

Submission to EPA Scheduled Premises Regulations Review November 2015

Executive Summary

Since the 1990 repeal of the 1937 Victorian Air Navigation Act the responsibility for controlling noise at non-Commonwealth airfields in Victoria fall to the State.

Section 13 of the Victorian EPA act sets out the duties and responsibilities of the EPA; the EPA is responsible for all activities in relation to the emission of noise and for preventing or controlling noise. There does not appear to be any provision for the Authority to abrogate those responsibilities.

Unless specifically written into contemporary operating permits, local councils have no power to control noise at non-Commonwealth airfields in Victoria.

Poorly written 50 year old permits with outdated conditions cannot be upgraded unless requested by the permit holder. Councils have no authority to enforce record keeping of airfield operations and therefore have no empirical evidence upon which to measure the detrimental effects of those operations on communities surrounding those airfields.

Airfield operators in Victoria can generally create as much noise as they like, whenever they like, using an *existing use rights* argument to support their position.

The Federal Government National Airports Safeguarding Framework has produced a set of guidelines (NASAG) which were signed up to by the Victorian Government in 2012. Guideline A sets out a matrix of noise/movement parameters that should be interpreted as the limit of noise events at which point some form of control is required.

In general terms no authority either State or Federal has the authority to control noise in non-controlled airspace and State entities responsible for noise control cannot, for obvious reasons, exercise controls in any airspace. This problem has been addressed by both the South Australian and Western Australian EPAs, by licensing the facility and setting limits on the environmental impacts it produces.

In the case of South Australia, airfields having movement numbers over a particular trigger point require a licence. Aldinga airfield with some 70 aircraft domicile at the airfield and 2.2 km from the nearest housing development has within its licence conditions requirements for an environmental Management Plan, Flight Movement Monitoring and Flight Movement Reporting. Conversely Tyabb airfield in Victoria, with somewhere between 150 and 200 aircraft operating out of the airfield, only metres from a major housing development, has no environmental controls nor any requirement to monitor or report.

The Western Australian EPA has been instrumental in the formulation and authorisation of the Busselton Airport Noise Management Plan. Both these jurisdictions recognise the importance of the numbers contained within contemporary guidelines and the importance of measuring to facilitate monitoring and control.

The misconception by the Victorian EPA and various State and Local Authorities that airfield noise is a Federal responsibility has been corrected and as such the duty to manage airfield noise events falls to the EPA.

Given that the issue cannot be addressed by SEPPN1 the obvious method of control falls to preventing or controlling noise through licencing provisions contained within a premise licence, as is done in South Australia.

Background

Despite evidence to the contrary, it has been a long held belief by all arms of Victorian State and Local Government that environmental control of aircraft noise from all airfields/airports in Victoria was a matter for the Federal Government. There was/is a belief that the Commonwealth 1984 Air Navigation (Aircraft Noise) Regulations were the enforcement instrument and that the Victorian State and Local Government had no role to play other than in planning matters around airfields.^{1,2,3,4,5}

This is incorrect, as a result of incomplete referral of powers over aviation to the Commonwealth in 1990, private aircraft operating from non-Commonwealth airports in Victoria (and Queensland) are not covered by Commonwealth regulations.

With the production of evidence from a myriad of sources it is now irrefutable that the control of aircraft noise arising from non-Commonwealth airfields in Victoria is a matter for the State Government.

It is unacceptable that an entity that generates noise events of a magnitude that make surrounding premises unacceptable for dwellings and schools, under Australian Standards, can operate without any form of environmental control.

The Tyabb Ratepayers submitted to the recent SEPP review that control of environmental noise from non-Commonwealth airfields/airports should be included in SEPP N1. It has been indicated by the Victorian EPA that this cannot be achieved. The SEPP submission contained many reference documents and statements that will be re-submitted as part of the Scheduled Premises Review.

The submission to the SEPP review by the Federal Department of Infrastructure further reinforced the Ratepayers' assertion and that environmental noise from non-Commonwealth airfields in Victoria was a State matter due to the 1990 repeal of the Victorian Air Navigation Act 1937. The Victorian Department of Infrastructure was reminded of this in a letter to the Department Secretary in 2007⁶. The Federal DoI is of the opinion that this noise should be controlled by the EPA SEPPs.

To this time there has been no recognition by any arm of Victorian Government that environmental noise from non-Commonwealth airfields is a State and in particular State EPA responsibility.

It is for the above reasons we make a submission to the Scheduled Premises Review.

Why do we need to Licence Premises?

Several recent events clearly indicate that regulating noise from non-Commonwealth airports/airfields is a matter of environmental concern and in Victoria a regulatory gap exists in managing that noise. Airfield operators, if they so choose, can operate with impunity and ignore any calls to regulate or control their operations in an environmentally responsible manner.

It follows that if SEPPs cannot regulate noise discharge then an instrument such as venue licencing is appropriate.

¹ EPA email to MPSC

² EPA letter to Neale Burgess

³ Letter from Vic. Solicitor General

⁴ Email from Vic. Dept. of Business and Innovation and VIC Minister for Aviation

⁵ Letter from Vic. Attorney General

⁶ Letter from Federal DoI to Victorian DoI Secretary.

The current EPA 1254 NOISE GUIDELINES incorrectly state that noise from aircraft in flight is a Commonwealth responsibility and refer these occurrences to Air Services Australia (ASA). Evidence presented to various forums shows that ASA can only intervene where noise occurs in controlled airspace. Controlled airspace generally begins several thousand feet above ground level at non-Commonwealth airfields. EPA cannot enforce noise emissions in airspace for a variety of reasons, but ASA has no statutory authority in that lower uncontrolled airspace.^{7,8}

Clearly it is in that block of airspace (ground level to the lower edge of controlled airspace) where most noise nuisance from airfields occur and it is this non environmentally-regulated airspace that creates the current “regulatory void.”

Hours of operation, numbers of movements and outright noise levels at non-Commonwealth airfields are of no interest to ASA, nor do they have any statutory authority to intervene other than to pass on complaints to an operator who may or may not choose to take action.

If flights or activities that cause or may cause environmental harm or nuisance are prevented at the source, such as a venue or premises licence, the managing of noise in the “void” becomes irrelevant and the current obstacle of managing noise in airspace below that where ASA has control is removed, i.e. the noise is stopped at the source, on the ground.

Licensing and or regulating airfields as venues/premises incorporating approved and enforceable noise management plans from where noise emanates solves this issue.

Any such licensing should be applied state wide.

Recent Events

A number of significant events indicate that Victoria is falling behind contemporary standards relating to the control of aircraft noise from non-Commonwealth airfields and is not, and has no provision for, regulating noise and nuisance to appropriate standards and thereby complying with its statutory obligations.

- Through its submission to the EPA SEPPs review , and several letters from Federal Aviation and Environment Ministers over many years prior, the Commonwealth has left no doubt that noise generated from non-Commonwealth airfields in Victoria is a state matter, that there are community expectations on the management of such noise and there is a jurisdictional gap in controlling that noise.^{9,10,11,12,13}
- The Commonwealth NASAF guidelines have been agreed to by SCOTI and passed into Victorian Planning Law.
- The NASAF guidelines, EPA 1254 noise guidelines and AS-2021 clearly indicate the dose where noise becomes a nuisance and defines the level where aircraft noise affects land suitability for dwellings.
- The South Australian Environment Protection Act has been challenged in the courts and the South Australian Environment Court has found that aircraft operations from smaller airfields create activities of “environmental significance” and upheld the provisions contained within the South Australian EP act.¹⁴

⁷ Email from ASA

⁸ Air Services CEO response to Senate enquiry into ASA management of aircraft noise

⁹ Greg Hunt Community Briefing 2007

¹⁰ Mark Vaile to residents through Greg Hunt

¹¹ Anthony Albanese to residents through Greg Hunt

¹² Warren Truss to residents through Greg Hunt

¹³ Commonwealth Dept. of Infrastructure to SEPP review

¹⁴ South Australian Environment Court Judgement

- The South Australian EPA has provision to licence airfields and has placed enforceable conditions such as monitoring and record keeping, restrictions on hours of operation and environmental management plans into those licences and in particular the Aldinga Airfield licence which has remarkable operational similarities to Tyabb.^{15,16}
- The Western Australian EPA developed a noise management plan for Busselton Airport which in part uses the NASAG framework as a reference.¹⁷
- Busselton Airport (WA EPA) noise management plan recognises the impact of repetitive flying training / circuit operations and manages them in a manner consistent with NASAF guidelines in determining noise amelioration guidelines and plans. It also recognises maximum noise levels and addresses them in a contemporary manner.
- The 2013-2033 Ballarat airport master plan recognises the environmental impacts of continuous arrivals and departures and limits these future operations. For that reason the plan states *“a second commercial flight training facility that relies on circuit training of pilots should not be pursued, supporting the Ballarat Airport Economic Analysis”*¹⁸

The Busselton management plan is exemplary and all-encompassing in its identification and resolution of issues and should be the standard for contemporary management of non-Commonwealth airfields. It clearly addresses the roles and responsibilities of the various agencies, acknowledges the limitations of airport operators to interfere within airspace and addresses noise management/amelioration accordingly.

Although Busselton is a major regional airport located 6.5 km from the town many of its operating restrictions are more relevant to airfields and airports closer to towns. It is, however, the methodology and analysis that is outstanding.

The Western Australian EPA involvement in the noise management process is clear as indicated by the attached report and Ministerial note.¹⁹

¹⁵ Excerpt SA EP Act

¹⁶ Aldinga Airfield Licencing Conditions

¹⁷ Western Australia EPA Busselton Report

¹⁸ Excerpt Ballarat Master Plan fact sheet 3

¹⁹ Western Australian Ministerial Report

Why the EPA?

Control of aircraft noise arising from non-Commonwealth airfields/ airports in Victoria is a matter for the State.

Section 13 of the Environment Protection Act sets out the powers and duties of the EPA, included among them are the following:

- (a) to administer this Act and any regulations and Orders made thereunder;
- (b) to be responsible for and to co-ordinate all activities relating to the discharge of wastes into the environment and the generation, storage, treatment, transport and disposal of industrial waste and the emission of noise and for preventing or controlling pollution and noise and protecting and improving the quality of the environment;
- (d) by the issue of works approvals, licences, permits, pollution abatement notices, minor works pollution abatement notices, research, development and demonstration approvals and notices under section 28B, to control the environmental impacts of activities which create a state of potential danger to the environment and to control the volume, types, constituents and effects of waste discharges, emissions, deposits, or other sources of pollutants and of substances which are a danger or a potential danger to the quality of the environment or any segment of the environment and the generation, storage, reprocessing, treatment, transport, containment and disposal of waste and to control the volume intensity and quality of noise;
- (e) to undertake surveys and investigations as to the causes, nature, extent, and prevention of pollution and to assist and co-operate with other persons or bodies carrying out similar surveys or investigations, and
- (k) to undertake investigations and inspections to ensure compliance with this Act and to investigate complaints relating to breaches of this Act.

It is clear that in the absence of Federal Regulations controlling noise discharge at non-commonwealth airfields in Victoria the responsibility falls to the EPA and the most appropriate enforceable method would be via a licence such as in South Australia.

The EPA has a duty under the act to mitigate noise effects and control its emission.

Licensing of airfields is consistent with the aims of licenced premises provisions:

- The current Scheduled Premises Regulations apply works approval and/or licensing requirements to a diverse range of industry premises, at which *“noise is, or is likely to be emitted; “ “activities are conducted that create a state of potential danger to the quality of the environment or any segment of the environment.”*
- Since its introduction in 1973, EPA licensing has been an important environment protection tool in Victoria, providing a strong mechanism to aid in the control of emission sources and the prevention of pollution. Licensing is now a common feature of most environmental regulatory regimes.
- Licences are an ongoing tool to manage wastes and discharges to the environment. They can include site-specific discharge limits to air, water and land, or for the acceptance or treatment of wastes. The Act (section 31D) requires licensees to submit an Annual Performance Statement (APS) on their performance against their licence conditions.

Why not the Council?

In refusing to grant a request for Tyabb airfield expansion in November 1965 the Minister for Local Government R.J. Hamer stated *“ the authorised Landing Ground (ALA) was not regarded as a really satisfactory site from the town planning point of view and any increase in operations would certainly add strength to the grounds put forward by numerous objectors at the previous hearing and detract from the conditions laid down for the use of the (ALA) which were designed to confine its use within reasonable bounds.”* He further stated *“the proposed development would lead to an increase in air traffic in the area to the detriment of the amenity of the surrounding properties.”*

In 2001 the Tyabb residents wrote to the Shire asking Council to implement guidelines on the management of aircraft noise from the local airfield.

14 years later we are no closer to having those guidelines.

The Shire undertook several initiatives all of which have failed for various reasons.

- In 2003 the Shire employed consultants GHD to undertake an airfield study.
- In 2004 the airfield operators proposed a major expansion of the airfield & its operations.
- The Shire received the GHD report and 450 residents’ signatures in a petition against airfield expansion.²⁰
- In 2005 Council determined there would be no airfield expansion without an appropriate Fly Neighbourly Agreement.
- In 2006 after a failed attempt by the Council to broker a Fly Neighbourly Agreement the Shire engaged consultants SOCOM to attempt the same thing. The process failed when the airfield operators withdrew and unilaterally produced their own, unenforceable, fly neighbourly advice.
- SOCOM made 6 recommendations of which only 1 was adopted and that was the setting up of a community reference group consisting of 2 Shire representatives, an independent chair, 2 independent community representatives and 2 members of the Tyabb Ratepayers Group. The airfield operators refused to attend the group meetings.²¹
- In 2007 the airfield operators embarked on an expansion plan which the Council voted unambiguously against on the grounds of the effects on amenity. The airfield operators challenged the Shire at VCAT and were successful and subsequent significant expansion has taken place, with more planned. The Ratepayers Group aligned with Council in the VCAT proceedings and joined the proceedings as an interested party.²²
- In 2010 the Shire advised that they would ask VCAT for a declaration on the numerous unresolved matters relating to the airfield and its operations. This never occurred.
- In 2013 the Shire, in its 3 yearly review of local law, introduced the EPA suite of noise guidelines 1254. Despite overwhelming evidence of the legality and appropriateness of the introduction of the full suite, and the recommendations of the officers, the Councillors voted down the 2 elements relating to aircraft and helicopters and the guidelines were introduced minus references to aircraft and helicopter noise.
- The Shire has stated that they are bound up by existing use rights claims by the airfield operators.
- The Shire has no mechanism to force noise monitoring and reporting. Any such monitoring and reporting should be undertaken at the polluters’ expense not the community.
- The Shire has stated that it is too difficult to follow up on noise complaints under the nuisance provisions of the Health Act.

²⁰ Council Petition

²¹ SOCOM Report

²² Hangar Growth to 2007

- The 3 Council permits for the airfield are for the use of the land as an airfield and contain only 1 surrogate noise control, based on aircraft weight, which is unenforceable due to the poor and outdated wording.

From the documented history of events it is clear that the Mornington Peninsula Shire Council has been inconsistent and ineffective. Over a period of 14 years it has failed to introduce even the most simple and basic guidelines to address a problem recognised locally, nationally and worldwide.

It is believed that there were less than 10 aircraft located at Tyabb in 1965. Recent estimates have the current numbers at somewhere between 150-200 including larger light aircraft that have escaped the financial costs of Moorabbin operations and shifted their financial burden to an environmental burden on the Tyabb community. It is believed, but cannot be confirmed due to the lack of formal documentation, that the majority of aircraft based at the airfield are owned and operated by people who do not live in Tyabb.

Existing Use Rights and Permit Conditions

Permit Conditions

The Tyabb airfield operates under 3 concurrent permits. Combined they authorise the use of the land as an airstrip for aircraft up to 12500 lbs. Maximum Take Off Weight (MTOW) with only 1 environmental condition applied as a *quasi*-noise control. Even this unenforceable condition does not capture the noisier aircraft.

The Shire has stated that there are difficulties in pursuing noise management controls due to a claim by the airfield operators that existing use rights cover their operation regardless of consequence.

By their inaction the Council has accepted that argument. In doing so the Council has failed to recognise that the local community has existing use rights and a right to enjoyment of property and amenity as expressed by the Minister in 1965.

A planning permit represents permission to use land for a particular purpose (subject to conditions). It is not a licence to cause pollution. If a person complies with a relevant planning permit, but breaches other laws, they cannot rely on the planning permit as 'permission' to do what they are doing.

However, as there are no current noise laws, 60 year old badly written permits are inadequate and permits cannot be changed without the permission of the permit holder, the Shire has limited scope to act.

What are existing use rights?

If an entity, against Council and Community wishes and without a master plan or strategy, successfully embarks on an expansion program that will impact community and amenity, what rights can be claimed? Can those claimed rights override contemporary noise and other guidelines?

The State Planning Policy Framework 18.04-3 states:

Plan for areas around all airfields such that:

*“Any new use or development which could **prejudice** future extensions to an existing airfield or aeronautical operations in accordance with **an approved strategy or master plan for that airfield is precluded.**”*

The question arises, if there is no airfield strategy or master plan how can the responsible authority judge any development to be prejudicial? In the face of an unknown, what is a prejudicial development?

Section 18 of the State Planning Policy Framework applies to transport infrastructure.

Does a private, primarily recreational airfield qualify as transport infrastructure? If not what obligation does the Shire have to protect the airfield from **community development**?

Given that the entire township lies within the airfield circuit area, are all non-airfield developments compromised by the existing use rights of the airfield although there is no airfield strategy or master plan? If the requirements of 18.04-3 are applicable then there can only be limited community and social development within the town.

At a meeting with Council and AirServices Australia 16/09/2013 a member of the airfield operators executive criticised the MPSC's decision to allow schools, nursing homes and housing development under the flight path of the Tyabb airfield.

At a meeting with Council, Tyabb Residents Group and ASA in April 2014 the airfield operators informed the meeting they would not discuss hours of operations, noise levels or numbers of movements as part on any agreement.

In the mid-1980s land 300 metres to the east of the airfield runway was zoned residential.

At this time the airfield had around 48 aircraft located on site and 250 club members.²³

Subsequent to the zoning and prior to significant airfield expansion approximately 200 houses were built.

By having an uncontrolled activity that is of "*environmental significance*" operating within 300 metres of the estate that existentially existed before major airfield expansion, and those airfield expansion /activities create noise events beyond contemporary standards, who has the existing rights, what are those rights, and who is responsible for ensuring those rights are respected?

The 2011 Tyabb Town Plan study received various advice from State Government departments and others. Part of that advice stated: "*discourage any inappropriate extension or intensification of the airfield use or development which would unreasonably adversely impact on existing surrounding residents.*"

It is evident that the existing residents have rights and that past and future incremental airfield expansion has eroded and will continue to erode those rights with the responsible authorities expressing no consideration, will or ability to control any environmental impacts.

The above is further evidence supporting that the control of environmental issues around non-commonwealth airfields has to come away from the local councils.

²³ Town Planning Tribunal Report 1983
Tyabb & District Ratepayers, Business & Environment Group Inc.

NASAG AND OTHER GUIDELINES

Pages 4 and 5 of Guideline A contained in the NASAF framework contain a series of metrics relating to aircraft movements and noise. EPA noise guideline 1254 aligns with chart D in AS-2021 building site acceptability for aerodromes without an ANEF.

Both the EPA chart and AS-2021 declare that airfields without an ANEF hosting more than 20 flights per day, 85dB (A) is the maximum noise before a site is declared unsuitable for a dwelling.

Whilst the charts are in line with contemporary maximum noise levels they have no reference to the now accepted view that it is a combination of noise intensity and noise events that also require management.

Guideline A of NASAF is more prescriptive and recognises that it is noise events and noise intensity combined that should be addressed. It is reasonable to state that the numbers contained in guideline A represent a value where the lower levels of nuisance and health effects begin and also represents a trigger point for compliance.²⁴

Why is it important to regulate noise at smaller airfields?

The noise at Commonwealth owned airports is generally well regulated through policy and public pressures. The removal of older jet aircraft operating into Australia is evidence of that process.

Flight tracks are monitored through sophisticated equipment and flight path sharing is incorporated into airport plans. Professional pilots and air traffic controllers ensure that policy and procedures are correctly followed.

AirServices Australia monitors and controls airspace and corridors so that best practice is followed. Land use planning is tightly controlled through relevant planning schemes and compliance with rules and procedures is policed.

Operations are undertaken by aircraft that meet current stringent noise regulations particularly for jet aircraft.

This is not so at smaller airfields. Many aircraft operating from these airfields are over 60 years old with the relevant engine and silencing technology of that era still employed. The average age of the registered piston engine fleet in Australia is 40 years old.²⁵

Even though the technology is old they are still issued with noise certificates issued by the Commonwealth. There is no embargo on noisy smaller aircraft such as there is on the modern commercial jet fleet.

Aircraft without compliant noise certificates are issued with noise exemption certificate. Aircraft using these exemptions are generally ultra-lights, home built, experimental build, scale model replicas and surplus ex-military aircraft often from overseas countries, and they aggregate at some of these smaller airfields in numbers disproportionate to the general fleet.

The procedure to obtain a noise exemption certificate is a paper work exercise with noise testing generally not required.

Noise generated by these older aircraft is in many cases louder than those in the modern commercial jet fleet.

²⁴ NASF Guideline A

²⁵ Ageing Fleet Management: CASA

Due to the high cost of operating at airfield such as Moorabbin, a Commonwealth owned airport with restrictions on noisier aircraft and their flight paths, owners migrate to smaller airfields such as Tyabb where there are no restrictions on movements, hours of operations or noise. The result is that in many cases the community is subjected to noise beyond that which is considered reasonable.²⁶

Aircraft such as Cessna 210, Beech 36, Cessna 206 and 337 have environmental / operational restrictions if they use Moorabbin. Tyabb hosts several of these aircraft which we believe have migrated from Moorabbin to escape the charges and restrictions. The noise effect on local environment is clearly shown on an attached spreadsheet.

Environmental issues surrounding Tyabb are not new. The Ambidji Group report into the capacity of aviation facilities in the Port Phillip Region dated 2000 indicates the environmental pressures already on airfields such as Tyabb, Lilydale and Coldstream.

Using charts published by the FAA and applying known noise distance data it can be seen that current operations generated by the noisier general fleet from Tyabb, due to the close proximity of housing, determines that some sites subjected to noise in excess of 85 dB(A).^{27,28,29,30}

Some of the Warbirds operating out of Tyabb produce noise in excess of 110 dB (A) which is approx. 16 times louder than the maximum allowed for a dwelling under the standard.³¹

Reference to the NASAF guidelines clearly show that some form of control is required at Tyabb due to the noise / movement metric that is exceeded by significant margins.

Reference to EPA guidelines would determine that the higher noise levels, 85 dB(A) and above, need control as they render a number of properties unsuitable for dwellings.

Any policy would need to be applied state wide and consider the local environment to determine the base line or a “trigger” point for licence requirements.

Any licence would need to consider the potential for disruption as the NASAF state that it is ultimate capacity noise modelling that should be used. Ambidji estimated that Tyabb has a potential of 60,000 movements p/a.

Current estimates of movements (they are not logged or counted) range between 19,000 p/a to 30,000 p/a depending on who is making the statement and who is the audience.

What we do know is that 161 take offs over 9 hours have been manually recorded by residents on a Sunday.

Licence requirements to log flight operations for aircraft type, operation type, hours of operation, numbers of circuits etc. would be necessary to enable transparency of the adherence to licence conditions.

²⁶ Moorabbin Special Procedures

²⁷ Federal Aviation Administration Circular 36-3H

²⁸ Spread sheet noise effects based on FAA 36-3H

²⁹ Beech 36 measured noise at Tyabb

³⁰ Harvard Warbird Noise measured at Tyabb

³¹ Noise intensity and relativity chart