

Senate Rural and Regional Affairs and Transport References Committee

Questions on Notice – Wednesday, 21 November 2012 CANBERRA, ACT

Inquiry into aviation accident investigations

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**SENATE RURAL AND REGIONAL AFFAIRS AND TRANSPORT
REFERENCES COMMITTEE**

Inquiry into aviation accident investigations

Public Hearing – Wednesday, 21 November 2012

**Questions Taken on Notice – Office of the Australian Information
Commissioner**

1. HANSARD, PG 2-3

Senator XENOPHON: You may want to take this on notice, but I am sure that the ATSB when they give evidence can clarify this. Have you looked at other jurisdictions that deal with transport safety accidents? My understanding is that there is a different approach to the NTSB in the United States to such matters. Are you able on notice to look at practices in terms of the reporting of draft reports of aviation accidents and the way matters are dealt with in other jurisdictions? To what extent is international best practice or the approach in other jurisdictions relevant in the context of considering, for instance, Australian legislation?

...

Senator XENOPHON: I would like to get down to some specific issues, but if you could look at what other aviation safety bodies, such as those in Europe, the United States and other jurisdictions, do in terms of their process of reporting. This is something I might touch on with Mr Dolan and his team as well.

Prof. McMillan: I am certainly happy to take that on notice. I have not had any discussions about this matter with the agency, but in the course of doing my own research I will speak to them.

2. HANSARD, PG 3

Senator XENOPHON: I would like to ask you some specific questions and I am happy for you to take them on notice, because they are of a technical nature. Is there anything that will prevent CASA maintaining publicly available registers of air operator certificates, accountable persons and statutory office holders such as the head of flight operations and the head of training and checking? For instance, what about the approval of check pilots? Is that something you have to take on notice?

Prof. McMillan: I will take it on record, but, in principle, subject to any wide-ranging secrecy provision, there is nothing to prevent an agency from conducting a register. Indeed, in our information policy function, we have often proposed that agencies should be proactive in making available, through the web, information that will be of public interest or that may be commonly sought. Particularly, then, it gives the agency an

opportunity to frame that information in a way that informs the public and avoids any misinterpretation of documents that are randomly released under the FOI. But I will certainly take that on notice.

3. HANSARD, PG 4

Senator XENOPHON: I will put it in context. There is a process whereby directly involved parties are provided with copies of drafts insofar as it affects them—I think Mr Dolan can elaborate on that later. Could you take on notice what your view is as to the axis of those directly involved parties' reports—whether it should be confined to directly involved parties, whether it should be sent to those who have a broader interest in a matter?

Prof. McMillan: I will take that on notice. The only comment I would make in general is that—once again, subject to any relevant secrecy provision, usually with a criminal penalty—once a document is disclosed to an individual, it is notionally disclosed to the world at large, because it is open to that individual to publish that document. The other side of that is whether the agency should take the initiative in making that document available independently of any view expressed by the individual. Clearly that could raise operational and privacy considerations.

4. HANSARD, PG 4

Senator XENOPHON: Could you consider whether CASA has the right to access them and use them as it sees fit? Can there be some element of privacy afforded to the individual that limits or prevents CASA from unencumbered access?

Prof. McMillan: I can certainly take that on notice. Again, my only general comment is that the Privacy Act is probably not the main vehicle for controlling how CASA or another agency may use information of that kind. The Privacy Act is more concerned with securing personal information against inappropriate use or release. The more relevant considerations are usually those stemming from administrative law. For example, an agency must have an adequate evidentiary basis for any decision it releases and must follow a natural justice process before it relies on information that is adverse to an individual.

5. HANSARD, PG 4

Senator XENOPHON: Can I draw to your attention, because you may want to consider it, the Hansard of 22 October of this inquiry. There are a series of questions put from information received from pilots that indicates that at the moment there is a no blame culture on the part of the ATSB. If a pilot is involved in an incident, there is a report sent to the ATSB on the basis that it allows people to know what is going on. If there is an incident or otherwise, unless it is deliberate or an imminent threat to safety, it is a

matter that, as I understand it, is meant to be confidential. That was the understanding of pilots.

The information that was provided to me is that in fact the pilot can be identified by virtue of the aircraft type and time. I have seen some of the logs and you can locate the pilot. A number of pilots have approached me and said that concerns them, because if it goes off to the regulator, to CASA, that may inhibit their willingness to report issues of safety to the ATSB, as the primary safety body for aviation in this country. Can you take on notice what your views on that are as Information Commissioner and whether you consider that might undermine the public policy aspects of encouraging pilots to come forward in a just, no blame culture approach?

Prof. McMillan: Yes, I would certainly be happy to take that on notice and express some views to the committee. Again, they may be general comments because there are a number of factors in play there—protecting the privacy of the individual, ensuring the efficiency of the operation. But I am happy to take that on notice and provide what opinions I can.

Senator XENOPHON: Again, Mr Dolan can clarify this, but the idea is that unless it is gross negligence or a deliberate act you try and learn from it without pinging anyone for it, to put it colloquially. But my understanding is that for some reason there has been an exchange of information, whether or unintentionally or not, between the ATSB and CASA. I will put it in these terms: if there has been an exchange with CASA of information that pilots routinely provide the ATSB that would tend to identify the pilot, would that be of concern to you in terms of a broader public policy consideration?

Prof. McMillan: Yes, particularly under our privacy role, the opportunity that technology now provides for data matching and fitting isolated pieces of information together is generally a concern. But, on the broader issue that you have raised about inhibiting the performance of the regulatory function if information is not provided, I am interested in the comment by the Australian Law Reform Commission in its report. In one of the few comments it made supporting the retention of a specific secrecy provision, it did support the retention of the secrecy provision for onboard recording information because of privacy concerns and the overriding public importance of ensuring that individuals in an aircraft cockpit feel free to talk without inhibition about the fact that their conversations were being recorded.

6. HANSARD, PG 5

Senator XENOPHON: Just finally from me—again, possibly on notice—can you advise whether CASA has any right to access an operator's internal investigations? What about internal disciplinary proceedings? If Mr McCormick reads this I hope he does not consider this a 'tautological rubbish' question.

Prof. McMillan: That issue of its access powers does not fall within the jurisdiction of my office but I am happy to take it on notice and see if there is an aspect on which I can

comment; otherwise, I will inform the committee that it is outside our area of responsibility.

Inquiry into aviation accident investigations

Questions Taken on Notice – Office of the Australian Information Commissioner

1.HANSARD, PG 2-3

Senator XENOPHON: *You may want to take this on notice, but I am sure that the ATSB when they give evidence can clarify this. Have you looked at other jurisdictions that deal with transport safety accidents? My understanding is that there is a different approach to the NTSB in the United States to such matters. Are you able on notice to look at practices in terms of the reporting of draft reports of aviation accidents and the way matters are dealt with in other jurisdictions? To what extent is international best practice or the approach in other jurisdictions relevant in the context of considering, for instance, Australian legislation?*

...

Senator XENOPHON: *I would like to get down to some specific issues, but if you could look at what other aviation safety bodies, such as those in Europe, the United States and other jurisdictions, do in terms of their process of reporting. This is something I might touch on with Mr Dolan and his team as well.*

The Office of the Australian Information Commissioner (OAIC) has not undertaken a study of the practice in other jurisdictions as to publication of draft reports of aviation safety incidents. This is not the kind of issue that we would ordinarily examine. Our focus is usually upon disclosure rules that apply to the whole of government rather than disclosure rules that apply to a particular area of government. The ATSB is better placed to comment on a comparison between Australian and foreign publication requirements in the aviation sector.

As a general observation, if the Committee felt that a new rule or obligation should be created to require publication of draft aviation incident reports, this is better done through legislation or guidelines applying specifically to this issue, rather than through the *Freedom of Information Act 1982* (FOI Act). A specific rule on publication of draft aviation incident reports could address important questions such as the time the draft report is to be published, to whom it is to be published, where it is to be published, whether material can be exempted from the draft report (eg, on personal privacy, law enforcement or legal professional privilege grounds), and whether interested parties have a right to make submissions in response to the draft report.

The FOI Act could be used by a person to seek access to draft reports of aviation accidents, but the Act is not tailored specifically to this purpose. There are a number of exemptions that could potentially apply if a request is received; whether the FOI access request is received prior to or after the finalisation of the report could also be relevant; and FOI access charges may apply. Consequently, the extent to which a draft report could be obtained wholly or partly under the FOI Act could vary from one request to another.

Inquiry into aviation accident investigations

Questions Taken on Notice – Office of the Australian Information Commissioner

2.HANSARD, PG 3

Senator XENOPHON: I would like to ask you some specific questions and I am happy for you to take them on notice, because they are of a technical nature. Is there anything that will prevent CASA maintaining publicly available registers of air operator certificates, accountable persons and statutory office holders such as the head of flight operations and the head of training and checking? For instance, what about the approval of check pilots? Is that something you have to take on notice?

The OAIC encourages agencies to be proactive in making available information that is in the public interest or that may commonly be sought. Proactive publication of government information on the web has become a strong theme in government policy and practice in recent years, as reflected in the *Declaration of Open Government* and the FOI Act reforms in 2010.

If a public register is established, consideration should be given to the impact on the privacy and business interests of individuals whose information is contained in the register and whether publishing this information is reasonable in the circumstances. The FOI Act requirements for agencies to publish information in the Information Publication Scheme and the Disclosure Log specifically exempt personal information and information about the business, financial or professional affairs of any person (FOI Act ss 8(2)(g), 11C(1)).

3.HANSARD, PG 4

Senator XENOPHON: I will put it in context. There is a process whereby directly involved parties are provided with copies of drafts insofar as it affects them—I think Mr Dolan can elaborate on that later. Could you take on notice what your view is as to the axis of those directly involved parties' reports—whether it should be confined to directly involved parties, whether it should be sent to those who have a broader interest in a matter?

Different purposes are usually served by making a draft report available directly to an involved party, and making a draft more widely and publicly available.

As concerns directly involved parties, the usual reason for making a draft available is to ensure procedural fairness in the preparation of a final report. The doctrine of natural justice requires that a person should be given an opportunity to comment on any adverse finding in a government report before it is finalised. The quality of a draft can also be improved and based on stronger evidentiary findings if people who have knowledge or a direct interest in commenting on a draft report are given an opportunity to do so.

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Public dissemination of a draft report is usually done with a view to seeking broader public input to decision making or policy formulation by a government agency. This is in line with the current emphasis on collaboration between government and the community. One of the reform proposals in the *Blueprint for Reform of Australian Government Administration* is 'Creating more open government' by 'Citizens directly communicating their views and expertise to government' and 'Citizens become active participants involved in government'.

If a draft report contains adverse findings about an individual it would generally not be desirable that the draft report is made publicly available before the individual has an opportunity to comment. To publish the draft could undermine the natural justice expectation that the individual should have the opportunity to comment and propose amendment before wider circulation of the draft. However, unless there is any statutory provision to prevent this, the individual may give the draft report to others, particularly to seek advice on their options to respond to the issues presented.

4. HANSARD, PG 4

Senator XENOPHON: *Could you consider whether CASA has the right to access them¹ and use them as it sees fit? Can there be some element of privacy afforded to the individual that limits or prevents CASA from unencumbered access?*

Neither the *Privacy Act 1988* nor the FOI Act confer upon CASA or any other government agency (except the OAIC) a right to access records held by private sector organisations. The Privacy Act provides individuals a right of access to personal information about themselves held by agencies and organisations subject to the Privacy Act.

The usual approach is that information gathering powers are conferred upon agencies in the legislation they administer (for example, the *Civil Aviation Act 1988*). Legislation of that kind will also state whether a person can object to providing information to a government agency, for example, on the grounds of legal professional privilege. The issue is covered more extensively in a report of the Administrative Review Council, *The Coercive Information-gathering Powers of Government Agencies*, Report No 48 (2008).

As a general observation, the core issue is whether CASA should be given specific information gathering powers in order to perform its lawful functions. It may be relevant to note that the Civil Aviation Act indicates that it is the object of CASA to establish a

¹ Civil Aviation Orders 82.3 require a number of records to be made and retained by operators – records include experience of each flight crew member, details of crew licences, ratings and endorsements, training and checking records etc. Accessed at: <http://www.comlaw.gov.au/Details/F2012C00843>

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regulatory framework for maintaining, enhancing and promoting the safety of civil aviation, with a particular emphasis on preventing aviation accidents and incidents², and the functions of CASA include providing a comprehensive surveillance of the aviation industry³ and developing effective enforcement strategies to secure compliance with aviation safety standards.⁴ The need for CASA to access this information in order for CASA to exercise these lawful functions would need to be balanced against the need to protect personal privacy.

5. HANSARD, PG 4

Senator XENOPHON: ...at the moment there is a no blame culture on the part of the ATSB. If a pilot is involved in an accident, there is a report sent to the ATSB on the basis that it allows people to know what is going on. If there is an incident or otherwise, unless it is deliberate or an imminent threat to safety, it is a matter that, as I understand it, is meant to be confidential...

The information that was provided to me is that in fact the pilot can be identified by virtue of the aircraft type and time. I have seen some of the logs and you can locate the pilot. A number of pilots have approached me and said that concerns them, because if it goes off to the regulator, CASA, that may inhibit their willingness to report issues of safety to the ATSB, as the primary safety body for aviation in this country. Can you take on notice what your views on that are as Information Commissioner and whether you consider that might undermine the public policy aspects of encouraging pilots to come forward in a just, no blame culture approach?

As a general observation, the aim of removing barriers to reporting safety issues seems prudent. To determine what information should be released and to whom, it is necessary to consider what information needs to be collected and disseminated in order to achieve a lawful purpose. It is the legislation governing the ATSB and CASA that will primarily determine what information should be shared between these two agencies, rather than the Privacy Act or FOI Act.

The submission provided by the ATSB to the Senate Inquiry clearly indicates that the aim of safety investigations is not to apportion blame or liability, but to identify safety factors associated with the occurrence under investigation.⁵ In the event of a complaint to the OAIC, we would consider whether it was indeed necessary to include in a report factors such as aircraft type and flight time, which may necessarily identify the pilot, for the ATSB to carry out its functions.

I note that a proposal to replace the voluntary reporting system, REPCON, with the Transport Safety (Confidential Reporting Scheme) Regulations 2013 is currently being

² Civil Aviation Act 1988 s 3A

³ Civil Aviation Act 1988 s 9(1)(f)

⁴ Civil Aviation Act 1988 s 9(d)

⁵ ATSB Submission: Senate Inquiry into Aviation Accident Investigations, pg. 11

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considered. Such a scheme would allow CASA greater access to information contained in reports to the ATSB, and is aimed at better placing CASA to perform its lawful function of enforcing compliance with safety regulations.⁶ I acknowledge that this has raised concerns regarding the danger of abrogating a reporter's common law privilege against self-incrimination, and this may adversely affect the free flow of safety-related information, as outlined in the Australian and International Pilots Association submission to this committee. It is not within the jurisdiction of the OAIC to comment on the validity or quality of this proposal.

6. HANSARD, PG 5

Senator XENOPHON: *...can you advise whether CASA has any right to access an operator's internal investigations? What about internal disciplinary proceedings?*

The issue of CASA's access powers does not fall within the OAIC's jurisdiction, and I am unable to comment further. This is a question of CASA's powers and functions as granted by its governing legislation, rather than the Privacy Act or the FOI Act.

⁶ *Civil Aviation Act 1988* s 9(1)(d)

**SENATE RURAL AND REGIONAL AFFAIRS AND TRANSPORT
REFERENCES COMMITTEE**

Inquiry into aviation accident investigations

Public Hearing – Wednesday, 21 November 2012

Questions Taken on Notice – Australian Transport Safety Bureau

1. HANSARD, PG 13

Senator XENOPHON: There is an issue of who heard what. How many times did the pilot in command or the first officer say 'say again'? Can I suggest to you that it was said on number of occasions in the transcript?

Mr Dolan: According to our transcript it was one time, I think.

Senator XENOPHON: I think it was several times to Fiji.

Mr Dolan: Are we talking about these two specific transmissions?

Senator XENOPHON: No, I am saying that in the transcript that you have, in terms of the communications with Fiji, the pilot actually said on several occasions 'say again'. If a pilot says 'say again', does that indicate to you perhaps a lack of clarity or some communications problem? We are assuming that Mr James's hearing was reasonable. Assuming that he has relatively normal hearing, if a pilot says on several occasions 'say again', would that tend to indicate some form of communications problem?

Mr Dolan: I only have a partial transcript in front of me, so I am happy to take it on notice.

2. HANSARD, PG 13

Senator XENOPHON: ...Furthermore, if it is shown that there were several occasions when the pilot said 'say again', would that tend to be indicative of some form of communications issue?

Mr Dolan: Yes.

Senator XENOPHON: Is that a yes or a no?

Mr Dolan: Yes, I am happy to take that on notice and get back to you.

Senator XENOPHON: But would you agree that, if someone keeps saying 'say again' to air traffic control, that could indicate some sort of problem?

Mr Dolan: It could indeed.

Senator STERLE: By the same token, if they say 'thank you', they have got it clear.

Senator XENOPHON: But this is 'say again'.

Mr Dolan: We will take it on notice.

3. HANSARD, PG 14-15

Senator STERLE: Obviously, the pilot had spoken to air traffic control and said, 'This is how many gallons I have on board and this is the reason why I need to fly at a different level than what you first'—or is that all taken into consideration?

Mr Dolan: I am not sure how detailed the pilot was in his request to go up rather than down, but that was the context for the request.

Senator STERLE: But there was no restriction from air traffic control to allow the pilot to change the level that he was on?

Mr Dolan: No. It was agreed to—

Senator STERLE: It was okay. Great. Are you able to provide to us the figures on the fuel that was—

Mr Dolan: Yes.

4. HANSARD, PG 17

Mr Dolan: It says that appropriately equipped aircraft can use RVSM airspace at any time, that other aircraft can use RVSM airspace with four hours notice but may have to be directed from that airspace if it conflicts with other traffic, and that air ambulance work—which was how the New Zealand rules saw this operation and it was defined in their air traffic control system—is immediately allowed into that airspace and allowed to operate in it.

Senator XENOPHON: Could you, on notice, provide us with that specific section of the regulations in respect of that? Is it in the report?

Mr Dolan: No. I believe it is in one of our supplementary submissions, but we will make sure there is a further copy supplied.

5. HANSARD, PG 17-18

Senator NASH: You said there was a report at nine o'clock and one just after. They were the ones we were talking about before. Is there a standard period of time that they are issued? Is it every hour? There was not one between eight and nine o'clock, was there? I just want to clarify that. Is there a standard—

Mr Dolan: There is a standard reporting period.

Senator NASH: And what is that?

Mr Dolan: The METAR are updated every half an hour.

Senator NASH: So why was there not one at 8:30 given that the 8:45 one seems to be the timing issue?

Mr Sangston: I cannot confirm whether there was or was not.

Senator NASH: I am sure Mr Dolan told me earlier that there was one at eight but then not till the two at nine o'clock. I want to clarify this before we move on. If I have got you wrong, Mr Dolan, I am sorry but I thought you said earlier there was one at eight and then there were those two on either side of the nine o'clock one or whatever.

Mr Dolan: Yes, but we should understand the difference between routine reports, the METARs, and the SPECIs, which are the reports that say there has been a significant variation.

Senator NASH: I have got that but you were saying those—excuse my layman—should happen at 30-minute intervals. Why was there not one at 8:30?

Mr Dolan: This is what we are checking. We understand there was but we will have to confirm that.

Senator NASH: If you could provide the answer to that one on notice as quickly as you can, that would be great.

6. HANSARD, PG 19

CHAIR: Yet, through a series of tos and fros, it went down to a minor safety incident, which means it was a broadly acceptable risk. How, in God's name, can you go from intolerable to acceptable? We would like to see the paper trail and the communications which made that happen.

Mr Dolan: If I could start and then perhaps Mr Sangston can—

CHAIR: Is there a paper trail?

Mr Dolan: There is an exchange of correspondence with CASA on this. There is our initial letter and there is—

CHAIR: Can we see the paper trail?

Mr Dolan: Absolutely. It is in the material we have provided. We can select it out and make it available separately.

CHAIR: We have a container load. Could we just have—

Mr Dolan: Our material was on a searchable hard disk. But we will make sure the information is provided.

Senator Sterle interjecting—

CHAIR: As Senator Sterle said, we would like the date—to give us some guidance—it went from intolerable to acceptable.

Mr Dolan: We are happy to provide that separately.

7. HANSARD, PG 20

CHAIR: If in your discussions CASA thought they were able to get you to say it was broadly acceptable rather than intolerable, does that mean you did not know what your job was? I do not mean that personally, but you have been six months on the job and it is a mystery how a senior officer who is dedicated and fair dinkum—and all Australians who travel rely on the Air Transport Safety Bureau—could review his position from intolerable to broadly acceptable.

Mr Dolan: I will try and add some information to that. As we tried to make clear, there was an initial assessment of the evidence we had available to us, which was essentially about decision-making en route and what informed us and everything else—whether the guidance that was available was reliable. Given that this had been a potential disaster—there were potentially six fatalities in this accident and it was only a fortuitous thing that there were not—we gave a very significant weight to any issue that was associated with this. So we said to CASA: 'This was almost a six fatality accident. Here is what we see at the initial stages to be a problem, and in the context of this accident we think it is significant. Pay attention.' CASA paid serious attention to it and gave us a response, which led us to further lines of inquiry to better understand what was at issue—the safety issue we have identified. We continue to review it and it remains in the report as a safety issue but not at the level of—

CHAIR: In the meantime, with no change to the evidence, you have repositioned yourself from intolerable to broadly acceptable.

Mr Dolan: Correct.

CHAIR: Incidentally the chief pilot from Pel-Air happened to go and work for CASA.

Mr Dolan: So I understand.

Senator NASH: Could you provide that comment from CASA you were just talking about?

Mr Dolan: Yes.

8. HANSARD, PG 21

CHAIR: Mr Dolan, could you assist the committee by giving us the date on which the decision was taken in the ATSB to downgrade the report from intolerable to broadly acceptable? You can take that on notice if you like.

Mr Dolan: I will take that on notice.

9. HANSARD, PG 21

CHAIR: Could you also provide the date of the transfer of the chief pilot of Pel-Air to CASA?

Mr Dolan: We will ask CASA and do what we can.

Senator XENOPHON: It might be simpler to ask CASA directly.

Mr Dolan: I think it might be, but we will do what we can to facilitate. Can I suggest that I ask CASA to provide the information direct to the committee?

CHAIR: Yes.

Senator XENOPHON: Or the committee could ask CASA directly. Did Unicom tell New Zealand twice about the weather by phone?

Mr Dolan: I will check the report.

10. HANSARD, PG 21-22

Senator XENOPHON: Perhaps you could take on notice, Mr Sangston, whether UNICOM told New Zealand twice about the weather by phone and whether it was passed on. My understanding is that that information was not passed on. Will you take that on notice, Mr Sangston? ...

Mr Dolan: I have not read the Hansard. I did watch Airservices given evidence on the day, so I have a recollection of the oral evidence.

Senator XENOPHON: You have a recollection of the issues. Airservices Australia—and they will get back to us on this—have said that they will tell us when they had communications with the ATSB. But, as a matter of course in something like this, did ATSB communicate with Airservices Australia at a stage prior to your report being made public?

Mr Dolan: Not that I am aware of, but we can check the details and see what communication there may have been with Airservices in the course of this.

Senator XENOPHON: But, given what appear to be critical issues, important issues with respect to Airservices Australia and its potential material impact in terms of the outcome that occurred here, wouldn't it have been prudent for the ATSB to

communicate with Airservices Australia in respect of these matters? It is a matter that Senator Heffernan was quite alive to on Monday.

Mr Dolan: I am happy to take the question on notice and give you that information.

11. HANSARD, PG 23

Senator NASH: I would like to ask a question on notice.

CHAIR: Go on.

Senator NASH: Thank you for that, Mr Dolan. But you did not really answer Senator Sterle's question. Can you take on notice for us: given, as Senator Heffernan has so clearly pointed out, that the evidence did not change, what specifically changed your view that the risk had changed from intolerable to acceptable?

Mr Dolan: The only comment I would make, and I am happy to provide details on that, is: while the evidence we relied on initially did not change, we did acquire additional evidence and we were assessing and analysing the evidence.

Senator STERLE: Which was not stated earlier.

Senator NASH: Could you also include what the additional evidence was?

Mr Dolan: Yes.

12. HANSARD, PG 25

Senator XENOPHON: I think this is absolutely critical. That email, to find which we had to dig and sift through the many thousands of documents, sends alarm bells because it says things like: 'We might find ourselves in AAT or a court. We will look a bit foolish if we as a regulator find ourselves in a position where we say there are two conflicting views, one of which has to be wrong and we have done nothing to rectify that over the years. Very untidy.' You interviewed ATPL students—is that right?

Mr Sangston: Yes, and a number of other pilots in the industry.

Senator XENOPHON: How many?

Mr Sangston: I think there were a total of eight. We also examined the operations manuals of a number of operators to see what guidance—

Senator XENOPHON: Is that included in your final report?

Mr Sangston: Yes.

Senator XENOPHON: Including the background analysis and the interviews?

Mr Sangston: Not specifically interview by interview.

Senator XENOPHON: Perhaps you could provide that for the interviews which were undertaken. That might be useful to give the background you had before you reached that conclusion.

Mr Dolan: This is not—

Senator XENOPHON: We do not need to know the names of the students.

Mr Dolan: My only comment would be that this is at the heart of the restricted information provisions in our act. So we would want that information to be treated confidentially by the committee.

Senator XENOPHON: If we do not know who it is—if it does not identify the pilots and it shows divergent views—how is that restricted information?

Mr Dolan: It is acquired in the course of our investigation and it comes under—

CHAIR: We can take it in camera.

13. HANSARD, PG 26

Senator XENOPHON: Going to the issue of when it was changed from a critical safety issue to a minor safety issue—at what date did you receive communications or representations from CASA saying, 'We do not think it is a critical safety issue'? Was it after this email of 20 March 2010 I have referred to?

Mr Dolan: We will provide the correspondence and you can check that.

Senator XENOPHON: I will be keen to pursue that.

14. HANSARD, PG 26

CHAIR: We will be putting some questions on notice. You may contribute to that, Senator Xenophon. The committee would be interested to know exactly when the ATSB requested the CASA special audit and when ATSB actually received the document.

Mr Dolan: We can provide that information.

15. HANSARD, PG 26

Senator EDWARDS: Are you prepared to share with the committee those recommendations or memos about how you would like to change the culture of the way in which you operate? Is there anything out there formally?

Mr Dolan: I can show you how, over time, we have set much tighter targets for the completion of our reports. I can show you the things that—

Senator EDWARDS: No, I mean specifically in the last month.

Mr Dolan: I am trying to think. Other than reminding staff—

Senator EDWARDS: No worries; take it on notice.

Mr Dolan: I will take it on notice. I do not think we have done anything specific, other than having a discussion at the executive level about what we have learnt from this. What I said to the staff is that one of the things we have learnt from this is that timeliness remains a very important thing for our organisation.

**SENATE RURAL AND REGIONAL AFFAIRS AND TRANSPORT
REFERENCES COMMITTEE**

Inquiry into aviation accident investigations

Public Hearing – Wednesday, 21 November 2012

Questions Taken on Notice – Australian Transport Safety Bureau

1. HANSARD, PG 13

Senator XENOPHON: There is an issue of who heard what. How many times did the pilot in command or the first officer say 'say again'? Can I suggest to you that it was said on number of occasions in the transcript?

Mr Dolan: According to our transcript it was one time, I think.

Senator XENOPHON: I think it was several times to Fiji.

Mr Dolan: Are we talking about these two specific transmissions?

Senator XENOPHON: No, I am saying that in the transcript that you have, in terms of the communications with Fiji, the pilot actually said on several occasions 'say again'. If a pilot says 'say again', does that indicate to you perhaps a lack of clarity or some communications problem? We are assuming that Mr James's hearing was reasonable. Assuming that he has relatively normal hearing, if a pilot says on several occasions 'say again', would that tend to indicate some form of communications problem?

Mr Dolan: I only have a partial transcript in front of me, so I am happy to take it on notice.

ATSB response:

The pilot of VH-NGA used 'say again' once in communications with Nadi air traffic control. This was in the context of querying the time associated with the 0630 METAR.

2. HANSARD, PG 13

Senator XENOPHON: ...Furthermore, if it is shown that there were several occasions when the pilot said 'say again', would that tend to be indicative of some form of communications issue?

Mr Dolan: Yes.

Senator XENOPHON: Is that a yes or a no?

Mr Dolan: Yes, I am happy to take that on notice and get back to you.

Senator XENOPHON: But would you agree that, if someone keeps saying 'say again' to air traffic control, that could indicate some sort of problem?

Mr Dolan: It could indeed.

Senator STERLE: By the same token, if they say 'thank you', they have got it clear.

Senator XENOPHON: But this is 'say again'.

Mr Dolan: We will take it on notice.

ATSB response:

At no stage during flight crew interviews or the flight re-enactment did either crew member advise ATSB investigators that they had any communication issues with air traffic control (ATC) units during the flight.

The flight crew used the term 'say again' a total of three times during the conduct of the flight. This was consistent with normal communications and routine requests for clarification of information, and in the assessment of the ATSB was not indicative of any radio operation or reception problem.

3. HANSARD, PG 14-15

Senator STERLE: Obviously, the pilot had spoken to air traffic control and said, 'This is how many gallons I have on board and this is the reason why I need to fly at a different level than what you first'—or is that all taken into consideration?

Mr Dolan: I am not sure how detailed the pilot was in his request to go up rather than down, but that was the context for the request.

Senator STERLE: But there was no restriction from air traffic control to allow the pilot to change the level that he was on?

Mr Dolan: No. It was agreed to—

Senator STERLE: It was okay. Great. Are you able to provide to us the figures on the fuel that was—

Mr Dolan: Yes.

ATSB response:

The flight crew of VH-NGA advised ATC that in relation to flight below FL310 '... it will make things difficult for us fuel wise'. No additional information was provided to ATC about the fuel status of the aircraft

Shortly after, a clearance to climb on the planned track to FL390 had been negotiated and issued.

4. HANSARD, PG 17

Mr Dolan: It says that appropriately equipped aircraft can use RVSM airspace at any time, that other aircraft can use RVSM airspace with four hours notice but may have to be directed from that airspace if it conflicts with other traffic, and that air ambulance work—which was how the New Zealand rules saw this operation and it was defined in their air traffic control system—is immediately allowed into that airspace and allowed to operate in it.

Senator XENOPHON: Could you, on notice, provide us with that specific section of the regulations in respect of that? Is it in the report?

Mr Dolan: No. I believe it is in one of our supplementary submissions, but we will make sure there is a further copy supplied.

ATSB response:

New Zealand AIP ENR 1.8.1.3.4 states that non-RVSM aircraft may fly in RVSM airspace subject to specific conditions.

One condition is that an 'ambulance flight' can fly in RVSM airspace.

VH-NGA was an ambulance flight and the entire flight was conducted in RVSM airspace.

5. HANSARD, PG 17-18

Senator NASH: You said there was a report at nine o'clock and one just after. They were the ones we were talking about before. Is there a standard period of time that they are issued? Is it every hour? There was not one between eight and nine o'clock, was there? I just want to clarify that. Is there a standard—

Mr Dolan: There is a standard reporting period.

Senator NASH: And what is that?

Mr Dolan: The METAR are updated every half an hour.

Senator NASH: So why was there not one at 8:30 given that the 8:45 one seems to be the timing issue?

Mr Sangston: I cannot confirm whether there was or was not.

Senator NASH: I am sure Mr Dolan told me earlier that there was one at eight but then not till the two at nine o'clock. I want to clarify this before we move on. If I have got you

wrong, Mr Dolan, I am sorry but I thought you said earlier there was one at eight and then there were those two on either side of the nine o'clock one or whatever.

Mr Dolan: Yes, but we should understand the difference between routine reports, the METARs, and the SPECIs, which are the reports that say there has been a significant variation.

Senator NASH: I have got that but you were saying those—excuse my layman—should happen at 30-minute intervals. Why was there not one at 8:30?

Mr Dolan: This is what we are checking. We understand there was but we will have to confirm that.

Senator NASH: If you could provide the answer to that one on notice as quickly as you can, that would be great.

ATSB response:

An 0830 SPECI was issued (refer to ATSB investigation report AO-2009-072, Appendix B, page 57).

6. HANSARD, PG 19

CHAIR: Yet, through a series of tos and fros, it went down to a minor safety incident, which means it was a broadly acceptable risk. How, in God's name, can you go from intolerable to acceptable? We would like to see the paper trail and the communications which made that happen.

Mr Dolan: If I could start and then perhaps Mr Sangston can—

CHAIR: Is there a paper trail?

Mr Dolan: There is an exchange of correspondence with CASA on this. There is our initial letter and there is—

CHAIR: Can we see the paper trail?

Mr Dolan: Absolutely. It is in the material we have provided. We can select it out and make it available separately.

CHAIR: We have a container load. Could we just have—

Mr Dolan: Our material was on a searchable hard disk. But we will make sure the information is provided.

Senator Sterle interjecting—

CHAIR: As Senator Sterle said, we would like the date—to give us some guidance—it went from intolerable to acceptable.

Mr Dolan: We are happy to provide that separately.

ATSB response:

The relevant documents are attached. Also, see response to Question 8.

7. HANSARD, PG 20

CHAIR: If in your discussions CASA thought they were able to get you to say it was broadly acceptable rather than intolerable, does that mean you did not know what your job was? I do not mean that personally, but you have been six months on the job and it is a mystery how a senior officer who is dedicated and fair dinkum—and all Australians who travel rely on the Air Transport Safety Bureau—could review his position from intolerable to broadly acceptable.

Mr Dolan: I will try and add some information to that. As we tried to make clear, there was an initial assessment of the evidence we had available to us, which was essentially about decision-making en route and what informed us and everything else—whether the guidance that was available was reliable. Given that this had been a potential disaster—there were potentially six fatalities in this accident and it was only a fortuitous thing that there were not—we gave a very significant weight to any issue that was associated with this. So we said to CASA: 'This was almost a six fatality accident. Here is what we see at the initial stages to be a problem, and in the context of this accident we think it is significant. Pay attention.' CASA paid serious attention to it and gave us a response, which led us to further lines of inquiry to better understand what was at issue—the safety issue we have identified. We continue to review it and it remains in the report as a safety issue but not at the level of—

CHAIR: In the meantime, with no change to the evidence, you have repositioned yourself from intolerable to broadly acceptable.

Mr Dolan: Correct.

CHAIR: Incidentally the chief pilot from Pel-Air happened to go and work for CASA.

Mr Dolan: So I understand.

Senator NASH: Could you provide that comment from CASA you were just talking about?

Mr Dolan: Yes.

ATSB response:

See response to Question 6.

8. HANSARD, PG 21

CHAIR: Mr Dolan, could you assist the committee by giving us the date on which the decision was taken in the ATSB to downgrade the report from intolerable to broadly acceptable? You can take that on notice if you like.

Mr Dolan: I will take that on notice.

ATSB response:

Early in the investigation, initial information indicated that there was a safety issue and the ATSB wrote to CASA about that issue. Subsequently, CASA brought additional information to the attention of the ATSB that they believed mitigated the level of risk associated with the safety issue. Additionally, during the interim period, the ATSB was gaining a better understanding of the interaction of the individuals/organisations involved. As the investigation and report underwent reviews within the ATSB the safety issue remained open. The day the Commission approved s25 release of the final report, on 16 August 2012, was when the safety issue was formally re-classified as a minor safety issue.

9. HANSARD, PG 21

CHAIR: Could you also provide the date of the transfer of the chief pilot of Pel-Air to CASA?

Mr Dolan: We will ask CASA and do what we can.

Senator XENOPHON: It might be simpler to ask CASA directly.

Mr Dolan: I think it might be, but we will do what we can to facilitate. Can I suggest that I ask CASA to provide the information direct to the committee?

CHAIR: Yes.

Senator XENOPHON: Or the committee could ask CASA directly. Did Unicom tell New Zealand twice about the weather by phone?

Mr Dolan: I will check the report.

ATSB response:

ATSB notified CASA of the Chair's question and understands that CASA has responded direct to the Committee Secretariat.

Yes, the UNICOM operator did contact Auckland ATC twice by phone in relation to the weather.

10. HANSARD, PG 21-22

Senator XENOPHON: Perhaps you could take on notice, Mr Sangston, whether UNICOM told New Zealand twice about the weather by phone and whether it was passed on. My understanding is that that information was not passed on. Will you take that on notice, Mr Sangston? ...

Mr Dolan: I have not read the Hansard. I did watch Airservices given evidence on the day, so I have a recollection of the oral evidence.

Senator XENOPHON: You have a recollection of the issues. Airservices Australia—and they will get back to us on this—have said that they will tell us when they had communications with the ATSB. But, as a matter of course in something like this, did ATSB communicate with Airservices Australia at a stage prior to your report being made public?

Mr Dolan: Not that I am aware of, but we can check the details and see what communication there may have been with Airservices in the course of this.

Senator XENOPHON: But, given what appear to be critical issues, important issues with respect to Airservices Australia and its potential material impact in terms of the outcome that occurred here, wouldn't it have been prudent for the ATSB to communicate with Airservices Australia in respect of these matters? It is a matter that Senator Heffernan was quite alive to on Monday.

Mr Dolan: I am happy to take the question on notice and give you that information.

ATSB response:

On 26 November 2009, the ATSB contacted Airservices to obtain an audio recording of the phone call with the pilot in command. On 4 December 2009, the ATSB again contacted Airservices to obtain records of the navigation aid calibrations at Norfolk Island and to ascertain if Australian-based HF receivers had recorded any conversations by VH-NGA: no recordings were found.

The investigation did not find any issues within the responsibility of Airservices Australia and consequently they were not included as a directly involved party (and did not receive a copy of the draft report for checking of factual information).

11. HANSARD, PG 23

Senator NASH: I would like to ask a question on notice.

CHAIR: Go on.

Senator NASH: Thank you for that, Mr Dolan. But you did not really answer Senator Sterle's question. Can you take on notice for us: given, as Senator Heffernan has so clearly pointed out, that the evidence did not change, what specifically changed your view that the risk had changed from intolerable to acceptable?

Mr Dolan: The only comment I would make, and I am happy to provide details on that, is: while the evidence we relied on initially did not change, we did acquire additional evidence and we were assessing and analysing the evidence.

Senator STERLE: Which was not stated earlier.

Senator NASH: Could you also include what the additional evidence was?

Mr Dolan: Yes.

ATSB response:

See response to Question 8.

12. HANSARD, PG 25

Senator XENOPHON: I think this is absolutely critical. That email, to find which we had to dig and sift through the many thousands of documents, sends alarm bells because it says things like: 'We might find ourselves in AAT or a court. We will look a bit foolish if we as a regulator find ourselves in a position where we say there are two conflicting views, one of which has to be wrong and we have done nothing to rectify that over the years. Very untidy.' You interviewed ATPL students—is that right?

Mr Sangston: Yes, and a number of other pilots in the industry.

Senator XENOPHON: How many?

Mr Sangston: I think there were a total of eight. We also examined the operations manuals of a number of operators to see what guidance—

Senator XENOPHON: Is that included in your final report?

Mr Sangston: Yes.

Senator XENOPHON: Including the background analysis and the interviews?

Mr Sangston: Not specifically interview by interview.

Senator XENOPHON: Perhaps you could provide that for the interviews which were undertaken. That might be useful to give the background you had before you reached that conclusion.

Mr Dolan: This is not—

Senator XENOPHON: We do not need to know the names of the students.

Mr Dolan: My only comment would be that this is at the heart of the restricted information provisions in our act. So we would want that information to be treated confidentially by the committee.

Senator XENOPHON: If we do not know who it is—if it does not identify the pilots and it shows divergent views—how is that restricted information?

Mr Dolan: It is acquired in the course of our investigation and it comes under—

CHAIR: We can take it in camera.

ATSB response:

The ATSB has provided the Committee Secretariat with details of where to locate the relevant documents within the material previously provided to the Committee.

13. HANSARD, PG 26

Senator XENOPHON: Going to the issue of when it was changed from a critical safety issue to a minor safety issue—at what date did you receive communications or representations from CASA saying, 'We do not think it is a critical safety issue'? Was it after this email of 20 March 2010 I have referred to?

Mr Dolan: We will provide the correspondence and you can check that.

Senator XENOPHON: I will be keen to pursue that.

ATSB response:

See response to Question 8 that refers to CASA correspondence dated 26 March 2010.

14. HANSARD, PG 26

CHAIR: We will be putting some questions on notice. You may contribute to that, Senator Xenophon. The committee would be interested to know exactly when the ATSB requested the CASA special audit and when ATSB actually received the document.

Mr Dolan: We can provide that information.

ATSB response:

The ATSB requested a copy of the CASA special audit report under a section 32 notice on 4 July 2012. A copy of the report was received on 9 July 2012.

On 15 June 2010, ATSB received an email from Pel-Air detailing actions done in response to the CASA Special Audit. The actions were detailed in their Pel-Air Management Action Plan (MAP).

The MAP actions as at 2 June 2010 were:

- Phase One – 26 items were completed between 20 November 2009 and 17 January 2010 prior to resuming domestic operations
- Phase Two – 11 items were completed between 1 December 2009 and 21 December 2009 prior to resuming international operations
- Phase Three – 14 items were completed between 14 December 2009 and 1 April 2010 with 6 on-going items scheduled for completion by 30 June 2010 for continuing improvement.

The MAP actions were the basis for the operator's safety action statement in the ATSB's draft and final reports.

15. HANSARD, PG 26

Senator EDWARDS: Are you prepared to share with the committee those recommendations or memos about how you would like to change the culture of the way in which you operate? Is there anything out there formally?

Mr Dolan: I can show you how, over time, we have set much tighter targets for the completion of our reports. I can show you the things that—

Senator EDWARDS: No, I mean specifically in the last month.

Mr Dolan: I am trying to think. Other than reminding staff—

Senator EDWARDS: No worries; take it on notice.

Mr Dolan: I will take it on notice. I do not think we have done anything specific, other than having a discussion at the executive level about what we have learnt from this.

What I said to the staff is that one of the things we have learnt from this is that timeliness remains a very important thing for our organisation.

ATSB response:

There have been no written communications with staff. However, the Commission has and will continue to reiterate within the ATSB the need for us to improve timeliness, the use of policy and procedures and our analytical methodology.



Australian Government

Australian Transport Safety Bureau

26 February 2010

Mr Richard White
Manager
Accident Investigation Liaison Unit
Civil Aviation Safety Authority
GPO Box 2005
Canberra ACT 2601

Dear Mr White,

**AO-2009-072 – Ditching – 3 NM south-west of Norfolk Island Aerodrome –
18 November 2010 – Westwind, registered VH-NGA - Critical Safety issue**

I refer to the meeting between officers of the Civil Aviation Safety Authority (CASA) and Australian Transport Safety Bureau (ATSB) that took place by video conference on 3 February 2010, and agreed that a critical safety issue existed in respect of the lack of regulation or guidance for pilots when exposed to previously unforecast meteorological conditions on long flights to destinations with no nearby alternates. An outcome of that meeting was that a number of the CASA participants indicated that they understood the issue, and that it should be progressed with CASA management.

Subsequently, on 12 February 2010, you rang the investigator in charge of the ATSB safety investigation, Mr Michael Watson and requested a supporting letter that described the critical safety issue and requested CASA's assistance in its resolution. In later telephone calls to me, you suggested that the receipt of this letter would allow you to 'kick-start' CASA's consideration of, and response to the issue.

62 Northbourne Avenue, Canberra City ACT 2601
Telephone: 02 6274 6443
24 hours: 1800 020 616

PO Box 967, Civic Square ACT 2608 Australia
Facsimile: 02 6247 3117
www.atsb.gov.au

ABN 65 061 156 887

UNCLASSIFIED COVERING INVESTIGATION -
IN - CONFIDENCE

Attachment One describes the nature of the critical safety issue that was identified as a result of the ATSB's initial investigative work in respect of the above accident, and formed the basis of our discussions on 3 February 2010. CASA's commitment to address the safety issue is appreciated.

Please don't hesitate to contact me

Ian Sangston
Director Aviation Safety Investigations
Australian Transport Safety Bureau

Attachment:

1. Nature of the critical safety issue – ditching 3 NM south-west of Norfolk Island Aerodrome, 18 November 2010

Nature of the critical safety issue – ditching 3 NM south-west of Norfolk Island Aerodrome, 18 November 2010

Background

Central to the investigation by the Australian Transport Safety Bureau (ATSB) of transport safety matters is the early identification of safety issues in the transport environment. The ATSB prefers to encourage the relevant organisation(s) to initiate proactive safety action that addresses safety issues. Nevertheless, the ATSB may use its power to make a formal safety recommendation either during or at the end of an investigation, depending on the level of risk associated with a safety issue and the extent of corrective action undertaken by the relevant organisation.

A safety issue is a safety factor that:

- can reasonably be regarded as having the potential to adversely affect the safety of future operations, and
- is a characteristic of an organisation or a system, rather than a characteristic of a specific individual, or characteristic of an operational environment at a specific point in time.

The ATSB's assessment of the risk level associated with an identified safety issue reflects the risk level as it existed at the time of the occurrence. That risk level may subsequently have been reduced as a result of safety actions taken by individuals or organisations during the course of an investigation.

Safety issues are broadly classified in terms of their level of risk. A critical safety issue is associated with an intolerable level of risk, and generally leads to the immediate issue of a safety recommendation unless corrective safety action has already been taken.

Safety action includes the steps taken or proposed to be taken by a person, organisation or agency in response to a safety issue. The ATSB may use its power to make a formal safety recommendation either during or at the end of an investigation, depending on the level of risk associated with a safety issue and the extent of corrective action undertaken by the relevant organisation.

Introduction

On 18 November 2009, an Israel Aircraft Industries Westwind 1124A aircraft, registered VH-NGA, ditched in the ocean 3 NM (6 km) to the south-west of Norfolk Island. The six occupants evacuated the sinking aircraft and were later recovered by a rescue vessel from Norfolk Island.

The flight crew had been unable to conduct a landing at Norfolk Island Airport because they could not see the runway after conducting four instrument approaches. The crew then elected to ditch before the aircraft's fuel supply was exhausted.

Based on an early assessment of the safety risk identified in the initial data gathering phase of the ATSB safety investigation, the following critical safety issue was identified:

Safety issue

There were no regulations or other guidance for application by flight crews when making in-flight, weather-related decisions in a changing meteorological environment. That reduced the reliability of in-flight decision making, and increased the risk of an aircraft arriving at a destination with insufficient fuel to continue to an alternate aerodrome, if the weather at the intended destination has deteriorated below its landing minima.

Initial safety action by the ATSB

In accordance with its preference to encourage relevant organisation(s) to initiate proactive safety action to address any identified safety issues, and in recognition of the criticality of the above safety issue, a meeting was convened by the ATSB with Civil Aviation Safety Authority (CASA) officers on 3 February 2010 to highlight the identified issue. In addition, the ATSB sought an understanding of the potential for safety action by CASA.

Initial safety action by CASA

During the 3 February 2010 meeting, CASA officers indicated that they understood the issue, and that it should be progressed with CASA management.

Development of the critical safety issue

Existing regulations and other guidance

An examination of the extant regulations and other guidance has identified that a pilot's pre-flight fuel planning shall, in addition to other considerations, take into account the forecast meteorological conditions for the destination and, if necessary, the alternate aerodrome. As a result, the affected pilot can uplift the appropriate fuel and otherwise plan his or her flight.

At the time of the accident, there were no regulations or other guidance to inform pilots' decision making once a flight had commenced and that would maximise the probability of a safe landing. This can be particularly pertinent to a flight undertaken in the following circumstances:

- the flight is of longer duration (at least several hours)
- there are few suitable alternates
- the available planning forecast indicates good terminal weather conditions for the arrival at the destination.

The flight planning regulations that were in place at the time of the accident required the carriage of sufficient fuel for the flight to the destination plus appropriate reserves; but, dependent of the forecast weather conditions and other factors affecting an aircraft's arrival, the relevant aircraft was not required to carry sufficient fuel to continue to an alternate. In addition, the affected aircraft may not have needed to have nominated an alternate at all. In consequence:

- There can be a point in such a flight at which the options for a safe landing reduce to one. From that point, the safety of the flight can only be assured if the destination weather remains adequate to assure a safe landing.
- The carriage of less fuel means less range. In that case, there are fewer options for the relevant flight crew to manage changing circumstances that may develop during their flight.
- If the forecast at the intended destination at the estimated time of arrival (ETA) does not require the nomination of an alternate, there is less incentive for a flight crew to be mindful once en route of the availability of potential alternate landing sites. Once passed and out of range, those landing sites would no longer represent suitable alternates.

The risk associated with a flight under the existing regulations and available guidance material can only be assured if the destination weather remains as forecast, or a suitable alternate is within the aircraft's range.

It could be argued that the most critical point during a flight to assess a destination's forecast weather conditions is the position from which the options for an assured safe landing have reduced to one. It would appear that many flight crew devote the necessary attention to their destination's weather conditions at the time of flight planning, but that the criticality of their in-flight decision making in respect of that (now possibly updated) weather is perhaps not recognised.

Examination of the existing regulations and guidance

An examination of the regulations and other guidance that applied to the accident flight suggested that there was little, if any operational information that could be expected to assist a pilot's in-flight decision making in respect of destination weather and the continuation or otherwise of a flight. The operational information that was examined included:

- civil aviation regulatory documents, including: Acts, Regulations and Orders; Civil Aviation Advisory Publications; and the Aeronautical Information Publication Australia (AIP)
- the theory-based knowledge and practical application for flight crew licence holders
- long distance operators' fuel requirements as specified in the large majority of those operators' operations manuals.

The results of that examination are summarised in the following paragraphs.

Fuel planning requirements. The practical regulatory requirements affecting fuel planning in the face of adverse destination weather conditions are at AIP ENR 73 *Alternate Aerodromes*, paragraphs 73.1 and 73.2. In addition, AIP ENR 1.10 *Flight Planning*, paragraph 1.2.5 discusses the validity requirements affecting the destination and (if required) alternate aerodrome forecasts, and the requirement for the nomination of those aerodromes in the flight plan. ENR 1.10 paragraph 1.2.6 requires the update of meteorological and operational information should a flight be delayed by more than 1 hour. All of which explicitly refer to the application of meteorological forecasts to flight planning. There is no guidance to suggest pilots should update their initial planning to ‘make provision for flight to an alternate aerodrome’ or to ‘provide for a suitable alternate aerodrome’ in response to en route weather or other updates.

Relevant rating and licence syllabi. As a part of this investigation, the ATSB examined the respective theory syllabi for a Command Instrument Rating and for the Day VFR syllabus (covering the theory requirements for the Private Pilot and Commercial Pilot (Aeroplane) Licences). In addition, the owner of a large Airline Transport Pilot (Aeroplane) Licence (ATPL(A)) school was interviewed, as an expert on the required knowledge for an ATPL(A) licence. All of the evidence indicated that, while a pilot should know how to find or to calculate the necessary information in support of a decision to continue a flight, pilots are not being taught how and when to request the necessary in-flight information to undertake or update those calculations. In addition, once a pilot has made those calculations, it appears that they have not been taught how to use the results of the calculations to make the most appropriate decision to ensure safe flight.

Long distance operators’ en route fuel planning requirements. An examination was carried out of a number of long distance turbine operators’ en route fuel planning requirements for application by their crews in circumstances such as described above (in terms of the duration of a flight, the availability of alternates and the weather at the planned destination). In most cases, the respective operations manuals required flight crews to ‘monitor’ the destination weather, and to ‘consider’ the need to divert. Of those operators examined, two used a prescriptive ‘decision to continue’ method in flights of this type. One of those was Pel-Air, which recently incorporated this requirement following consultation with CASA staff.

In-flight application of the existing regulations and guidance

The ATSB has identified an inconsistent approach by pilots to the en route management and application of destination weather. Responses from operators and flight crew indicate that flight crew are expected to use ‘good airmanship’, ‘common sense’, or ‘conservative decision making’ when making in-flight decisions to divert. These are tacit, experience-driven methods of managing in-flight decision making. The subjective nature of that methodology decreases the reliability of the decisions, increasing risk. The investigation has established a number of examples of that unreliability, including:

- **When flight crews seek weather updates.** Some crew indicated that they obtained regular updates of their destination’s weather, and some used operationally-driven triggers. That included when approaching a critical operational point, such as the last point of safe diversion.
- **Weather products sought by flight crews.** Some flight crews stated that, when en route, they requested destination aerodrome weather reports, and correlated them with the pre-flight aerodrome forecasts (TAF) to satisfy themselves that the pre-take off destination forecast was still correct. Some flight crews preferred to check if the destination’s TAF had been amended.
- **Weather product reliance - in-flight decisions.** Some flight crews indicated that they based their in-flight decision to continue or to divert on the destination TAF; some based their decision on developing trends in the destination weather reports; and others used forecasts when more distant from their destination, and changed to relying on weather reports as they got nearer to their destination.
- **Relevance of the landing and alternate minima to the decision to divert.** Some flight crews reported that they diverted if the destination weather information (be it derived from the TAF or destination weather reports) was below the destination aerodrome’s alternate minima. Alternately, some crews stated that they only diverted if the weather information approached or was below the destination aerodrome’s landing minima.



Australian Government
Civil Aviation Safety Authority

Trim Ref: AT10/23

26 March 2010

Mr Ian Sangston
Director
Aviation Safety Investigations
Australian Transport Safety Bureau
PO Box 967
CIVIC SQUARE ACT 2608

29 March 2010

① Joe Hattley *29/3/2010*

② Mike Watson

Dear Mr Sangston

I refer to your letter dated 26 February 2010 regarding draft Transport Safety Report AO-2009-072.

CASA's comments on the safety issues raised in this report are attached.

Please contact John Grima,

Yours sincerely

Richard White
Manager
Accident Liaison and Investigation Unit

Draft Transport Safety Report AO-2009-072 raised the following safety issue:

There were no regulations or other guidance for application by flight crews when making in-flight, weather-related decisions in a changing meteorological environment. That reduced the reliability of in-flight decision making, and increased the risk of an aircraft arriving at a destination with insufficient fuel to continue to an alternate aerodrome, if the weather at the intended destination has deteriorated below its landing minima.

While the Civil Aviation Regulations are not prescriptive in relation to in-flight decisions of the type you describe, CASA considers that (a) the current legislative regime, combined with (b) aeronautical knowledge training requirements contained in the *Day VFR Syllabus – Aeroplanes*, and (c) published guidance material, has the result that pilots should make appropriate in-flight decisions. However, CASA is nonetheless reviewing the regulations with a view to seeking appropriate amendments to them.

Day VFR Syllabus – Aeroplanes

This syllabus contains various flight standards and aeronautical knowledge training requirements dealing with fuel planning, calculations, diversions, decision making, human factors and threat and error management. The relevant references are summarised below.

FLIGHT STANDARDS: Unit C4: *Manage Fuel*, Element C4.2 – *Manage fuel system*; Unit C6: *Manage Flight*, Element C6.3 – *Assess situations and make decisions*; Unit C7: *Threat and Error Management*, Element C7.1 – *Recognise and manage threats*; Unit C8: *Navigate Aircraft*, Element C8.7 – *Perform diversion procedure*.

AERONAUTICAL KNOWLEDGE TRAINING – GROUND TRAINING BLOCK 2: 7 – *Navigation* – 7.4 *Computations*, 7.5.5 *Plan in-flight diversions*; 8 – *Aircraft Operation, Performance and Planning* – 8.9 *Equi-time point (ETP), Point of no return (PNR)*; Diversions 11 – *Human Performance and Limitations*.

Sections of the Air Transport Pilot Licence are also relevant in particular Section 5.4 *Practical Flight Planning and Flight Monitoring* and Section 7.5 *Threat and Error Management*.

Education program

In 2009, CASA provided a comprehensive package to all sectors of the aviation industry (particularly for Regular Public Transport, charter operators and flying training schools) titled *Safety Behaviours – Human Factors for Pilots*. This package contained various multi-media training materials in respect of human factors, situational awareness and decision making. A copy of this material was also provided to the ATSB for information. In addition, the *Flight Safety Australia* magazine has made reference to many in-flight decision related accidents and incidents aimed at enhancing pilot awareness of making sound in-flight decisions.

Operations manual and reckless operation of aircraft

The accident also highlighted the need for the operator to have an appropriate and detailed operations manual. Compliance with an operations manual is required by CAR 215 and in this respect an operator's prescriptive requirements are mandatory. CAR 224 also imposes obligations on a pilot on the "continuation, diversion and end of a flight" having regard to "any information, instructions or directions" and "if applicable, the operations manual."

Section 20A of the *Civil Aviation Act* also makes it an offence to operate an aircraft being **reckless** as to whether the manner of operation could endanger the life of another person (or the pilot).

In relation to the accident flight, this obligation combined with CAR 224 and the proper airmanship required to be displayed the incident pilot required the pilot take into account the things you say he was not required to by the Regulations.

Proposed legislative amendment

CASA has a standards development project underway to review its regulations and guidance concerning fuel planning and alternate aerodrome considerations. This project is being conducted in two phases.

Phase 1 involves reviewing the requirements for operations to remote islands. It is proposed to require fuel for flight to an alternate aerodrome (from the destination aerodromes) for passenger-carrying commercial flights to a remote island, regardless of the meteorological conditions. This will involve amendments to section 82.0 of the CAO and also the addition of guidance in Civil Aviation Advisory Publication (CAAP) 234-1. The CAAP will also be enhanced by providing guidance on considerations necessary for flights to any remote aerodrome and in particular, when and under what circumstances a pilot should consider a diversion.

Phase 2 will involve a more comprehensive review of CAAP 234-1, with an emphasis on in-flight fuel management. Regulatory changes are also being considered to further strengthen the requirements for in-flight fuel management, including a requirement that a pilot must not continue a flight to its intended destination if a safe landing can not be performed (with fuel reserves remaining in tact), when an alternate aerodrome is available.

CASA believes that in-flight decision making in relation to in-flight diversions requires some manner of pilot discretion and judgement in deciding whether to divert or not. There are many variables to consider for each aerodrome when considering this action. These include not just meteorological conditions but also other variables such as the availability/reliability of weather forecasts, navigation aid availability, runway characteristics and the possibility of aerodrome closure.

If regulations were made requiring diversions to be made in certain defined circumstances, this may create new threats which could pose potential risks to safety. The December 2007 Norfolk Island incident (Occurrence Investigation Report AO-2007-070) is an example of where a diversion may pose such risks. From the

investigation report it seems that before commencing the approach to Norfolk Island, the flight crew decided that they would divert to Noumea if a landing could not be made due to weather. During the missed approach the leading edge device failed. Despite this, the flight crew continued their climb and diversion to Noumea. It was not until top of climb that the flight crew considered the possibility of having insufficient fuel to reach Noumea, with the possibility of have to ditch the aircraft. It does not appear that the flight crew considered the option of holding and attempting another approach at Norfolk Island. This may have been the safest option, particularly if the failed slat did not retract further upon troubleshooting, providing the range necessary to reach Noumea.

These threats must be weighed up to ensure the safest outcome is achieved. This is where a pilot's discretion is necessary. Every situation and event is likely to be different and a one-size-fits-all regulation effectively mandating a diversion to an alternate aerodrome could, in certain cases, create new and unintended risks.

For these reasons, CASA is of the view that providing guidance on the matters a pilot should consider, rather than prescribing certain actions to be made, is the safest option.

However, as stated above, CASA is proposing to make amendments to section 82.0 of the CAO for commercial passenger-carrying operations to a remote island. CASA is proposing that fuel for diversion to an alternate aerodrome must be carried in all circumstances. This mitigates the threat of an aircraft being unable to land at the destination aerodrome and not having fuel for diversion to an alternate aerodrome. CAAP 234-1 will provide further guidance on the considerations which should be made in this case.



Australian Government
Civil Aviation Safety Authority

OFFICE OF THE DIRECTOR OF AVIATION SAFETY

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05 December 2012

Senator the Hon Bill Heffernan
Chair
Senate Rural and Regional Affairs
and Transport References Committee
Parliament House
CANBERRA ACT 2600

Dear Senator Heffernan

**Questions to Airservices Australia and the Australian Transport Safety Bureau
at 19 and 21 November hearings**

During testimony by officers of Airservices Australia and the Australian Transport Safety Bureau during the hearings of the Senate Rural and Regional Affairs and Transport References Committee Inquiry into aviation accident investigations (Pel-Air) on 19 and 21 November 2012, two questions were taken on notice on behalf of CASA. CASA's responses to these questions are as follows:

19 November (Hansard p.7)

Senator XENOPHON: Who is responsible for ensuring that material, which requires some sort of mandatory action, is properly based on a legal instrument and with an appropriate head of power?

Mr Hobson: The author, CASA.

Senator XENOPHON: In the particular case of AIP ENR 73, Alternate Aerodromes, is there one or more legal instruments that establish those requirements?

Mr Hobson: On notice, please.

Civil Aviation Regulation 240 provides CASA with the head of power to issue instructions relating to alternate procedures. When not issued in the form of a Civil Aviation Order, such instructions must be served on a person or published in NOTAMS or AIP if it is to be binding. The instrument supporting the instructions appearing in ENR 73 is Civil Aviation Authority Instrument Number DASR 1/1994 (6 January 1994).

21 November (Hansard, p.21).

CHAIR: Could you also provide the date of the transfer of the chief pilot of Pel-Air to CASA?

Mr Dolan: We will ask CASA and do what we can.

Senator XENOPHON: It might be simpler to ask CASA directly.

Mr Dolan: I think it might be, but we will do what we can to facilitate. Can I suggest that I ask CASA to provide the information direct to the committee?

CHAIR: Yes.

Senator XENOPHON: Or the committee could ask CASA directly...

The attention of the Committee is drawn to CASA's response to a question taken on notice (CASA08) at the hearing of 22 October 2012 from Senator Nash (p.52 of *Hansard*) about the recruitment of Mr John Wickham. The CASA response was published on the Committee's website and indicates Mr Wickham commenced employment with CASA in February 2011. The exact date was 28 February 2011.

I would like to take this opportunity to clarify that Mr Wickham was not in any way 'transferred' from Pel-Air to CASA. This implies some kind of arrangement between Pel-Air and CASA giving rise to Mr Wickham's employment by CASA. This was certainly not the case.

A great many applicants for positions in CASA work, or have previously worked, for an air operator. CASA's recruitment processes are competitive and applicants are selected individually on their merit. A successful applicant's former employer is not involved in that process, except perhaps, in some cases, as a referee.

I trust this information is of assistance.

Yours sincerely

John F. McCormick
Director of Aviation Safety