Australian Government

Department of Infrastructure and Regional Development

Civil Aviation Safety Authority

Indemnity and Insurance Arrangements

for industry delegates, authorised persons and others

Policy Paper

November 2017

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The Government's response to the Aviation Safety Regulation Review required that a policy paper on Civil Aviation Safety Authority (CASA) industry indemnity and insurance arrangements be released for consultation. The purpose of the paper is to put forward proposals for appropriate future indemnity arrangements for persons who are not employees of CASA, but who are delegates or authorised persons, appointed under the Civil Aviation Regulations 1988 or the Civil Aviation Safety Regulations 1998.

The Department of Infrastructure and Regional Development is leading this consultation. Submissions on the issues raised in the paper are encouraged by 22 December 2017, to Indemnity.Consultation@infrastructure.gov.au.

Civil Aviation Safety Authority

Indemnity and Insurance Arrangements for industry delegates, authorised persons and others

Policy Paper

November 2017

PURPOSE

1. The purpose of this policy paper is to put forward proposals for appropriate future indemnity arrangements for persons who are not employees of the Civil Aviation Safety Authority (CASA), but who are delegates or authorised persons, appointed under the *Civil Aviation Regulations 1988* (CAR) or the *Civil Aviation Safety Regulations 1998* (CASR).[1]
2. Indemnity arrangements of any kind necessarily involve the availability of appropriate and sufficient insurance coverage for CASA. Additionally, those individual or corporate entities which are not covered by an indemnity need to be able to access reasonable insurance coverage on the private market.
3. The roles and functions currently or previously performed by delegates and authorised persons, but which have come, or are expected to come, to be exercised instead as privileges under an authorisation (a licence, rating, endorsement or some other permission) are listed in the table at **Attachment A.**
4. The four key proposals put forward in this policy paper, consistent with the Government's indemnity policy and acknowledging the specific nature of CASA's safety regulatory functions are:
   - Proposal 1 – Status Quo: continue current arrangements;
   - Proposal 2 – Extended Coverage: indemnities be extended to all persons exercising regulatory powers of a kind previously performed by delegates and authorised persons;
   - Proposal 3 – Adoption of Prescribed Criteria: indemnities for the performance of specified functions and the provision of specified services be determined on a case-by-case basis against prescribed criteria; and
   - Proposal 4 – Indemnity determined by availability of commercial insurance: indemnities for performance of specified functions and provision of specified services be provided, where commercial insurance is not available to the provider of the specified function or service.

BACKGROUND

5. For the past 25 years, CASA (and its predecessor) has indemnified industry delegates and authorised persons performing important aviation-related functions under the civil aviation legislation.[2] The functions subject to this indemnity have included conducting flight tests of pilots, issuing certificates of airworthiness for aircraft and approving modifications to aircraft.
6. This approach came at a time when little insurance cover was available, and provided these delegates and authorised persons with assurance that any costs or claims for which they might be liable, on account of alleged negligent conduct in the performance of their functions, would be covered by CASA.

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[1] *Delegates* of CASA under both CAR and CASR are appointed by the Director of Aviation Safety under CASR 11.260. *Authorised persons* are appointed by CASA under CAR 6 for the purposes specified in CAR, and under CASR 201.001 for the purposes specified in CASR.

[2] The indemnity undertaking is expressed in Civil Aviation Advisory Publication (CAAP) Admin (1), *Delegations and Authorisations* (January 1992), which appears as **Attachment C** to this paper. CAAP Admin (1) can also be accessed on the internet at https://www.casa.gov.au/files/admin1pdf.

7. As a result of recent amendments to CASR, a number of the functions previously performed by industry delegates (and in some cases, authorised persons) have become privileges that may, and in some cases may only, be exercised by the holders of certain ratings, approvals and other permissions issued as civil aviation authorisations.[3]

8. Although these new authorisation holders engage in essentially the same activities they previously performed as delegates or authorised persons, under the new regulations they perform those functions in the exercise of corresponding privileges under a permission, not as delegates or authorised persons exercising powers on behalf of CASA.

9. As a consequence of this change in status, former delegates and authorised persons who have transitioned under the new regulations are no longer eligible for CASA's indemnity. New authorisation holders, who had not previously been delegates or authorised persons, are also precluded.

10. CASA has consistently maintained insurance coverage to enable it to provide the indemnity arrangements set out in CAAP Admin 1. Currently that coverage is the basis of CASA's participation as a member of Comcover, the Australian Government's self-managed insurance fund.

11. CASA's ability to maintain its indemnity arrangements reflected in CAAP Admin 1 is based on Comcover's continuing agreement to provide coverage for the potential insurable risk liabilityto which CASA is exposed as a consequence.

GOVERNMENT RESPONSE TO THE AVIATION SAFETY REGULATION REVIEW

12. In its response to Recommendation 15 of the Aviation Safety Regulation Review (ASRR) panel report that CASA: '*continues to provide appropriate indemnity to all industry personnel with delegations of authority'* the Government indicated that it agreed in principle with the recommendation. The response also required that a policy paper on future proposals be prepared by CASA for public and industry comment having regard to the Department of Finance's rules on the indemnity provisions under the *Public Governance, Performance and Accountability Act 2013* (PGPA Act).

13. Subsequently CASA, and the departments of Infrastructure and Regional Development and Finance, formed a Working Group to produce a policy paper for public and industry consultation.

14. The Working Group's Terms of Reference provide that it should prepare a policy paper that includes a comprehensive analysis of the nature, scope and propriety of CASA's existing and proposed industry indemnity regime and outlines a range of possible options for the future.

    Accordingly, this policy paper considers:

    - The nature and extent of, and the justification for, past, current and future industry indemnity arrangements;
    - The risks of both providing indemnities and not providing indemnities for each of the relevant activities;
    - The availability of private market insurance for relevant activities;

[3] ***Civil aviation authorisation*** is defined in the *Civil Aviation Act 1988* to mean 'an authorisation under this Act or the regulations to undertake a particular activity (whether the authorisation is called an AOC, permission, authority, licence, certificate, rating or endorsement or is known by some other name' (s. 3). Neither an instrument of delegation nor an instrument of appointment as an authorised person constitutes a civil aviation authorisation.

- The use of industry indemnities by other Commonwealth entities; and
- Other relevant matters.

THE NATURE, EXTENT AND JUSTIFICATION FOR INDUSTRY INDEMNITY ARRANGEMENTS

15. In 1991, the *Civil Aviation Act 1988* (the Act) was amended[4] to put beyond doubt that regulations could be made providing for the delegation of regulatory functions and powers to be conferred on a person who was not an officer (employee) of CASA's predecessor, the Civil Aviation Authority.

16. The purpose of that amendment, which was given retrospective effect to the date the Act initially came into effect in 1988, was to confirm the legality of what the Authority and its predecessors had been doing for at least the preceding 30 years, namely, delegating 'certain air safety functions under the [regulations] to industry bodies'.[5]

17. On this basis, CASA has routinely conferred authority to perform certain functions and exercise certain powers under the regulations on industry members, appointing them:

    - as ***delegates*** under CASR Subpart 11.H; or
    - as ***authorised persons*** under CASR 201.01 in respect of CASR and CAR 6 in respect of CAR.

18. In 1991, the then Civil Aviation Authority undertook to indemnify industry delegates and authorised persons for damages for which they might be found liable, as a result of acts of ordinary negligence on their part occurring in the normal performance of their functions or exercise of their powers under the regulations. That undertaking was expressed in CAAP Admin 1. The justification for extending this indemnity is expressed in CAAP Admin 1 as follows:

> *. . .[B]ecause the Authority accepts that such persons are to some extent exercising such powers on behalf of the Authority, the Authority has agreed to indemnify all delegates/authorised persons against liability or loss arising from the exercise of powers conferred upon them by the delegation/authorisation.*

19. The table at **Attachment A** shows the numbers of existing delegates and authorised persons as at 1 July 2017 and the powers they are authorised to exercise.

20. In summary, and as explained in greater detail below, as at 1 July 2017, there were 938 CASA industry delegates and authorised persons, of whom:

    - *322 Approved Testing Officers (ATOs) will need to transition to become holders of authorisations of one kind or another by 1 July 2018.*
    - *320 may elect to transition to become Approved Design Organisations (ADOs), but are not presently obliged to do so.*
    - *296 may continue to perform the functions they have been appointed as delegates or authorised persons to perform—and a potentially unlimited number of persons may apply to become delegates or authorised persons under the regulations to perform those functions*.

21. While it is acknowledged that there has been a history of delegations for industry to perform certain functions over a period of time, it is also the case that these functions benefit the industry and those that perform them, as well as CASA. Since those functions were first

[4] *Transport and Communications Legislation Amendment Act 1991*, s. 20.
[5] Explanatory Memorandum, Transport Communications Legislation Amendment Bill 1991, paras 2.28-2.30.

undertaken by industry there has been increasing availability of private insurance for some industry delegates and authorised persons to cover the risks associated with performing the functions, even though they are of also of benefit to CASA and other members of the aviation industry.

22. It is therefore important to closely examine the specific types of functions being performed, regardless of whether they are described as delegations, authorisations or privileges, in order to properly consider the justification for an indemnity being provided by CASA.

Designated Aviation Medical Examiners (DAMEs)

23. DAMEs conduct medical examinations of applicants for medical certificates, who are either pilots or air traffic controllers.

24. 53 of the total number of industry delegates identified are DAMEs who hold delegations to issue Class 2 Medical Certificates (for private pilot licence holders).

25. As delegates, these 53 DAMEs are currently covered by the CAAP Admin 1 indemnity.

26. However, as medical practitioners, DAMEs are required to hold professional indemnity insurance and medical negligence insurance. Moreover, it is a condition on each instrument of delegation issued by CASA to these DAMEs that they must have professional indemnity insurance with $20m minimum cover.

27. The existence of reasonable private insurance arrangements for this cohort, and the nature of the function, should be considered in looking at the justification for availability of an indemnity to cover this function, against prescribed criteria.

Airservices Australia delegates - air traffic controller authorisations

28. Airservices delegates have the power to grant a rating or endorsement on an Air Traffic Controller (ATC) licence, or grant a rating or endorsement on a flight service licence. There are 115 employees of Airservices Australia on whom delegated authority has been conferred for the purpose of issuing ATC authorisations. These arrangements facilitate the ability of Airservices to issue qualifications to its employees quickly and efficiently on the successful completion of training for various ATC qualifications.

29. Established by the *Air Services Act 1995*, Airservices is corporate Commonwealth entity and a public non-financial corporation under the PGPA Act. Airservices does not participate in the Comcover fund, but rather holds its own commercial insurances.

30. As delegates performing licensing functions under CASR Part 65, Airservices employees are currently covered by CASA's CAAP Admin 1 indemnity arrangements. In so far as Airservices' independent insurance arrangements do, or could be extended to, cover Airservices employees exercising licensing powers under CASR Part 65, the cessation of Comcover's CAAP Admin 1 coverage for those Airservices delegates beyond 30 June 2018 would have no adverse effect on those individuals. It may, however, increase Airservices' premiums, where the coverage involved is not currently seen to extend to include the exercise of delegated powers under CASR.

31. The continuation of indemnity cover for this function should be assessed against prescribed criteria.

Approved Testing Officers (ATOs) and Flight Examiner Rating (FER) holders

32. ATOs issue flight crew ratings or endorsements and conduct flight tests of pilots for the grant of a pilot licence, endorsement or rating.

33. As at 1 September 2014, when CASR Part 61 came into effect, there were 959 ATOs, performing flight testing functions as CASA industry delegates. As at July 2017, 637 of those ATOs had transitioned to become FER holders.

34. As at July 2017 there were 322 individuals holding ATO delegations who had not yet transitioned to become FER holders. Since 1 September 2014, 394 persons who were never ATOs obtained FERs or an equivalent authorisation. None of these 394 'new' FER holders, who had never been an ATO, but applied for and obtained a FER for the first time on or after 1 September 2014, would ever have enjoyed CAAP Admin 1 indemnity arrangements. Despite this, a large number of persons obtained such an authorisation.

35. Except to the extent ATOs who have elected to transition to become FER holders effectively lost their existing CAAP Admin 1 indemnity protection at the time they transitioned, and in so far as 'new' FER holders will not previously have enjoyed that protection, none of these individuals (FER holders) (some 1031 people) would be adversely affected by either the cessation of CAAP Admin 1 coverage as from 1 July 2018, or by the reduction in the coverage afforded under those arrangements from 1 July 2018.

36. The continuation of indemnity cover for this function should be assessed against prescribed criteria.

Approved Design Organisations (ADOs)

37. ADOs perform design certification. Specifically, under CASR Subpart 21.J, an authorised person, CASA or an ADO, may exercise a range of CASR Part 21 design powers (see **Attachment B**). CASR Part 21 was amended in 2013 to make provision for the approval of ADO's. However, unlike Part 61, under which ATOs were required to transition to FER status, there is currently no requirement in Part 21 that a person currently exercising design approval powers as an authorised person transition to become an ADO. Those activities may continue to be carried out by authorised persons or delegates of CASA.

38. As at June 2017, there were 2 ADOs, one of which employed persons who were previously authorised persons under CASR Part 21. While those individuals are no longer indemnified by CASA (as authorised persons), they are presumably covered by the corporate insurance maintained by their employer.

39. Because ADOs are not currently delegates or authorised persons, they are not currently indemnified by CASA under CAAP Admin 1 and therefore this function's applicability for indemnity coverage needs to be assessed against prescribed criteria.

Other Functions

40. In addition to the 322 ATOs who have not yet transitioned to become FER holders, the 53 DAMEs and the 115 Airservices delegates, as at July 2017 there were 25 other industry persons holding CASA delegations, primarily related to aircraft airworthiness matters. There are also 357 authorised persons who are primarily engaged in activities authorising them to make aircraft airworthiness related decisions.

RISKS FOR CASA AND THE COMMONWEALTH

41. There are inevitably risks to the Commonwealth in agenices, such as CASA, providing indemnity arrangements and accordingly clear justification is required for indemnities remaining in place or being introduced. Existing Commonwealth policy requires that such risks be clearly identified and managed

42. There are financial risks involved, noting that should CASA's arrangement with Comcover be exceeded, CASA is exposed to any liability created by an authorised person or delegate.

43. For CASA, there is also the risk of the function not being performed if the indemnity is not available.

44. Should for any reason the arrangement with Comcover cease or change, CASA's ability to maintain indemnity arrangements in favour of industry delegates and authorised persons

would be correspondingly affected unless CASA can make alternative insurance arrangements on the commercial insurance market.

AVAILABILITY OF PRIVATE MARKET INSURANCE FOR RELEVANT ACTIVITIES

45. Comcover has been providing insurance and risk management services to CASA and other Commonwealth corporate and non-corporate entities since 1998. The specific indemnity arrangements under discussion in the paper have been with Comcover since 2007, prior to that, cover was purchased from the commercial insurance market.

46. Were CASA to obtain private insurance to cover the risks currently involved, it is estimated the cost of such coverage could be from $1m to $1.5m per annum.

47. CASA is aware of at least three underwriters or brokers who provide insurance products designed specifically for persons performing flight test functions. The premiums for such coverage vary. For example, one insurer provides a policy for flight examiners with a $10m policy limit for a $3,500.00 annual premium. For a $1m policy limit, it is understood the annual premium would reduce to approximately $1,000.

48. That such coverage as is currently available may not have been available previously would appear to reflect, at least in part, that the existence of CAAP Admin 1 has effectively precluded the need for a market for this kind of coverage. However, with the introduction and implementation of CASR Part 61, Subpart 21J, Part 149 and others, the potential for growth in this market is demonstrable. In the event, it is not unreasonable to assume that premium costs will come to reflect the competitive nature of this new market.

49. The appropriateness and sufficiency of the coverage offered, and the reasonableness of the premium involved, would need to take into account the nature of, and the frequency with which, the covered activities are carried out, other relevant considerations bearing on the circumstances of the activities carried out, the fees the person charges for providing the services involved, collateral insurance arrangements maintained by the person's employer and the annual income generated by the conduct of those activities.[6]

50. In response to this policy paper, the insurance industry is encouraged to provide input on current and future insurance coverage in the performance of these activities in Australia.

USE OF INDEMNITIES BY OTHER COMMONWEALTH ENTITIES

51. Similar types of indemnities are provided by other Commonwealth entities. Examples include:

- by the Department of Agriculture and Water Resources in relation to losses that might be incurred by independent contractors in performing a function conferred on them for the evaluation of export beef carcases, and
- by the Department of Infrastructure and Regional Development to state government agencies in relation to the delivery of services to certain Commonwealth territories under service agreements between the Commonwealth and the State.

[6] This is the kind of information that should be obtained in a survey.

PROPOSALS

52. The four key proposals put forward in this policy paper, consistent with the Government's indemnity policy and acknowledging the specific nature of CASA's safety regulatory functions are detailed below. These proposal are not addressed in any order of preference.

Proposal 1 – Status Quo: continue current arrangements

53. On the understanding that appropriate and sufficient insurance coverage will be necessary to support such arrangements, this option would provide for the maintenance of appropriate indemnity arrangements in accordance with current arrangements.

54. Under the current arrangements, only certain functions are covered by CASA's indemnity, while other functions, such as the cohort of ATOs who have transitioned to become FER holders, are not covered.

55. The rationale for some form of indemnities for people performing regulatory functions is broadly that reflected in the supporting rationale for the amendments to the Act in 1991, being '*that it is accepted that such persons are to some extent exercising such powers on behalf of the Authority'.*

56. However, the difficulty with maintaining the status quo is that it sustains the inequity that currently exists between the various groups of people undertaking functions involving the provision of services, with some people currently enjoying coverage under the indemnity and others not enjoying such coverage. Some of the functions covered by the current arrangements also may not meet criteria for justifying indemnity cover.

Proposal 2 – Extended Coverage: indemnities be extended to all persons providing regulatory services of a kind previously performed as delegates or authorised persons

57. It is important to recognise that in many cases the availability of industry delegates and authorised persons performing regulatory functions allows for the provision of critical services to the Australian aviation industry, which CASA is no longer likely in a position to efficiently provide of its own accord.

58. The recent transition of the legislative mechanism by which many of these functions are provided, from performance by delegates and authorised persons to the exercise of privileges by authorisation holders, does not diminish the criticality of those services, or the need to ensure that they remain readily available to the Australian aviation industry.

59. Indemnities could be extended to all authorisation holders who had previously been or who are now delegates or authorised persons, and who have transitioned (or could transition) to the status of an authorisation holder under the applicable provisions of CASR, as well as persons who have never been a delegate or an authorised person, but who engage in activities in the exercise of privileges under specified authorisations that are the same or substantially similar to the performance of corresponding functions by a delegate or an authorised person.

60. Given potential financial concerns over the cost of such an extension, a financial limit (cap) on the indemnity available could be applied, for example in the amount of $10 million. Under that approach, anyone who wishes to insure themselves against claims exceeding the cap specified in CASA's indemnity would be obliged to obtain that additional insurance coverage on their own accord, and at their own (or their employer's) expense.

61. These indemnity arrangements, and the underlying insurance coverage they require, could apply retrospectively to the date on which a person transitioned to become an authorisation holder and ceased to be a delegate or authorised person for those purposes.

62. All persons who, never having been a delegate or authorised person performing corresponding functions, apply for and obtain a civil aviation authorisation, the privileges of which involve activities which, prior to the introduction of the regulations under which those authorisations have been issued, would have been functions performed by a CASA industry delegate or authorised person could be given cover under the indemnity from the date on which the person obtains the relevant civil aviation authorisation.

63. This proposal needs to be assessed having regard to the increased cost to the Commonwealth, whether all the functions being performed could be classified as "performing regulatory functions for CASA" and against prescribed criteria for justifying indemnity cover.

Proposal 3 – Adoption of Prescribed Criteria: indemnities for the performance of specified functions and the provision of specified services be determined by CASA on a case-by-case basis against prescribed criteria

64. Under this approach, consideration of indemnities for the performance of regulatory functions and the provision of equivalent services would be undertaken against prescribed criteria.

65. This approach could involve application of the criteria set out in the Department of Finance (DoF) guidance material on indemnities, guarantees and warranties published for use by non-corporate Commonwealth entities.[7] The table below sets out the criteria specified in the DoF guidance material, which could be considered under this approach.

Criteria
1. Risks should be borne by the party best placed to manage them.
2. The benefits to the Commonwealth should outweigh the risks involved.
3. Officials must ensure that the risk management arrangements that are appropriate to the complexity and potential costs of the indemnity are in place before entering, after entering and for the duration of the arrangement
4. Before granting an indemnity, officials should consider whether options, such as the use by the other party of commercial insurance, are appropriate
5. If insurance is readily available, then using insurance, where the benefits outweigh the costs, is the preferred course of action.
6. Officials should consider whether the proposed indemnity will set a precedent that may be undesirable
7. Before granting an indemnity, officials should consider, whether the entity would be required to fund the potential cost from existing resources or whether insurance provided by Comcover would meet the cost

[7] *Indemnities, guarantees and warranties by the Commonwealth*, Resource Management Guide No. 414 (December 2016),

8.	**Officials should consider whether a maximum financial limit on payments or claims made under the arrangement should be included.**
9.	**Officials should consider including a time limit on the operation of an indemnity.**

66. In conjunction with these criteria, and in keeping with the principles reflected in the relevant DOF guidance, additional considerations that should be brought to bear in connection with this balancing process include:

- the demonstrable utility of the services provided by such individuals to the Australian aviation community;
- the absence of a sufficient number of qualified individuals generally able and willing to provide those services effectively and efficiently;
- the absence of a sufficient number of qualified individuals able and willing to provide those services effectively and efficiently in remote geographic regions or areas; and
- the ability and capacity of CASA to provide, or to arrange for the provision of, those services effectively and efficiently.

67. While this approach may result in a decision that some functions currently covered by the indemnity should not be covered going forward, it provides a clear and objective basis upon which to assess the suitability of functions for indemnity coverage. It is also an inherently fair option since whether or not a function or person is covered by the indemnity will be determined according to a set of objective criteria and not based on arbitrary or largely historical factors.

Proposal 4 – Indemnity determined by availability of commercial insurance: indemnities for performance of specified functions and provision of specified services be provided where commercial insurance is not available to the providers of the specified functions or services.

68. The original establishment of the indemnities came at a time when there was limited, or in some cases, no private aviation insurance market available to industry participants for performing these functions.

69. With these markets now developing in a number of the areas covered by the relevant functions, this approach would involve the provision of indemnity only where relevant commercial insurance is not available.

70. CASA could, , assess specific claims from industry under this approach before deciding whether an indemnity was appropriate, in consultation with the Department of Finance and Department of Infrastructure and Regional Development.

71. This proposal would reduce the number of functions that are indemnified and increase costs to persons who must then buy insurance on the private market. However, insurance is a normal cost of doing business and provided it can be reasonably obtained then it can be argued commercial aviation operators, like in other industries, should do so.

72. This option could also be combined with Proposal 3, where the availability of reasonable insurance would become one of the criteria to be considered in looking at the appropriateness of future indemnity coverage.

SUMMARY

73. Future indemnity arrangements should take into account the risk to the Commonwealth, the safety impacts on CASA and different industry sectors, cost considerations for the Government and industry, and the current and future availability of insurance.

74. Feedback is now sought on the four proposals outlined in this paper, which have been developed having regard to the key issues identified above.

75. Your feedback to the Department of Infrastructure and Regional Development at Indemnity.Consultation@infrastructure.gov.au would be appreciated by 22 December 2017.

ATTACHMENT A

DELEGATES AND AUTHORISED PERSONS (AT 1 JULY 2017)

Regulation	Number of authorised persons	Number of CASA delegates	Number of Organisations
CAR 5 – 'ATO' flight test delegates		322 current	
CASR 67.165, 67.175, 67.180 and 67.195 – DAME issue of Class 2 medical certificates		53	
CASR 21.007 - Approval of a defect in an Australian aircraft as a permissible unserviceability	3		N/A
CASR 21M – Grant of modification/repair design approvals	108 1 pending application		N/A
CASR 21.176 – To issue a certificate of airworthiness	66		27 organisational 39 individual
CASR 21.181(6) – To suspend or cancel a certificate of airworthiness	2		2 organisational
CASR 21.195A – To issue an experimental certificate	24		13 organisational 11 individual
CASR 21.195B(5) – To suspend or cancel an experimental certificate	2		2 organisational
CASR 21.200 – To issue a special flight permit	41		13 organisational 28 individual
CASR 21.324 – To issue an export certificate of airworthiness	39		15 organisational 24 individual
CAR 29A – To conduct welding examination	5		1 organisational 4 individual
CAR 37 to approve a defect in an Australian aircraft as a permissible unserviceability		18	8 organisational 10 individual
CAR 42M and 42R - To approve a system of maintenance and a change to a system of maintenance	17		5 organisational 12 individual

CAR 42R - To approve a change to a system of maintenance	20		6 organisational 14 individual
42ZC(6) - To authorise person to perform specified maintenance on Australian aircraft in Australian territory		5	5
CAR 262AP(5) - To authorise a particular aircraft to be operated over the built-up area of a city or town	18		11 organisational 7 individual
CAR 262AP(6) - To authorise an experimental aircraft to be operated other than by day and under the VFR	12		8 organisational 4 individual
CASR 65.080(1), 65.130(1), 65.085 (2), 65.140(1A) - To reissue a rating on an ATC licence		115 (Airservices Australia employees)	
CASR 101.335 - To issue operating certificate to unmanned aircraft operator		2	
TOTAL	103[8]	515	

[8] There are persons who hold multiple powers, hence the fact the total is less than the total sum of the above figures.

ATTACHMENT B

REGULATORY POWERS THAT AN APPROVED DESIGN ORGANISATION OR AUTHORISED PERSON CAN EXERCISE

Regulatory Power	Description
CASR 21.006	Approval of aircraft flight manual
CASR 21.006A	Approval of changes to aircraft flight manual
CASR 21.007	Approve defect as a Permissible unserviceability (unrepaired damage)
CASR 21.007A	Advice about major damage
CASR 21.009	Approval of technical data
CASR 21.095	Approval of minor changes to type design
CASR 21.098	Approval of major changes to type design
CASR 21.195A	Issue experimental certificate (including imposing condition on certificate and asking holder to make it available for inspection, or surrender it)
CASR 21.305A	Approval of material, part, process or appliance
CASR 21.437	Grant of a modification/repair design approval
CASR 21.502	Approval of imported aircraft engines or propellers
CASR 21.502A	Approval of imported material, part, process or appliance

There are 320 individuals who hold one or more of the abovementioned powers as an authorised person.

CIVIL AVIATION ADVISORY PUBLICATION

Date: January 1992 **No: ADMIN (1)**

DELEGATIONS AND AUTHORISATIONS

PURPOSE

1. The purpose of this publication is to explain the legal effect of delegations and authorisations and to provide general information to persons holding delegations and authorisations about their duties and liabilities. It does not purport to be an exhaustive statement of the rights and liabilities of such persons. It is intended only as a summary of the general principles involved. It also provides details about the Civil Aviation Authority's policy in relation to indemnifying delegates and authorised persons against actions brought against them as a result of the exercise of powers under a delegation or authorisation (whether exercised before or after the date of this publication).

CANCELLATION

2. This CAAP is the first issue of CAAP ADMIN (1), and will remain current until withdrawn or superseded.

REFERENCES

3. This publication should be read in conjunction with regulations 6 and 7 of the CARs.

HOW TO OBTAIN COPIES OF THIS PUBLICATION

4. Copies of this publication may be obtained from:

Civil Aviation Authority Publications Centre

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CONTENTS

SUMMARY

What is a delegation?

A delegation is a legal mechanism whereby an individual or body possessing legal powers transfers the right to exercise any or all of those powers to another person or body.

Under the *Civil Aviation Act 1988* and the Civil Aviation Regulations only the Chief Executive Officer of the Authority can delegate the Authority's powers and functions. Accordingly, a person will only hold a valid delegation if he or she has a written instrument of delegation issued by the Chief Executive Officer.

What is an authorisation?

An authorisation is a legal mechanism whereby an individual or body confers upon a person a right to do something which, apart from the authorisation, the person does not possess.

Authorisations are made under the Civil Aviation Regulations and are issued in the form of written instruments of authorisation. An authorisation can be issued by the Chief Executive Officer *or* by a person to whom the Chief Executive has delegated the power of issuing authorisations. Accordingly, a person will only hold a valid authorisation if he or she has a written instrument of authorisation issued by the Chief Executive Officer or by a delegate.

Generally, an authorisation is issued by a delegate rather than by the Chief Executive Officer.

Right of Civil Aviation Authority to delegate/authorise

The Civil Aviation Regulations confer various powers upon the Civil Aviation Authority. Those regulations also expressly empower the Authority to delegate those powers or to authorise other persons to exercise those powers.

What are the responsibilities of a delegate/authorised person?

If a person has been made a delegate or appointed as an authorised person then the person has a responsibility to ensure that any actions taken by the person are undertaken strictly in accordance with the terms of the delegation/authorisation and do not exceed the statutory power delegated to, or conferred upon, the person.

What if delegate/authorised person is sued for exercising a power?

At common law, if a delegate/authorised person is an employee of the Authority then the Authority will normally be vicariously liable for the actions of such persons. However, at common law the Authority would normally not be vicariously liable for the actions of delegates/authorised persons who are not employees of the Authority.

However, because the Authority accepts that such persons are to some extent exercising such powers on behalf of the Authority, the Authority has agreed to indemnify *all* delegates/authorised persons against liability or loss arising from the exercise of powers conferred upon them by the delegation/authorisation.

Are delegates/authorised persons indemnified in all circumstances?

No. The Authority will generally only indemnify a delegate/authorised person where the delegate/authorised person exercises a power within the scope of the delegation or authorisation.

The Authority will not normally indemnify delegates/authorised persons against liabilities or losses arising from the exercise of powers or the performance of functions that are outside the range of the Authority's statutory functions and outside the limits of the delegation or authorisation of the person concerned.

Nor will the Authority normally indemnify delegates/authorised persons who exercise their authority with reckless disregard.

What about insurance?

The Authority has comprehensive insurance which covers its delegates/authorised persons against liabilities or losses arising from their performance of functions carried out on behalf of the Authority, when those functions relate to the Authority's statutory functions and are the subject of the delegation/authorisations.

Delegates/authorised persons are encouraged to carry their own insurance in respect of activities that are not part of their delegated/authorised functions and in respect of which they may be subject to legal action.

All delegates and authorised persons must use care when exercising delegated powers

It is important to note, however, that liability for negligence only arises if a person fails to exercise reasonable care in the exercise of a power given to him or her. Accordingly, it is essential that in all cases delegates and authorised persons (whether employees of the Authority or not) exercise their powers using reasonable care and do not exercise those powers in an irresponsible or negligent manner.

What should a delegate/authorised person do if an action is brought against him or her?

If an action is brought against a delegate or authorised person because of actions taken by the delegate/authorised person under a delegation or authorisation then the person should contact the Insurance Manager in the Corporate Services

Division of the Civil Aviation Authority as soon as possible after the person receives advice of a possible action.

The number to ring is Canberra (06) 268 4111 (switchboard) or fax (06) 268 5683.

Further details

Additional technical information about delegations/authorisations is set out in the following pages.

DELEGATIONS (Reg 7)

(a) What is a delegation?

Under the Civil Aviation Regulations the Civil Aviation Authority is given various discretionary powers relating to the safety regulation of civil air operations in Australia. A discretionary power must, in general, be exercised only by the person or body to which it has been committed unless there is an express power to delegate it to another.

Delegation, strictly used, refers to the act by which an individual or body possessing legal authority transfers the right to exercise any or all of those powers to a subordinate individual or body.

(b) Why is delegation necessary?

Arguments for and against delegation cannot be stated in black and white — a balance of advantages and disadvantages is involved. The main arguments supporting delegation are that delegation:

(a) saves time higher up — in particular, may relieve senior officers of the burden of many relatively routine matters;

(b) makes possible quicker and cheaper decisions by reducing the need for reference to higher levels. It may also reduce formality, by making it easier to settle matters on a face-to-face basis;

(c) enables decisions to be made by those most knowledgeable about them, and able to adapt them to the needs of the particular case;

(d) encourages personal initiative, and an increased sense of responsibility in the officer to whom wider powers are given. It may also promote the officer's skill as a decision taker.

(c) What is the effect of a delegation?

In general, a delegation of power does not imply parting with authority. The delegating body will retain not only power to revoke the delegation, but also power to act concurrently on matters within the area of delegated authority. This is made clear by section 34AB of the *Acts Interpretation Act 1901* (C'lth) which provides that a delegation 'does not prevent the performance or exercise of a function or power by' the person or body delegating the power or function.

A delegation by the Civil Aviation Authority of its powers under the Civil Aviation Regulations does not automatically create a principal/agent relationship between the Authority and the delegate. Nor does a delegation by the Authority automatically render the Authority legally liable under the general law for the actions of a delegate. A delegate performs functions under the delegation in the delegate's own right, not on behalf of the Authority (see *O'Reilly v. State Bank of Victoria* (1983) 57 ALJR 130 at page 140; *Re Ombudsman Reference* (1979) 2 ALD 86 at page 94). However, there are some duties of care under the general law for which the Authority cannot escape liability by delegating their performance to another body or individual.

(d) Legislative basis for delegations under the Civil Aviation Regulations

Regulation 7 of the Civil Aviation Regulations provides that the Authority may delegate all or any of its powers under the Regulations. Regulation 7 makes it clear that the Authority can, under this power, delegate its powers to *any* person and is not restricted to delegating its power to officers or employees of the Authority.

(e) Is the Civil Aviation Authority vicariously liable for the acts of its delegates?

In looking at delegations by the Authority under the Civil Aviation Regulations different considerations apply whether the delegate is an officer or employee of the Authority or whether the person is someone who has no connection with the Authority at all. However, in both cases the question arises whether there is any significance for the tort liability position of the Authority when it delegates its powers i.e. is the Authority vicariously liable for the actions of all of its delegates.

A person is normally answerable for his own actions and not for those of anybody else, but in some limited circumstances the law will impose liability on one person for the negligence of another e.g. generally an employer is responsible for what his employee does in the course of the employer's business. A plaintiff must therefore establish that he was harmed by the employee doing what he was employed to do. However, the law draws a distinction between an employee acting outside the scope of employment, when the employer will not be liable, and an employee doing improperly something that the employee was supposed to do, thus making the employer liable. The employee does not escape liability himself, and may be sued by the injured person, although in general it is the employer who will be sued because, in most cases, he has the means to pay damages. The employee is also liable to the employer, who is entitled to be indemnified, although in most cases the employee's means will not justify a claim.

The basic test for vicarious liability, therefore, has been whether the person who has breached a duty of care is under the control of the person or entity whose vicarious liability is in issue. Accordingly, where a person has an independent discretion and is not under the direction of another person then the basis for vicarious liability is absent. *Nipper v. Watson* (1882) 3 NSWR 168; *Stanbury v. Exeter Corporation* [1905] 2 KB 838; *Lambert v. Great Eastern Railway Company* [1909] 2 KB 776 and see generally Halsburys Laws of England Vol. 1(1) para. 199.

(f) Liability at common law for delegates who are officers/ employees of the Authority

Applying this principle, it would appear that where the Civil Aviation Authority itself acts *through* its employees and officers, then the first precondition for vicarious liability is present. However, where the Authority itself does not act but appoints one of its employees as a delegate, then the delegate is exercising his or her own power. This suggests that such a delegate is not under the direction of the Authority and that therefore there is no basis for attributing vicarious liability to the Authority for acts and omissions of the delegate. However, in *Minister of Housing and Local Government v. Shart* [1970] 1 All ER 1009 (especially at 1019 and 1026) the Court of Appeal indicated that an authority can be held vicariously liable for the acts and omissions of its employee even when the employee's relevant act or omission occurred while the employee was under someone else's direction and control. This suggests that where a person to whom the Civil Aviation Authority has delegated powers under Regulation 7 is an officer or employee of the Authority, then the Authority may be vicariously liable for acts and omissions of the individual in relation to the delegated powers even though that individual may not be under the direction and control of the Authority in exercising the delegated powers.

(g) CAA practice in relation to its officers/employees

The Civil Aviation Authority practice is that it will indemnify its officers and employees who are holders of delegations against any liability or loss arising from the exercise of powers or the performance of functions carried out on behalf of the Authority, *where those*

powers or functions are within the scope of the delegation.

However, the Civil Aviation Authority will not, generally, indemnify delegates against liabilities or losses arising from the exercise of powers or the performance of functions which are outside the scope of the delegation or which are exercised or performed with reckless disregard.

(h) Position at common law of delegates who are not officers/employees of the Authority

At common law, there is generally no basis for attributing vicarious liability to the Authority for the actions of delegates who have no connection with the Authority at all — such as independent contractors or employees of airline operators. The general rule is stated by Dixon J. in *Colonial Mutual Life Assurance Society Ltd. v. Producers and Citizens Co-operative Assurance Co. of Australia Ltd.* (1931) 46 CLR 41 at page 48:

'In most cases in which a tort is committed in the course of the performance of work for the benefit of another person, he cannot be vicariously responsible if the actual tortfeasor is not his servant and he has not directly authorised the doing of the act which amounts to a tort. The work, although done at his request and for his benefit, is considered as the independent function of the person who undertakes it, and not as something which the person obtaining the benefit does by his representative standing in his place and, therefore, identified with him for the purpose of liability arising in the course of its performance. The independent contractor carries out his work, not as a representative but as a principal.'

(i) CAA practice in relation to delegates who are not officers/ employees

In spite of the common law position, the Civil Aviation Authority practice is that it will indemnify non-Authority persons who are holders of delegations against any liability or loss arising from the exercise of powers or the performance of functions carried out on behalf of the Authority, *where those powers or functions are within the scope of the delegation.*

The Civil Aviation Authority will not indemnify non-Authority delegates against liabilities or losses arising from the exercise of powers or the performance of functions which are outside the scope of the delegation or which are exercised or performed with reckless disregard.

AUTHORISED PERSONS (Reg 6)

(a) Legislative basis for appointing authorised persons

Regulation 6 of the Civil Aviation Regulations empowers the Authority to appoint persons as 'authorised persons' for the purposes of a provision of the Regulations in which the expression 'authorised person' exists.

(b) Legal effect of authorisation

In the case of *Ex p. Johnson re Macmillan* (1947) 47 NSWR 16 at 18 Jordan CJ said that 'The word `authorise', according to its natural meaning, signifies *the conferring upon the person of a right to do something which, apart from the authorisation, he or she does not possess ...'.*

(c) Authority employees and persons outside the Authority may be authorised

In some contexts, the expression may be used to describe the action taken to create an agency relationship. With some of the Civil Aviation Regulations it is clear that ordinarily the only person who would be appointed as an authorised person would be an officer or employee of the Authority. For example, it would be highly unlikely if anyone other than an Authority officer or employee were to have power to determine which officers of the Authority were to be obliged to have copies of the Liens Register (regulation 273). It would

also be surprising if anyone other than an officer or employee were to have power to disallow claims by creditors (regulation 275).

However, with other Regulations it is very clear that it is contemplated that persons appointed will include persons who are not connected with the Authority. For example, Regulations 47, 49, 51 and 53 refer to 'an authorised person (whether as an employee or on his or her own behalf)'. This clearly contemplates that the person authorised may be independent of the Authority. Similarly in regulation 43 the reference to an authorised person being a body corporate also contemplates that the 'authorised person' under that regulation may be unconnected with the Authority.

(d) Authorisation does not automatically make a person an agent of the Authority

It is apparent when all of the regulations which use the term 'authorised person' are read together that the conferring of authority on a person does not of itself make the person an agent of the Authority. *The action of the Authority under regulation 6 in appointing a person confers on the person appointed a statutory status and capacity which the person would not otherwise have but does not bring the 'authorised person' into any employer/employee or master/servant relationship. Accordingly, the Authority is not vicariously liable in tort for the actions of authorised persons simply because of their status under regulation 6.*

(e) Position at common law of authorised persons who are Authority employees

However, the Authority is generally vicariously liable in tort for the acts and omissions of its employees acting within the scope of their employment. It may well be that a person appointed under regulation 6 is also an employee of the Authority and it may be part of their employment with the Authority to carry out the functions associated with the status of being an 'authorised person'. In such circumstances where the authorised person is an employee or officer of the Authority, the tort duty of care which the individual owes to other persons, and the range of the acts and omissions for which the Authority can be vicariously liable, will be affected by the statutory powers which the person has as an 'authorised person'.

(f) CAA practice in relation to Authority officers who are authorised persons

As in the case of delegates who are Authority employees the Authority has agreed that it will indemnify Authority employees and officers who are holders of authorisations against any liability or loss arising from the exercise of powers or the performance of functions carried out on behalf of the Authority, where the exercise of those powers or functions is within the scope of the authorisation.

The Civil Aviation Authority will not, generally, indemnify Authority officers and employees who are authorised persons against liabilities or losses arising from the exercise of powers or the performance of functions which are outside the scope of the authorisation or which are exercised or performed with reckless disregard.

(g) Position at common law of persons who are not Authority employees

Where the person appointed as an authorised person is not an Authority officer or employee then at common law the Authority will generally not be vicariously liable for the actions of that person. In such cases the authorised person will be personally liable for any acts committed while exercising his or her powers.

(h) CAA practice in relation to authorised persons who are not Authority officers or employees

As in the case of delegations, the Authority has agreed that it will indemnify non-Authority persons who are holders of authorisations against any

liability or loss arising from the exercise of powers or the performance of functions carried out on behalf of the Authority, where those powers or functions are within the scope of the authorisation.

The Authority will not indemnify non-Authority persons who are authorised persons against liabilities or losses arising from the exercise of powers or the performance of functions which are outside the scope of the authorisation or which are exercised or performed with reckless disregard.

GENERAL

(a) All delegates and authorised persons must use care when exercising delegated powers

It is important to note, however, that liability for tort only arises if a person fails to exercise reasonable care in the exercise of a power given to him or her. Accordingly, it is essential that in all cases delegates and authorised persons (whether employees of the Authority or not) exercise their powers using reasonable care and do not exercise those powers in an irresponsible or negligent manner.

(b) What should a delegate/ authorised person do if an action is brought against him or her?

If an action is brought against a delegate or authorised person because of actions taken by the delegate/authorised person under a delegation or authorisation then the person should contact the Insurance Manager in the Corporate Services Division of the Civil Aviation Authority as soon as possible after the person receives advice of a possible action.

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