Aviation Regulations 1988 ("CAR") where false and abbreviated training, testing and checks have been undertaken on a regular basis;
(ii) dangerous goods training and documentation;
(iii) weights control;
(iv) fuel planning;
(v) the reporting of accidents or incidents to CASA;
(vi) the reporting of conditions at remote aerodromes used by the company;
(vii) the Chief Pilot Scott McKenzie forging Alan Trickey's signature on a request form in order to obtain a CASA aircraft endorsement [sic], approval and rating certification sticker book (form 214).

336 Ibid, paragraph 3. Reason's given for the unacceptable performance of Mr McKenzies duties as chief pilot were:

(i) The company's training and checking organisation which you are required under CAO 82.3, Appendix 2, 2.1 to manage has conducted abbreviated training and checking to company pilots and company pilot records have been falsified to hide non-compliance;
(ii) You have failed to monitor operational standards as the company's induction training for its pilots have not been carried out in accordance with the company's operations manual;
(iii) You failed to ensure compliance by the company in relation to;
(a) the carriage of dangerous goods,
(b) the training of company employees in the carriage of dangerous goods,
(c) aircraft load control,
(d) fuel load control,
(e) the reporting to the ATSB and CASA of accidents and incidents,
(iv) You have rostered unqualified pilots on regular public transport flights;
check pilot stated that he was not performing the task of Check Pilot, which it was said could lead to the conclusion that he might not be a fit and proper person to be entrusted with the exercise of the duties and responsibilities of a check pilot.

In early May solicitors acting for each of Lip-Air, Mr McKenzie and Mr Smith responded to the notices at some length. The response was not as expansive as the Authority wanted. When it came to dealing with the allegations of forgery of documents and falsification of records the solicitors expressed the view that 'given the criminal nature of the allegations, neither the company nor its personnel will address any of these issues, either in this response or at a show cause conference'. On 2 June 2008 the Authority informed Mr McKenzie of its decision to cancel his Chief Pilot approval with effect at the end of the second calendar day after service. On the same day a letter was sent to Mr Smith advising of the Authority's decision to revoke his Check Pilot's delegation. That decision was said to take effect immediately upon service of the notice. On 4 June 2008 applications were lodged in the Administrative Appeals Tribunal on behalf of Lip-Air, Mr McKenzie and Mr Smith seeking a review of the decision made in relation to both men. Once the applications had been lodged the matters were listed for the hearing of an application for a stay of the implementation of the decision on 6 June 2008.

Because Lip-Air believed that the imminent cancellation of the chief pilot's approval would have the effect of closing down its operation it made an urgent application to the Federal Court seeking relief pursuant to the Administrative Decision (Judicial Review) Act. That application came on before Buchanan J on 5 June 2008 and his Honour made an order which had the effect of

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(v) You forged Alan Trickey’s signature on a request form to CASA for an endorsement certification sticker book;
(vi) You rostered company pilot John Beaton on flights where he exceeded CAO 48 flights and duty limits.

337 Ibid paragraph 6.
338 Ibid paragraph 7. This was done under subclause 6.1 of Appendix to Civil Aviation Order 82.0.
339 Ibid paragraph 8. Ms Ford, counsel for the Authority, accepted that Lip-Air was a proper party and had standing to bring an application in its own right in relation to cancellation decisions that involve licenses or authorities held by Mr McKenzie and Mr Smith.
staying the decision sought to be reviewed in the Tribunal, until the following day when it was set down for hearing.341

At the hearing on 6 June 2008, after considerable argument the Tribunal granted a stay of the implementation of the two decisions until 21 July 2008. Certain directions were given and it was hoped that when these directions were complied with, the state of affairs the Tribunal was dealing with would become clearer.

Up until early June 2008 the Authority seems to have taken a compliant approach to the whole situation. It had taken no action to suspend or cancel Lip-Air's Air Operators certificate although it had grounds for doing so. The Group General Manager of the Authority, Mr Gregory Vaughan, had at this stage 'serious concerns about Lip-Air's ongoing capacity to manage its obligations under its AOC'.342 Late in June, three things occurred which changed Mr Vaughan's mind.343 The significance of the three things from a safety point of view was that:

The company had allowed a situation to develop where by the pilot responsible for checking pilots on the stand operating procedures required in the company's operating manual had not himself had a recent check of his own proficiency in the conduct of those procedures.344

1. Mr Vaughan gave evidence that he had lost confidence in the company's only check pilot who was not current on all the aircraft in Lip-air's fleet and

343 The three things were:
1. Lip-Air put forward for approval a Check Pilot but in doing so failed to comply with its own internal checking and training procedures.
2. The application contained inaccurate information concerning the training and experience of the applicant to hold the position of Check Pilot.
3. Mr Vaughan became aware that Mr Smith was no longer current (in terms of having the required base or line checks) on any of the aircraft operated by the company. It followed that he was no longer able to perform the role of Check Pilot within the company’s check and training organizations in accordance with the terms of his approval from the Authority.
344 Ibid paragraph 11.
thus not able to conduct checks on other company pilots. He appeared to have been doing such checks regardless.

2. Lip-Air was reliant on external approved testing officers to renew the instrument ratings of their pilots.\(^{345}\) This was in breach of CAR 217 and the Lip-Air Operations Manual.

3. The company seemed unable to follow the procedures in its own operations manual to qualify another pilot to be approved as Check Pilot for the company.

The result was that when faced with such extreme breaches Mr Vaughan made a decision to suspend the Lip-Air’s Air Operators Certificate pursuant to s 30DC of the Civil Aviation Act. This was on the basis that Lip-Air 'had engaged in, was engaging in, or was likely to engage in, conduct that resulted in a serious and imminent risk to air safety'.\(^{346}\)

On 4 July the Authority lodged in the ACT District Registry of the Federal Court an application for an order to enforce the suspension for a period not exceeding forty days. In the meantime and as the Tribunal noted, presumably to forestall an application by the Authority, Lip-Air filed an application in the NSW Registry of the Federal Court on 2 July 2008 seeking final and interlocutory relief from the notice of suspension served on 27 June 2008. After argument on 2 July Bennett J, having accepted certain undertakings proffered on behalf of Lip-Air, made an interlocutory order pursuant to s 15 of the Administrative Decisions (Judicial Review) Act, suspending the operation of the suspension decision the Authority had imposed on 27 June 2008. The Authority's proceedings, commenced in the ACT, were then transferred to the New South Wales Registry of the Federal Court and were listed for directions before the Court on 31 July 2008.

After lengthy analysis of the legal issues involved in the matter before the Tribunal it was decided that Mr McKenzie and Mr Smith were not entitled to

\(^{345}\) This was in breach of CAR 217 and the Lip-Air Operations Manual.

\(^{346}\) Civil Aviation Act 1988 (Cth), s 30DC. Under this section the Authority must make an application to the Federal Court before the end of the fifth day after notification of the suspension for an order, enforcing the suspension for a period not exceeding forty days. This is to enable the Authority to complete an investigation into the circumstances giving rise to the suspension decision.
an automatic stay pursuant to s 31 of the Civil Aviation Act. The matter, it was decided, was best approached on the basis of the material set out in s 41(2) of the Administrative Appeals Tribunal Act. Taking this approach the starting point had to be, that it had been demonstrated that a stay was necessary 'for the purpose of securing the effectiveness of the hearing and determination of the application for review'.\textsuperscript{347} Without a stay it was apparent that the aviation business that was Lip-Air, would undoubtedly collapse. The next issue to consider was the question of air safety, which was the main object of the Civil Aviation Act. The question for the Tribunal to consider in this context was whether the grant of a stay would create a real, as distinct from fanciful, risk that the safety of air navigation would be compromised and passengers, staff or other persons put at risk.\textsuperscript{348}

The Tribunal then proceeded to analyse the facts of the case as presented by the Authority. This analysis did show a history of many breaches, some more serious than others, of the Act and Regulations, such breaches going back to 2003.\textsuperscript{349} These facts, it was found, demonstrated that Mr McKenzie, as chief pilot failed in his responsibility to ensure 'that Lip-Air's air operations were conducted in compliance with the regulatory scheme, and failed to manage and supervise the training and checking operations'.\textsuperscript{350} Notwithstanding these findings the Tribunal granted a stay of the implementation of the decisions involving of Mr McKenzie and Mr Smith.\textsuperscript{351} Deputy President Hack stated that the stay was stipulated 'to be for a relatively short time since I intend for the hearing to take place at the earliest opportunity'.\textsuperscript{352}

\textsuperscript{347} McKenzie and Ors and Civil Aviation Safety Authority [2008] AATA 651 (25 July 2008), paragraph 29.
\textsuperscript{348} Ibid paragraph 31.
\textsuperscript{349} McKenzie and Ors and Civil Aviation Safety Authority [2008] AATA 651 (25 July 2008), paragraphs 32-37.
\textsuperscript{350} Ibid paragraph 38.
\textsuperscript{351} Ibid
\textsuperscript{352} (a) the Tribunal orders, pursuant to s 41(2) of the Administrative Appeals Tribunal Act 1975 (Cth), that implementation of the decision under review be stayed until the hearing and determination of the application or earlier order;
(b) there is liberty to apply to vary the order in paragraph (a).
\textsuperscript{352} Ibid paragraph 40.
The facts in this case it is submitted, tend to show a conciliatory approach taken by the Authority for some time prior to taking decisive action. When it felt that matters had reached a really serious stage it acted to bring Lip-Air's operation to a stand still. Lip-Air for its part was able to exploit the very clumsy way the Authority sought to achieve its ends and successfully avoid the sudden closure of its activities.

6.4.4 Summary of the period 2003 - 2008

This period covers the time Mr Bruce Byron was in charge of the Civil Aviation Safety Authority. It was he who devised and drove the 'new' enforcement strategy that commenced in 2003.

The Senate Inquiry of 2008 displayed two sides of this strategy. Severe criticism from a former senior counsel of CASA, predicted dire consequences if the regulator continued to proceed along its path of being in 'partnership' with industry. However the path as viewed from Mr Byron's perspective was one of a 'balanced regulator', in contrast to the former CAA's prescriptive and across the board, heavy handed method of regulating.

The other side of the strategy demonstrated that the regulatory reform taking place under Mr Byron's guidance was moving towards the formatting of regulations that were 'outcome' based. Thus he was using an Ayres and Braithwaite model of graduated response to non-compliance, but tempered this with education in risk management, and a carefully structured audit procedure.

Combining this enforcement strategy with factual evidence from the cases there does seem to be a trend to use education, counselling and assistance for non-compliance infringements. The latter cases demonstrate a very 'understanding' stance on the part of the regulator with the 'big stick' only being produced when the 'softer' approach is not bringing about the desired result. Scattered through the cases there are however examples of where the regulator has come down hard on breaches when it considers the seriousness of the breach warrants such action.
From the perspective of observing regulatory theory at work in practice this is encouraging. Despite the criticisms found in the various inquiries regarding the 'misuse' of a compliant approach to regulation, the former alternative of the use of punitive measures in the first instance cannot work in the complex aviation environment of today. It would be satisfying to know that somewhere in the policy making section of the regulatory authority, someone may be aware of the beneficial effect a greater knowledge and prudent application of modern day regulatory philosophy may have on the outcomes the regulator is committed to achieve.
CHAPTER 7  

CONCLUSION

7.1 Preface

There is little margin for mistakes in aviation and even small errors can have 
catastrophic consequences. To date Australia has recorded no hull losses or 
fatal accidents involving high capacity Regular Public Transport aircraft. This 
gives Australia the best international record in this category of aircraft in the 
world.\(^1\) In the low capacity Regular Public Transport class with which this 
thesis is concerned there have been only three fatal accidents, collectively 
involving 30 deaths since 1990.\(^2\) However this thesis has not been concerned 
with fatal accident statistics and these are mentioned only briefly. Rather its 
prime focus is with the methods of enforcement used by the regulatory 
authority in the pursuit of preventing aviation accidents, together with the role 
regulatory theory may be able to play in achieving a greater understanding of 
the regulator's behaviour in undertaking this charge.

7.2 The importance of understanding aviation history

Historical events and resulting political pressures that took place in the 
formative years of the aviation industry, particularly the effects of two major 
World Wars, have had a lasting impact on the international aviation scene. 
This in turn has greatly influenced Australia's domestic aviation scene, 
especially regarding the legislation put in place to deal with regulating safety 
in the industry. Thus the historically based chapters of this thesis demonstrate 
how different safety issues, have at different times received varying levels of 
attention. It is understandable that the relative importance of different 
elements of an aviation safety system can change over time. For example the 
eyearly Kyeema disaster\(^3\) was the result of inadequate navigational aids

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\(^1\) Commonwealth of Australia, Australian Transport Safety Bureau, International Fatality 
Rates: A Comparison of Australian Civil Aviation Fatality Rates with International Data, 

\(^2\) Commonwealth of Australia, Australian Transport Safety Bureau, Analysis of Fatality 
Trends involving Civil Aviation Aircraft in Australian Airspace between 1990 and 2005, 
ATSB research and Analysis Report B2005/0388 (2006) 39. These accidents are listed as the 
Monarch Airlines crash of 1993, the Whyalla crash of 2000 and the most recent, the Lockhart 
River crash of 2005. The Seaview Air crash that caused such a backlash of controversy for the 
regulator discussed in detail in chapter two of this thesis, was classed as a charter flight, and 
for statistical purposes fell into the category of 'general aviation'.

\(^3\) Discussed on page 27 of this thesis.
available to assist the pilot in poor weather and today, with the assistance of modern technology this situation should not occur. Yet we have, in 2005, the Lockhart River fatal accident claiming 15 lives. The visibility was poor, the pilots were making an approach to land in cloud and were doing so by navigating on instruments in what should have been a tried, tested and proven manner. Yet the pilots literally flew the aircraft into the ground. Other factors were at play besides a lack of navigational aids in poor weather. Evidence given at the coroner's inquiry strongly suggested that pilot training and pilot supervision in the airline company Transair was poor and below acceptable standards. The regulator had been made aware of these concerns on several occasions. The regulator did not act.

One may assume from the ATSB report that the regulator failed in the execution of its enforcement strategy, however eloquent that enforcement strategy appeared in print in the Enforcement Manual. An undeniable fact remains, that the regulator permitted an operator to continue flying when it had been made aware of the inadequacies prevalent in the company's operation. The ATSB in its summing up made veiled reference to the regulator failing in its enforcement duties and emphasised that guidance material provided to CASA inspectors was inadequate.

### 7.3 International safety oversight

Aviation's international regulatory body, the International Civil Aviation Organization, is very active in enunciating a plethora of rules, standards, conditions and auditing procedures, yet in the end it lacks the real power to enforce the rules and standards it recommends. It must be said however that

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4 Discussed on page 137 of this thesis.
5 Coroners Court of Queensland, Coronial Inquest into the Aircraft Crash at Lockhart River on 7 May 2005 (17 August 2007) 237.
the recent initiatives with the mandatory universal safety oversight audit program for the regulatory authorities of its member states, has a strong incentive value in its own right to raise safety standards. To fail or be marked down badly on an ICAO audit is to cast a shadow over a country’s safety standard, which can then translate into economic loss for those airlines coming under its control. This said, the stronger enforcement leverage has in reality been left to others in the international aviation community to take up the cudgel, and the United States and the European aviation community have been active in taking on this role. These safety initiatives concentrate on the high capacity RPT operators and are not currently applied in a direct manner to the low capacity RPT and charter airlines. Although there may be some indirect safety benefit filtering down through the regulator’s approach, they do not have any observable impact on these two classes of airline operation.

7.4 The resolution of Constitutional issues
The understandable lack of any reference to aviation in the Australian Constitution posed a problem for the Commonwealth government in the early days of the industry. It managed to ‘ignore’ the problem until the mid 1930s when a number of High Court challenges riveted its attention. The obvious solution of changing the Constitution was poorly handled as a referendum issue and the States’ co-operation was then successfully sought and obtained to resolve the matter. As far as the Commonwealth government is concerned, there is now no impediment to commonwealth autonomy as far as legislating and controlling aviation safety is concerned. It is interesting in this context to contemplate whether in respect of low capacity operations, which are frequently confined to one state or territory, there may be a role for devolved state-level enforcement and what effect this may have on raising the standard of safety in these operations.

7.5 The two-airline policy
Australia’s two-airline policy was unique in the world, ushering in a long period of very strict regulation. This stretched for over 40 years in the post

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Note especially the active role of IATA, together with the recent initiative of ICAO with its comprehensive safety audits, both discussed in detail in chapter two of this thesis.
World War II era, during which time the governments of the day managed to manipulate the laws of the land to ensure that 'competition' was confined to only two airlines, one government owned and one privately owned. The changes that took place in aviation safety regulation at the end of the two-airline policy in the late 1980s were quite dramatic. The former policy came to an end and economic factors quickly took centre stage with the change from a very heavily regulated environment to the 'deregulated' extreme. A period of some turbulence in the newly formed regulatory authority was probably to be expected.

7.6 Recommendations

Society places a strong emphasis on the safe operation of the aviation industry. It is difficult to compare accident statistics from the past era with today's statistics and this has not been attempted. The technical engineering advances and vastly improved navigation and weather reporting systems of the past few decades have meant that accidents once caused by technical failures are now rare. It is submitted that there is a greater need for more proactive solutions to counteract the increasing proportion of human performance related accidents now occurring.

7.6.1 Financial audit considerations

As outlined in the methodology section this thesis has been concerned with low capacity RPT and charter operations. There have been no recorded cases of safety regulation enforcement action cases being brought before the Tribunal or courts in the high capacity RPT category. One possible reason for this is that the regulator manages to 'informally' reach a satisfactory arrangement with such operators so that enforcement actions are avoided and safety issues do not reach the public domain. If so, this state of affairs itself tends to highlight the economic and commercial factors that may be at the root of some safety lapses in the low capacity area. At present when a prospective operator applies for an AOC, the regulator examines the financial state of the applicant. However regular financial audits after the initial investigation are

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10 See page xiii of this thesis.
not required. It is submitted that a regular financial audit of low capacity RPT and charter operators could prove useful in indicating to the regulator when additional surveillance may be warranted. Skimping on maintenance when a company is suffering cash flow problems could be very tempting. The fact that lower profitability has been shown to correlate with higher accident and incident rates, particularly for low capacity RPT operators, shows up in a number of studies undertaken in the United States.\(^{11}\) One such study in 2005 looked at the link between financial performance and air safety after deregulation, using accident rates as a measure of safety. The conclusions highlighted an inverse relationship between profitability and air safety, especially in relation to smaller regional operators.\(^{12}\)

There are several examples in the cases discussed in this thesis where CASA has taken enforcement action against an operator because log books have not been kept accurately, with defects going unreported and hours 'stretched' to elongate the time between 100-hourly services. The unpalatableness of regular financial audits and their potentially difficult political ramifications could perhaps be tempered with a 'carrot' incentive of free or subsidised training in the area found to be in need of improvement.\(^ {13}\)

### 7.6.2 A role for the acknowledgement of regulatory theory?

It is submitted that there is a greater role for regulatory theory than has to date been implemented. What is clear from the evidence presented to the 2008 Parliamentary inquiry into the Civil Aviation Safety Authority is that large amounts of money have been directed into regulatory reform in the aviation safety field in recent years,\(^ {14}\) however scant attention appears to have been given in the midst of this reform, to the part played by the strategies of


\(^{13}\) The 'carrot' approach being a preferred alternative to the 'stick' approach at the apex of the Ayres and Braithwaite enforcement pyramid model.

\(^{14}\) Commonwealth of Australia, Senate Standing Committee on Rural and Regional Affairs and Transport, Administration of the Civil Aviation Safety Authority (CASA) and related matters, (September 2008) 120.
enforcement adopted by the regulator and how the philosophies behind these
may assist in refining the execution of the enforcement strategies. An
extensive literature review has revealed only one Australian journal article
directly related to the topic,\(^\text{15}\) and virtually no reference is made to regulatory
theory and philosophy in the inquiries analysed in this thesis.\(^\text{16}\)

What can be said with some certainty from this research is that the Australian
aviation safety regulator tends to follow a strategy of 'compliance' rather than
one of 'deterrence' or sanctioning in the enforcement of its regulations.

'Graduated response' along the lines of the Ayres and Braithwaite pyramid
element,\(^\text{17}\) was an enforcement policy enunciated by the Civil Aviation
Authority shortly after its formation and subsequently followed by it before
the formation of the separate statutory body, the Civil Aviation Safety
Authority. A policy of 'graduated response' is still espoused as being the
preferred mode of dealing with breaches of the regulations, except where the
breach could lead to 'a serious and imminent risk to air safety'.

### 7.6.3 Balancing the job of educator and policeman

Evidence from the Parliamentary inquiries and cases studied in this research
show a regulator, over the past 20 year period, trying to balance the difficult
job of being both educator and advisor to the industry and at the same time
being the industry's 'policeman'. It is perhaps understandable that at times
prior to the separation of the service and regulatory roles of the Civil Aviation
Authority that these two roles would indeed cause conflict and may give less
than desirable results. However these conflicts still occur to some extent,
regardless of the separation of the functions of the former Civil Aviation
Authority into two new entities that occurred in July 1995.\(^\text{18}\)

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\(^{16}\) Peter Grabosky and John Braithwaite, Of Manners Gentle: Enforcement Strategies of
Australian Business Regulatory Agencies (1986). These authors have touched on the aviation
industry briefly, in amongst the 96 businesses and regulatory agencies they studied.

\(^{17}\) See page 180 of this thesis for a description of 'responsive regulation'.

\(^{18}\) These came into existence in July 1995 when The Civil Aviation Safety Authority, responsible for overseeing the safety health of the aviation industry was formed, and the
former 'commercial' arm of the Authority was reallocated to another separate entity - that of
Airservices Australia.
The Authority is 'educator' one minute - at the base of the Ayres and Briathwaite enforcement pyramid - yet may have to turn into 'policeman' next minute, when attempts at 'educating' have not worked and regulations are continuing to be breached. In the Seaview Inquiry,\(^\text{19}\) as one example, the margins separating one role from the other became blurred and the many variables drawn together and acting collectively on each individual regulatory official involved, produced quite different actions. These examples occurred prior to the separation of the Authority into two different arms, yet even since the separation in July 1995, in the regulatory sphere of the Civil Aviation Safety Authority, the inquiries and cases studied attest to conflict arising when officials try to balance and work with the different facets of the two different roles of 'eductor and 'policeman'.

It is submitted \(^\text{20}\), that it may be helpful to explore and compare how other regulatory agencies deal with this quandary. Although the point is made that there are difficulties in combining these two roles, an unknown and important factor is what success there may be where eduction and counselling has indeed worked and the policeman's powers are not in fact required? Evidence from the studies by Ayres and Braithwaite,\(^\text{21}\) suggest that success is more likely to occur when a 'softy softly' approach is taken to enforcement whilst at the same time there is the threat of the 'big stick' being in the background, available for use if necessary.

In 1996, with the handing down of the 'Staunton Report',\(^\text{22}\) the new Authority gave clear direction for a more forceful and deterrent type approach to regulation. However as demonstrated aptly by an analysis of the cases that have come before the Administrative Appeals Tribunal over the last 20 years

\(^{19}\) Commonwealth of Australia, Commission of Inquiry into the Relations Between the CAA and Seaview Air (1996) Vol 1 & 2, ('The Staunton Report')

\(^{20}\) This idea is referred to at the end of this chapter where there are included recommendations for future research.

\(^{21}\) Ian Ayres and John Braithwaite, Responsive Regulation: Transcending the Deregulation Debate (1992).

\(^{22}\) Commonwealth of Australia, Commission of Inquiry into the Relations Between the CAA and Seaview Air (1996) Vol 1 & 2, ('The Staunton Report').
the factors that shape an agency's enforcement strategy are complex and there are no simple solutions for change, even if this is what is directed. A few cases that follow the date of that inquiry do tend to show a slightly more 'deterrent' approach to enforcement on the part of the Authority. However a significant number of other cases during the period tend to show just the opposite. Numerous times, right across the whole 20-year time period, the facts as described in the cases show evidence of an Authority bending over backwards to educate, assist and help a 'wayward' participant, before circumstances force it to come down with the big stick of suspension or cancellation of a relevant licence or authority.

7.7 The role of the Administrative Appeals Tribunal

The cases before the Administrative Appeals Tribunal,23 show it on many occasions as a Tribunal ready at times to pull out all stops to assist a non-compliant operator to remain in business, despite numerous regulatory discrepancies that have eventually worn down the initial compliant attitude of the regulator. Overall, with only a few extreme exceptions, the Tribunal tends to takes a far more lenient view of transgressions than does the regulator. On the other hand appeals to the Federal Court from decisions of the AAT rarely succeed, with the Federal Court certainly in those cases studied, tending to back up what it considers to be the more expert decisions of those in the Tribunal. It should be born in mind that approximately eighty per cent of applications made to the Tribunal are determined without going to a hearing. Orders are made with the consent of the parties in the overwhelming majority of these cases and matters in dispute are settled by way of preliminary conferences or mediations.24

7.8 Avoiding a return to a deterrent approach to regulatory enforcement

One of the most obvious findings apparent in the inquiries analysed is the fact that almost all inquiries, especially those following on from any serious aviation accident, find the regulator to be 'at fault' in the manner in which it

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24 Commonwealth of Australia 2008, Administrative Appeals Tribunal Annual Report 2007-2008, Appendix 3 page 119. For example in the category of Civil Aviation of the 30 applications lodged in the financial year 2007-2008, 26 of these were finalized.
has enforced the regulations. Such 'fault' when looked at overall, seems to be at variance with the manner in which the facts, as they appear in the cases, tend to show the Authority undertaking its duties over a wide, far-reaching and complex aviation industry.

The underlying theme in the inquiries is that of strong criticism of the Authority's 'weak' approach to enforcement, leading to a lack of appropriate action. This in turn is seen to be the reason for an accident occurring and thus the reason for the untimely death of innocent people. This is emotive material. When a fatal accident happens it is perhaps human nature to want retribution for loss suffered and politicians are not slow in attempting to apportion blame. The regulator is invariably in the 'hot seat' in this scenario. Criticism abounds that the regulator has leant too far towards the 'compliant' end of the enforcement strategy spectrum, when it should be using a far more 'deterrent' approach. This is very apparent in those inquiries that follow on directly after a serious accident. Such criticism may indeed be justified in narrow isolated examples and when it is deemed so, much is made of it in the subsequent inquiry. It is noticeable how after each inquiry or review a 'compliant' approach to enforcement is criticised and a 'deterrent' approach is recommended. But a reversion to a 'deterrent' modus operandi by the regulator as these inquiries suggest, seems merely to fly in the face of modern regulatory theory, research and philosophy. Of considerable concern is why a graduated response, that should in theory serve operational regulation well, turns into a situation bordering on 'negligent' enforcement procedures.

In the cases the evidence outlined in the factual descriptions of events, leading up to any ultimate use of a 'big stick' approach by the Authority, demonstrates that the present day CASA adopts a knowingly graduated and 'compliant' strategy of enforcement. According to statements from the current CEO of the organization a strong leaning towards clearly defined methods of risk assessment now back this approach. On the whole regulatory theory suggests that this should lead to a more successful oversight position on the part of the regulator. The emotive element, ever present in the reporting of aircraft accidents tends to 'muddy the waters' somewhat when looking at the success
or failure of the Authority's regulatory scrutiny. The current emphasis on 'risk control', which provides a systematic form of accountability, could be seen as giving a more rational, defensible and structured way of providing the flexibility required. In fact 'meta risk management' may be the answer to more successfully regulating the modern day aviation environment.\textsuperscript{25} The current enforcement policy as espoused by Mr Bruce Byron, seems to point in this direction.\textsuperscript{26} It provides a system that is seen as most appropriate when in an environment that has risks that are volatile and where it is difficult for the regulator to know when such risks are effectively under the control of the aviation operator, over whom the regulator does have some leverage. CASA now monitors the self-monitoring of aviation organizations that, in practical terms must have adequate safety management systems tied into risk management systems in addition to having developed methods to evaluate such systems. Thus the emphasis is on the regulator's oversight of the risk management system specifically attuned to all aspects of safety risks within the organization. It is a system that should be equally well implemented when dealing with the many small low capacity RPT and charter operators, as well as high capacity operators such as Qantas and Virgin airlines.

\textbf{7.9 Recognising and dealing with 'capture'}

This research has unearthed considerable misunderstanding in the industry about the good or bad effect of seeing the regulator 'in partnership' with industry. The regulator being 'captured' by the industry is emphasized and condemned in aviation inquires and coroners reports after a major accident has taken place. Frequently in the circumstances such criticism seems warranted. However it is suggested that more emphasis on the research and findings regulatory theorists expound regarding ways and means to identify and avoid 'capture', together with some incorporation of their findings, to CASA's officers in the field and also to management further up the chain, may have an advantageous effect.

\textsuperscript{25} Discussed on page 186 of this thesis.
\textsuperscript{26} Discussed on page 288 of this thesis.
7.10 The 'human factor' element in its application to officers in the field

It is obvious from the regulator's detailed enforcement manual that it is well aware of the importance of its various enforcement strategies. However one area that is so well demonstrated in the Seaview inquiry, but which does not seem to be given any serious attention is the 'human factor' element of the differing personalities of the various field officers and how these can in turn result in varying degrees of inconsistency in the interpretation of exactly what is meant in the practical application of enforcement guidelines. Mr Hoy's very exact and prescriptive interpretation of the regulations as described in the Seaview Inquiry was poles apart from the interpretation placed on the same regulations by his superior. Although well outside the scope of this thesis human factors and how differing personality types react in different situations could, it is suggested, be given more attention by the regulator.  

7.11 Future Research

There is no shortage of excellent topics for further research in this area and four main areas are suggested. Each area could be refined much further opening up a variety of subject matter, which at present has hardly been touched upon.

1. The field of comparative research could, it is suggested prove rewarding. Looking at the regulatory enforcement strategies of New Zealand and Canada, being the two countries most closely aligned to Australia in relation to their aviation safety regulation, would be a good starting point.

2. Regulatory capture studied in more detail, as a topic on its own should receive more attention. Again a comparative approach to other regulatory authorities could be used.

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27 Commonwealth of Australia, Commission of Inquiry into the Relations Between the CAA and Seaview Air (1996) Vol 1, ('The Staunton Report').
28 Ibid 416.
29 Much research has been done and is available in the area where employees receive guidance and insight into how their own psychological makeup can affect their everyday decisions in the workplace. See Taibi Kahler The Process Therapy Model (2008).
3. An empirical study of current regulatory enforcement along the lines of the Grabrosky and Braithwaite study could prove enlightening. A case study approach utilizing interviews with regulatory inspectors is suggested, because it is a major limitation at present that there is virtually no empirical research studies undertaken that deal with quantitative evaluation of a regulator's enforcement strategy, in which the individual inspector is the unit of analysis. Studies such as that undertaken by Grabrosky and Braithwaite that include a substantial number of regulatory agencies are of a kind that may determine whether sensible and bureaucratic structure make a difference, however they cannot determine whether decisions made by individual inspectors reflect their previous work experience, personal confidence or background traits.

4. The role of the regulator being both educator and policeman is referred to on a number of occasions in the inquiries studied. It would be interesting to compare the aviation safety regulator with other regulatory agencies, (such as for example the Australian Competition and Consumer Commission), who also takes on both roles, to examine how other regulatory agencies cope with this problem.

It is hoped that this thesis has drawn attention to a little researched area of the regulation of Australian aviation safety. In understanding how the role of the regulator's enforcement strategy has evolved and is currently operating, with all the forces and pressures modern aviation brings to bear on it, is a vital factor in the aviation safety 'game'. So far the role of regulatory theory has not received much attention. This researcher looks forward to more studies in this area that could result in bringing regulatory enforcement strategy successfully to the fore in the thinking and planning of the civil aviation safety regulator.

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APPENDIX 1

'Removal of the Auto-Pilot Computer Amplifier from Monarch Airlines Piper Chieftain VH-NDU.1

Evidence as to the status of the autopilot and its associated functions from February 1993 until the day of the crash, was at times contradictory during the Coroner's Inquiry. However systematically it displays both an appalling lack of any form of 'safety culture' within the management of Monarch Airlines, and a serious lack of safety oversight by the regulator.

It is repeated here in chronological order as this gives in graphic detail the unfolding of events that lead to the fatal crash of VH-NDU on the 11th June 1993.

17 February 1993:
The first real evidence of any problem with the autopilot came from a pilot (Nowakowski), who had recently commenced employment with Monarch. He undertook his first flight, a route check, with Monarch's Chief Pilot, Wilson, on 17 February 1993. He advised Wilson on this flight that the autopilot had failed. Nowakowski piloted a number of flights in VH-NDU until he ceased employment with Monarch on 6 April 1993. He gave evidence that on every flight that he flew on VH-NDU the autopilot remained inoperable.

Nowakowski stated that he did not record the defect in the required manner as he considered his job would be in jeopardy if he did so.

Wilson claimed in his evidence that Jet Centre Avionics rectified the autopilot failure of 17 February and that it was working until 29 March. Nowakowski's evidence contradicted this and it was his version that was accepted by the Coroner.

29 March 1993:
On the 29 March 1993 at the conclusion of the flight in VH-NDU another pilot, (Chehade), reported the defective autopilot on the flight record. He did not enter an MA6 defect form, as he should have done. If he had, it would have come to the attention of a licensed aircraft mechanical engineer, (LAME), at least by the next maintenance inspection.

30 March 1993:
On the 30 March two senior Airworthiness Inspectors from the Civil Aviation Authority carried out an unscheduled inspection, or 'ramp check' as it is called, on another of Monarch's aircraft, (VH-TXK). This ramp check found that the autopilot on VH-TXK was inoperative and not reported on the appropriate forms as required under the regulations. As a result of this, on the same day, the CAA directed Monarch to immediately surrender the maintenance records.

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1 The following factual evidence of the effect of the removal of the autopilot and its associated components from VH-NDU is taken from the Coronial Inquest: Coroners Court of New South Wales, Coronial Inquest into Deaths resulting from air crash of Monarch Airlines Aircraft at Young of 11 June, 1993, 29-40.
of VH-NDU as well as those of the aircraft, VH-TXK that had been the subject of the ramp check.

1 April 1993:
VH-NDU was due for a 50 hour inspection on 1 April. Mr Thornton of the maintenance organization Aquila Aviation carried this out. He found that when the computer amplifier was removed the HSI and RMI did not work. He advised McLean, Monarch's general manager, that the compass system would not work if the computer amplifier were removed. He also advised Wilson, Monarch's Chief Pilot, of this fact.

It is important to note that the Bureau of Air Safety, (BASI) had, about this time by reason of the anonymous confidential reporting system, (CAIR), advised the CAA that they had received an allegation that Monarch pilots were being required to fly Regular Public Transport operations in the aircraft VH-NDU without a serviceable autopilot. Furthermore BASI had also been advised that an engineer was sacked for refusing to sign out VH-NDU as defect-free.

Also on 1 April, Neil Morton, of the CAA, was advised by an employee of Monarch that the Minimum Equipment List, (MEL), for VH-NDU was to be invoked due to the inoperable autopilot. The pilot Chehade had previously reported this to Monarch on 29 March.

3 April 1993:
Evidence was given to the Coronial Inquiry that both McLean and Wilson were at a pilots' meeting on 3 April at which the inoperable autopilot on VH-NDU was discussed. McLean commented that the autopilot would have to be sent away to be fixed and while out of the aircraft the HSI\(^2\) and RMI\(^3\) would be inoperative.

13 April 1993:
On 13 April, Mr. Thornton, who had previously carried out the 50-hour inspection on VH-NDU, advised Morton of the CAA, that the autopilot on VH-NDU had not been fixed. Morton acted on this advice and asked one of his officers to check. The officer found that VH-NDU's maintenance records had not been surrendered to the CAA as had been requested on 30 March. The 10-day period under the Minimum Equipment List (MEL) had expired, and VH-NDU was not legally permitted to fly RPT operations without a 'Permissible Unserviceability' (PUS), document being granted by Morton on behalf of the CAA.

16 April 1993:
On 16 April, McLean applied for a Permissible Unserviceability document from the CAA for two of Monarch's aircraft, VH-TXK and VH-NDU. Containing strict conditions this was granted by Morton on the same day. It was described as being valid … 'until midnight Sunday 16 May 1993 Eastern Time.'

\(^2\) HSI - Horizontal Situation Indicator
\(^3\) RMI - Radio Magnetic Indicator
Standard Time, or until the required components are available for refitment to the aircraft, WHICHEVER OCCURS FIRST.

19 April 1993:
After issuing the Permissible Unserviceability document for both aircraft, Morton organized that he obtain the flight plans of these aircraft from pilot briefing in Melbourne. This was so that he could monitor whether two pilots names were being put on the flight plans in compliance with one of the conditions of the Permissible Unserviceability document. On Monday 19 April, in reviewing the weekend's flying he noted that only one pilot's name was being submitted on the flight plans. He decided to carry out a ramp check on VH-NDU. Accompanied by two additional CAA officers, a joint airworthiness and flying operations ramp check was done on the evening of the 19th April at Sydney's Kingsford Smith airport.

Despite the fact that five breaches of the Permissible Unserviceability document were found during the ramp check, the aircraft was permitted to depart on an RPT service with those deficiencies unchanged.

As a result of the ramp check Morton conferred with the CAA district flight Operations Manager, Mary O'Brien about the circumstances and seriousness of the breaches. He recommended that Monarch be asked to 'show cause' why its Air Operators Certificate (AOC), should not be suspended or cancelled.

30 April 1993:
On 30 April, on Wilson's instructions two pilots, Hicks and Vella, flew VH-NDU to Honeywell Aviation, Coolangatta to have the autopilot fixed. Honeywells said that to fix the autopilot components they would have to be removed from the aircraft. One of the pilot's who had flown the aircraft to Honeywells phoned McLean and told him that the engineers proposed to remove the autopilot components and pointed out the effect that would have on the HSI and RMI. However as this pilot knew, the aircraft was scheduled to be used for an RPT flight from Kempsey to Sydney. McLean authorized the RPT flight with the autopilot removed and the HSI and RMI inoperative, saying that as the flight would be undertaken with a second pilot this satisfied the conditions of the Permissible Unserviceability document granted for the aircraft. The RPT flight was duly undertaken. No record (as required by the regulations) was made by the pilots or Honeywell that the computer amplifier and controller from the autopilot had been removed.

4 May 1993:
On 4 May McLean advised Morton (CAA), that the autopilot on the other aircraft VH-TXK, had been fixed by Honeywell and added 'I'll probably take VH-NDU to Honeywell as well'. Morton phoned Honeywell and ascertained that they had refitted the autopilot when they were unable to fix it, and had told Monarch to bring the aircraft back when wiring diagrams arrived form the United States.

14 May 1993:
On 14 May 1993 McLean contacted Morton and requested an extension of the Permissible Unserviceability permit for another 30 days. This was granted. Meanwhile, also on the 14 May, McLean requested that Honeywells return the autopilot parts to him. Honeywells complied with this request and the autopilot parts were returned to McLean.

Again on this day, McLean had a meeting with the CAA district flight Operations Manager, Mary O'Brien. Despite Morton's recommendation she decided not to revoke or suspend Monarch's AOC. Rather she simply advised Mclean that she had decided to cancel Wilson's Chief Pilot approval, and would only consider as a replacement Chief Pilot somebody who had the appropriate maturity, experience and managerial skills.

31 May 1993:
On 31 May the computer amplifier was removed from VH-NDU at the request of McLean. As there was no Licensed Aircraft Mechanical Engineer (LAME), available at the time the computer amplifier was removed by Johnson, an unlicensed engineer. He gave evidence that he then made the appropriate entry in the work sheet for the LAME's approval and signature. There was conflicting evidence regarding who then went on to remove the flight controller. What was clear was that Honeywells did receive back from Monarch both the computer amplifier and the flight controller on 2 June. Johnson, the unlicensed engineer denied removing the flight controller, and McLean was both evasive and 'forgetful' in his replies to questions on the subject.

Coroner's summary of evidence relating to the removal of the autopilot:
On instructions from the General Manager of Monarch Airlines, Richard McLean, the Chief Engineer removed the computer amplifier and controller components of the autopilot from VH-NDU on the 31 May 1993. They were sent to Honeywells at Coolangatta for repair. They remained at Honeywells and were not repaired until the afternoon of 11 June 1993. This was ironically the day of the crash.

VH-NDU had flown from 30 April 1993 to 14 May 1993 and again from 1 June 1993 to the day of the crash, 11 June 1993, with the computer amplifier removed. The consequence of this was that the Horizontal Situation Indicator (HSI), and Radio Magnetic Indicator (RMI) were inoperative. This was in contravention of the Minimum Equipment List (MEL) for this aircraft.

The Civil Aviation Authority's Flight Operations Inspector, (FOI), in charge of supervising Monarch Airlines, said that at no stage was he aware that VH-NDU was being operated with the RMI and HSI inoperative. If he had known he would have stopped the operation. This was because the relevant effect of unserviceability of the HSI and RMI was to deprive the pilots of primary gyro-stabilized earth referenced heading information, and to raise doubts about the radio direction finding. Pilots rely on the HSI and the RMI when coming into land, particularly at night and in poor weather.

The removal of those parts from the aircraft was stated by the Coroner to be in gross breach of the Civil Aviation Regulations
APPENDIX 2

AIRCRAFT CATEGORIES

The Australian civil aviation industry encompasses a very wide range of aircraft types, with differing maintenance and other regulations applying to them. The industry itself can be divided into four branches.

1. Regular Public Transport (RPT), which is divided into two sections, high and low capacity aircraft according to the number of passengers carried or weight of cargo permitted.

2. General Aviation (GA), which includes charters, aerial agriculture, flying training and private flying.

3. Sport Aviation concerned with ultra light aircraft, hang gliders and ballooning.

4. Military aviation, which is not touched upon in this thesis.

The different categories of aircraft that come within the first two branches are those with which the body of this thesis is primarily engaged.

Australian law has recently replaced what were the three main categories of aircraft traditionally recognised internationally, with five 'new' categories, which are specific to Australian legislation. There is an additional system of classification for maintenance purposes. In broad terms the former three 'traditional categories' were 'regular public transport (RPT)', 'charter aircraft' and 'private aircraft'.

The five 'new' categories that have replaced the traditional categories in Australian law for operational and licensing purposes are:

1. Air Transport Operations (large aircraft). Aircraft with a type certificate maximum take off weight of more than 5,700 kilograms.

2. Air Transport Operations (small aircraft). Aircraft with a type certificate maximum take off weight of 5,700 kilograms or less.

3. Air Transport Rotorcraft operations (helicopters).

4. Aerial Work. This category includes such activities as police work aerial agriculture and search and rescue.

5. General Aviation

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1 All three categories are defined in s 3(1) of the Air Navigation Act 1920 (Cth) and regulation 3(1) of the Air Navigation Regulations 1947 (Cth). Private use is anything other than carriage of passengers or goods for reward.

2 Regular Public Transport and charter passenger-carrying operations involving helicopters are subject to the provisions of the Civil Aviation Safety Regulations 1998 (Cth), proposed Part 133.
Fixed wing aircraft, with which this thesis is concerned, are divided into two weight categories. Aircraft with a maximum take off weight below 5,700 kilograms, and aircraft with a maximum take off weight above 5,700 kilograms. Those aircraft in the first weight category generally include most aircraft in the General Aviation category. This can range from a small two-seater training aircraft, to aircraft used in charter and low capacity regular public transport (RPT) operations. Aircraft above the 5,700 kilograms weight category include turboprop and turbofan (jet) aircraft found in corporate aviation, the airlines and some charter operations.  

The main difference between regular public transport (RPT) services and charter services are that RPT services have fixed schedules, fixed terminals and are available for the use of the public generally.  

Australian aviation safety legislation specifically places emphasis on the protection of the fare-paying passenger, especially in larger aircraft, irrespective of the regular or irregular nature of the airline service being offered. It is for this reason that it has seen fit to reclassify aircraft operations into the five categories listed above. Of the five, 'air transport operations' are considered the most important and effectively include all the previous RPT and charter classes. Theoretically now, there is no difference in the level of safety expected for all these air transport operations.

Both large and small aircraft in the 'air transport operations' category are required to obtain from the regulator (CASA), an Air Operator's Certificate (AOC) for transport operations when they are operating for purposes broadly specified as 'commercial' as defined under regulation 206 of the Civil Aviation Regulations 1988.  

A further classification of aircraft for the purposes of the regulations exists and is relevant regarding maintenance. It is based on the distinction between:

1. "class A aircraft", defined in the Civil Aviation Regulations 1988 (Cth), which are Australian aircraft, other than balloons, that are either "certificated as a transport category aircraft" or "being used, or [are] to be used, by the holder of an Air Operators' Certificate which authorises the use of that aircraft for the commercial purpose" referred to in reg 206(1)© of the Civil Aviation regulations 1988 (ie, any RPT services), and
2. "class B aircraft" (which include anything else).  

'Maintenance' as it appears in the regulations is broadly defined and the regulatory system governing it is currently undergoing redevelopment. It is a condition of an Air Operators Certificate that aircraft engaged in regular

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4 Ibid 128.
7 Civil Aviation Safety Regulations 1998 (Cth), regulation 2(1) gives the definition of 'maintenance'.
public transport must have a system of maintenance control in place, which is in accordance with the requirements of the regulations. An approved System of Maintenance must be followed for the maintenance of all aircraft and also for any aircraft components that are fitted to the aircraft from time to time.
APPENDIX 3

Cases 1988 - 2008

1989


Heard in Melbourne before, I R Thompson, Deputy President, Dr D J Howell, Member, and J H Wilson, Member.

Hugh Denison was a commercial pilot who suffered from defective colour vision. The CAA had granted him a commercial pilot's licence, with the restriction that he was not to fly at night. He sought to have this restriction on his licence lifted.

The decision under review, precluding the pilot from undertaking night flights, was set aside and a substituted decision made that Hugh Denison could be granted a commercial pilot licence to fly both fixed wing and rotary aircraft subject to two new conditions. They were:

1. The first condition was that he was not permitted to pilot an aircraft in 'international air navigation' except with the permission of the appropriate authority of the country concerned.
2. The second condition was that he was not permitted to pilot an aircraft within control zones, unless the aircraft being flown by him was fitted with a radio that enabled him to maintain two-way communication on appropriate frequencies.

The hearing was lengthy, (28 days), as it dealt with the 'transition period' during the introduction of the new regulations attached to the Civil Aviation Act 1988, together with a wide consideration on restrictions on flying for those pilots diagnosed with colour blindness.

The decision reached involved a weighing up by the Tribunal of the discretion vested in the Authority in relation to the regulations and the facts in the case. They had to take into consideration whether defective colour vision posed a significant and unacceptable risk to the safety of the public. Having decided it could indeed do so, the Tribunal looked at ways and means to establish a possible elimination or reduction of this risk in a less severe manner for this particular pilot, than by forbidding night flying. The imposition of the two conditions listed above, were seen by the Tribunal to be a satisfactory solution.

Re Aquatic Airways Pty Limited and Civil Aviation Authority [1989] AATA 201 (1 September 1989).

Heard in Sydney before Hon Justice R N J Purvist, Presidential Member.

Discussed on page 226 of this thesis.

Re Trevor Terrence Francis Burns and Civil Aviation Authority [1989] AATA 223 (19 October 1989).

Heard in Hobart before R C Jennings QC, Deputy President and J H Wilson, Member.

Discussed on page 228 of this thesis.

Heard in Sydney, before Hon Justice R N J Purvis, Hon Justice P J Moss and Dr D J Howell.

The applicant in this case was an air traffic controller who was in the employ of the Civil Aviation Authority. He was seeking a review of a decision made by his employer in 1987. His application was dismissed.

1990


Heard in Sydney before B J McMahon, Deputy President.

The hearing involved a review of two decision of the Civil Aviation Authority. The Tribunal dismissed both applications.

The Civil Aviation Authority had granted Mr Gowing a 'delegation' on 3 February 1989 to become an approved Test Officer. In particular this was to conduct flight tests for pilots trained by Kempsey Aviation. This delegation was to remain valid until 31 January 1990. The Tribunal defined such a delegation as 'a delegation by the Authority of some of its functions'. It was therefore not deemed to be a 'reviewable decision' coming within the jurisdiction of the Tribunal.

The second decision involved the cancellation of Mr Gowing's appointment as a Chief Flying Instructor. As the result of certain drafting irregularities in the new legislation the Civil Aviation Act 1988, the Tribunal found that the legal underlying base of Mr Gowing's appointment had effectively disappeared on 1 July 1988, which was well before the cancellation of his 'appointment' and his subsequent application to the Tribunal.

Thus Mr Gowing's request for a review of this second decision was also dismissed.

Although interesting in regard to the legal technicalities occurring in a practical sense at the time of the introduction of the Civil Aviation Act 1988, the facts leading up to the decision of the Authority to cancel Mr Gowing's delegation are not revealed. Thus this case is of little assistance in gaining understanding of the Authority's enforcement policy of the time.


Heard in Adelaide before B H Burns, Deputy President, Miss W J F Purcell, Senior Member, and Mr G. Brewer, Member.

Discussed on page 232 of this thesis.


Heard in Melbourne before I R Thompson, Deputy President, G Brewer, Member, and C G Woodwood, Member.

This case referred to a private pilot, Mr Dawson and involved a six-week suspension of his private pilot's licence. The Civil Aviation Authority claimed they suspended the licence after Mr Dawson piloted an aircraft into
meteorological conditions for which he did not at the time, hold the appropriate instrument rating.

Evidence presented at the hearing referred to previous occasions on which Mr Dawson had come adversely to the notice of the Civil Aviation Authority or its predecessor, the Department of Civil Aviation. The evidence of previous misdemeanours was presented just prior to the hearing and the Tribunal was extremely critical of the tardiness of the Authority in not presenting it earlier. Whilst at the same time the Tribunal was at pains to point out that 'to seek to prove every peccadillo which is on a pilot's record is quite uncalled for'. It stated that it was not necessary for evidence to be received by the Tribunal about any past events.

Thus it is not possible to ascertain if the Authority was taking a 'compliant' or 'deterrent' approach to Mr Dawson's alleged breach of the regulation relating to flight into instrument meteorological condition whilst not in possession of the required rating.

The Tribunal dismissed Mr Dawson's application for a review of the decision, finding in favour of the Authority.

1991


Heard in Melbourne, before B M Forrest, Deputy President, A Argent, Member, and G Brewer, Member.
Discussed on page 233 of this thesis.


Heard in Sydney before Justice D F O'Conner, President.
The case involved cancellation of the approval of a Chief Pilot's authorization, and whether the decision to do so by the Authority was reviewable by the Tribunal.
This case is one of a number of cases to have come before the Tribunal over a period of several years concerning Dr Russell Broadbent.
The Civil Aviation Authority approved Dr Broadbent's appointment as Chief Pilot of Surf Air on 22 March 1990. However on 29 October 1990 the Authority made a decision to cancel Dr Broadbent's approval. Dr Broadbent made an application for a 'stay', which was granted by the Tribunal on 11 December 1990. The current case revolved around the legality or not of the Authority's ability to act in relation to the cancellation, pursuant to the transitional arrangements in place prior to the amending legislation of the Civil Aviation Regulations coming into force on 24 May 1990. The Tribunal found in favour of the Authority. Dr Broadbent then took the matter to the Federal Court where (in Re Michael Russell Mark Broadbent v Montchel Pty Ltd Re Civil Aviation Authority [1991] FCA 485, 21 October 1991), an extension of time was granted, and a period of five days for trial set.

Heard in the Federal Court, Melbourne before Ryan J.
Discussed on page 235 of this thesis.
Held in Perth, before T E Barnett, Senior Member.
The CAA had refused an application for a student pilot licence claiming that the applicant, Mr Gerald Repacholi, was not a 'fit and proper person' to hold such a licence. This refusal followed quite a long and tortuous history of conflict between Mr Rapacholi and the Civil Aviation Authority, involving a series of serious breaches of the regulations at a previous time when Mr Racholi did hold a valid pilot's licence. The Tribunal agreed with the Authority that Mr Racholi was not a 'fit and proper person' to enjoy the privileges of such a licence and thus affirmed the Authority's decision.

Heard in the Federal Court, Brisbane before Pincus J.
Dr Broadbent made an application to the Federal Court for an extension of time to bring proceedings for the review of a decision made by the Civil Aviation Authority on 28 March 1991. See: Re Surf Air and Civil Aviation Authority [1991] AATA 50; 22 ALD 118 (28 February 1991), described briefly above. Dr Broadbent was successful in this application and was granted the extension of time he sought.

1992

Heard in Adelaide before Deputy President B H Burns.
This case involved an application for a 'stay' order regarding de-registration of an aircraft for non-payment of charges. The Tribunal granted a stay and it was noted that the application was not one whereby the decision affected the safety of persons or property.

Held in Melbourne before I R Thompson, Deputy President.
Involved deregistration of six flying school aircraft for non-payment of registration charges dating back many years. The Tribunal decided to set aside the decision under review, and in substitution the Tribunal decided that the certificates of registration of the aircraft to which these proceedings related were not to be cancelled.

Heard in the Federal Court, Perth before French J.
Discussed on page 236 of this thesis.
1993


Heard in Brisbane before D W Muller, Senior Member.

In this case the Tribunal saw fit to uphold the decision of the District Flight Operations Manager in Brisbane, Captain Taylor, regarding the deferment of his decision to approve Mr Sheehan's approval as chief pilot of Crossroads Aviation, pending the outcome of criminal charges against him.

The Tribunal stated that it was clearly the duty of the Authority to be cautious in its approach to the giving of the licences and approval to people involved in aviation. If there were any doubts about the suitability of an applicant for an approval, that applicant should not be given the licence or the approval until the doubts were removed.

Roy Frederick Griffiths, Grif-Air Helicopters Pty Ltd and Civil Aviation Authority No: Q93/484 and Q93/485 AAT [1993] AATA 274 (27 August 1993).

Heard in Brisbane before S A Forgie Deputy President, T R Gibson, Member, and H G Julian, Member.

Involving an application for a 'stay', this case was concerned with helicopters, their inadequate maintenance and numerous breaches of the regulations by Mr Griffith. The application for a 'stay' was refused. It is interesting because it set out the matters to which the Tribunal should have regard, in considering the merits or not of granting a stay of a decision of the Authority. They were:

i) The prospects of success of the application for review of the decision;
ii) The hardship to the applicant if the stay orders were not made: and
iii) Whether public safety was likely to be imperilled if the stay orders were not made.

1994

Roy Frederick Griffiths and Civil Aviation Authority [1994] AATA 156 (31 May 1994).

This case was heard in Brisbane before S A Forgie, Deputy President, T R Gibson Member, and H G Julian, Member.

It was concerned with Mr Griffith being considered as 'a fit and proper person to hold a helicopter licence'. The Tribunal confirmed the decision of the Authority that he was not such a person.


Heard in Melbourne before B M Forrest, Deputy President), A Argent Member, and J T.C Brassil, Member.

Discussed on page 239 of this thesis.

Roy Frederick Griffiths v Civil Aviation Authority [1994] FCA 1528 (2 December 1994).

Heard in the Federal Court, Brisbane, before Kiefel J as an appeal from the decision of the Administrative Appeals Tribunal confirming the Authority's
decision that Mr Griffiths was not a fit and proper person to hold a helicopter licence.

The Civil Aviation Authority requested a dismissal of the appeal as incompetent on the basis that prior to its institution, Mr Griffith's property had been sequestrated. Kiefel J ordered that the appeal be dismissed as incompetent.

1995

Roy Frederick Griffiths and Grif-Air Helicopters Pty Ltd v Civil Aviation Authority and Peter P Rundle [1995] FCA 1244 (16 May 1995).
Heard in the Federal Court, Brisbane, before Cooper J.
This case concerned an application to the Federal Court by Mr Roy Griffith and Grif-Air Helicopters Pty Ltd, relating to the suspension of Mr Griffiths' commercial and private helicopter licences, his aeroplane licences, his Chief Pilot Approval and the suspension of the Air Operators Certificate of Grif-Air Helicopters Pty Ltd. It followed hearings in the Administrative Appeals Tribunal discussed above in Roy Frederick Griffiths, Grif-Air Helicopters Pty Ltd and Civil Aviation Authority No: Q93/484 and Q93/485 AAT [1993] AATA 274; (1993) 31 ALD 380 (27 August 1993) and Roy Frederick Griffiths and Civil Aviation Authority [1994] AATA 156 (31 May 1994).
The proceedings in the Federal Court were instituted by application for prohibition, mandamus and injunction against an officer of the Commonwealth. Cooper J dismissed the application and costs were awarded in favour of the Authority. The full Court of the Federal Court subsequently overturned this decision. See below, Roy Frederick Griffiths v Civil Aviation Authority [1996] FCA 1502 (24 May 1996).

Heard in Brisbane in the Queensland Registry of the Federal Court before Drummond J.
This was an application for a judicial review of a decision by the Civil Aviation Safety Authority, made under the Civil Aviation regulations, requiring Dr Broadbent to take an examination of his 'aeronautical skills and knowledge'. Dr Broadbent challenged the validity of the decision requiring him to submit to the examination. He sought an order from the court under s 15(1) of the Administrative Decisions (Judicial Review) Act 1977 (Cth), suspending the operation of this examination decision until the determination of his Administrative Decisions (Judicial Review) challenge. Alternatively he sought an interlocutory injunction restraining the Authority from making a decision in terms of a letter it had sent to Dr Broadbent on 28 June 1995. (This letter informed Dr Broadbent that he was required to take the examination testing his 'aeronautical skills and knowledge').
There was no secret about what the Authority intended to do if Dr Broadbent did not undertake the examination. The Authority stated unequivocally that it would proceed to impose a suspension on Dr Broadbent's pilot's licence until the examination was satisfactorily undertaken.
After much legal argument Drummond J got to the factual substance of Dr Broadbent's application and the real concerns the Authority had in 'letting him get away' with breaches of the regulations. The Authority's concern was to ensure that pilots - even highly experienced pilots such as Dr Broadbent - must abide by the disciplinary framework for flying that is contained in the Civil Aviation Regulations. An attitude that a particular pilot is the best judge of whether he needs to obey the regulations was one that could properly be regarded as contrary to the maintenance of this regulatory air safety framework. As such this attitude could be expected to attract the sanctions open to the Authority, such as requiring the particular pilot to undergo examination, even though he personally regarded it as an affront to his standing as a pilot.
Dr Broadbent's notice of motion was dismissed.

Heard in Sydney before Justice Jane Matthews, President.
Involved legal argument as to whether or not a decision made pursuant to a Civil Aviation Order to suspend a chief pilot's approval was a reviewable decision under s 31 of the Civil Aviation Act. The Tribunal found that it was a reviewable decision. No 'facts' as they related to the case were given in the report.

Heard in Brisbane before D P Breen (Deputy President).
Discussed on page 243 of this thesis.

**Michael Russell Mark Broadbent and Montchel Pty Ltd v Civil Aviation Safety Authority** [1995] FCA 1542 (15 September 1995).
Heard in Brisbane in the Queensland Registry of the Federal Court before Drummond J.
This matter before the Court challenged two decision of the Civil Aviation Authority made on 28 March 1991 and 15 May 1992. The first decision was a refusal by the Authority to permit the appointment of Dr Broadbent as Chief Pilot of his aviation company Montchel Pty Ltd. The second decision was similar, being the Authority's further refusal of the same appointment. The litigation had a tortuous history with numerous interlocutory applications. Dr Broadbent sought a review of the first decision on the grounds, among other things, that a breach of the rules of natural justice occurred in connection with the making of it.
The Tribunal found that Dr Broadbent and his company had presented enough evidence to the court to show that the Authority's delegates 'fell into an error of law in making each decision'. Drummond J decided not to make any formal order, but rather to leave it to the parties to consider his reasons and the findings he made and having done so come back before him on seven days notice for directions.

Heard in Melbourne before B M Forrest, Deputy President, A Argent, Member and C G Woodard, Member.

Mr Alaa Saraya applied to the Tribunal for a review of a decision of the (then), Civil Aviation Authority not to grant him an Australian Aircraft Maintenance Engineer licence. Mr Saraya claimed to hold an Egyptian Aircraft Maintenance Engineer’s licence issued by the Arab Republic of Egypt. He produced a copy of this licence valid for the period of 17 July 1995 - 9 December 1995. Evidence was given of Mr Saraya’s various attempts to pass the relevant required Australian examinations, and also fulfil required current practical requirements.

The Civil Aviation Authority's insistence on practical and recent experience on Australian registered aircraft was approved by the Tribunal, who regarded this insistence as reasonable and consistent with the practical experience requirement to be found in CAR 31 4(c) for a 'qualified person'. It was noted that Mr Saraya did not have any 'hands on' experience in a workshop, hangar, or in the field in Australia, and had not worked on aircraft for more than four years. The Tribunal stated that they were cognisant that the aviation industry was a constantly changing industry and the only means to keep abreast of these changes was to be active in the industry.

The Tribunal found from the evidence it was clear that Mr Saraya had not had the necessary practical experience in Australia. Thus he failed to satisfy the practical experience requirement as specified and was thus not entitled to be treated as a qualified person for the purposes of CAR 31 (6)(b).

The Tribunal therefore affirmed the decision of the Authority not to grant Mr Saraya an Australian Aircraft Maintenance Engineer's licence.

Mr Saraya appealed this decision in the Federal Court for a review of the decision, where it was heard on 1 May 1997 before Merkel J sitting in Melbourne. (Alaa Saraya v Civil Aviation Authority [1997] FCA 364 (1 May 1997). The application for review was dismissed.


Heard in Sydney before B J McMahon, Deputy President, D D Coffey, Member and C M Prime, Member.

This case centred around whether Mr Coburn's refusal, in his capacity as a Licensed Aircraft Maintenance Engineer to undergo a written examination was grounds for the Authority to vary his licence by removing an endorsement relating to an entitlement to service wooden structures in aircraft. The Tribunal found that the Authority's decision to vary his licence was not based upon a secure foundation and the decision was set aside. The Authority appealed to the Federal Court. (Civil Aviation Safety Authority v Roy Dennis William Coburn [1996] FCA 1827 (18 October 1996).

Branson J in the Federal Court set aside the decision reached by the Administrative Appeals Tribunal. This was on the grounds that there had been a wrong identification of the issue by the Administrative Appeals Tribunal. Branson J remitted the case back to the AAT to be heard again and 'determined according to law'.

Heard in Brisbane before Mr D W Muller, Senior Member
This case concerned several applications before the Tribunal involving the cancellation of William Larsen's Commercial and Private helicopter licences. In addition Mr Larsen's Air Operators Certificate had been varied by the Authority to exclude all helicopter operations, his Low Flying Permit and his Chief Pilot's Approval. This action resulted from a helicopter accident that occurred near Cairns on 25 September when a helicopter flown by Mr Larsen fell into the water at Trinity Inlet in far north Queensland and drowned one of the two passengers.
The Tribunal affirmed the decision of the Authority as far as the cancellation of Mr Larsen's pilot licences was concerned, stating that Mr Larsen should never have operated the helicopter in the way that he did on the day the accident occurred. On that day Mr Larsen was found to have exhibited a lack of judgement and a lack of knowledge in relation to the handling of the helicopter. There was, in the view of the Tribunal an element of 'she'll be right' showing a careless or reckless approach to the job in hand. Findings of fact indicated that there was a breach of S.20A of the Act and breaches of Regulation 269. There were also breaches of regulations relating to seat belts, harnesses and low flying.
However the Tribunal did set aside the decision of the Authority regarding the variation to Mr Larsen's Air Operators Certificate as it was satisfied that after the cancellation of Mr Larsen's Chief Pilot Approval Mr Larsen subcontracted his charter work to another operator.


Heard in Brisbane before S A Forgie, Deputy President.
This case involved an application for an extension of time to lodge an application for the review of three decisions made by a delegate of the Civil Aviation Safety Authority. The applicant Dr Broadbent had a long-standing dispute with the Authority claiming that he had suffered vindictiveness and malice at the hands of its employees. The Tribunal found this not to be so and refused the application for a review of the decisions.


Heard in Sydney before D Chappell, Deputy President, D D Coffey, Member and M E C Thorpe, Member.
This case dealt with the Authority's refusal to grant a flight engineer a relevant licence because he suffered from a medical condition the Director of Aviation Medicine considered could impinge on the safe exercise of his duties.
Conflicting evidence existed as to the extent of, and risk arising from, Mr Wyatt's condition. The case turned primarily on the medical evidence given by various medical practitioners. The Tribunal affirmed the decision of the Authority commenting that it was guided in its decision by the 'overreaching consideration of the safety of air navigation' thus affirming the direction given
in section 9A of the Civil Aviation Act which provides that the safety of air navigation must be regarded as 'the most important consideration'.

Heard in the Federal Court, Brisbane, before Spender, Einfeld and Cooper JJ. This was an appeal from a variation of Mr Griffith's commercial helicopter pilot licence and the effect of Mr Griffith's bankruptcy on the proceedings. It dealt with the effect of bankruptcy on the proceedings and whether the right of appeal was property that vested with the trustee. The decision of the Court affirmed Mr Griffith's right to appeal to the Federal Court from the decision of the Tribunal, and also confirmed his right to appeal from the previous judgment of Kiefel J of the Federal Court. Such rights it was stated did not vest in the Official Trustee upon acquisition by Mr Griffith.

Heard in Sydney before Dr D Chappell, Deputy President. Concerned an application for a stay brought by Mr Gillespie after the cancellation by the Authority of his special private pilot's licence. The application for a 'stay' was refused on the grounds that the licence should not have been issued in the first place and the Tribunal concluded that 'there is nothing in essence to say'.

Heard in Brisbane before K L Beddoe (Senior Member). This case related to a review of a decision of the Authority to cancel a Chief Pilot's licence for hot air balloons. The Tribunal's decision affirmed the Authority's action.


Heard in Perth before T E Barnett, Deputy President, and A Argent, Member. Discussed on page 259 of this thesis.

1997

Leigh Desmond Cane and Civil Aviation Safety Authority [1997] AATA 75 (10 March 1997).
Heard in Sydney before D Chappell, (Deputy President) The case was concerned with the refusal by the Authority to renew a Class 1 Medical Certificate for Captain Leigh Cane, a Qantas pilot, who had refused to attend an aviation psychiatrist for a medical evaluation regarding his mental
state. The Tribunal considered much very lengthy evidence before affirming the decision of the Authority to refuse to renew Captain Crane's Class 1 Medical Certificate.

**Alaa Saraya v Civil Aviation Authority [1997] FCA 364 (1 May 1997).**

Heard in the Federal Court, Melbourne, before Merkel J. 

**Jason John Foster and Civil Aviation Safety Authority [1997] AATA 269 (5 August 1997).**

Heard in Melbourne, before G L McDonald (Deputy President). 
This was a request by Mr Foster to review a decision of the Civil Aviation Safety Authority in which he had failed an examination conducted by the Authority relating to theory requirements needed to obtain an instrument rating endorsement on his pilot's licence. The Authority filed a request with the Tribunal under s 42A(4) of the Administrative Appeals Act 1975, to dismiss the application on the basis that the decision was not one that was reviewable by the Tribunal. The Tribunal confirmed that the decision in the application was not one that it was authorised to review.

**Hevi Lift (PNG) Pty Ltd v Civil Aviation Authority [1997] FCA 1308 (14 October 1997).**

Heard in the Federal Court, Sydney, before Einfeld J. 
This case deals with the Civil Aviation Safety Authority's decision to refuse to issue Hevi Lift with an Air Operator's Certificate, to enable it to conduct aerial work operations using a Russian-built Kamov KA32A helicopter. Part of the basis for this refusal was that the Authority refused to accept a type certification from Russia. 
Einfeld J ordered that the decision of the Authority as it pertained to the refusal to issue an Air Operator's Certificate in relation to this helicopter be set aside. The balance of the application was adjourned for further argument with the Authority being ordered to bring a valid decision on the application within seven days, or alternatively give an immediate Air Operator's Certificate for a period that would allow Hevi Lift to meet any additional legitimate requirement of CASA.

1998

**Ian Reginald Wall (Trading as South East Coast Air Services) and Civil Aviation Safety Authority [1998] AATA 783 (1 October 1998).**

Heard in Sydney before B J McMahon, Deputy President. 
Discussed on page 262 of this thesis.

**Aviex Pty Limited and Civil Aviation Safety Authority [1998] AATA 916 (17 November 1998).**

Heard in Sydney before B J McMahon, Deputy President.
This case involved an application by Aviex Pty Ltd to stage an Air Show at Bankstown airport near Sydney. The application was made to the Civil Aviation Safety Authority because 'except with the permission in writing of the Authority a person shall not engage in acrobatic flight in an aircraft over a city, town populous area, regatta, race meeting or meeting for public games or sports'.\(^1\) However the Tribunal did not consider that it was a 'reviewable decision' that could be considered and ruled upon by the Tribunal. Therefore the application was dismissed.

1999

**Re Coral Sea Airlines Pty Ltd and Civil Aviation Safety Authority [1999]**
AATA 329 (17 March 1999).
Heard in Brisbane before Deputy President Dr Gerber.
Discussed on page 267 of this thesis.

Heard in Hobart before Mr C P Webster (Senior Member) and Mr A Argent (Member).
In this case a Flight Instructor sought a review of a decision by the Authority to suspend his rating as a Grade 1 flight instructor for a period of twelve months.
The Tribunal affirmed the decision of the Authority. Clear evidence was presented that Mr Arthur had not taken the appropriate test to be upgraded from a Grade 2 to a Grade 1 flight instructor. Furthermore the Tribunal considered that by falsely altering official records, including his own log book and falsely representing that he undertook a test that he had not in fact undertaken, Mr Arthur was not a fit and proper person to hold a Flight Instructor Grade 1 licence.

**Window and Civil Aviation Safety Authority [1999]** AATA 525 (20 July 1999).
Heard in Sydney before Miss S A Forgie (Deputy President), Mr J D Horrigan (Member) and Dr J M Lawrence (Member).
This case involved the Tribunal in the review of a decision of the Authority to refuse to issue a medical certificate to Mr Window. The Tribunal had to consider the question of whether it was likely that drug dependency would interfere with the safe exercise of the privileges or the performance of the duties of a student or private pilot's licence. The Tribunal affirmed the decision of the Authority not to issue Mr Window with a medical certificate.

**Robertson and Civil Aviation Safety Authority [1999]** AATA 608 (18 August 1999).
Heard in Sydney before the Hon. R.N.J. Purvis, Q.C. Deputy President.
This case involved an application by Mr Robertson on behalf of his company Aviex Pty Limited to review a decision of the Civil Aviation Safety Authority to permit him to stage an aerobatic display at Bankstown Airport in November 2000. The case had similar issues to an earlier case on the same subject. That

\(^1\) Civil Aviation Regulations 1988 (Cth) reg 155.
is Aviex Pty Limited and Civil Aviation Safety Authority [1998] AATA 916 (17 November 1998), mentioned above. The Authority made an application to the Administrative Appeals Tribunal contending that there was no jurisdiction to hear and determine Mr Robertson's application for review. The basis for what was said to be this lack of jurisdiction was that the Authority had not yet made a reviewable decision. The supposed lack of jurisdiction was the substantive application before the Tribunal. This was dealt with by a close analysis of, and the construction to be placed on, written material that passed between Mr Robertson and the Authority. The Tribunal dismissed Mr Robertson's application.

Reddish and Civil Aviation Safety Authority [1999] AATA 721 (23 September 1999). Heard in Hobart before A M Blow OAM QC, Deputy President. This case involved three applications for review by the Tribunal of three decisions made by delegates of the Authority. The first was a decision on 11 August 1997 to cancel Mr Reddish's Chief Pilot's approval. The second was a decision on the same day to revoke his chief flying instructor's approval. The third was a decision on 10 September 1997 to suspend his flight instructor ratings and require him to undertake an examination. A flying school called Skytech Aviation Services, which ceased operations in October 1997, at the relevant time, employed Mr Reddish. As a result the Authority contended before the Tribunal that whatever the Tribunal might decide if it proceeded to review the decision to cancel Mr Reddish's Chief Pilot approval, it would not be able to do anything that would be of any advantage to him. Mr Reddish however argued that the proceedings could have a practical application, in that their outcome would affect his reputation and employability in the future. The Tribunal however decided that the proceedings should be dismissed if it was unable to make a decision favourable to Mr Reddish that had some practical effect, as distinct from a mere vindication of the action for him. The Tribunal drew attention to the fact that an application to the Tribunal could be dismissed on the ground that it was frivolous if the Tribunal was unable to make a decision that would be of any practical benefit to the applicant. It was clear in this instance that the Tribunal would not be able to make a decision that would be of any practical benefit to Mr Reddish and it would be a waste of everyone's time and money for any of the three applications to be allowed to remain on foot. The Tribunal therefore decided to dismiss them all pursuant to s.42B(1)(a) of the Administrative Appeals Tribunal Act.

Ellery and Civil Aviation Safety Authority [1999] AATA 744 (8 October 1999). Heard in Brisbane before S A Forgie, Deputy President. This case concerned agricultural aviation. This activity involved the spraying of a variety of agricultural crops. The Civil Aviation Safety Authority had seen fit to cancel Mr Ellery's Chief Pilot approval and to cancel the Air Operators Certificate issued to Ellery Air Services Pty Limited. The Tribunal affirmed the decision of the Authority.

Australian (NDT) Services Pty Ltd and Civil Aviation Safety Authority [1999] AATA 796 (25 October 1999). Heard in Melbourne before Mrs Joan Dwyer, Senior Member.
This was an application pursuant to s 41(2) of the Administrative Appeals Tribunal Act 1975, for a stay of a decision by the Civil Aviation Safety Authority to suspend the Certificate of Approval held by the company Australian (NDT) Services Pty Ltd, allowing it to engage in non-destructive testing of aircraft, aircraft components and materials.

The Tribunal refused the application for a stay of the suspension of the company's Certificate of Approval, finding that although there would be damage to the interests of the company in the suspension continuing, the Tribunal had a duty to be satisfied that there was no risk to air safety if it did grant a stay. The Tribunal had to balance the interests of the company on one hand and those of the community, which has an interest in air safety, on the other hand.


Heard in Brisbane before K L Beddoe, Senior Member.

This case is one of a series of cases to come before the Tribunal and the Federal Court over a period of many years that concern Dr Broadbent.

Dr Broadbent was a general surgeon and accomplished commercial pilot. Among a number of aviation interests he owned a Flying School at Coolangatta Airport, on the Gold Coast Queensland. He constantly came into conflict with the Authority for various breaches of the Act and Regulations including quite a number of violations of controlled airspace. This particular application was brought on by reason of the Civil Aviation Safety Authority cancelling Dr Broadbent's commercial pilot's licences. It was not, so the Tribunal acknowledged that he did not know any better, or was ignorant of the regulations. It was simply at times that he considered himself to be the best judge of how and where he should go in the air space in which he was operating. The Authority cancelled his pilot licences claiming that he was not a fit and proper person to exercise the privileges of those licences. The Tribunal agreed with the Authority. Dr Broadbent immediately appealed to the Federal Court. See case below, Broadbent v Civil Aviation Safety Authority [1999] FCA 1871 (23 December 1999).


Heard in Brisbane before K L Beddoe, Senior Member.

As in the case above this case involved a further decision of the Civil Aviation Safety Authority to refuse Dr Broadbent's application for an Australian Airline Transport Pilot's Licence. The Authority had declined to grant the licence on the basis that Dr Broadbent was not 'a fit and proper person to hold the licence'. The Tribunal agreed with the Authority's decision.


Heard in the Federal Court Brisbane, before Cooper J.

This case involved an application to the Federal Court in Brisbane by Dr Broadbent, for orders staying decisions of the Civil Aviation Safety Authority relating to the cancellation of his relevant pilot's licences. The Court affirmed
the decision of the Authority and the Tribunal, and Dr Broadbent's application for a stay was dismissed.

**Lea and Anor and Civil Aviation Safety Authority [1999] AATA 1021 (24 December 1999).**

- Heard in Brisbane before Deputy President DP Breen.
- The case involved hot air balloons.

**2000**

**Aerotechnology Pty Ltd and Civil Aviation Safety Authority [2000] AATA 188 (12 January 2000).**

- Heard in Hobart before Mr C P Webster, Senior Member.
- This was a successful application by Aerotechnology Pty Ltd to be granted a stay in relation to the decision by the Civil Aviation Safety Authority to cancel its Air Operator’s Certificate. It was an interlocutory decision and no details of the factual situation are given in the report, other than to state that the continued operations of the company did not, in the opinion of the Tribunal, constitute a threat to air safety.

**CGA Australia Pty Ltd and Civil Aviation Safety Authority [2000] AATA 74 (7 February 2000).**

- Heard in Brisbane before Miss S A Forgie, Deputy President and Mr A Argent, Member.
- This case dealt with the issue of an Air Operator's certificate to a company undertaking towing banners for advertising together with charter work. The issue revolved around the wording of the Air Operator's Certificate for the company and whether or not it should have followed the wording of a previous Certificate. The Tribunal affirmed the Authority's decision in this matter.

**Aerotechnology Pty Ltd and Civil Aviation Safety Authority [2000] AATA 192 (14 February 2000).**

- Heard in Hobart before Mr C P Webster (Senior Member).
- This was an application by the Civil Aviation Safety Authority to revoke a stay order made by the Tribunal. The application was refused.

**Paggi (trading as Paggi's Aviation) and Civil Aviation Safety Authority [2000] AATA 348 (3 May 2000).**

- Heard in Perth before Mr T E Barnett, Deputy President, and Mr A Argent, Member. Discussed on page 271 of this thesis.

**Mark Allan trading as Jackaroo Aviation and Civil Aviation Authority [2000] AATA 929 (25 October 2000).**

- Heard in Sydney before Mr B J McMahon (Deputy President). Discussed on page 274 of this thesis.

**Ord Air Charter Pty Ltd v Civil Aviation Safety Authority [2000] FCA 1545 (31 October 2000).**

- Heard in Perth, before Carr J. Discussed on page 276 of this thesis.
2001

  Heard in Sydney before Dr D Chappell, Deputy President.
  Discussed on page 281 of this thesis.

  Heard in Canberra before B H Burns, Deputy President.
  This case involved hot air balloons. The Tribunal affirmed the decision of the Authority.

  Heard in the Federal Court in Sydney before Moore J.
  This was an appeal on a question of law in the case of Mark Allan trading as Jackaroo Aviation and Civil Aviation Authority [2000] AATA 929 (25 October 2000). The Authority claimed that the Tribunal had erred in law in giving the direction it did to the Civil Aviation Safety Authority in that case. The Court dismissed the application.

  Heard in Brisbane before D W Muller, Senior Member.
  This was an application for a stay of the decision of the Authority to cancel Mr McBain's helicopter licence.
  The application for a stay was refused.

  Heard in Brisbane before Cooper J.
  This case dealt with a stay granted by the AAT and whether as a matter of discretion the Court should exercise its jurisdiction to quash the order under review, where events namely the 28 days of the stay, had overtaken the proceedings so as to render the issue moot.
  The application was dismissed.

  Heard in Melbourne before Mrs Joan Dwyer, Senior Member, and Mr A Argent, Member.
  This case involved a further application for a stay of the decision of the Authority to cancel Mr McBain's helicopter licence. The application was refused with the Tribunal commenting that Mr McBain 'appears to be a person who has an unacceptable attitude towards the rules relating to the safe operation of helicopters.'

Heard in Melbourne before Mrs Joan Dwyer, Senior Member and Mr A Argent, Member.
This case involved the application for renewal of Mr Stoke's aircraft maintenance engineer's licence after a period of time when he had been engaged in work on designing a new aircraft. Mr Stokes claimed that the production of drawings connected with the design of this proposed aircraft, was comparable with the duties and privileges of an aircraft maintenance engineer's licence. The Authority disagreed and required Mr Stokes to sit an appropriate examination before being reissued with an aircraft maintenance engineer's licence.
The Tribunal affirmed the decision of the Authority.

2002


Heard in Perth before Mr R D Fayle, Senior Member.
This was an application for a stay of a decision to immediately suspend the licences of Mr Repacholi. It is an interesting case from the factual point of view. The Civil Aviation Safety Authority had suspended Mr Repacholi's commercial and private pilot licences, because he had without prior authority from the regulator, launched a float plane from the back of a moving trailer at Jandakot airport early one morning prior to the opening of the Tower. Although the procedure undertaken had, according to some expert witnesses, approval in the United States from its aviation regulator, it did not have such approval in Australia. The Tribunal refused the request for a stay. (See Repacholi and Civil Aviation Safety Authority [2003] AATA 573 (18 June 2003) below.


Heard in Brisbane before Mr I R Way, Member.
This case dealt with an application by Mark Strange, who was an aircraft maintenance engineer employed by Qantas, for the review of a decision of the Civil Aviation Safety Authority to refuse his request to amend his personal records held by the Authority. The Tribunal varied the Authority's decision.


Heard in Sydney before R P Handley, Deputy President.
Involved the review of a decision by the Civil Aviation Safety Authority to refuse permission to hold an Air Show at Bankstown Airport. The Tribunal affirmed the Authority's decision.


Heard in Brisbane before Mr R G Kenny, Member.
This was a review by the Tribunal of a decision of the Civil Aviation Safety Authority to refuse to renew Mr Rundle's approval as a 'check pilot' after it
expired on 31 August 2001. Mr Rundle had ceased to be employed by the company Island Link Air Charter after a change of ownership of that company. As such the Authority argued he could not have a check pilot's approval granted by the Authority, when he was not employed by a relevant aviation organization. As Mr Rundle was no longer engaged as a pilot with Island Link Air Charter, or with any other aviation operator the Tribunal found that there could be no practical advantage in a decision approving him as a check pilot. In addition it was noted that the Authority could not give its approval unless the person for whom approval was sought, was nominated as an operator for that purpose. The Tribunal therefore dismissed the application.

**Edwards and Civil Aviation Authority [2002] AATA 412 (30 May 2002).**
Heard in Melbourne before Miss S A Forgie, Deputy President.
This case involved an application to the Tribunal by the Civil Aviation Safety Authority that certain documents relevant to the case involving the suspension of Mr Edward's Chief Pilot's approval be restricted to the Authority and members and staff of the Tribunal until a week prior to the hearing of the case. The Tribunal acquiesced to the request from the Authority that certain documents be withheld from Mr Edwards prior to the hearing to enable the Authority to complete its investigation without interference from Mr Edwards.

**McBain and Civil Aviation Safety Authority [2002] AATA 527 (28 June 2002).**
Heard in Melbourne before Mrs J R Dwyer, Senior Member and Mr A Argent, Member.
This case involved the Authority's decision to refuse to issue Mr McBain with a commercial helicopter licence, together with a consideration of the Authority's decision that Mr McBain was not 'a fit and proper person', within the meaning of the Civil Aviation Act, to hold such a licence. The Tribunal affirmed the Authority's decision.

**Layton v Civil Aviation Safety Authority [2002] FCA 1231 (2 October 2002).**
Heard in the Federal court, Brisbane, before Kiefel J.
On 12 November 2001 the Civil Aviation Authority advised Mr Layton that his flight crew licences were cancelled and the Authority required him to surrender the licences. Mr Layton sought a review of that decision by the Administrative Appeals Tribunal. On 8 July 2002 Mr Layton brought an appeal to the Federal Court from an interim and discretionary decision of the Tribunal refusing to refer questions of law to the Federal Court under s 45 of the Administrative Appeals Tribunal Act (1975). The appeal was dismissed with costs. Mr Layton then pursued his review in the Tribunal until 15 July 2002 at which time the Tribunal recorded that the parties consented to a dismissal of his application. Dr Broadbent later disagreed that there had been consent on the part of Mr Layton, although the Tribunal transcript of proceedings made it clear that Mr Layton had not committed himself to continuing the hearing before the Tribunal. Since that time it become obvious to Mr Layton and Dr Broadbent that the Tribunal proceedings might be required to prop up a case in the Federal Court. Kiefel J found that there was no basis in law or fact shown, for interfering with the order made by the Tribunal.
The application on foot in these proceedings was filed on 2 August 2002. It claimed that the powers of the Civil Aviation Safety Authority to suspend or cancel Mr Layton's licences were ultra vires the Constitution, and the Tribunal's powers invalid for the same reason.

The Court found that the three declarations sought by Mr Layton were bare declarations. They were not declaratory of Mr Layton's interest and would provide merely an opinion of the Court on the general question of the Authority's powers. Kiefel J found that there was no justiciable matter and as prerogative relief was not sought, (and it did not appear to be necessary), then to deal with the balance of the arguments as to whether there was any possible merit in the allegations that the Act and the Regulations were invalid, was not required.

Schutt Flying Academy (Australia) Pty Ltd and Anor and Civil Aviation Safety Authority [2002] AATA 1151 (8 November 2002).

Heard in Melbourne before Mr B H Pascoe, Senior Member.

This case involved applications for the review of two decisions of the Civil Aviation Safety Authority, both made on 16 April 2002, and both granted a stay by the Administrative Appeals Tribunal. As the facts in both decisions were similar both parties agreed to the applications for review being heard together.

The first decision was to cancel an Air Operator's Certificate for the company Schutt Flying Academy and the second to cancel the Chief Pilots approval of Mr Van De Wiel, the person who owned and controlled the company. Schutt Flying Academy was a small aviation company based at Moorabbin airport near Melbourne. Under the terms of its Air Operator's Certificate the company was authorised to conduct charter operations and aerial work operations such as aerial survey - pipeline inspections, banner towing and flying training.

Problems arose with the regulator when Schutt Flying Academy began to venture, according to the Authority, into the field of offering Regular Public Transport flights to Flinders Island, such flights not being authorised under the terms of its Air Operator's Certificate.

The Tribunal found, after analysing much conflicting evidence as to the operation or not of regular public transport flights being undertaken by the company, that they had indeed taken place and were in contravention of the regulations. However they also found that Mr Van De Wiel did not deliberately and knowingly embark on such a course. The Tribunal also noted that it had no evidence of any serious safety issues in the operation of Schutt Flying Academy.

Weighing up the evidence the Tribunal decided that the circumstances of the case justified a suspension only and not full cancellation of the company's air Operator's Certificate. It was also considered appropriate to set aside the decision to cancel Mr Van De Wiel's Chief Pilots approval and in its stead suspend such approval until the date of the decision.


Heard in the Federal Court in Brisbane before Drummond J.
Two applications were before the Court. The first was a notice of motion seeking leave to appeal from what was described as an interlocutory judgment of Kiefel J given on 2 October 2002 and the second was an application for an extension of time to file and serve a notice of appeal against that judgement. The judgment was a described as a final judgement where orders were made summarily dismissing Mr Layton's application and orders that Mr Layton and Dr Broadbent, who appeared in those proceedings as Mr Layton's counsel, both be ordered to pay the Authority's costs on an indemnity basis. The matter was adjourned until 6 December 2002.

Heard in the Federal Court Brisbane, before Dummond J.
On the question of costs and extension of time to appeal in the above matter of Layton v Civil Aviation Safety Authority [2002] FCA 1500 (29 November 2002). Costs were awarded in favour of the Civil Aviation Safety Authority and the application for an extension of time to appeal was dismissed.

2003

Heard in Brisbane before Mr K L Beddoe, Senior Member and Dr K P Kennedy, Member.
Dealt with the review of a decision or the Authority to refuse to grant person 'Q' (name suppressed), a Class 1 or Class 2 Medical Certificate under provision of regulation 6.06 of the Civil Aviation Regulations 1988. This was because of evidence that the person 'Q', suffered from a schizo-affective disorder.
The Tribunal affirmed the decision of the Authority.

Heard in Sydney before M D Allen, Senior Member.
This case involved the cancellation of Mr Sullivan's private pilot (Helicopter) Licence by the Civil Aviation Safety Authority after a series of safety related incidents that occurred between 9 February 1995 and October 2001. The Tribunal affirmed the Authority's decision.

**Snook and Civil Aviation Safety Authority [2003] AATA 285 (27 March 2003)**
Heard in Perth before Associate Professor S D Hotop, Deputy President and Air Marshall I B Gratton, Member.
This case involved an application by Mr Snook, a licensed aircraft maintenance engineer, for a review of a decision of the Civil Aviation Safety Authority on 26 February 2002 to cancel his Certificate of Approval, previously granted to him on 17 August 2001.
Mr Snook operated an aircraft maintenance business known as 'Aeronautique Australia' situated at Jandakot Airport, near Perth Western Australia. He had a long history, dating from 1993, of previous breaches of the regulations. At different times the Authority had taken various enforcement actions in relation to these breaches. The breach of the Act and Regulations that prompted the
cancellation action of the Authority forming the subject of this case, was the claim that Mr Snook had installed an unapproved engine in an aircraft used for fire-fighting, without obtaining the authorised release certificate from the Authority prior to doing so.

Evidentiary facts concerning the fitting of the supposed 'incorrect' engine were detailed and at times contradictory. This was compounded by the fact that the engine itself was of a batch manufactured for use in the European 'Eastern Bloc' and was not supplied as compliant with the United States FAA approval. The Tribunal concluded from the plethora of facts presented that Mr Snook had mistakenly relied on documentation relating to the engine and that his reliance on this documentation although incorrect was a reasonable mistake in these particular complicated circumstances.

The Tribunal set side the decision under review and in substitution for the decision of the Authority decided that Mr Snook's Certificate of approval should not be cancelled. However the Tribunal noted that Mr Snook's record of compliance was less than exemplary and was certainly capable of improvement.

**Repacholi and Civil Aviation Safety Authority [2003] AATA 573 (18 June 2003).**

Heard in Perth before Associate Professor S D Hotop, Deputy President and Air Marshal I B Gration, Member.

This was an application for a review of a decision by the Civil Aviation Safety Authority to cancel Mr Repacholi's commercial and private pilot licences after he had launched a floatplane from a moving trailer as a truck was towing it. This occurrence took place in the early hours of the morning, at Jandakot airport.

A very long history of breaches of the Civil Aviation Regulations on the part of Mr Repacholi was present to the Tribunal, such breaches dating from September 1984.

However in this case the Tribunal found in favour of Mr Repacholi, set aside the decision under review and substituted instead that Mr Repacholi's commercial and private pilot licences should not be cancelled.

**Edwards and Civil Aviation Safety Authority [2003] AATA 594 (26 June 2003).**

Heard in Darwin before K L Beddoe, Senior Member.

This case involved applications for a stay and review, of a decision of the Civil Aviation Safety Authority, lodged on 2 June 2003 to cancel Mr Edward's Air Transport and Commercial pilot's licences. He was advised of the Authority's decision to cancel his licences on 8 May 2003.

The Authority had approved Mr Edwards as Chief Pilot of Yugal Mangi Clan Developments Pty Ltd on 31 October 2000. The company operated an air service 'Air Ngukurr', providing passenger and cargo flights to and from Ngukurr in the Northern Territory. Mr Edwards had, together with Ms Leah Mott established Air Ngukurr in December 1977 when another air service ceased operations from Ngkurr.

Evidence supporting the Authority's cancellation of Mr Edwards' pilot licences was in the main part anecdotal. Many of the allegations, so the Tribunal decided went to 'process' rather than situations where public safety was actually imperilled.
The Tribunal granted a stay and directed that the matter be listed for hearing at Darwin on dates to be advised.

**Badaouï and Civil Aviation Safety Authority [2003] AATA 1059 (21 October 2003).**

Heard in Sydney before Ms G Ettinger, Senior Member.
This case concerned the refusal of the Civil Aviation Safety Authority to issue Dr Zed Badaouï with a 'special class 2 medical certificate' that would allow him, as an insulin dependent diabetic person, to fly solo without the current restriction on his medical certificate that he must have a co-pilot with him whilst he was in command of an aircraft. The Tribunal affirmed the Authority's decision not to issue Dr Badaouï with the 'special class 2 medical certificate'.

**Aerolink Air Services Pty Ltd and Civil Aviation Safety Authority [2003] AATA 1357 (24 December 2003).**

Heard in Sydney before M D Allen, Senior Member.
This was an application to the Tribunal by the company Aerolink Air Services to review a decision of the Civil Aviation Safety Authority to refuse to issue Aerolink Air Services with an Air Operator's Certificate. Mr Danny Ryan, the CEO of the company, owned one aircraft a Cessna 310, which was a light twin capable of carrying six passengers.
In refusing Mr Ryan's company an Air Operator's Certificate the Authority claimed that Mr Ryan had breached a number of the Civil Aviation Regulations on a number of occasions, such breaches being directly related to maintenance of the Cessna 310. Evidence was also given regarding Mr Ryan's unprofessional and overbearing attitude to his aviation activities. The Tribunal found that at all relevant times Aerolink Air Services held itself out to the public as a company which had aircraft and pilots available for charter. The reality was that it was no more than a 'front' company through which Mr Ryan was able to organise for other companies, with an Air Operators Certificate, to charter his aircraft. However the Tribunal found that there was no evidence that Mr Ryan's activities compromised aviation safety in any way.
The Tribunal also found that there was no evidence whatsoever that Aerolink had in any way breached provisions of the Act and Regulations. It considered that the Authority's real objection to the granting of an Air Operators Certificate to Aerolink Air Services was the position Mr Ryan would hold in the company. This was no reason for refusing to grant an Air Operator Certificate to the company and the Tribunal stated its intention to set aside the decision of the Authority in this regard.

**2004**

**Hall and Civil Aviation Safety Authority [2004] AATA 21 (14 January 2004).**

Heard in Sydney before Mr R P Handley, Deputy President.
This case concerned a refusal by the Civil Aviation Safety Authority to allow 56 year old Mr Hall a conditional Class 2 Medical Certificate to enable him to obtain a private pilot's licence. Mr Hall suffered from a heart condition that involved impaired circulation to his heart muscles and it was possible that he could become incapacitated during flight. He was granted instead a
conditional special Class 2 Medical Certificate that necessitated Mr Hall flying with a qualified co-pilot sitting beside him in a cockpit that had dual controls.

The Tribunal affirmed this decision of the Authority.

**McWilliam and Civil Aviation Safety Authority [2004] AATA 176 (20 February 2004).**

Heard in Melbourne before S A Fogie, Deputy President.
This case involved the regulation of parachute operations.

**Andrew Brazier and Civil Aviation Authority [2004] AATA 313 (26 March 2004).**

Heard in Sydney before Mr E Fice, Member.
Discussed on page 297 of this thesis.

**Gammadell Pty Ltd (trading as Midstate Airlines) and Civil Aviation Safety Authority [2004] AATA 489 (17 May 2004).**

Heard in Brisbane before Senior Member McCabe.
This was an application for a stay, on behalf of Gammadell Pty Ltd, trading as Midstate Airlines, after the Authority cancelled the company's Air Operator's Certificate on 1 March 2004. An audit of the company's operations by the Authority on 29-30 April 2004 prompted this decision.
Midstate Airlines applied for a 90-stay within the required five-day period. As a hearing before the Tribunal had not occurred within the 90-day period, Midstate Airlines applied for a further stay until a hearing could be scheduled. The reason given for the delay was that the Tribunal had been unable to provide a hearing date within the 90-day time-frame contemplated by s 31A of the Civil Aviation Act 1988.
The application for an extension of the stay period was extended until such time as a hearing could take place.

**Yu and Civil Aviation Safety Authority [2004] AATA 664 (22 June 2004).**

Heard in Sydney, before Justice Gary Downes, President.
This was a part heard matter before Deputy President Hanley in the Tribunal in Sydney. It was a matter of some complexity, which had already taken five days and a further two weeks had been set aside for the hearing. Deputy Presidents Hanley's time on the Tribunal was likely to have come to an end prior to the case finishing. To avoid complications and time lost if this were to happen, it was decided that the proper course was for the Tribunal to be reconstituted and Member Egon Fice, a former RAAF pilot and lawyer was appointed to hear the matter. (See below, Yu and Civil Aviation Safety Authority [2005] AATA 274 (6 April 2005).

**Civil Aviation Safety Authority v Boatman [2004] FCAFC 165 (25 June 2004).**

Heard in the Federal Court, Sydney, via video link to Canberra and Melbourne, before Sunberg, Stone and Selway JJ.
This case involved much legal argument regarding the separation of judicial power and whether section 30DE of the Civil Aviation Act empowered the Civil Aviation Safety Authority to suspend an authorization immediately, where it considered that there was a 'serious and imminent risk to air safety'.
Under this provision, which was introduced in 2003, the suspension would lapse after five days unless the Authority applied to the Federal Court. The Appeal Court looked at whether the Federal Court had the power to extend this suspension on it being satisfied that there was a serious and imminent risk to safety. It was not considered necessary to consider the facts of the case, or examine the circumstances in which CASA may have had 'reason to believe' that there had been a contravention of section 30DB of the Act. It seemed clear to the Court that CASA could exercise this power as soon as it had knowledge of circumstances that suggested there was a need for an investigation.

The case revolved around a lengthy consideration of the issue of whether section 30DE of the Act involved a valid conferral on the Federal Court of the judicial power of the Commonwealth which, pursuant to section 71 of the Commonwealth Constitution, the Commonwealth may vest in 'such other federal courts as the Parliament creates'. The Court held that it did.

**Cape York Airlines P/L and Civil Aviation Safety Authority [2004] AATA 682 (28 June 2004).**

Heard in Brisbane before Senior Member McCabe.

This case involved the publication on the web site of the Civil Aviation Safety Authority, information advising that the company Cape York Airlines had received notification from the Authority that its Air Operator's Certificate was cancelled. As the company had exercised its right to apply to the Tribunal for an automatic 'stay' of the decision within the required five day period, (pursuant to s 31 of the Civil Aviation Act 1988), the decision was stayed for 90 days.

However Cape York Airlines objected to the publication of the matter on the Authority's web site whilst the stay was in place and before the matter had been heard and determined by the Tribunal.

The Tribunal decided that its power under s 41(2) of the Administrative Appeals Tribunal Act 1975 did not extend as far as Cape Your Airlines was contending. The Authority's decision to publish on its web site was triggered by the cancellation decision, which itself was subject to a stay. But the decision to publish was not part of the decision under review. Publication of the notice was not integral to, nor necessarily connected with the decision to cancel. If it were, an order might be made. The implementation of the decision in question involved taking steps to prevent Cape York Airlines from flying. Publishing notice of the decision on the website did not do that, even if it may have practical commercial implications for Cape York Airline's business.

In making this decision Senior Member McCabe said that he was conscious of the Tribunal's status. The Tribunal was not a Court and its orders are not enforceable in the way that court orders may be enforced. If he were to make an order in the manner in which Cape York Airlines sought, he would effectively be giving an injunction and that would be trespassing on the territory of the Federal Court. He concluded that the Tribunal did not have the power to make the orders sough be Cape York Airlines.
Heard in Brisbane before Senior Member McCabe.
Discussed on page 300 of this thesis.

Heard in the Federal Court, Sydney, before Gyles J.
This was an application made by two pilots, Graeme Boatman and Valerie Kennedy, on 20 May 2004 requesting an order that the substantive proceeding be dismissed. The substantive proceeding concerned immediate suspension of their pilot licences.
The pilot's licences had been suspended by CASA on 13 May 2004 pursuant to section 30DC of the Civil Aviation Act.
On 20 May 2004 CASA made an application to the Federal Court for an order under section 30 DF of the Act prohibiting the pilots, for a period of 25 days from doing anything that would otherwise be authorised by their suspended pilot licences. On 27 May 2004 CASA's application came before Gyles J. That in turn led to the reserving of the question of the validity of section 30DE of the Act to the Full Court (See above, case of Civil Aviation Safety Authority v Boatman [2004] FCAFC 165 (25 June 2004).
Previously in the Federal Court on 10 June 2004 consent orders had been approved by Stone J, whereby both pilots agreed not to exercise the privileges of their pilot licences until 18 June 2004. These orders were the result of an arrangement between the two pilots and CASA that had occurred in correspondence leading up to the hearing.
Time had elapsed for CASA to issue the appropriate 'show cause' notice. The Court found it was clear that its role was to provide an independent determination as to the decision to suspend, pending CASA's appropriate investigation of the matter. Consent orders had been made. The CASA investigation into the circumstances that gave rise to its decision to suspend the licences was complete before the Full Court handed down its decision on the validity of section 30DE of the Civil Aviation Act.
The Court dismissed the section 30 DE application and awarded costs against CASA.
This decision was appealed. (See Civil Aviation Safety Authority v Boatman [2004] FCAFC 336 [24 December 2004] below).

Heard in Brisbane before Senior Member McCabe.
This case involved an application for an extension of a stay regarding the Authority's cancellation of a Chief Pilot's approval. The Tribunal had previously granted a stay of 30 days on 8 July 2004. CASA did not oppose the application and did not express any fresh concerns about safety issues. The Tribunal saw fit to extend the stay until 26 August 2004, or if a new chief pilot were approved before that date, the stay would terminate on the date of that approval.
Heard in Melbourne before Mr E Fice, Member.
This case involved parachute operations.

Heard in Perth before Associate Professor S D Hotop. Deputy President, and Mr E Fice, Member.
Discussed on page 303 of this thesis.

Hogan and Ors and Civil Aviation Safety Authority [2004] AATA 1090 (19 October 2004).
Heard in Sydney before Justice Garry Downes, President, and Air Marshal I B Gratton, AO AFC, RAAF (Retd), Member.
This case concerned conditions attached to an Air Operators Certificate that dealt with towing a banner for the purposes of advertising. The Authority attached certain conditions to the certificate in relation to the minimum height allowed and length of time for the validity of the certificate. The Tribunal remitted the questions of the 'conditions' back to the Authority for reconsideration, together with directions as to what should be covered in the 'reconsidering' process.

Heard in Melbourne before Mr E Fice, Member.
This case involved the renewal of an aircraft engineer's maintenance licence subject to the condition placed upon it by the Civil Aviation Safety Authority. The Authority employed Mr Baker as a Flying Operations Inspector, (FOI). He was also the holder of an aircraft maintenance engineer's licence and commenced his employment with the Authority on 1 September 1997. At the time of the hearing he was the Flight Operations Inspector in the General Aviation Branch of the Compliance Division based in the Victoria/Tasmania Area Office, at Moorabbin Airport near Melbourne.
Mr Baker's aircraft maintenance engineer's licence was endorsed with an expiry date two years after its issue. This was in accordance with the provisions for such licences set out in Regulation 32 of the Civil Aviation Regulations 1988. When he submitted his licence for renewal in 1997, 1999, and 2001 a delegate of the Authority, at the Moorabbin office, renewed his licence on each occasion, without any restriction being endorsed on his licence.
After 2001 the Authority adopted a policy of having its officers in Canberra renew AME licences for its own staff. The purpose behinds such policy being that there should be no conflict of interest between the issuing officer and the applicant, particularly where those two persons were based at the same location.
Mr Baker's December 2003 application for renewal of his AME licence contained the restriction that certification of maintenance under his licence was limited to that of daily or equivalent manufacturer's inspections only. The
reason given by the Authority for such a restriction was that Mr Baker had not satisfied the requirement of the licence by showing evidence that he had exercised the privileges of that licence for periods totalling not less than six months in the preceding twenty-four months. He simply stated that as a Flying Operations Inspector with CASA, he had engaged in work that may be considered as comparable with the duties and privileges pertaining to his aircraft maintenance engineer's licence.

The Tribunal had no hesitation in affirming the Authority's decision to impose a restriction on Mr Baker's licence. This was in accordance with reg 31(2) of the Civil Aviation Regulations.

**Aerolink Air Services Pty Ltd and Civil Aviation Safety Authority [2004]
AATA 1288 (3 December 2004).**

Heard in Sydney before Mr M D Allen, Senior Member.

Discussed on page 306 of this thesis.

This case involved a request by Aerolink Air Services for a review of the Civil Aviation Safety Authority’s decision to grant the company an Air Operators Certificate that was subject to conditions.

On 29 July 2004 the Authority had granted an Air Operators Certificate authorizing the company to conduct charter operations subject to two conditions. [See above Aerolink Air Services Pty Ltd and Civil Aviation Safety Authority [2003] AATA 1357 (24 December 2003)].

These were:

(i) It is a condition of this AOC that Danny Ryan (Aviation Reference No 27619) does not occupy a control seat on any commercial flight authorised by this AOC.

(ii) It is a condition of this AOC that Danny Ryan (Aviation Reference No 527619) does not perform any maintenance on aircraft operated pursuant to this AOC.

The Authority made it clear to the Tribunal that it had definite reservations about the actions and influence of Mr Ryan, the managing director of the company. The reservations concerned the ability of Mr Ryan as a pilot, in that it was claimed he may influence and direct the actions of any employed pilot while that pilot was flying with him, in a way so as to compromise air safety. Also the Authority stated that it considered that Mr Ryan had an incomplete understanding of maintenance certification requirements for aircraft involved in commercial flying.

The Tribunal did not accept the first condition imposed as being either necessary or appropriate. It had been impressed by the evidence of the Mr Bartlett, the Chief Pilot of Aerolink Air Services, and considered that he would not be likely to be overborne by Mr Ryan and would make it clear to his pilots that in accordance with the Civil Aviation Regulations they, as pilot in command, had the final say-so regarding the operation of the aircraft. If the Authority still had reservations about Mr Ryan then it was appropriate that those reservations be taken up directly with the Chief Pilot.

The Tribunal did not agree also with the imposition of the second condition. The Tribunal remitted the decision under review back to the Civil Aviation Safety Authority, with the direction that the Air Operator's Certificate issued to Aerolink Air Services on 29 July 2004 be varied by deleting conditions one and two, and substituting in lieu of them the one condition that 'It is a
condition of this AOC that Danny Ryan (Aviation Reference No.527619) does not perform any maintenance on an aircraft when that aircraft is being operated pursuant to this AOC'.

Heard in Sydney before Professor G D Walker, Deputy President.
This case was an application for a stay of a decision of the Civil Aviation Safety Authority that a medical certificate issued to Mr Commans be accompanied by a condition he fly as, or with, a co-pilot. The Tribunal examined Mr Commans' medical condition and weighed up the risks to public safety.
The application for a stay was refused.

Heard in Canberra before Whitlam, Finn and Conti JJ, on appeal from a decision of Gyles J. (See above Civil Aviation Safety Authority v Boatman [2004] FCA 915 (13 July 2004).
The central issue in the appeal was whether Gyles J in the above case, erred in dismissing the application he heard on 13 July 2004.
The appeal succeeded on a question of law and involved the construction of section 30DE of the Civil Aviation Act 1988.
Confusion had resulted from the earlier making of consent orders.
The Court concluded that Gyles J had erred on a question of law and ordered that the matter be remitted to a judge of the Court to hear CASA'S application for an order under section 30DE of the Civil Aviation Act 1988.

2005

Heard in the Federal Court, Sydney, before Whitlam J.
This was an application for a certificate under section 6(1) of the Legal Proceedings (Costs) Act 1981 (Cth).

Heard in Sydney before Mr E Fice, Member.
This case dealt with the issue and subsequent cancelling of a Special Certificate of Airworthiness in respect of an ex-military training and light attack, two-seater, single engine jet aircraft. The Tribunal affirmed the Civil Aviation Safety Authority's decision to cancel the Special Certificate of Airworthiness.

Heard in Sydney before Professor G D Walker, Deputy President.
This case was about banner towing operations involving helicopters.

Heard in Perth before Associate Professor S D Hotop, and Deputy President
Air Marshal I B Gration, Member.
This case involved a private pilot involved in a series of dangerous low flying and 'train-buzzing' incidents during a private flight that had taken place from Nullarbor to Kalgoorlie in Western Australia.
The Tribunal affirmed the decision of the Civil Aviation Safety Authority to cancel the private pilot licence of Mr Byres.
Mr Byres appealed to the Federal Court. (See below in Byers v Civil Aviation Safety Authority [2005] FCA 1751 (6 December 2005). The Federal Court found that there had been no unreasonableness in the Tribunal decision.

Heard in the Federal Court, Perth, before Siopis J.
The Civil Aviation Safety Authority sought a judicial review in the Federal Court of the decision by the Deputy President of the Administrative Appeals Tribunal, Mr Stanley Hotop, staying the Authority's decision to cancel the Air Operator's Certificate of Polar Aviation Pty Ltd. The matter was heard in the Administrative Appeals Tribunal on 11 February 2005.
The factual aspects of this case are discussed on page 315 of this thesis. The facts are referred to as part of a discussion of a later case involving the same aviation company, Polar Aviation Pty Ltd and Civil Aviation Safety Authority [2006] AATA 270 (24 March 2006).

Heard in Sydney before Professor G D Walker, Deputy President.
This case involved a decision by the Civil Aviation Safety Authority to refuse to grant an aircraft maintenance engineer's licence to Mr Ekinci, on the basis that he did not meet the necessary experience requirements specified in the Civil Aviation Orders.
The Tribunal affirmed the Authority's decision.

Heard in Sydney before Professor G D Walker, Deputy President.
Discussed on page 308 of this thesis.

Heard in Sydney before Senior Member Robin Hunt.
The Civil Aviation Safety Authority refused to renew Mr Badam's aircraft maintenance engineer's licence. Mr Badam sought a review of this decision. The preliminary issue for the Tribunal was whether it had jurisdiction to review the non-renewal of a licence decision. The Authority submitted that the Administrative Appeals Tribunal did not have jurisdiction to review such a decision, as it was not a decision to refuse to grant or issue a licence. The Tribunal found that the decision not to issue Mr Badam with a current licence was a reviewable decision. It then considered Mr Badam's entitlement to a current licence. He was found to be lacking in that he did not perform 'comparable work' for six months out of the 24 months preceding his
application. He relied on his past work record up to the time he lost his job on 5 May 2003.
Requirements for AME licences are set out in Civil Aviation Order 100.90. The Orders are given the force of law under section 98(5) of the Civil Aviation Act. Mr Badam's licence could not be renewed if he failed to satisfy the requirements of Civil Aviation Order 100.90, specifically paragraph 7.3, which states:

A licence may be renewed if the holder:
(a) in the preceding 24 months has exercised the privileges of the licence for not less than 6 months; or
(b) has been engaged in work which may be considered by CASA as comparable with the duties and privileges pertaining to his or her licence.

The Tribunal held that for paragraph 7.3(b) of the Order to be meaningful, Mr Badam's recent experience could be the only experience that could be taken into account as 'comparable work'. He did not satisfy this requirement and unfortunately the Tribunal found that Mr Badam did not satisfy the requirements for the renewal of his licence and the decision of the Authority was affirmed.

Heard in Melbourne before S A Forgie. Deputy President.
This case dealt with parachute operations.

Heard in Melbourne before Mr E Fice, Member.
Discussed in more detail on page 318 of this thesis.
This case dealt with the Civil Aviation Safety Authority's cancellation of a chief pilot approval for Mr Gross, claiming that he posed a serious risk to flight safety and his standards as a chief pilot were of an unacceptable level. The Authority cited as evidence the overloading of aircraft, a failure on his part to authorise flights, as he should do in his position and a failure to sight flight details. There was in addition a claim of an inappropriate level of supervision of other pilots, and a poor past safety and compliance record. More specifically the facts as they came out in the case were that Mr Gross was both the chief pilot and the chief flying instructor for a small flying school situated at Tooradin on the Mornington Peninsular in Victoria. By a letter from the Authority dated 7 March 2005 he was asked to show cause why his Chief Pilot Approval, in respect of the Air Operators Certificate held by Mr Glenn Balas, should not be suspended or cancelled. His rely was unsatisfactory and the Authority cancelled his Chief Pilot approval on 17 May 2005.
The Tribunal found that Mr Gross ran into some operational difficulty as chief pilot of Tooradin Flying School partly because of confusion resulting from two different Air Operators Certificate holders at the same airfield operating the same aircraft. The Tribunal accepted that for a brief period Mr Gross's performance as a chief pilot may have dropped below a satisfactory level, however he later took significant steps in order to remedy the problems that previously led to the cancellation of his approval. On the evidence presented to the Tribunal it was thought that Mr Gross would continue to maintain a
satisfactory level of performance in the future, and the Tribunal did not consider that his performance continued to represent a 'serious risk to air safety'. The Tribunal therefore set aside the cancellation of Mr Goss's Chief Pilot approval and ordered that he be re-instated to his former position.

**Lewis and Civil Aviation Safety Authority and Ors [2005] AATA 1129 (14 November 2005).**
Heard in Melbourne before Mr E Fice.
Discussed on page 312 of this thesis.

**Byers v Civil Aviation Safety Authority [2005] FCA 1751 (6 December 2005).**
Heard in Perth before Nicholson J.
This was an appeal from a decision of the Administrative Appeals Tribunal pursuant to s 44 of the Administrative Appeals Tribunal Act 1975.
This case involved the Civil Aviation Authority cancelling a private pilot's licence for flying an aircraft at a height lower than 500 feet during a flight from Nullarbor to Forrest and from Forrest to Kalgoorlie in Western Australia. The Tribunal ruled out the factors that may have forced low altitude flying in the circumstances, such as stress of weather, or other unavoidable cause for the pilot to maintain a height lower than 500 feet. In doing so Mr Byres contravened regulation 157 of the Civil Aviation Regulations. In addition Mr Byre flew the aircraft at a low height towards and alongside a moving train, during the flight from Forrest to Kalgoorlie. He behaved in a reckless manner and failed in his duty with respect to matters affecting the safe operation of an aircraft. The Authority deemed him to be not a fit and proper person to hold a pilot licence and subsequently cancelled his licence.
The Tribunal agreed with the Authority and affirmed the decision to cancel Mr Byres Pilot's licence.
The Federal Court dismissed the appeal, finding that the Tribunal had methodically worked its way through all the evidence and had not made any errors of law.

**2006**

**Hempel and Civil Aviation Safety Authority [2006] AATA 188 (3 March 2006).**
Heard in Brisbane before Deputy President P E Hack SC.
This case involved an application by Mr Barry Hempel for a review or two decisions made by the Civil Aviation Safety Authority. The first decision, made on 5 September 2001, prohibited the operation of an aircraft pending the performance of certain maintenance being carried out on the aircraft. The second decision cancelled Mr Hempel's delegation to conduct flight tests. Neither decision was considered by the Tribunal to satisfy the test of being a 'reviewable decision' within the meaning of the legislation. The Tribunal therefore had no jurisdiction to review the decisions.

**Van De Wiel and Civil Aviation Safety Authority [2006] AATA 207 (7 March 2006).**
Heard in Melbourne before Deputy President S A Forgie.
This case was concerned with the charges imposed by the Civil Aviation Safety Authority to provide a large number of documents to Mr Van De Wiel
that he had requested under the Freedom of Information Act. Mr Van De Wiel had asked that he not be required to pay the charges and a deposit, on the basis that giving him access to the documents he had requested was in the general public interest and also that payment of the fee would cause him financial hardship. The Tribunal decide that charges should be imposed and a deposit paid, but only in relation to certain documents, and a financial cap be placed on the total amount and deposit required.

Heard in Sydney before Senior Member M D Allen.
Discussed on page 315 of this thesis.

Heard in Brisbane before Senior Member B J McCabe.
This case involved helicopters and agricultural related flying approvals and it was an application for a stay of various decisions made by the Civil Aviation Safety Authority. A stay in all matters, (save that of the flight instructor rating), was granted. The application for a stay of the decision of the Authority to decline to renew the flight instructors rating until such time as a flight test could be arranged, was adjourned for seven days.

Civil Aviation Safety Authority v Boatman [2006] FCA 460 (28 April 2006).
Heard in the Federal Court in Canberra and Sydney, before Madgwick J.
Discussed on page 320 of this thesis.

Brazel Agricultural Services Pty Ltd and Civil Aviation Safety Authority [2006] AATA 379 (1 May 2006).
Heard in Melbourne before Mr Egon Fice, Member.
This case involved the cancellation of an Air Operator's Certificate for an aircraft engaged in agricultural operations, specifically crop straying. The Tribunal set aside the decision to cancel the Air Operator's certificate and reinstated it, but with specific conditions attached.

Heard in Hobart before Mr Egon Fice, Member.
This case involved a pilot who suffered a long standing medical condition that could cause him to suffer sudden collapse at any time. The medical certificate issued to him by the Civil Aviation Safety Authority contained a condition that required Mr Mulholland to fly as, or with, a qualified co-pilot at all times. Mr Mulholland requested a review of the Authority's decision regarding the restriction on his medical certificate.
The Tribunal affirmed the Authority's decision.

Heard in the Federal Court, Melbourne, before Ryan J.
Involved the cancellation of Mr Christidis's Australian commercial helicopter licence after his New Zealand licence had been cancelled by the New Zealand Civil Aviation Authority.
The Court found that on the facts this was not a reviewable decision under the Administrative Decisions (Judicial Review) Act 1997 (Cth).

Heard in Sydney before Professor G D Walker, Deputy President.
In this case Mr Furness, a 76 year old licensed aircraft maintenance engineer, sought the Tribunal's review of a decision by the Civil Aviation Safety Authority to cancel his Licence and Certificate of Approval on the grounds that he:
i) Failed in his duty with respect to matters affecting safe navigation or operation of an aircraft, and
ii) That he is not a fit and proper person to have the responsibilities and perform the functions of a certificate of approval.
The Authority submitted in evidence a long list of errors made by Mr Furness in relation to the pre-sale of an aircraft that had multiple defects, including corrosion, supposedly 'missed' by Mr Furness who had signed out the maintenance release of the aircraft as being 'airworthy'.
Mr Furness had been a licensed aircraft maintenance engineer since 1951. The Tribunal considered all the copious evidence and concluded that the decision under review should be set aside and the matter remitted to the Authority for reconsideration in the light of the reasons given by the Tribunal. These reasons revolved around the fact that Mr Furness had an unblemished record as an aircraft maintenance engineer spanning more than 50 years and the contraventions of the regulations he committed, other than that relating to the finding of corrosion, were not of such gravity as to cause the cancellation of his licence and approval. Rather in the circumstances the Tribunal advised that it might be appropriate to make Mr Furness's certificate and license subject to restriction, such that he should undertake a course in relation to the treatment of corrosion.

Repacholi Aviation Pty Ltd and Civil Aviation Authority [2006] AATA 578 (30 June 2006).
Heard in Perth before S D Hotop, Deputy President.
This case involved the review of a decision of the Civil Aviation Safety Authority to refuse to issue Mr Repacholi with a Chief Pilot approval. This was as a result of consideration by the Authority of Mr Repacholi's past compliance history and his previous dealings with CASA officers.
The company Repacholi Aviation Pty Ltd, at the time of this hearing was engaged solely in agricultural aviation and it was to this aspect of aviation that its Air Operator's Certificate applied.
Mr Repacholi was first issued with his Chief Pilot's approval on 10 February 1995. He relinquished this approval in March 2002, following a controversial flight he made on 10 January 2002. (See above: Repacholi and Civil Aviation Safety Authority [2003] AATA 573 (18 June 2003).
As a result of this flight the Authority saw fit to cancel his commercial and private pilots licences, and Mr Repacholi subsequently made a successful appeal to the Tribunal regarding these cancellations. At the time no
administrative action was taken by the Authority in respect of his capacity as chief pilot of Repacholi Aviation, and no administrative action was taken by the Authority against the company, or its Air Operator’s Certificate. Mr Repacholi’s chief pilot’s approval was not attacked, or made the subject of any ‘show cause’ process. The only administrative action taken by the Authority was against his private and commercial pilot licences. However in consultation with the Authority after the incident, Mr Repacholi agreed to ‘step back’ from his involvement with the company pending the resolution of his dispute with the Authority, on the understanding, so he thought, that when his licences were restored he would again be appointed as chief pilot of the company. In the meantime another less experienced pilot was engaged as ‘Chief Pilot’ and due to his lesser experience and qualifications Recholi’s Air Operators Certificate had to be amended to exclude the former charter category and became limited to conducting only agricultural operations. Mr Recholi’s numerous ‘clashes’ with the Authority were discussed in detail in this case and the Tribunal, after quite exhaustive examination of them, decided to set aside the decision to refuse to issue Mr Repacholi with a Chief Pilot’s approval and remitted the matter back to the Authority for reconsideration in accordance with certain specific directions.

Heard in Brisbane before Senior Member B J McCabe.
This case concerned helicopters and involved an application for a stay of various decisions made by the Civil Aviation Safety Authority. The Tribunal granted the stays requested.

Heard in Brisbane before Deputy President P E Hack SC.
This case dealt with helicopters and the cancellation by the Civil Aviation Safety Authority of Mr Mulligan's commercial helicopter licence, his private pilot aeroplane licence, his student pilot licence and his radio licence. The Tribunal varied the decision cancelling only the commercial pilot licence and private aeroplane (fixed wing), licence.

Murtagh and Civil Aviation Safety Authority [2006] AATA 673 (1 August 2006).
Heard in Brisbane before Senior Member B J McCabe.
This case concerned a private pilot whom the Civil Aviation Safety Authority contended had committed multiple breaches of the Civil Aviation Regulations. The Authority deemed him to be not a fit and proper person to hold a private pilot's licence. The Tribunal agreed, but varied the decision of the Authority by imposing a suspension period of four months from the date of the decision, during which time Mr Murtagh would have, so it said, the opportunity to reflect on his conduct and consider opportunities for further training.

Heard in the Federal Court, Brisbane before Kiefel J.
This case was concerned with helicopters, and the cancellation of a pilot's delegation from the Civil Aviation Safety Authority to conduct certain flight
tests. The application for judicial review of the decision before the Court was found not to be reviewable in the Administrative Appeals Tribunal and was dismissed with costs awarded in favour of the Civil Aviation Safety Authority.

Heard in The Federal Court, Melbourne, before Ryan J.
The case involved parachute operations.

Heard in Melbourne before Mr Egon Fice, Member, and Dr Kerry Breen, Member.
This case involved a decision of the Civil Aviation Safety Authority to place conditions on the class 2 medical certificate of a pilot who suffered from type one diabetes. The Tribunal affirmed the decision of the Authority.

2007

Heard in Sydney before Professor G D Walker, Deputy President and Air Vice-Marshall Franklin Cox AO, Member.
This case involved a refusal by the Civil Aviation Safety Authority to issue a foreign aircraft Air Operator's Certificate to the company Heavylift Cargo Airlines because it was claimed, they had not complied with aviation legislation. There were, according to the Authority, deficiencies in their operations manual, breaches in handling of dangerous goods and the operation of aircraft with defects.
The Tribunal affirmed the decision of the Authority.

Heard in Brisbane before Deputy President P E Hack SC.
This case involved an application for the review of a decision by the Civil Aviation Safety Authority not to renew Mr Horne's aircraft maintenance engineer's licence. The evidence presented to the Tribunal made it quite clear that Mr Horne was not able to now comply with the regulatory requirements a renewal required, despite the fact that he had in the past satisfied those requirements.
The Tribunal affirmed the decision of the Authority.

Heard in Sydney before Professor G D Walker, Deputy President, and Dr M Thorpe, Member.
This case was concerned with the cancellation of a private pilot's licence for a pilot who was medically classified as deaf. The Tribunal affirmed the Civil Aviation Safety Authority's decision to cancel the licence.
Tomkins and Anor and Civil Aviation Safety Authority [2007] AATA 1747 (10 September 2007).
Heard in Brisbane before Senor Member B J McCabe.
The case involved helicopters and the refusal of the Civil Aviation Safety Authority to grant certain licences and the suspension and cancellation of certain licences.
The Tribunal set aside the decisions under review and remitted some of the decisions back to the Authority for reconsideration.

Van De Wiel and Civil Aviation Authority [2007] AATA 1841 (8 October 2007).
Heard in Melbourne before Mr Egon Fice, Member.
Mr Van De Wiel made an application under the Freedom of Information Act 1982, to obtain a very large number of documents from the Civil Aviation Safety Authority. The Authority indicated to Mr Van De Wiel by letter, on 9 February 2005, that it would take the Authority approximately 'four person months' to peruse and search its files in order to find the documents that he had requested. It declined his request. Mr Van De Wiel subsequently modified the number of documents requested but was advised by the Authority that the documents sought were subject to legal professional privilege.
The case involved an analysis of the various classes of documents. The Tribunal accepted the exemptions claimed by CASA, except in a minor number of instances and in this respect CASA had by the end of the case, already provided those documents to Mr Van De Wiel.

Heard in Hobart before Ms Anne Cunningham, Senior member and Mr Egon Fice, Member.
Concerned the issue of medical certificates to a private pilot whose medical condition was such that it rendered him as having 'a high risk of losing consciousness flying an aircraft'. The medical certificate CASA issued to him was subject to 'conditions in the interests of safety of air navigation' whereby he was restricted to only flying with a qualified co-pilot. Mr Mullohilland sought a review of the conditions the Authority imposed on him. The Tribunal affirmed the Authority's decision.

Heard in Sydney before Deputy President P E Hack SC.
This case was primarily concerned with maintenance work carried out on helicopters. The Civil Aviation Safety Authority had cancelled Mr Grant's aircraft maintenance engineer's licence after it was found that he falsified maintenance records, and lied to the Authority when it was undertaking an investigation about a helicopter incident.
The Tribunal set aside the decision of the Authority to cancel the licence and substituted a decision that the licence be suspended for a period of two months.

2008


Heard in Sydney before Ms G Ettinger, Senior Member.
This case dealt with an application for a stay of a decision of the Civil Aviation Safety Authority to cancel a helicopter pilot's various licences. The Tribunal granted the stay until the substantive matter could be heard and determined.


Heard in Sydney before Senior Member, Mrs Josephine Kelly.
Discussed on page 323 of this thesis.


Heard in the Federal Court in Sydney, before Buchanan J.
Discussed on page 328 of this thesis.

Torr and Civil Aviation Safety Authority [2008] AATA 479 (10 June 2008).

Heard in Melbourne before Mr G L McDonald, Deputy President and Miss E A Shanahan, Member.
This case involved an application for a class 1 or class 2 medical certificate for a former airline pilot who had sustained a medically significant head injury on 7 March 2007. Following the head injury the Civil Aviation Safety Authority suspended his medical certificates and would not consider his further medical certification until at least March 2008. Comprehensive medical records were analysed by the Tribunal. The Authority's decision was varied by adding a direction that the Authority should consider the pilot for a class 2 medical certificate after the expiry of a twelve-month period from 7 March 2007 and after eighteen months for a class 1 medical certificate. The latter certificate was subject to him not suffering from a post traumatic seizure in the period under consideration.


Heard in Sydney before Professor G D Walker, Deputy President, and Dr M E C Thorpe, Member.
This was an application by Mr Joseph White, a student pilot, to review a decision of the Civil Aviation Safety Authority not to issue him with a class 2 medical certificate.
The Tribunal affirmed the Authority's decision.


Heard in the Federal Court, Sydney, before Stone J.
This case deals with an application by the Civil Aviation Safety Authority to suspend Mr Bell's Private and Commercial licences pursuant to s 30DC of the Civil Aviation Act. Under this section the Authority must apply to the Federal Court within five days to be able to extend the length of suspension beyond the automatic five days permitted by the legislation. Subject to s 30 DE an order of the court then continues in force for the period determined by the Federal Court when making the order, but not more than 40 days. This time allows CASA to complete an investigation into the circumstances that gave rise to CASA’s decision in the first place. Mr Bell received notification of his suspension on 29 May 2008.

The circumstance that gave rise to the suspension was the landing of an aircraft with seven passengers on board on a dirt road in mistake for the dirt runway of a country airstrip at Glen Station in Western Australia on 16 May 2008. Having realised his mistake the Mr Bell immediately applied power and took off again. During the take off run the aircraft hit a tree and significantly damaged the right wing. Although the aircraft was damaged Mr Bell managed to land it successfully on a different airstrip and the passengers, though shaken, were not injured.

The Court made the order sought by CASA, which in effect suspended Mr Bell's pilot's licence until the day the hearing occurred, that is 14 July 2008.

**McKenzie and Ors and Civil Aviation Safety Authority [2008] AATA 651 (25 July 2008).**

Heard in Brisbane before Deputy President P E Hack SC

This case involved the aviation company Lip-Air, and is discussed in detail on page 330 of this thesis

**McWilliam and Civil Aviation Safety Authority [2008] AATA 687 (6 August 2008).**

Heard in Melbourne before Mr Egon Fice, Member.

The case involved parachute operations.

**Snook and Civil Aviation Safety Authority [2008] AATA 861 (25 September 2008).**

Heard in Melbourne before Mr Egon Fice, Member.

This was an application for a stay of a decision of the Civil Aviation Safety Authority to suspend Mr Peter Snook's private pilot's licence, his aircraft maintenance engineer's licence, and vary his Certificate of Approval to conduct maintenance on aeroplanes issued to his maintenance organization which traded as Aeronautique Australia.

**Snook and Civil Aviation Air Safety Authority [2008] AATA 1139 (19 December 2008).**

Heard in Melbourne before Mr Egon Fice, Member.

This application before the Tribunal was to extend the period of a stay granted on 25 September 2008 to 26 February 2009 which would permit two applications to vary two different decisions, (one involving the cancellation of a private pilot's licence and the other the cancellation of a certificate of
approval for an aircraft maintenance organization), of the Civil Aviation Safety Authority to be heard at the same time.

The Tribunal extended the period of the stay.

**Vasta and Anor and Civil Aviation Safety Authority [2008] AATA 1120 (16 December 2008).**

Heard in Sydney before Justice Tamberlin, Presidential Member and Professor G D Walker, Deputy President.

This case concerned a request for documents under the Freedom of Information Act. Orders were sought under s 37(2) of the Administrative Appeals Tribunal (Act 1975) that the Civil Aviation Safety Authority lodge with the Tribunal, and give access to each of the applicants in the proceedings certain documents. Discussion in the Tribunal revolved around whether the documents sought under the Act were 'relevant' to the review of a decision by the Tribunal.

The Tribunal directed CASA to lodge with it the documents that were the subject of the s37(2) application within 28 days. It also stated that there would be no access to the documents by the applicants and their representatives without further order of the Tribunal. This would occur at a date to be fixed by the Tribunal.
APPENDIX 4

THE ROLE OF THE CHIEF PILOT

The position of Chief Pilot is one of the main employee positions for holding an Air Operator Certificate (AOC). 1 If an organization does not have a Chief Pilot it cannot exercise the privileges of an AOC.

The Chief Pilot is responsible for holding and carrying out the duties of one, and in many cases two, of the four 'key personnel' positions in the Act. These are 'the head of the flying operations part of the organization', and 'the head of the training and checking part of the organization'.

The role can be taxing, as it requires a focus on regulatory compliance and is the important link between the AOC holder and CASA. The holder of this position requires the strength of character to balance what may be conflicting demands of safety and the requirements of the regulator, with commercial considerations.

The approval process for the appointment of Chief Pilot of an organization is quite rigorous. The regulator considers the pilot's aeronautical experience, knowledge of the duties required of a Chief Pilot, flight planning, loading and performance, briefing and most likely will require the pilot to undergo a flight check with one of the regulator's Flying Operations Inspectors (FOIs).

The regulator considers management skills, which are not currently written into the minimum requirements for a Chief Pilot, to be an important aspect of the job. They see this as tying in with the ability to plan well ahead and avoid making decisions under pressure, thus avoiding situations of 'crisis management' where snap decisions have to be made suddenly. The exposure to risk of incidents and accidents is elevated when snap decisions are made.

It is the Chief Pilot who more than anyone else determines the safety culture of the organization. He or she can determine what methods are chosen to meet the regulatory standards required, and must be aware that a poor safety culture is more likely to produce behaviours which contribute to an accident.

The regulator encourages the Chief Pilot to develop a professional interface with the Authority. This way life can be made a lot easier for both parties. If there are rules, which the Chief Pilot finds unnecessarily onerous, a professional relationship with CASA can be helpful in finding a long term solution to any problems he or she may have.

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1 Civil Aviation Act 1988 (Cth) Section 28(1)(b)(iv)
Civil Aviation Regulations 1988 (Cth), 215, 216, 217.
Civil Aviation Safety Regulations 1998 (Cth) Part 119
Civil Aviation Orders (CAOs) CAO 82.0 CAO 82.0 Appendix 1 Air Operators Certification Manual (AOCM) Volume 2 Annex 3.1.16 Approval of Chief Pilot
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