



## **Legal Rights for Glider Retrieval**

### **Advice by Paul Matthews – GFA Legal Advisor**

#### **The scenario**

A glider pilot makes a safe outlanding on a farm without damaging any property. The farmer rolls up in his ute, accuses the pilot of trespassing, aggressively orders him off his land, and says he won't allow anyone to enter his land to retrieve the glider.

#### **So ... what are the legalities?**

- Where does the pilot stand legally?
- Obviously, the farmer can deny an aerotow retrieve, but can he deny a ground retrieve?
- If the situation arises, have the police the legal power to assist the glider owner to retrieve the glider?

A glider coming down in these circumstances is quite involuntary and there is an over-riding obligation upon the pilot to land safely. A pilot will be liable for any actual damage caused to the property however a glider landing in a grazing or fallow paddock does zero damage.

Generally a ploughed paddock fits into the same category but with the cost of laser ploughing these days we must accept that some (although slight) uncertainty exists with such paddocks. Speaking practically though such paddocks are almost entirely confined to cotton farming and they can generally be identified from the air.

Despite extensive research there seems to be no absolute authority by which the pilot (or the police) can demand to enter the farmer's land to retrieve the glider. However, this does not mean that the farmer can assume control or possession of the glider. In addition, the pilot may rely on what is known as "recaption" as a defence to trespass when entering the land to retrieve the glider.

#### **The legal rights – is the pilot trespassing?**

Generally, any member of the public has a "licence" – or right – to go upon a path or driveway to the entrance of a dwelling for the purpose of lawful communication with, or delivery to, any person in the dwelling. This is implied if the means of access leading to the entrance of an ordinary suburban dwelling house is left unobstructed and with the entrance gate, if any, unlocked.

The courts have adopted a common sense attitude towards this situation: "...the law must not be seen to be an ass so as to make people first go to a householder to ask for permission to enter his or her land to retrieve a hat which had blown over a fence from a public street" (*Lincoln Hunt Australia Pty Ltd v Willesee*, NSW Supreme Court).

However, this implied invitation to enter is only for limited purposes and entry unrelated to those purposes will be a trespass from the moment of entry. Retrieving a hat blown over by the wind is

quite different to retrieving a glider, and the layout of a large farm is quite different to that of an ordinary suburban dwelling. Hence, an implied invitation to enter may not be of much help to the pilot.

The *Inclosed Lands Protection Act 1901* (NSW) (NB not “Enclosed” but “Inclosed” for some reason) makes it an offence for a person to enter into enclosed lands without the consent of the owner and without lawful excuse (proof of which lies on the entrant). There is similar legislation in other states and territories<sup>1</sup>.

Hence, it is best to assume that the farmer has an apparent right to sue for damages (such as they are) in trespass.

However, it is arguable (but by no means tried law) that the pilot can lawfully enter the land and retrieve the glider relying on what is known as “recaption” as a defence to trespass. See below for comments on recaption.

### **The legal rights – can the farmer assume control of or possession over the glider?**

Firstly, it is relevant to note that even if trespass is proven and there is no lawful excuse for it, this does not give the farmer any right to assume control over the glider to the exclusion of others. Trespass is a criminal action and therefore only under the domain of the police. If the glider causes damage then the farmer may pursue a civil remedy to seek monetary damages but cannot hold on to the glider as there is no agreement to do so and therefore no “lien” (or right of possession) is established.

If the farmer does assume control or possession over the glider this would provide the glider owner with a right of action for damages for what is known as “conversion” of property. However this only applies if the farmer plans to use (most unlikely), destroy or damage the glider.

However, a bare denial of the pilot’s title to the glider is not conversion. Nor is it conversion if the farmer refuses or threatens to refuse to allow the pilot to retrieve the glider.

The pilot would also have an action in what is known as “detinue” which is a right of action to seek a court order that the glider be returned to its owner. This may occur when the pilot lawfully demands the return of the glider and the farmer wrongfully refuses to comply with that demand. The farmer’s retention of the glider would not amount to “larceny” because this requires the owner of the land to physically take it away (which would be practically difficult and unlikely).

In addition to their questionable application, the above principles cannot be relied on to compel the farmer to immediately allow the pilot to retrieve the glider. They fail to address the main practical issue namely: can the pilot (or the police) enter the farmer’s land and retrieve the glider?

Also it is worth noting that “necessity” may be relied on as a defence to an action in trespass. This is appropriate where the pilot is sued or prosecuted and needs to show that entering the land to retrieve the aircraft was a reasonably necessary act for the preservation or protection or the preservation of the pilot’s property or of others, and was carried out with reasonable care. In these circumstances a trespass to land is justified by necessity.

A possible example of this could be the imminent likelihood of the glider being damaged by fire or flood – possibly also likely damage by animals could fit this scenario.

Ultimately though what is known as “Recaption” provides a more appropriate remedy.

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<sup>1</sup> *Inclosed Lands Protection Act 1901* (NSW) s4; *Enclosed Lands Protection Act 1943* (ACT) s4; *Trespass Act 1987* (NT) s5; *Summary Offences Act 1966* (VIC) s9(1); *Police Act 1892* (WA) s82A; *Police Offences Act 1935* (TAS) s14B; *Summary Offences Act 1953* (SA) s17; *Land Act 1994* (QLD) s404.

## **Does “Recaption” allow the pilot to trespass?:**

It is a defence to trespass if the trespasser has a lawful excuse to enter the landowner’s land. Although there is no authority that supports the proposition that retrieving a glider amounts to a lawful excuse, the right of entry and recaption provides a helpful remedy.

“Recaption” is the act of taking back something that belongs to you. It is a self-help remedy which does not require a court’s approval. In the appropriate circumstances, the pilot is able to enter the land to retrieve the glider and avoid the charge of trespass against them.

In doing so the pilot may use whatever “force” is reasonably necessary to gain control of the glider (although the use of force must follow a demand to yield up possession peacefully). By “force” we are only talking here of cutting a lock or merely opening a closed gate. It does not mean the use of any personal force. Whilst a member of the public cannot use personal force ultimately the police can if that remains the only option to keep the peace.

Queensland, WA and Tasmania have given statutory backing to this right by empowering a person, who is entitled by law to the possession of movable property, to take that property from an unlawful possessor and to use such force as is necessary to obtain possession provided grievous bodily harm is not inflicted<sup>2</sup>.

For the other States there is the common law there which provides for "entry and recaption". This is the right of an owner of goods to enter private property (i.e. to lawfully trespass) for the purpose of retrieving the goods.

It is limited to situations where goods are wrongfully in the possession of another. Although recaption cannot be relied upon if the trespasser is responsible for the goods being on the private land, it is arguable that the word “responsible” has an unusual application in these circumstances.

Referring back to the *Willesee* case, it concerns goods that accidentally “fall” or are “blown onto” another’s property. If landing the glider on a farm falls into this category, and we think it does, then the pilot (and the police) can rely on the right of recaption to retrieve the glider.

Arguably the notion that a glider’s outlanding is not deliberate will always apply (but see the note below about outlanding training). The pilot did not plan to outland or to deliberately be in a position where landing on a particular property was a certainty. As pilot in command of the aircraft the pilot has a fundamental duty of safety and care to those on board, the aircraft itself and the public in general. Getting the glider onto the ground without causing damage is the pilot’s primary duty of care if staying airborne is not safely possible.

We make the point here that outlanding training is quite different. In this case there is a deliberate goal of landing in a private property and in such cases it would be legally prudent and a practical courtesy to seek the property owner’s consent beforehand.

## **Conclusion**

The pilot has a limited opportunity to choose where to land the glider. However, the glider must inevitably land somewhere. This important fact in this scenario is that ultimately the pilot has no choice but to land and this fact will allow the pilot (or the police) to lawfully retrieve the glider.

**The legal position in QLD WA and TAS is suitably covered and their legislation which provides a right of entry although with a difficult farmer it would be prudent to ask the police to attend and keep the peace.**

**In the other states and territories, and to the extent that the act of landing leaves the pilot with no other option, recaption is available as a defence to trespass and it allows the police**

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<sup>2</sup> *Criminal Code* 1899 (QLD) s274; *Criminal Code Act* 1924 (TAS) s13; *Criminal Code* (WA) s251.

**to rely on recaption in favour of the pilot and to assist the pilot to keep the peace whilst retrieving the glider.**

In a practical sense, we strongly recommend calling the police at the first sign of trouble. Their fundamental job is to keep the peace. They are experienced in doing this and generally their mere presence will solve the problem.

In practical terms though, it may be useful for the GFA and the HGFA (and clubs if they wish) to retain a copy of this advice to give to police as guidance if ever there is a standoff with a property owner. Almost certainly the police will have little idea as to what the strict legal rights are.

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