

Professional Aviators Investigative Network.

Senate Standing Committee on Rural Affairs and Transport.

Supplementary comments:

Re opened investigation.
Norfolk Island ditching.



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TSI Act.

http://www.comlaw.gov.au/Details/C2014C00423/Html/Text#_Toc393713891

ICAO Annexe 13.

http://www.fzt.haw-hamburg.de/pers/Scholz/dglr/hh/text_2013_11_07_ICAO_Annex13_AircraftAccidentAndIncidentInvestigation.pdf

Acronyms.

ATSB	Australian Transport Safety Bureau.
CASA	Civil Aviation Safety Authority.
DIP	Directly Interested Parties.
ICAO	International Civil Aviation Organisation.
TSBC	Transport Safety Board Canada.
MoU	Memorandum of Understanding.
TSI (Act)	Transport Safety Investigation Act. (Australia).

Introduction.

Professional Aviators Investigative Network (PAIN) is a loosely organised, informal, confidential network which has formed and expanded over a number of years. There are approximately 1000 associates of the network; many participants, in one form or another may be properly considered expert witnesses.

Conducting investigations and generating reports began simply to provide a defence for fellow professional aviators against what were perceived as unfair, unreasonable or incorrect, subjective assessments made by the Civil Aviation Safety Authority (CASA) 'expert' Flight and Airworthiness Operations Inspectors.

The approach is a simple one identify the dispute, locate and contact industry 'experts' in the field, analyse the problem and present a possible solution. However, it was noted that despite clear evidence and logical argument it proved difficult to prevent the CASA from taking excessive, administratively based punitive actions against individuals and companies.

This culminated in the 'Network' becoming proactive and seeking assistance from outside agencies. There remain only two 'real' options available as avenues toward achieving a safe, efficient, equitable regulatory system. Through the 'Press'; or through the interest of prominent, respected public figures.

The following report has been made available to members of the Senate AAI Committee, investigating the circumstances and events which occurred subsequently to the ditching of a Pel-Air 'medivac', patient transport flight off Norfolk Island.

Comment and opinion is offered on the proposed re investigation by the Air Transport Safety Bureau (ATSB) into the Norfolk Island event. We believe both the Senate inquiry and the Transport Safety Board Canada (TSBC) peer review revealed a fatally flawed public reporting system, a defunct confidential reporting system; a Memorandum of Understanding (MoU) which abrogates Australia's obligations under Annexe 13 of the International Civil Aviation Organisation (ICAO) convention and corrupted conclusions to accident investigation. We believe these are serious matters, directly within the ambit of the national interest.

Please note: Associates opinions, names and details are confidential; however, should you wish to discuss the issues raised please contact the distributing editor and access to various senior members will be quickly facilitated.

Professional Aviators Investigative Network.

The Editors.

Executive summary.

- 1) The purpose of this report is to draw to the attention of the Aviation Accident Investigation (AAI) Senate Committee members, who participated in the Pel-Air inquiry several matters of grave concern raised from within the PAIN network.
- 2) In short, we are certain that the committee is very aware that the Australian Transport Safety Bureau (ATSB) has grudgingly condescended to re-open the investigation into the 'report' of that incident. The following are of concern:-
 - a) That the ATSB have elected to utilise Dr. Michael Walker of the ATSB to lead the investigation. We believe that to be effective, any investigation should be conducted independently and not involve ATSB, the commissioners or staff if only to preclude any suspicion of 'internal' influence or external bias being raised.
 - b) The terms of reference cited by Mr. Sangston are narrow and only mention the 'report' itself. Whilst the industry acknowledges that the report was substandard, there is little doubt that the investigators conducted their work with integrity and within the prescribed guidelines. Indeed, the early stages of the ATSB report were exemplary and clearly directed toward serious safety recommendations being made. We believe little will be gained by utilising scarce resources re-investigating the original ATSB investigative 'reports'.
- 3) Our greatest concern is that a deliberate, calculated manipulation of the national aviation safety system was attempted. It is not a 'one off' aberration. We firmly believe that the subsequent actions of both the Civil Aviation Safety Authority (CASA) and the ATSB were proven, by the AAI committee, to grossly pervert the conclusions of the ATSB investigation to suit a clearly predetermined outcome, thus denying industry valuable, safety related knowledge and information.
- 4) It is the process by which these subsequent events occurred which demands an independent investigation conducted transparently in public. We believe the Senate Committee is the right reporting and oversight platform for that investigation. The committee Senators are well briefed, informed and have a firm, current understanding of what transpired during the events subsequent to the Pel-Air aircraft ditching off Norfolk Island. Further, the Estimates committee is very clearly 'awake' to the machinations of the various aviation oversight bodies and will not easily be misled or confounded by 'technical' issues.
- 5) We submit that any other form of investigation will not withstand the scrutiny of industry experts; as the initial premise is fatally flawed. The potential for further disingenuous obfuscation is obvious. This will, ultimately, be detrimental, not only to the travelling public and industry, but to the government which allowed one authority to investigate its own wrong doings, but avoided investigating those agencies and their officers, which aided and abetted the travesty, which was the Pel-Air accident investigation became.

Directly Interested Parties.

1) Mr. Dominic James was the command pilot of the Pel-Air Westwind 'medivac' jet which ditched off Norfolk Island. He, Flight Nurse Karen Casey, Dr. David Helm, Bernie and Gary Curral, the Senate AAI committee, the Transport Safety Board Canada (TSBC) and the Australian aviation fraternity are all, now, directly and vitally interested.

2) Given that both the Senate AAI inquiry and TSBC peer review identified the current Memorandum of Understanding (MoU) between CASA and ATSB as being legally unsafe, heavily weighted toward abrogating the principles of the International Civil Aviation Organisation (ICAO) Annex 13 and 19 and is now currently under review:-

a) Can the ATSB commissioners provide the Directly Interested Parties (DIP) with written assurance that the re-investigation will not be conducted under the auspices of the MoU?

3) Given that both the Senate AAI inquiry and, particularly the TSBC peer review identified that the ATSB DIP review process is flawed, highly vulnerable to third party intervention and creates great potential for conflict of interest;

a) Can the ATSB commissioners provide the DIP written assurance that none of the original ATSB reviewers, including the Commissioners will not, in any way be involved with the conduct of the proposed re-investigation and subsequent analysis?

4) Both the Senate AAI inquiry and the TSBC peer review clearly identified the autonomy of the IIC* and control primacy over investigation** during the original investigation as being severely eroded and nugatory. (*primary investigator) (**defined by ICAO Annex 13).

a) Can the ATSB commissioners provide the DIP written assurance, guaranteeing that present and future degradation of the IIC authority, control and integrity will not reoccur?

5) As this becomes a 'matter of trust', would it not be advisable to instruct the Chief Commissioner to appoint an independent special investigator (AFP officer or Parliamentary delegate). This is permitted under s63E of the Transport Safety Investigation Act (TSI) to oversee, give provenance to and a tangible surety of integrity to the re investigation.

6) We submit that making this appointment would be highly desirable, given that the original investigation, when closely examined by the Senate Committee, consistently raised many instances of suspected interference and manipulation which could be construed and potentially prosecuted as breaches of s24 of the TSI Act. There is a need not only to eliminate any potential for interference; but to be seen as actively preventing that interference. The Senate AAI committee hearings clearly evidenced both a potential and willingness within CASA and the ATSB, at executive level, to be 'selective' with evidence and 'economical' with explanation.

7) As now both the Senate AAI Committee the TSBC are, by definition, Directly Interested Parties (DIP) to this re-investigation, will they be involved in the DIP process? It is reasonable to ask, if not, why not? Further, will any DIP be 'allowed' to appoint or suggest an *accredited* representative to the re-investigation; in the interests of transparency? ICAO Annex 13 5.23 allows this, subject to the prescribed conditions in 13 5.24 to 5.26.

Memorandum of Understanding.

1) Many in industry believe the MoU in its present form should be revised or terminated for several valid reasons; the Pel-Air debacle providing a superlative example.

a) The independence of the ATSB is a State responsibility under the ICAO convention to which Australia is a signatory. Under the MoU this independence is directly compromised. The results clearly visible in the Pel-Air case, supported by the TSBC findings.

b) The absolute control and authority of the IIC investigator assigned to an accident is unassailable; yet, under the MoU CASA felt free to barge into the Pel-Air investigation and subvert the IIC power, under the guise of a 'parallel' investigation, (refer CAIR 09). The results clearly visible in the Pel-Air case, supported by the TSBC findings.

c) The drafting of an accident report and issue of subsequent safety recommendations is solely the responsibility of the ATSB officers. Under the MoU CASA have ample opportunity to sway opinion and reduce potential embarrassment. The results clearly visible in the Pel-Air case, supported by the TSBC findings.

2) Australia is unique in having a MoU between the 'accident investigator' and the regulator. It is no accident that other leading aviation nations have failed to adopt this demonstrably flawed and conflicted by having clearly defined roles for the 'authorities' within their Navigation Acts which Australia does not currently have.

3) Most of the issues surrounding the management of the Pel-Air investigation and the calumny which followed may be traced directly back to the 'liberal' translation of the Miller report and the manipulation of both the spirit and intent, to produce the MoU.

4) It is not the intention of the editors to labour the point; there exists an extensive 'briefing' on the MoU, or how it impinges on and affects the investigators and colours investigation. Mr. Mick Quinn provided what many believe was a definitive description and explanation during his oral testimony to the Senate AAI inquiry, which we recommend as a short, concise, quick study guide. Extract: Quinn Submission to Senate AAI inquiry:-

“Tension between safety regulators and accident investigators is not unusual – there are international examples of such tension and, in any case, some degree of constructive tension between the ATSB and CASA should be expected given their respective roles. Although they are both important contributors to Australia's aviation safety system and share the same long term goal (improving aviation safety), they have quite different powers and functions.

The very nature of the role of the ATSB often places it in the position of reviewer of CASA's regulatory and other actions where there has been an accident or serious incident. There can also be tensions arising from legitimate differences of opinion. Information about what happened in an aircraft accident or incident can be fragmented, allowing for a variety of hypotheses about what actually happened. The causes contributing to an aircraft accident or incident can often be diverse, leaving ample room for debate over what actually caused it. Differing professional judgements will inevitably lead to different views, often firmly held.”

“Creative tension can be a positive force. Professional disagreement, properly expressed, can lead to better outcomes overall as each party examines the views of the other and the expertise available to each is shared, debated and evaluated. A clearer picture can emerge and a better outcome may result.”

Reference - ICAO Annexe 13.

State of Occurrence

5.1 The State of Occurrence shall institute an investigation into the circumstances of the accident and be responsible for the conduct of the investigation, but it may delegate the whole or any part of the conducting of such investigation to another State or a regional accident investigation organization by mutual arrangement and consent. In any event, the State of Occurrence shall use every means to facilitate the investigation.

5.1.1 Recommendation.— The State of Occurrence should institute an investigation into the circumstances of a serious incident. Such a State may delegate the whole or any part of the conducting of such investigation to another State or a regional accident investigation organization by mutual arrangement and consent. In any event the State of Occurrence should use every means to facilitate the investigation.

PARTICIPATION OF OTHER STATES

Rights.

5.23 Any State which on request provides information, facilities or experts to the State conducting the investigation shall be entitled to appoint an accredited representative to participate in the investigation.

Note.— Any State that provides an operational base for field investigations, or is involved in search and rescue or wreckage recovery operations, or is involved as a State of a code-share or alliance partner of the operator, may also be invited to appoint an accredited representative to participate in the investigation.

ENTITLEMENT OF ACCREDITED REPRESENTATIVES

Advisers.

5.24 A State entitled to appoint an accredited representative shall also be entitled to appoint one or more advisers to assist the accredited representative in the investigation.

Note 1.— Nothing in the above provisions is intended to preclude a State participating in an investigation from calling upon the best technical experts from any source and appointing such experts as advisers to its accredited representative.

Note 2.— Facilitation of the entry of the accredited representatives, their advisers and equipment is covered in Annex 9 —

Facilitation. The carriage of an official or service passport may expedite the entry.

5.24.1 Advisers assisting accredited representatives shall be permitted, under the accredited representatives' supervision, to participate in the investigation to the extent necessary to enable the accredited representatives to make their participation effective.

Participation

5.25 Participation in the investigation shall confer entitlement to participate in all aspects of the investigation, under the control of the investigator-in-change, in particular to:

- a) visit the scene of the accident;
- b) examine the wreckage;
- c) obtain witness information and suggest areas of questioning;
- d) have full access to all relevant evidence as soon as possible;
- e) receive copies of all pertinent documents;
- f) participate in read-outs of recorded media;
- g) participate in off-scene investigative activities such as component examinations, technical briefings, tests and simulations;

h) participate in investigation progress meetings including deliberations related to analysis, findings, causes and safety recommendations; and

i) make submissions in respect of the various elements of the investigation.

However, participation of States other than the State of Registry, the State of the Operator, the State of Design and the State of Manufacture may be limited to those matters which entitled such States to participation under 5.23.

Note 1.— It is recognized that the form of participation would be subject to the procedures of the State in which the investigation, or part thereof, is being conducted.

Note 2.— The collection and recording of information need not be delayed to await the arrival of an accredited representative.

Note 3.— Nothing in this Standard precludes the State conducting the investigation from extending participation beyond the entitlement enumerated.

Note 4.— The pertinent documents referred to in subparagraph e) also include documents such as the reports on examinations of components or studies performed within the framework of the investigation.

Obligations

5.26 Accredited representatives and their advisers:

a) shall provide the State conducting the investigation with all relevant information available to them; and

b) shall not divulge information on the progress and the findings of the investigation without the express consent of the

State conducting the investigation.

Note.— Nothing in this Standard precludes prompt release of facts when authorized by the State conducting the investigation, nor does this Standard preclude accredited representatives from reporting to their respective States in order to facilitate appropriate safety actions.

Consultation

6.3 The State conducting the investigation shall send a copy of the draft Final Report to the following States inviting their significant and substantiated comments on the report as soon as possible:

a) the State that instituted the investigation;

b) the State of Registry;

c) the State of the Operator;

d) the State of Design;

e) the State of Manufacture; and

f) any State that participated in the investigation as per Chapter 5.

If the State conducting the investigation receives comments within sixty days of the date of the transmittal letter, it shall either amend the draft Final Report to include the substance of the comments received or, if desired by the State that provided comments, append the comments to the Final Report. If the State conducting the investigation receives no comments within sixty days of the date of the first transmittal letter, it shall issue the Final Report in accordance with 6.4, unless an extension of that period has been agreed by the States concerned.

Note 1.— Nothing in this Standard is intended to preclude the State conducting the investigation from consulting other States, such as those States which provided relevant information, significant facilities, or experts who participated in the investigation under 5.27.

Note 2.— Comments to be appended to the Final Report are restricted to non-editorial specific technical aspects of the Final Report upon which no agreement could be reached.

Note 3.— When sending the draft Final Report to recipient States, the State conducting the investigation may consider using the most suitable and quickest means available, such as facsimile, e-mail, courier service or express mail.

Note 4.— Intended safety recommendations are to be included in the draft Final Report.

6.3.1 Recommendation.— The State conducting the investigation should send, through the State of the Operator, a copy of the draft Final Report to the operator to enable the operator to submit comments on the draft Final Report.

6.3.2 Recommendation.— The State conducting the investigation should send, through the State of Design and the State of Manufacture, a copy of the draft Final Report to the organizations responsible for the type design and the final assembly of the aircraft to enable them to submit comments on the draft Final Report.

Reference - TSI Act.

http://www.comlaw.gov.au/Details/C2014C00423/Html/Text#_Toc393713891

24. Offence to hinder etc. an investigation

(1) A person is guilty of an offence if:

- (a) the person engages in conduct; and
- (b) the person is reckless as to whether the conduct will adversely affect an investigation:
 - (i) that is being conducted at that time; or
 - (ii) that could be conducted at a later time into an immediately reportable matter; and
- (c) the conduct has the result of adversely affecting such an investigation (whether or not the investigation had commenced at the time of the conduct); and
- (d) the conduct is not authorised by the Chief Commissioner.

Penalty: Imprisonment for 12 months.

(2) Subsection (1) does not apply if the conduct was necessary:

- (a) to ensure the safety of persons, animals or property; or
- (b) to remove deceased persons or animals from an accident site; or
- (c) to move a transport vehicle, or the wreckage of a transport vehicle, to a safe place; or
- (d) to protect the environment from significant damage or pollution.

Note: A defendant bears an evidential burden in relation to the matter in subsection (2). See subsection 13.3(3) of the *Criminal Code*.

(3) Subsection (1) does not apply if the conduct was:

- a) the withdrawal of the person's consent to the Chief Commissioner entering premises under section 34; or
- (b) the refusal to give any assistance to the Chief Commissioner (in relation to that entry) after the withdrawal of that consent.

Note: A defendant bears an evidential burden in relation to the matter in subsection (3). See subsection 13.3(3) of the *Criminal Code*.

(4) The Chief Commissioner must not unreasonably withhold an authorisation under paragraph (1)(d).

(5) In this section:

conduct includes omission.

26. Draft reports

(1) The ATSB may provide a draft report, on a confidential basis, to any person whom the ATSB considers appropriate, for the purpose of:

- (a) allowing the person to make submissions to the ATSB about the draft report; or
- (b) giving the person advance notice of the likely form of the published report.

(2) A person who receives a draft report under subsection (1) or (4) must not:

- (a) make a copy of the whole or any part of the report; or
- (b) disclose any of the contents of the report to any other person or to a court.

Penalty:

- (a) in the case of a contravention of paragraph (a) – 20 penalty units; or
- (b) in the case of a contravention of paragraph (b) – imprisonment for 2 years.
- (3) Strict liability applies to the element of the offence against subsection (2) that the draft report is received under subsection (1) or (4).
- (4) Subsection (2) does not apply to any copying or disclosure that is necessary for the purpose of:
 - (a) preparing submissions on the draft report; or
 - (b) taking steps to remedy safety issues that are identified in the draft report.

Note: A defendant bears an evidential burden in relation to a matter in subsection (4). See subsection 13.3(3) of the *Criminal Code*.

- (5) A person who receives a draft report under subsection (1) or (4) cannot be required to disclose it to a court.
- (6) A person who receives a draft report under subsection (1) or (4) is not entitled to take any disciplinary action against an employee of the person on the basis of information in the report.
- (7) A draft report provided under subsection (1) must not include the name of an individual unless the individual has consented to that inclusion.

63E Special investigators

The Chief Commissioner may, by written instrument, appoint a person as a special investigator for the purposes of this Act if the Chief Commissioner is satisfied that the person satisfies the criteria prescribed by the regulations.