

The Senate

Rural and Regional Affairs and
Transport Legislation Committee

Transport Safety Investigation Bill 2002

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Chapter One

The Committee's Inquiry

Reference of the Bill to the Committee

1.1 On 16 October 2002 the Senate referred the Transport Safety Investigation Bill 2002 to this Committee for examination and report by 12 November 2002: Due to the complexity of matters raised by the inquiry and the need to consider amendments proposed to the bill by the Minister, the Committee has been granted several extensions of time to table the report by the Senate..

1.2 The Committee was asked to address concerns from civil aviation organizations particularly representing pilots, who were not consulted on the provisions of Bill.

Purposes of the Bill

1.3 The main purpose of the Bill is to consolidate the Statutory structure for the investigation of Air and shipping accidents by the Australian Transport Safety Bureau within a single Act and for the first time to provide for statutory rational rail safety investigation.

The Committee's Inquiry

1.4 Following the referral of the Bill, the Committee wrote to key stakeholder groups - especially in civil aviation, to invite submissions. A total of 13 written submissions was received. A list of written submissions is included at Appendix 1.

1.5 In addition, the Committee was forwarded some two hundred and fifty faxed letters commenting on and supporting the Air Safety Australia submission on the Bill. These are tabled with this report.

1.6 The Committee held a public hearing on the Bill in Canberra on Thursday, 24 October 2002 . The witnesses who appeared at the hearing are listed at Appendix 2 of the report.

1.7 Published submissions and the *Hansard* of the Committee's hearing on the Bills are tabled with this report. The *Hansard* of the hearing is available at the Hansard site on the Parliament House homepage on the Internet (www.aph.gov.au).

1.8 Following the hearing, the Minister for Transport and Regional Services, the Hon John Anderson MP, wrote to the Committee (on 17 November and 4 December 2002) proposing detailed amendments to the Bill.

1.9 The Committee subsequently consulted these who made submissions to the Committee's inquiry on these amendments before finalising its report to the Senate.

Consideration of the Committee's Report

1.10 The Committee met on 10 and 11 December 2002 to consider its report.

Acknowledgements

1.11 The Committee acknowledges the considerable assistance and contribution made to its inquiry by all those who prepared written submissions on this inquiry. The Committee also acknowledges the assistance provided at its public hearing on the Bills by all witnesses.

1.12 In particular, the Committee acknowledges the considerable assistance provided by the summary of the Bill provided in the Parliamentary Library Bills Digest which has advised the Committee in the preparation of Chapter 2 of this report.

1.13 In addition, the assistance of the Australian Transport Safety Bureau and of principal witnesses in analysing the effect of this Bill and proposed amendments is appreciated by the Committee.

Chapter Two

The provisions of the Bill

2.1 The Bill's purpose is to consolidate the statutory basis for the investigation of air rail and shipping accidents by the Australian Transport Safety Bureau within a single Act and for the first time to provide for statutory national rail safety investigation.

Background to the Bill

2.2 The Australian Transport Safety Bureau (ATSB) was created in July 1999 by amalgamating the former Bureau of Air Safety Investigation (BASI), the non-regulatory parts of the Federal Office of Road Safety (FORS) and the Marine Incident Investigation Unit (MIIU).⁽¹⁾ It is a non-statutory agency within the Commonwealth Department of Transport and Regional Services (DOTRS).

2.3 The ATSB

is operationally independent and has a strict organisational separation from transport regulators and other bodies that may need to be investigated. ATSB undertakes investigations and analyses safety data without fear or favour and in so doing helps to improve safety and maintain public confidence that the safety of the transport system is not being compromised.

2.4 ATSB air safety investigators currently exercise statutory powers delegated by the Executive Director, who has been designated the Director of Air Safety Investigation under Part 2A of the *Air Navigation Act 1920*. The Executive Director has the power to release air safety information under section 19HA and delegated power to release final investigation reports under section 19CU. Note that disciplinary action and criminal or liability assessment do not form part of ATSB safety investigation and may be progressed by separate agencies.

Incorporation of rail transport within ATSB's mandate

2.5 One of the principal changes that is proposed by the Bill is to provide ATSB with legislative authority in relation to rail safety investigation. Amongst other things, this will provide ATSB with the ability to collect evidence, restrict disclosure of relevant information etc in a way that overrides State safety investigations carried out under State law.

Main Provisions of the Bill

Preliminary

2.6 **New section 7** outlines the objects of the Act. Notably, it makes clear that attributing blame for transport accidents or incidents or providing the means to

determining the liability of any person for the same is not an object of the Act. This 'no blame' approach is in line with current ATSB practice.

2.7 **New section 8** provides that the Chapter 2 of the *Criminal Code Act 1995* applies to all offences in the Act. This means that standardised concepts of fault, availability of defences etc apply.

2.8 **New section 10** clarifies that the Act is not intended to exclude the operation of State and Territory laws as long as they are capable of operating concurrently with the Act. In practice, while this allows the States and Territories to proceed with their own statutory transport safety investigations, ATSB will be able to collect evidence, restrict disclosure of relevant information etc in a way that overrides State safety investigations carried out under State law. Page 34 of the explanatory memorandum to the Bill gives an extensive commentary about the rationale for **new section 10**.

2.9 **New section 11** sets out the circumstances in which the powers under the Act apply. These reflect the Commonwealth's constitutional limitations in regulating transport. The most common circumstances in which the powers of the Act will apply include those that involve interstate or overseas trade or commerce, involve a constitutional corporation, take place outside of Australia or attract the external affairs power.

2.10 The investigatory powers of the ATSB under the Act are further restricted by **new section 22**. There are two main restrictions. The first is that the relevant 'transport safety matter must have a connection with Australia, unless in the case of a foreign registered ship or aircraft the foreign country requests ATSB to investigate. The second restriction is where the transport safety matter involves an Australian military ship or aircraft or a foreign military, police or customs ship or aircraft, ATSB can only investigate if the incident *also* involves another civil vehicle or transportation facility. However, the second restriction does not prevent the ATSB from investigating in relation to an Australian military ship or aircraft if it is requested to do so by the Defence Force.

Administration

2.11 **New section 12** requires the Secretary of DoTARS to create the position of the Executive Director of Transport Safety Investigation under section 77 of the *Public Service Act 1999*. The Executive Director may delegate most of his or her powers to another person. However, the powers to appoint special investigators (**new section 14**) and publish investigation reports (**new section 25**) cannot be delegated.

2.12 The Executive Director cannot be directed by either the Minister or Secretary 'in respect to the exercise of [his or her] powers under this Act' except the Minister may require the Executive Director to investigate a transport safety matter: **new sections 15** and **21**. In exercising powers under the Act, the Executive Director 'must have regard to the desirability of minimising any resulting disruption to transport by means of transport vehicles': **new section 16**. He or she must also ensure that such

powers are 'exercised in a manner that is consistent with Australia's obligations under [those] international agreements' listed in regulations: **new section 17**.

Compulsory Reporting

2.13 **New sections 18-20** provides for compulsory reporting of certain matters by 'responsible persons'. The range of matters, and meaning of responsible persons, are to be prescribed by regulations. If a responsible person has knowledge of a reportable matter and fails to report it 'as soon as practicable' they commit an offence punishable by up to six months imprisonment: **new subsection 18(1)**. No offence occurs if they believe 'on reasonable grounds' that another responsible person has duly reported the incident. The method of reporting is also to be prescribed by regulations.

Investigations and reports

2.14 Part 4 of the Bill deals with investigations and reports.

2.15 **New section 21** provides the Executive Director with the power to investigate any transport safety matter subject to the limitations previously mentioned in **section 22**. The Executive Director may discontinue an investigation at any time, although they must make publicly available the reasons for doing so within 28 days of the discontinuation. Presumably this 'discontinuation' power also applies for investigations ordered by the Minister under **new paragraph 21(1)(b)**.

2.16 **New section 24** creates the offence of hindering an investigation. Essentially, an offence occurs if a person is reckless as to any possible adverse impacts of his or her conduct on a current or possible future investigation (note the conduct must actually adversely affect such investigation) and the conduct is not authorised by the Executive Director. An offence is punishable by up to six months imprisonment. An offence does not occur if the conduct is necessary to ensure the safety of persons, animals or property, remove bodies, move the relevant transport vehicle to a safe location or protect the environment from significant damage or pollution. Refusing to let the Executive Director (including of course their delegate) enter private premises that is not an accident site does not give rise to an offence.

2.17 The explanatory memorandum to the Bill comments that⁽¹¹⁾

This provision is intended to cover conduct such as withholding information, concealing evidence, tampering with evidence etc but no conduct will constitute an offence unless it actually has an adverse effect on an investigation. This clause not only relates to accident sites where it is very important that evidence is preserved, but also extends to include such things as the destruction/removal of evidence remote from the accident site such as minutes of meetings, training records, data recordings etc. Such information may provide crucial evidence pertinent to the investigation. Where an immediately reportable matter has occurred, the offence may apply before the matter is reported and before Executive Director decides to investigate. This is because a person would reasonably be expected to know that the Executive Director is likely to investigate in such cases.

2.18 **New section 25** provides for the compulsory publication of investigation reports by the Executive Director. He or she may also publish preliminary reports, interim factual reports, safety recommendations etc, whether or not the investigation has been completed. A report may include submissions made to the Executive Director either in response to a draft report released under **new section 26** or to safety recommendations. The explanatory memorandum comments

for example, the Executive Director may wish to include, as part of the public record, comments made by directly involved parties to the investigation in relation to the accuracy of the factual information in a draft report

2.19 The Executive Director may give draft reports to persons for comment or for the purpose of 'advance notice'. Any draft reports so given are confidential and copying or disclosing the report, except in very limited circumstances such as remedying safety deficiencies identified by the draft report, carries a maximum penalty of 2 years imprisonment: **new subsection 26(2)**.

2.20 A published report cannot include the name of an individual unless they have consented to the inclusion. This is reflection of the 'no blame' approach to ATSB's reporting. Further, **new section 27** provides that **new section 25** and **26** reports are not admissible in evidence in civil or criminal proceedings, although **new section 25** reports (ie published reports) are admissible in a coronial inquiry.

Investigation Powers

2.21 **New section 28** provides that any powers conferred under Part 5 can only be exercised 'for the purposes of an investigation'.

2.22 **New section 32** allows the Executive Director to require a person to attend an examination and answer any questions under oath or affirmation relevant to an investigation or produce any specified evidence. 'Examination' provisions are becoming fairly common in recent Commonwealth legislation, though their content varies.

2.23 Under **new section 47** a person is *not* excused from answering questions or evidential material on the grounds of self-incrimination, or of exposure of the individual to a penalty. However, the information, evidence or documentation, or anything obtained as a direct or indirect consequence⁽¹²⁾ of the information, evidence or documentation provided cannot be used in evidence against the individual in *criminal* proceedings except for a prosecution for failing to provide information or giving false or misleading information. Note that the information given could be used to criminally prosecute a company. There is no right for counsel to be present at an examination, nor is there any provision for a record of the examination to be given to the examinee.

2.24 Failure to attend an examination, answer lawful questions, provide requested evidence or a refusal to take an oath or affirmation is punishable by a fine of up to \$3 300.

2.25 **New sections 33-39** contain a fairly standard set of search and seizure provisions, except that in the case of 'special premises' the Executive Director requires neither a warrant nor the occupier's consent to enter. Special premises encompass accident sites, the transport vehicle(s) involved, and any thoroughfares needed to get access to these. The Executive Director may use 'reasonable force' to gain entry to special premises or to any premises under warrant. Where entry is to special premises or to any premises under warrant, he or she may also require a person on the premises to answer questions or produce evidential material and seize and evidential material without the occupier's consent - a failure to answer questions attracts a fine of up to \$3 300: **new section 36**. **New section 47** applies to **new section 36**. Occupiers are entitled to be present during a search as long as they do not impede to search. Standard compensation provisions apply under **new section 46** should any electronic equipment or data be damaged or corrupted through insufficient care as the consequence of operating equipment under **new section 36** to access evidence.

2.26 **New sections 40-42** deal with the issuing of investigation warrants by magistrates. These are all standard provisions regarding the grounds for the warrant, requirement for the provision of information on oath to the magistrate etc. The making of false or misleading statements in applying for an investigation carries a maximum penalty of two years imprisonment.

2.27 **New section 43** provides that the Executive Director may issue a protection order to prevent evidence that might be relevant to an investigation from 'being removed or interfered with'. The penalty for contravention of an order is imprisonment for a maximum of 12 months. As for **new section 24**, a **new section 43** offence does not occur for actions done to ensure the safety of persons, animals or property etc.

2.28 **New section 45** deals with the treatment of evidential material. In particular, **new subsections 45(6) and 45(7)** allow the Executive Director to provide evidential material that is not an on-board recording or restricted information (see below) directly to other Commonwealth and State authorities or to a coroner. However, before doing so, the Executive Director must be satisfied that making the material available will not interfere with an investigation to which the material relates.

Protection of on board recordings and restricted information

2.29 **New sections 48-63** contain provisions setting out limited circumstances in which 'on-board recording' (OBR) information and 'restricted information' can be disclosed or otherwise made available to various parties. OBRs are defined in **new subsection 48(1)**, but the most common example is of course the cockpit voice recording (CVRs) devices used in larger commercial aerservices. According to the explanatory memorandum, it is arguable that the release of CVR information on occasion into the courts and the public domain has in fact had a prejudicial effect on transport safety:

...CVRs were originally intended only to be used to assist in the investigation of occurrences where the flight crew were fatally injured as a result of an accident and were therefore unable themselves to provide critical safety information about the events immediately preceding the

accident. CVR information is now used more broadly in many non-fatal accidents and serious incidents as the information has also proven to be vital in those cases.

It is acknowledged that such recordings constitute an invasion of privacy for the operating crew of an aircraft that most other employees in workplaces are not subject to. Such recordings, therefore, must be treated with the utmost confidentiality and continue to be used for safety investigation purposes only. To ensure the ongoing availability of information from CVRs, it was considered necessary to protect the rights of individuals, in particular the operating crew of an aircraft. Inappropriate use of CVR information in the judicial system, for example, may adversely affect transport safety, both domestically and internationally, as it is unlikely that the availability and free flow of safety information will be guaranteed/continued in the future. Inappropriate use by an operator such as for disciplinary action may also result in an adverse outcome for transport safety. For example, the operating crew of an aircraft has the ability to deny access to CVR information simply by ‘pulling’ a circuit breaker, thus rendering a CVR inoperative.

In a recent case in New Zealand (NZ), the desire of NZ police to prosecute a DASH-8 crew for an operational error that led to an aircraft crash resulted in strong ICAO/international criticism. In this case, the police charged the crew with manslaughter and seized the cockpit voice recorder as evidence. These actions subsequently led to NZ and foreign aircrews ‘pulling’ circuit breakers on CVR devices when within NZ airspace and in doing so, rendered the CVR inoperative. This effectively denied access by investigators to vital information for future safety investigations. Aircrews were also less inclined to be cooperative and forthcoming to safety investigators in relation to their role in air safety occurrences. At the time of the events described above, NZ legislation did not provide protection regarding the disclosure and use of CVRs. Those tensions have since eased with a change to NZ law that now provides similar disclosure and use provisions for CVRs as those provided in Australian legislation.

The need to provide adequate protection to CVR information was recently reaffirmed by the International Civil Aviation Organisation (ICAO) in its Working Paper A33-WP/46 of 29 June 2001, in which it expressed a concern about inappropriate use of accident and incident records in some Contracting States. ICAO considered that accident and incident records such as CVR recordings should be protected from utilisation in disciplinary, civil, administrative and criminal proceedings, and from disclosure to the news media and the public. Therefore, it proposed a resolution urging Contracting States ‘to examine, and if necessary, adjust their laws, regulations and policies to protect certain accident and incident records in order to mitigate impediments to accident and incident investigations’.

2.30 Information that falls within the definition of an OBR under **new subsection 48(1)** can be excluded from the definition either by regulations (**new subsection 48(2)**) or by a decision of the Executive Director (**new subsection 49(1)**).

2.31 The Executive Director can only exclude an OBR on the grounds of either a decision not to investigate the relevant transport safety matter or deciding part of the OBR is not relevant to the investigation.

2.32 **New section 53** creates a criminal offence for copying or disclosing OBR information except in certain cases. An offence carries a maximum penalty of 2 years imprisonment. The main exceptions (ie where disclosure or copying is permitted) are:

- in the course of the exercise of powers under this Act or in connection with the Act - for example under **new section 51**. The explanatory memorandum comments that this might occur for example 'as a normal part of the investigation process where a team approach is taken and where it may be necessary to disclose the contents of an OBR to external experts and others for the purposes of properly analysing the significance of the information'⁽¹⁴⁾
- for purposes of the investigation of any offence against a law of the Commonwealth, State or a Territory
- to a court for the purposes of criminal proceedings against any person who is *not* a crew member of a relevant transport vehicle - for example the OBR could be used in prosecuting a passenger for an assault or hijacking, or
- to a court⁽¹⁵⁾ in civil proceedings if the Executive Director has issued a certificate under **new section 50**⁽¹⁶⁾ and the court is satisfied that the public interest outweighs any adverse impact of such disclosure on any current or future investigation.

Even if OBR information is disclosed to a court under one of the above, **new subsection 53(5)** allows the court to issue directions to prohibit or restrict publication and communication of the OBR information to any person. The explanatory memorandum comments that this allows a court to:

ensure that the "audience" is restricted to only those persons necessary and keeps out other parties, for example, the media, who may take the OBR information out of context or use it for purposes other than relating to the proceedings.⁽¹⁷⁾

2.33 Even where OBR information is lawfully disclosed, a person cannot take disciplinary action against an employee 'on the *basis* of OBR information': **new section 54**. However, it is not clear whether OBR information could be *used in conjunction* with other evidence to support a disciplinary action.

2.34 OBR information is not admissible as evidence in any criminal proceedings against a crew member of a transport vehicle, other than proceedings under the Act (for example a prosecution under **new section 18** for failure to report an incident): **new section 55**

2.35 **New section 51** allows the Executive Director to disclose OBR information if they consider is 'necessary or desirable for the purposes of transport safety'. If this

information contains personal information,⁽¹⁸⁾ those elements can be only disclosed in circumstances to be prescribed in regulations.

2.36 **New section 56** restricts the admissibility of OBR information in civil proceedings. **New subsection 56(1)** allows OBR information to be admitted in civil proceedings *only* if the Executive Director has issued a **new section 50** certificate *and* that the court has made an order under **new subsection 56(3)**.⁽²⁰⁾ Essentially **new subsection 56(3)** requires the court to be *both* satisfied that that the OBR information is the only source of evidence regarding a material fact *and* that the public interest outweighs any adverse impact of such disclosure on any current or future investigation. OBR information admitted under **new section 56** cannot be used as evidence in determining any liability of a crew member of the transport vehicle: **new section 58**.

2.37 **New section 59** allows a coroner to request OBR information held by the Executive Director. Access must be granted unless the Executive Director believes the coroner's access to the information is likely to interfere with any investigation to which the OBR information relates. The explanatory memorandum comments:

For example, a particular transport safety matter may still be under investigation at the time of a coronial inquiry into that same or related matter. In such cases, the Executive Director may consider it inappropriate to disclose the requested OBR information at that time as it may prejudice that investigation if that information was made public before the investigation was completed.⁽²¹⁾

If the OBR information is obtained by the coroner, he or she can only disclose it in the context of coronial proceedings if they consider the information is relevant to proceedings, cannot be obtained by an alternative means, and where any adverse impact on a safety investigation is outweighed by the public interest. Even if it is so disclosed, the coroner may issue directions to prohibit or restrict publication and communication of the OBR information to any person. Contravention of a direction is an offence carrying a penalty of up to 2 years imprisonment: **new subsection 59(5)**.

Subject to some exceptions, **new subsections 60(1)-(3)** prohibit a person who is or has been a staff member,⁽²²⁾ or who has been authorised to access restricted information under **new section 62**, from making a record of restricted information, or disclosing the information to any person. Restricted information is defined in **new section 3**, but generally covers various types of sensitive information acquired or made in the course of an investigation. Disclosures or copying are permitted if they are done by persons performing functions under the Act: **new subsection 60(4)**. Disclosure is also permitted by the Executive Director in civil or criminal courts under limited circumstances: **new subsections 60(4)-(6)**. If disclosure is prohibited by **new section 60**, a court cannot order them to disclose it: **new subsection 60(8)**. Any information from a prohibited disclosure is not admissible in any civil or criminal court: **new subsection 60(8)**.

The Executive Director may disclose restricted information if they consider this is 'necessary or desirable for the purposes of transport safety': **new section 61**.⁽²³⁾ If this

information contains personal information those elements can only disclosed in circumstances to be prescribed in regulations.

The powers of Parliament and Royal Commissions to obtain information are not bound by Part 6.

Chapter Three

Issues raised during the Committee inquiry

Introduction

3.1 Matters raised during the Committee's inquiry into the Bill are directed at three issues:

- Access by interest parties (particularly insurance) to accident investigation site during or shortly after investigations by ATSB
- Power of search and entry
- The status given to cockpit voice recordings (CVR's) might be put under the Bill.

Reasons for Preparation of the Bill

3.2 In its submission, the Australian Transport Safety Bureau Director, Mr Kym Bills explained the reason for the Bill as follows

A main purpose of the TSI bill is to provide the ATSB with a new power to conduct independent and professional no blame safety investigations on the interstate rail network, and this reflects the growing importance and reform of interstate rail. Although existing ATSB powers for aviation and marine safety investigation are relatively unchanged, other than to reflect the generic multimodal character of the bureau's work and to harmonise among the modes, some changes are proposed.

The ATSB still intends to focus on fatal accidents, and accidents and incidents involving commercial—especially passenger—transport with most safety value. We submit that in reading the TSI bill it is misleading to take clauses out of their no blame safety context in the bill and regulations or to ignore the current legislation. An investigation by the ATSB is undertaken based on Australia's international marine and aviation obligations, such as that in annex 13 to the Chicago Convention on International Civil Aviation.¹

Consultation

3.3 In relation to a principal issue before the Committee – consultation with aviation bodies – Mr Bills told the Committee

It was not practicable for the ATSB to consult individually with every possible stakeholder in aviation, marine, rail, coronial, police, OH&S, state and territory government and other sectors. Nevertheless, consultation in the

1 *Hansard, 24 October 2002, p2.*

aviation sector was significant. CASA, Airservices, the Department of Defence, Qantas, Ansett, Virgin Blue, the Regional Airlines of Australia Association, the Aircraft Owners and Pilots Association of Australia, the Helicopter Association of Australia, the Aerial Agriculture Association of Australia, the Australian Federation of Air Pilots, the Ansett Pilots Association, the Australian Airline Flight Engineers Association, the Australian and International Pilots Association, the Civil Air Operations Officers Association of Australia and the Flight Attendants Association of Australia were invited to a workshop on the bill on 21 September 2001. They were also provided with an exposure draft of the bill and an explanatory memorandum, upon which any comment, concern or request for further briefing was sought.

The minister and government were advised of the consultation and approved all aspects of the TSI bill, once clauses conformed with the Commonwealth's legal policies as overseen by the Attorney-General's Department. The minister issued a media release about the TSI bill when it was introduced on 20 June this year. The bill and explanatory memorandum were placed on the ATSB's web site shortly thereafter. Despite the ATSB's efforts, there was little response from most aviation bodies until recently. This had suggested that they had no major concerns with the bill. However, following a campaign by Air Safety Australia, concern has recently been raised by AOPA, the Ultralight Federation, AIPA, AFAP, RAAA, and others. Mostly it has taken the form of adopting suggestions made by Mr Munro, which I have already broadly addressed in these opening remarks.²

And, in answer to a question from Senator Colbeck

Senator Colbeck - In your presentation today you mentioned the consultative process. Why didn't you consult with Air Safety Australia?

Mr Bills - We were not aware that Air Safety Australia had presented its credentials to government and sought to be involved in consultation. In fact, when we checked with the Civil Aviation Safety Authority, who were engaged in a lot of consultation on their regulatory program—because there is not a lot of legislation in the aviation area—CASA advised us not only that they were not on their consultation list but also that they had specifically sought not to be consulted in relation to, I think, part 47 of the civil aviation regulations. So we were not aware that that body had said they wanted to be consulted and therefore we did not consult with them.³

Principal Issues for Consideration

Access to accident site and ATSB Investigation Process

3.4 In its submission to the Committee, QBE Aviation Insurance put to the Committee that the Bill contains provisions which would deprive airlines and insurers

2 *Hansard, 24 October 2002, p3.*

3 *Hansard, 24 October 2002, p9.*

of the opportunity to conduct their own investigation to an accident and the experts could find themselves excluded from the accident investigation process and from accident sites.⁴

3.5 In particular, provisions included in Clause 26 and 33, 44, 45 and 66 appear to limit the rights of insurers, to information and the ability to examine an accurate finding to protect insurer and aircraft owner interests. In addition, QBE submitted that representatives of the airline or insurer should be permitted access to material to be examined particularly if testing or recovery of material irrecoverably changes the nature of accident material.⁵

3.6 QBE noted in its submission that clause 44 of the Bill was a matter of particular concern.

Under clause 44, the Executive Director may secure the perimeter of an accident site and any person who enters the accident site or remains on the accident site without the permission of the Executive Director is guilty of an offence. There is no offence if the person is present to ensure the safety of persons, animals or properties, to remove deceased persons, to move a vehicle or wreckage to a safe place or to protect the environment.

The power to secure accident sites in clause 44 is of particular significance in the case of aircraft accidents because there have been recent accidents where the ATSB has secured sites under existing powers to the prejudice of owners and insurers.

Access to an accident site is of considerable importance to airlines, owners and insurers so that experts can carry out their investigation at this critical stage and location and, in some cases, for the purpose of preserving the damaged aircraft or components for salvage or repair.⁶

and

The crucial question in the future, if clause 44 of the Bill is enacted in its present form, will be whether or not the Executive Director will be entitled to withhold permission for representatives of the owner and the insurers to enter or remain on an accident site. Sub-clause 44(4) provides that “*The Executive Director must not unreasonably withhold a permission...*”. The rights of airlines, owners and insurers should be more clearly protected by a provision which preserves their entitlement to enter and remain on the accident site unless there are special safety reasons for their exclusion. It should be incumbent upon the Executive Director to demonstrate special circumstances to justify the exclusion of such representatives.

4 QBE Insurance (Australia) Limited, submission 3,

5 QBE Insurance (Australia) Limited, Submission 3, p1.

6 QBE Insurance (Australia) Limited, Submission 3, p5.

The Bill should provide that representatives of the airline, owners and insurers, unless there is some compelling reason otherwise, are permitted to be present during the examination and testing of aircraft components. This is a serious omission.

Obviously, in the case of destructive testing, the requirement for such a provision becomes even more critical.⁷

QBE's submission also raised difficulties regarding the availability of accident reports and evidence. In relation to clause 66 of the Bill, QBE noted

Under clause 66, a current or past ATSB staff member is not obliged to comply with a subpoena to attend and answer questions relating to an investigable matter if the Executive Director has given a certificate, under clause 65, that the person is or has been a staff member involved in an investigation under the Act. Moreover, an ATSB staff member (the Executive Director and his delegates) is not compellable to give an expert opinion in any civil or criminal proceeding, other than a coronial inquiry, in relation to a matter related to transport safety.

In short, other than at coronial inquiries, it could be impossible to get ATSB officers, and former officers, into court to provide factual evidence of matters uncovered during the investigation but at the same time these may be the only people who were permitted to observe these matters.⁸

and

It will be readily apparent that the powers conferred upon the Executive Director could have a financial impact on owners and insurers, either directly as a result of the loss or destruction of an aircraft or components as a result of a decision by the ATSB or indirectly by the loss of evidence which in turn could mean the difference between success or failure in defending proceedings where negligence is alleged against the owner or in bringing a subrogation action to recover the value of the loss. This may operate against Australian airlines, operators and insurers and favour overseas manufacturers of engines and aircraft⁹

3.7 In a letter dated 10 December 2002 to the General Manager of QBE, the Minister for Transport advised that in relation to proposed clause 44 of the Bill.

Nothing in the current legislation or the TSI Bill explicitly prevents owners/operators from gaining controlled access to an accident site involving their aircraft. The purpose of this clause is simply to ensure that, to the extent possible, the site is controlled in such a way as to ensure that perishable evidence is not inadvertently destroyed and that other evidence is made available to the investigation team for examination and analysis.

7 QBE Insurance (Australia) Limited, Submission 3, p6.

8 QBE Insurance (Australia) Limited, Submission 3, p9.

9 QBE Insurance (Australia) Limited, Submission 3, p11

A secondary purpose of this and other clauses is to ensure that the integrity of the investigation process is not compromised. If an owner/operator or any other person with a direct interest in the occurrence, for example, insurer, were to be able to indiscriminately enter an accident site without restriction, some (including other parties to the investigation and courts) may wish to challenge whether evidence was tampered with or removed, thereby changing the outcome of the investigation, regardless of whether there is any truth to this matter or not.

Any reasonable request to enter and view the site is and would be accommodated in accordance with subclause 44(4), thus providing more certainty than current legislation. The ATSB only requires that the person/s be escorted for the reasons described above.¹⁰

and in relation to clause 66

Clauses 65 and 66 relate to the non-compellability of current and former staff members in court proceedings other than coronial inquiries and not to evidential material. Having appropriate controls over disclosure and use of OBR and Restricted Information would be rendered meaningless and contrary to the principles of Annex 13 without also having appropriate control over the appearance of staff members in adversarial proceedings.¹¹

Cockpit Voice Recordings (CVR's)

3.8 There was strong opposition expressed to provisions in the Bill regarding the potential use – and misuse – of cockpit voice recordings (CVR's) by ATSB (and/or other agencies).

3.9 ATSB Director, Mr Kym Bills told the Committee that

The requirement to use cockpit voice recording in Australia is a requirement under CASA regulations, so it is not a requirement under this act. That may be part of what you have not seen in the bill. The nexus for us to an on-board recording includes clause 48(1)(c), which says:

any part of the recording was made at the time of the occurrence of an immediately reportable matter that involved the transport vehicle ...

Immediately reportable matters are to be defined in the proposed regulations. There is a draft of those on our web site. They are the more serious types of occurrences. If there is a more serious type of occurrence—an accident or a serious incident—we would be interested in the recording and, on that basis, we would probably seek to get it from the aircraft and we would listen to it to see if it could help us with the investigation. There needs to be that nexus to something happening, rather than a general power

10 Minister's Letter, 10 December 2002, p3.

11 Minister's Letter, 10 December 2002, p4.

to pull cockpit voice recordings and listen to them willy-nilly. That is probably the key clause that deals with the issue that you have raised.¹²

3.10 Pilots' organisations generally expressed considerable concern to the AIPA about these provisions. AIPA noted, in its comments on the proposed changes, that

From the beginning, it has always been understood that, with very limited exceptions, cockpit voice recordings are only to be used for accident investigation. This is reflected in Annex 13 of the Chicago Convention, but more importantly, it is reflected in the law presently applying, namely the Air Navigation Act. Section 19 HE of that Act provides that a cockpit voice recording made during the flight of an aircraft operated by an Australian operator is not admissible in evidence in any criminal proceeding in an Australian Court. Section 19 HF provides that a cockpit voice recording is not admissible in any civil proceedings in an Australian Court. The exception to this rule is that a party to civil damages proceedings may apply to the Court for an order that the cockpit voice recording or part thereof be admissible in evidence in those proceedings. If such an application is made, the Court must only admit the recording into evidence if it is satisfied:-

- (a) that a material question of fact in the proceedings will not be able to be properly determined from other evidence available to the Court;
- (b) the cockpit voice recording or part of it will assist in the proper determination of that material question of fact; and
- (c) that in the circumstances of the case, the public interest in the proper determination of that material question of fact outweighs the public interest in protecting the privacy of members of crews of aircraft.¹³

and that the introduction of a classification of new type of recording (On-Board Recording – OBR) was a matter of concern ...,

The significance is simply this: that it is only an OBR or On Board Recording, as defined, which enjoys the level of protection currently afforded to Cockpit Voice Recordings.

At present all Cockpit Voice Recordings are subject to the restrictions on their use for other than accident investigation by the provisions of section 19HE and 19HF of the Air Navigation Act. It does not matter whether the Cockpit Voice Recording was made during the occurrence of an accident, a serious incident, a minor incident, or in routine flight. The Air Navigation Act, and similar enactments in other English speaking countries, protect, to a great extent the confidentiality of such recordings.

But not the Transportation Safety Investigation Bill. A Cockpit Voice Recording would only be an OBR, and partake of the same level of

12 *Hansard, 24 October 2002, p5.*

13 Australian and International Pilots Association, Submission 6, p2.

protection, if it was made at the time of an accident or a serious incident of the kind referred to in the definition of “immediately reportable matter”.¹⁴

and

The net effect of this is three-fold:-

- (a) Cockpit Voice Recordings would only continue to enjoy the level of protection they currently enjoy if an immediately reportable matter, this is a serious incident or an accident, occurred in the course of the recording;
- (b) Cockpit Voice Recordings which are not OBRs, will enjoy a more limited degree of protection as “restricted information” if and only if, they are recordings that are produced from the custody of the ATSB;
- (c) Cockpit Voice Recordings that are not OBRs, and which are in the possession of any other person, and are produced to the Court from the custody of anybody else, enjoy no protection whatsoever.

What is the reason for this extraordinary change in the law? We know of none. Neither are we aware of any cogent criticism of the law as it currently stands.¹⁵

3.11 In evidence to the Committee, Mr Blackburn (representing AIPA as its legal adviser) noted

Our complaint is that at the moment all cockpit voice recordings are inadmissible in criminal proceedings against crew members and largely inadmissible in civil proceedings. That is radically altering under the proposed legislation for this reason: only cockpit voice recordings which fall within the definition of on-board recordings in this bill enjoy that level of protection. A cockpit voice recording— that is, a recording of what is said on the flight deck—which under this new bill does not fall within the definition of an OBR in clause 48 and which is not produced or sought to be produced from the custody of the ATSB, can be acquired from any other source and is completely admissible in all criminal proceedings and all civil proceedings. That is the difference.¹⁶

From the commercial airline pilot’s perspective, there is nothing more dangerous to air safety, assuming that you have a safe aircraft, than the loss of frank communication between flight crew members. That is something that we do not feel there is an appreciation of by the proponents of this bill. If airline pilots get the sense that, in criminal proceedings, for example, in what I might call prosecutions against crew members for infractions of the regulations, they no longer have the protection that the Air Navigation Act provides them— that is, recordings being completely inadmissible in

14 Australian and International Pilots Association, Submission 6, p5.

15 Australian and International Pilots Association, Submission 6, p6.

16 *Hansard, 24 October 2002, p17.*

prosecutions against crew members— then the inevitable consequence of that is that at some time with some crews there is going to be reticence and caution. It is human nature.¹⁷

Other Issues – Search Powers

3.12 The Bill contains provisions which provide a number of new coercive powers and powers of search and seizure to ATSB. Search powers were provided by clauses 32 and 33.

3.13 In its submission, AIPA advised that clause 32 (1) (a) of the Bill provides that a person required to attend and be required to answer questions “put by any person” relating to matters relevant to the investigation.¹⁸

3.14 AIPA noted

The words “any person” are quite unrestrained, and this is plainly contemplated by the explanatory memorandum. Such persons could include representatives of other agencies or private industry. There is no reason why the Act would preclude the presence of an insurer’s representative, an employer’s representative, the police, or a representative of CASA. The ATSB’s view, as we understand it, is that it is ATSB policy not to have persons such as the interviewee’s employer, police, insurers or representatives of a regulatory authority present at those interviews. If that is the ATSB’s policy, then they have absolutely no need for a legislative power that permits “any person” to put questions to a person require to attend, on pain of substantial penalty. One matter of significant concern is the possibility of the attendance of the representative of a foreign manufacturer. Such a person may well be under commercial obligations as to the sharing of information which are quite incompatible with the objectives of the Act.

Under the present section 19CC of the Air Navigation Act, there is a defence of “reasonable excuse” for failing to attend before the director or failing to answer questions. This defence has been removed from the TSI Bill, and the only defences to such a prosecution are the matters listed in part 2.3 of the Criminal Code, which include lack of capacity, mental impairment, involuntary intoxication, mistaken belief or ignorance negating intention, duress or “sudden or extraordinary emergency”. Reasonable excuse is much broader and fairer than these restricted defences. The ATSB’s justification for this is that “reasonable excuse” was removed because the Criminal Law Branch of the Attorney Generals Department objected to its inclusion, as it was not in accordance with current Commonwealth criminal law policy.

17 *Hansard, 24 October 2002, p17.*

18 Australian and International Pilots Association, Submission 6, p9.

This is a vivid example of what appears to AIPA be a lack of understanding of the air safety consequences of this Bill. The change has been made because of the policy of the Criminal Law Branch in the Attorney General's Department. Apparently this change has been made because current legislation does not accord with that policy. Again, there appears to be no appreciation of the effect of these changes on the relationship between pilots and air safety investigators.¹⁹

19 Australian and International Pilots Association, Submission 6, p11.

Chapter Four

Proposals for Amendment of the Bill

Introduction

4.1 As noted in Chapter 1, at the conclusion of its hearing on the bill on 24 October, the Committee urged the Minister and his officials to consult with witnesses who made submissions to the Committee with a view to considering amendment to the bill which would address the concerns raised with the Committee.

Proposed Amendments to the Bill.

4.2 By letter dated 3 December 2002, the Minister for Transport and Regional Services advised the Committee of amendments which the Government intended moving to the Bill when it was considered by the Senate.

4.3 That letter is attached as appendix 3 to the report.

4.4 The amendments contained in the Transport Safety Investigation Bill 2002 and to the Transport Safety Investigation (Consequential Amendments) Bill 2002 are attached as appendix 4 to this report.

Power of Entry and Seizure

4.5 In its 13th report to the Senate for 2002 (23rd October 2002) the Senate Scrutiny of Bills Committee resolved a number of concerns regarding the powers of search, entry and seizure in the Bill.

4.6 By letter dated 11 November 2002, the Minister advised the Chair of that Committee, Senator McLucas.

Subject to the normal Government approval and drafting protocols and procedures, I propose to seek amendments to the TSI Bill and draft TSI Regulations along the lines of the following:

1. Provide an express link to the TSI Regulations in cl 13(6) in relation to specifying requirements for a person to be considered suitable as a delegate of the Executive Director including in relation to appropriate briefing/training in search and seizure powers where these are proposed to be delegated (similar to the arrangements to be proposed for cl 14)
2. Amend cl 30 by replacing the text with a requirement for the Executive Director to take all reasonable steps to notify the occupier of the purpose of the entry and produce an identity card when exercising premises powers.

3. Amend cl 33 to require the Executive Director to inform the occupier of their rights and obligations as specified in the TSI Regulations before exercising cl 33 powers.
4. Limit the use of powers under cl 33 to Immediately Reportable Matters, which include accidents and serious incidents.
5. Include a 'reasonable grounds' requirement in cl 33 for entry to special premises for the investigation of Immediately Reportable Matters.¹

4.7 As well as addressing matters raised by the Scrutiny of Bills Committee's report on the Bill, the Minister's letter of 11 November (and the amendments proposed), address concerns expressed to this Committee. The Committee comments further on this issue in Chapter 5.

Cockpit Voice Recordings

4.8 The matter of greatest concern to pilot representative organizations who made submissions on Cockpit Voice Recordings emphasized that the use of CVR's in ensuring cockpit operating safety and the confidentiality of data should not be jeopardized.

4.9 In a letter dated 13 November 2002, the Minister advised the Committee that the proposed amendments to the Bill would address issues raised during the Committee's inquiry.

4.10 The Minister's letter noted

As you are aware, at the recent hearing of the Committee, witnesses raised two general concerns with the implications of the TSI Bill. The first set of concerns deal with, amongst other things, the entry and search powers of the ATSB and are similar to issues considered by the Scrutiny of Bills Committee that have led to several suggestions by that Committee. I have recently written to the Scrutiny of Bills Committee outlining that while I consider amendments to the Bill to address these issues are not strictly necessary, I do not oppose amendment to the Bill to cover all of the issues that they raised. As such, I intend to seek amendments to be made to the Bill prior to its formal consideration in the Senate to take account of the Committee's comments, subject to the normal Government approval and drafting protocols. A copy of my letter to that Committee will be supplied to you once that Committee has tabled its report.²

1 Minister's Letter, 11 November 2002

2 Minister's Letter, 13 November 2002

4.11 By further letter dated 3 December 2002, the Minister advised the Committee that amendments to the Bill would be as follows

Cockpit Voice Recorders

- The amendments to the TSI (Consequential Amendments) Bill 2002 protect the confidentiality of Cockpit Voice Recordings (CVRs) where they are not designated On Board Recordings (OBRs) under the TSI Bill 2002
- it was argued in the Senate Rural and Regional Affairs and Transport Legislation Committee that CVRs that are not OBRs still need to be protected to reflect Australia's obligations under Annex 13 to the Chicago Convention, to ensure the ongoing availability of CVR information, and to protect the privacy of crew members
- the provisions insert a new Part 3A into the *Air Navigation Act* to prevent CVRs being used against crew except in cases of serious criminality or in damages proceedings where the court has conducted a balancing act
- there is also an exemption of CVR information under the Freedom of Information Act.³

A full copy of the proposed amendments to the Bill are attached as appendix 4 to this report.

4.12 The Committee sought comments on the proposed amendments from the organizations and individuals who forwarded comments to the Committee. In its submission, the Australian and International Pilots Association noted its opposition to the proposed amendment to Section 22ZX of the Bill.

The effect of the sub-sections is to artificially restrict the definition of CVR and thus restrict the protection afforded to CVRs. Section 22ZX, as it is currently, drafted would not protect a CVR from disclosure if it was on an aircraft that was not owned by a constitutional corporation or Commonwealth entity and was involved in an intra-State journey. Such recordings would not be CVRs for the purposes of Part 3A of the ANA and thus would not attract the protections afforded by that Part.

4.13 In a further letter dated 5 December, AIPA noted

AIPA is extremely concerned about the possible consequences of some of the proposed amendments. As we noted in our previous correspondence the new sections 22ZY(3)(d) and 22ZZA(a) in Part 3A of the ANA cast too wide a net in relation to the type of offence that will allow the disclosure or admission of CVR information in criminal proceedings. Further the proposed amendments have the inevitable consequence of attaching criminal

3 Minister's Letter, 3 December 2002

liability to pilots for actions (or inaction), and decisions, in the course of their duty.

4.14 AIPA was concerned to highlight the following points

- Commercial airline pilots only accepted the installation of cockpit voice recorders (and the invasion of privacy that they entail) on the understanding that they would only be used for accident investigation. There was an express agreement between the Australian Government and the Australian Federation of Airline Pilots to that effect. It was clearly understood that CVR information was not to be used in proceedings involving allegations of negligence or questions about the conduct of a pilot in the course of his or her duties.
- Without amendment these sections will amount to a betrayal of the understanding between the Australian Government and Australian pilots. This betrayal will irreparably damage the relationship of trust and confidence between commercial pilots, the Australian Government and its authorities.
- AIPA appreciates the rationale for providing exceptions to the restrictions on the use of CVR information in exceptional circumstances where serious criminal activity is involved and the pilot was not acting pursuant to his or her duties (e.g. terrorism, murder and drug running). However it is critical that the exceptions to the admissibility of CVR information in criminal proceedings be restricted to the mischief at which they were aimed.

4.15 AIPA suggested to the Committee that a number of proposed amendments (also sent to ATSB for consideration) would improve the legislation. It noted

AIPA suggests the following amendments to 22ZY(3)(d) and 22ZZA that will better achieve the intention of the exceptions:

1. Insert a new sub-section 22ZY(4):

“(4) Nothing in sub-section (3) will permit disclosure of CVR information to a court in criminal proceedings against a crew member in the conduct of his or her duties”.

2. Renumber the current section 22ZZA so that the body of it becomes subsection 22ZZA(1) and insert a new sub-section 22ZZA(2):

“(2) Nothing in sub-section (1)(a) will permit the admission into evidence of CVR information in criminal proceedings against a crew member for any offence arising out of an act or omission of the crew member in the conduct of his or her duties”.

The amendments allow the use of CVR information in extraordinary circumstances where serious criminal acts by a pilot are involved. This was clearly the intention of the amendments. However pilots would be protected from the use of CVR.

Access to Accident Sites

4.16 QBE Insurance commented to the Committee by supplementary submission that amendments proposed by the Minister did not address the concerns raised in its submission.

4.17 QBE noted

The amendments to the Transport Safety Investigation Bill released on 4 December 2002, as expected, deal primarily with powers of entry conferred upon delegates of the ATSB. Whilst these amendments may go some way to allay the concerns voiced during the public hearing, they do not address the issues raised in the QBE submission which appear to have been overlooked by the Committee and the Government. I refer in particular to the provisions which confer exclusive control over accident sites and subsequent investigations.

The issues which have been raised, and which we understand are also matters of concern to the Regional Aviation Association of Australia, are not matters of self interest. Ultimately they are matters that go directly to the safety of aviation in Australia. There are parties, such as airlines, owners, operators and insurers who have a legitimate interest in ascertaining the true cause of an accident and who can bring to the investigation a level and depth of expertise from within their own organisation and from the experts and consultants who they retain, which can materially contribute to and positively affect the outcome of an investigation. In short, the contribution may be instrumental in ascertaining the true cause of an accident which in turn can have an impact on the future safety of aviation by the prevention of any recurrence of similar events.⁴

4.18 By letter dated 10 December 2002, to the General Manager of QBE Insurance, the Minister advised

I am advised by the ATSB that while QBE's submissions contain errors of fact, the Bureau recognises the legitimate role of insurers with respect to a safety occurrence being investigated by the ATSB because of the valuable technical expertise that they may bring to an investigation and the need for them to meet their commitments to owners and operators. Under current legislation, to ensure that evidence is properly protected, insurers do not have a right to enter accident sites without approval. Under the TSI Act, while there is still no right of entry, approval for insurers to enter accident sites must not unreasonably be withheld.⁵

This letter and attachments are Appendix 5 to this report.

4 QBE Aviation Correspondence, 9 December 2002

5 Minister's Letter, 10 December 2002

Chapter Five

Conclusions and Recommendations

Introduction

5.1 The Committee received major submissions from pilots, from organisations involved in aviation and from an insurer in the aviation industry which have led the Committee to the conclusion that the prior consultation process which preceded preparation of this bill did not allow for the important changes proposed to the existing regime of air safety scrutiny and investigation to be fully addressed.

5.2 The Committee's terms of reference require it to report to the Senate on matters related to the bill and to consultation with aviation bodies.

5.3 In this regard, the Committee comments that the consultation process described by the ATSB Director, Mr Bills, gives an impression of being exhaustive, but no indication as to whether aviation industry participants – and particularly pilots – had their views considered in relation to the final bill - particularly that part of the bill dealing with Cockpit Voice Recorder records.

5.4 In relation to the position of aviation insurers, the Committee notes - as it does elsewhere in this report - that the submission received from QBE Insurance indicates that problems that were encountered in the past by insurers (and aircraft owners) with regard to access to accident sites, to damaged aircraft components etc. could have been addressed in this bill.

5.5 The Committee finally notes the responses of the Minister to comments by the Senate Scrutiny of Bills Committee, and to the matters raised both in submission on the bill and at this Committee's hearing on 24 October 2002 indicate that the Government has addressed a number of concerns regarding the bill.

5.6 The Committee has considered the Bill, submissions to it and evidence received at a public hearing on 24 October 2002. In addition, the Committee received advice from the Minister for Transport and Regional Services on proposed amendments to the Bill.

Committee Conclusions

Consultation

5.7 In Chapter 3 the Committee has noted the advice from the ATSB on consultations with bodies regularly on the preparation of the Bill.

5.8 The Committee considers that, given the importance of the issues dealt with (particularly the issues of the intended use of Cockpit Voice Recordings) that genuine consultation with pilot bodies was imperative. It is likely that a greater degree of

consultation with these bodies have saved delay on the Bill and its debate by the Senate.

Powers of Entry and Seizure

5.9 The Committee has discussed the issues regarding these matters in Chapters 3 and 4. The Committee has also drawn attention to and discussed the comments it has received on the Bill and amendments relevant to this issue proposed by the Minister

5.10 The Committee considers the Bill and proposed amendments should now go forward for debate.

Cockpit Voice Recordings (CVR's)

5.11 The Committee has discussed this issue in Chapters 3 and 4. The Committee has also referred to proposed amendments to the Bill relevant to this issue proposed by the Minister.

5.12 The Committee has noted (in paragraph 4.15) the further amendments to the Bill proposed by the Australia and International Pilots Association (AIPA) The Committee believes that the Minister should consider these amendments and advise the Senate during debate on the Bill as to whether they can be accepted.

Access to Accident Sites

5.13 The Committee notes in paragraph 4.17 and 4.18 the comments regarding this issue and that the Minister has addressed these matters in his letter of 10 December 2002 (Appendix 5).

Recommendations

1. The Committee recommends that the Transport Safety Investigation Bill 2002 go forward for debate and that amendments to the Bill in the Transport Safety Investigation Amendment Bill 2002 and the Transport Safety Investigation (Consequential Amendments) Bill 2002 be accepted.

2. The Committee recommends that amendments to clauses 22ZY and 22ZZA of the Transport Safety Investigation Bill 2002 proposed by the Australian and International Pilots Association which are set out in paragraph 4.14 and 4.15 of this report be considered by the Minister and that the Minister advise the Senate during the Committee stage of debate on the Bill as to whether those amendments can be accepted.

Senator the Hon Bill Heffernan

Chair

APPENDIX ONE

SUBMISSIONS

Submission No.	Author
1	Peter Boughen
2	Australian Ultralight Federation Inc
3	QBE Insurance (Australia) Ltd
4	Douglas P Sprigg
5	John Page
6	Australian & International Pilots Association
7	Air Safety Australia
8	Helicopter Association of Australia
9	The Australian Air Traffic Control Association
10	Air Safety Australia
11	Michael G Hunt
12	Doug Edwards
13	Regional Aviation Association of Australia
14	Peter Kowald

APPENDIX TWO

WITNESSES

Canberra, Thursday, 24 October 2002

Australian Transport Safety Bureau

Mr Kym Bills, Executive Director, ATSB

Ms Kerryn MaCaulay, Team Leader, ATSB

Ms Wancy Lam, Senior Lawyer, DoTARS

Capt Christopher Filor, PSM, Deputy Director, ATSB

Air Safety Australia

Mr Boyd Munro

Australia & International Pilots Association

Mr Tom Blackburn

Aircraft Owners and Pilots Australia

Mr Bill Pike

APPENDIX THREE



The Hon John Anderson MP
Deputy Prime Minister
Minister for Transport and Regional Services
Leader National Party of Australia

Senator the Hon Bill Heffernan
Chair
Senate Rural and Regional Affairs and Transport Legislation Committee
SG 53
Parliament House
CANBERRA ACT 2600

Dear Senator Heffernan

I refer to the letter to my office dated 27 November 2002, from the Secretary of the Committee, Mr Andrew Snedden, concerning the Committee's inquiry into the *Transport Safety Investigation Bill 2002* (TSI Bill).

I confirm the Government will move amendments to the Bill. The proposed amendments are in line with the position I foreshadowed in my letter to you of 13 November 2002 and I am confident they will address the major concerns of members of the Committee, based on the issues raised by witnesses. For the information of the Committee, I have attached a copy of the proposed amendments, the Supplementary Explanatory Memorandum and a short briefing that outlines their intent.

I am pleased to facilitate the valuable work of your Committee and look forward to a favourable report.

Yours sincerely

JOHN ANDERSON

Parliament House, Canberra ACT 2600

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Proposed Government Amendments to the *Transport Safety Investigation Bill* & *Transport Safety Investigation (Consequential Amendments) Bill*

The proposed Government amendments address issues raised in evidence provided to the Senate Rural and Regional Affairs and Transport Legislation (RRAT) Committee and in a report by Senate Standing Committee on the Scrutiny of Bills. The amendments also address minor additional matters concerning international agreements and investigations in foreign countries.

Transport Safety Investigation Bill

Special premises and entry powers

The Amendments at clauses 30, 33 and 13(6) provide:

- enhanced notice to occupiers of their rights and obligations under the *Transport Safety Investigation Bill 2002* (TSI Bill) regarding entry and search of premises or seizure of items from the premises where the Bill allows for it
- that only persons with appropriate qualifications and experience (as per regulation) will be delegated powers under the Bill, including premises powers
- a legislative assurance that people's individual rights will not be unduly trespassed upon in the exercise by the ATSB of special premises entry powers for serious occurrences as part of a 'no blame' transport safety investigation.

International Agreements

- Clause 17 makes it clear that international agreements listed in regulation will include changes to such agreements after the regulations come into force and that the ATSB will have regard to non-binding international instruments identified by regulation that Australia as a matter of practice follows.

Investigations in foreign countries

- Clause 22 ensures that the scope of the TSI Bill covers investigations conducted by the ATSB on behalf of a foreign country or ATSB participation in investigations led by a foreign country. This will provide legal certainty that sensitive evidence ATSB investigators obtain during these investigations is protected under the TSI Bill.

Transport Safety Investigation (Consequential Amendments) Bill 2002

Cockpit Voice Recorders

- The amendments to the TSI (Consequential Amendments) Bill 2002 protect the confidentiality of Cockpit Voice Recordings (CVRs) where they are not designated On Board Recordings (OBRs) under the TSI Bill 2002
 - the provisions insert a new Part 3A into the *Air Navigation Act* to prevent CVRs being used against crew except in cases of serious criminality or in damages proceedings where the court has conducted a balancing act
 - there is also an exemption of CVR information under the Freedom of Information Act.

2002

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

TRANSPORT SAFETY INVESTIGATION BILL 2002

**TRANSPORT SAFETY INVESTIGATION
(CONSEQUENTIAL AMENDMENTS) BILL 2002**

SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendments to be Moved on Behalf of the Government

(Circulated by authority of the Minister for Transport and Regional Services,
the Honourable John Anderson, MP)

TRANSPORT SAFETY INVESTIGATION BILL 2002**TRANSPORT SAFETY INVESTIGATION (CONSEQUENTIAL AMENDMENTS) BILL 2002****OUTLINE**

The amendments make changes to the Transport Safety Investigation Bill 2002 (TSI Bill) and the Transport Safety Investigation (Consequential Amendments) Bill 2002 (TSI (Consequential Amendments) Bill) in response to matters raised by the Senate Standing Committee for the Scrutiny of Bills and in the Senate Rural and Regional Affairs and Transport Legislation Committee. The amendments also address some matters on the technical wording of the Bill and provide greater legal certainty on the operation of the Bill in an overseas investigation. The purpose of the amendments is to:

- enhance notice to occupiers of their rights and obligations under the TSI Bill regarding entry and search of premises or seizure of items from the premises where the Bill allows for it;
- provide a regime to protect the confidentiality of Cockpit Voice Recordings (CVRs) where they are not designated as On Board Recordings (OBRs) under the TSI Bill;
- include within the scope of the TSI Bill, investigations conducted by the Australian Transport Safety Bureau (ATSB) on behalf of a foreign country or ATSB participation in investigations led by a foreign country to ensure evidence that ATSB investigators obtain during these investigations is protected by the confidentiality provisions of the TSI Bill; and
- make changes to clause 17 of the TSI Bill so that the clause requires that the Executive Director exercise his or her powers in accordance with international obligations under international agreements as in force from time to time and also have regard to other international instruments.

Financial impact statement

The amendments do not affect the Financial Impact Statement included in the Explanatory Memorandum for the Transport Safety Investigation Bill 2002.

TRANSPORT SAFETY INVESTIGATION BILL 2002**NOTES ON CLAUSES****Amendment No. 1**

The amendment amends Subclause 13(6) by omitting the reference to a 'suitable person' as someone to whom the Executive Director can delegate powers under the Bill. Subclause 13(6) now requires the specification of criteria in the regulations which a person must satisfy if the Executive Director is to delegate powers to that person under the Bill. Only a person who meets the criteria prescribed in the regulations will be able to have powers delegated to them by the Executive Director.

The amendment addresses a specific concern of the Senate Standing Committee for the Scrutiny of Bills and assures that the delegation of power will only be made to persons who have the appropriate qualifications and experience to exercise the delegated power.

Amendment No. 2

The amendment amends Clause 17 of the Bill. The amendment to Clause 17 makes a change to the wording so that the Executive Director will ensure the Executive Director's powers under the Bill are exercised in a manner that is consistent with Australia's obligations under international agreements 'as in force from time to time' that are identified by the regulations. With the amendment, it will be clear that the international agreements listed in the regulations will include changes that are made to those international agreements after the date the regulations come into force.

Amendment No. 3

The amendment adds a subclause to Clause 17. It requires that the Executive Director should, when exercising powers under the Act, have regard to any rules, recommendations, guidelines, or codes or other instruments (as in force from time to time) that are promulgated by international organisations and that are identified by the regulations for the purposes of the clause. The purpose of the amendment is to ensure that the Executive Director will have reference to international instruments that are not international agreements but nonetheless contain recommended practices which Australia is expected to follow. The International Maritime Organization (IMO), for example, issues codes that are non-binding. Consistent with international practice the ATSB has regard to such codes when it is conducting an investigation.

Amendment No. 4

The amendment to Subclause 22(1) of the Bill replaces Paragraphs 22(1)(c) and (d) with a new Paragraph 22(1)(c). The amendment retains the substance of Paragraphs 22(1)(c) and (d) (see Paragraph 22(1)(c)(i) which allows for an investigation under the

Bill into an occurrence outside Australia where evidence relating to the occurrence is found in Australia, and Paragraph 22(1)(c)(ii) which allows for an investigation under the Bill where the appropriate authority of another country has requested that the Executive Director be involved in the investigation of an occurrence).

In addition, the new Paragraph 22(1)(c)(iii) allows for an investigation under the Bill outside Australia where the Executive Director considers it necessary and there is the agreement of the appropriate authority of another country. This may include, for example, participation in an accident investigation to gain major accident experience on a particular aircraft type. Further, Paragraph 22(1)(c)(iv) provides for an investigation under the Act into an occurrence outside Australia where Australia has a right or obligation under an international agreement to participate in an investigation into the occurrence. This may include participation in an accident investigation involving loss of Australian lives.

The amendment covers all the situations where in practice an ATSB investigation may take place into an occurrence overseas. The amendment thereby provides legal certainty that the provisions of the Bill, such as confidentiality provisions under Part 6, apply in the case of an ATSB investigator obtaining information in the course of an overseas investigation. Without this guarantee ATSB investigators could be forced to pass on information they have obtained to agencies or parties to court proceedings for the purpose of laying blame. The ATSB has a reputation for conducting no-blame safety investigations that guarantee the future free flow of safety information. The amendment maintains the ATSB's capacity to do this.

Amendment No. 5

The amendment replaces Clause 30. The previous Clause 30 required the Executive Director to produce his or her identity card if the occupier of premises requested to inspect it. If the Executive Director failed to comply he or she could not exercise powers under Part 5 of the Bill. The new Clause 30(1) now requires that the Executive Director take reasonable steps to produce his or her identity card and notify the occupier of the purpose of entry before the Executive Director enters the premises. In its application the Executive Director would be expected to make a reasonable attempt, at the premises, to get the occupier to take note of the identity card and advise them of the purpose of entry. The application of Subclause 30(2) means that if the Executive Director failed to take the reasonable steps under Subclause 30(1) he or she could not exercise any of the premises powers under Part 5 of the Bill.

Based on a recommendation of the Senate Standing Committee for the Scrutiny of Bills, the amendment is made in relation to premises powers to give a legislative assurance that people's individual rights are not unduly trespassed.

Amendment No. 6

The amendment replaces the present Clause 33. The new Clause 33 still allows the Executive Director to enter *special premises* without consent or a warrant and with such assistance, and by such force, as is necessary and reasonable. However, the new

Clause 33 only allows the Executive Director to enter *special premises* where the Executive Director believes on reasonable grounds that it is necessary to do so and the investigation is into an *immediately reportable matter*. The amendment provides a legislative assurance that Clause 33 will not be used excessively or outside the context of what is necessary for the conduct of a transport safety investigation.

Further, new Subclause 33(3) requires that the Executive Director must take reasonable steps to give to an occupier of the premises (if present) a written notice setting out the occupier's rights and obligations before entry to the premises. In its application the Executive Director would be expected to make a reasonable attempt, at the premises, to get the occupier to take receipt of the written notice.

The application of Subclause 33(4) would mean that if the Executive Director failed to take the reasonable steps under Subclause 33(3) he or she could not exercise any of the powers in relation to *special premises* under Clause 36 of the Bill.

The amendment is based on a recommendation of the Senate Standing Committee for the Scrutiny of Bills, in relation to *special premises* powers to give a legislative assurance that individual rights are appropriately balanced against the public interest in the need to quickly access perishable evidence and potentially time critical evidence.

Apart from the amendment to Clause 33 to provide legislative assurance for the protection of an occupier's rights in relation to *special premises*, clause 33 also works in conjunction with other provisions that provide safeguards for the exercise of powers in the Bill. For example, where powers under Clause 33 need to be delegated, the amended Subclause 13(6) will mean the Executive Director can only delegate such powers to a person who meets criteria specified in the regulations.

TRANSPORT SAFETY INVESTIGATION (CONSEQUENTIAL AMENDMENTS) BILL 2002

The Transport Safety Investigation (Consequential Amendments) Bill 2002 accompanies the Transport Safety Investigation Bill 2002.

NOTES ON CLAUSES

Amendment 1

The amendment inserts a new Part 3A into the *Air Navigation Act 1920* (AN Act). The amendment addresses concerns raised in the Senate Rural and Regional Affairs and Transport Legislation Committee with respect to the non-disclosure of Cockpit Voice Recordings (CVRs). Part 3A covers confidentiality and use of CVRs that are not designated on-board recordings (OBRs) under the Transport Safety Investigation Bill 2002 (TSI Bill). To a great extent Part 3A preserves the protection CVRs presently have under Part 2A of the AN Act which is to be repealed with the commencement of the Transport Safety Investigation Act 2002 (TSI Act).

To reflect international obligations in relation to protection of CVRs under Annex 13 to the International Convention on Civil Aviation (Chicago Convention), CVR information will continue to be protected where it is not OBR information under the TSI Bill. The confidentiality of CVRs that are not OBRs under the TSI Bill is also important because the recordings, regardless of whether or not they are or may be used in any investigation under the TSI Act, include private crew conversations in an aircraft.

By continuing to provide protection for CVR information that is not OBR information under the TSI Bill, the amendment to the AN Act helps to ensure the ongoing availability of information from CVRs for no-blame safety investigations. Inappropriate use of CVR information in the judicial system, for example, may adversely affect transport safety, both domestically and internationally, as it is unlikely that the availability and free flow of safety information will be guaranteed/continued in the future. Inappropriate use by an operator such as for disciplinary action may also result in an adverse outcome for transport safety. For example, the operating crew of an aircraft has the ability to deny access to CVR information by pulling a 'circuit breaker', thus rendering a CVR inoperative, or simply erasing a recording at the end of a flight. The possible consequences of disclosure may outweigh the relatively minor legal consequences for breaching the law which requires conversations within the cockpit to be recorded, and may therefore provide an incentive for crew members to tamper with the CVR. The protections provided for CVR information by the insertion of the new Part 3A into the AN Act will help ensure that critical CVR information continues to be available for the investigation of transport safety matters in the future.

Clause 22ZW Definitions

Provides definitions for terms that are used in the new Part 3A.

Clause 22ZX Definition of CVR or cockpit voice recording

Provides the definition for a CVR. To fall within the definition, the recording must meet the descriptions provided under Subclause 22ZX(1). Note that a recording will be a CVR for the purpose of Part 3A only if the recording is not an OBR for the purposes of the TSI Act.

Clause 48 of the TSI Bill defines an OBR. Clause 49 of the TSI Bill has the effect of an OBR ceasing to be an OBR under the Executive Director's declaration. Under clause 49 the Executive Director has a discretion to issue this declaration but also must issue it where he or she decides not to investigate. If the Executive Director does decide to investigate then the declaration must be issued for any part of the OBR that is not relevant to the investigation. If a CVR does not meet the requirements of Clause 48 of the TSI Bill or is declared not to be an OBR under Clause 49 then the provisions of the new Part 3A of the AN Act will apply to it, provided the CVR meets the criteria set out in Subclause 22ZX(1).

Clause 22ZY Copying or disclosing CVR information

Subclauses 22ZY(1) and (2) prohibit copying or disclosure of CVR information subject to the exceptions listed in Subclause 22ZY(3).

Subclause 22ZY(3) provides the exceptions to the prohibitions under Subclauses 22ZY(1) and (2). Such exceptions include copying or disclosure for the purposes of an investigation under the TSI Act. This exception is made should it happen that CVR information from an aircraft is required for the purposes of a Transport Safety Investigation under the TSI Act but the CVR information is not classified as OBR information under the TSI Act because it does not meet the criteria to be classified as an OBR (eg. if the CVR does not relate to an *immediately reportable matter*) or is declared not to be an OBR (see Clause 22ZX).

Paragraph 22ZY(3)(b) allows copying or disclosure for purposes of the investigation of any offence against a law of the Commonwealth, a State or Territory. It should be noted that any CVR information so disclosed has limitations placed on its admissibility in criminal proceedings against a crew member (see Clause 22ZZA).

Paragraph 22ZY(3)(c) allows for the full disclosure of CVR information to a court in criminal proceedings against a person who is not a crew member.

Paragraph 22ZY(3)(d) works in conjunction with Clause 22ZZA and allows for the disclosure of CVR information to a court in criminal proceedings against a person who is a crew member for an offence against a law of the Commonwealth, a State or a Territory punishable by a maximum penalty of imprisonment for life or more than 2 years. This is to permit CVR to be disclosed for purposes of criminal proceedings for

serious offences such as drug running, terrorism or murder but cannot be disclosed for less serious (eg regulatory) prosecutions.

Paragraph 22ZY(3)(e) allows for the disclosure of CVR information in damages proceedings where the court has made a determination under Subclause 22ZY(4).

Subclause 22ZY(4) sets out the conditions under which a court may order that the CVR information is permitted to be disclosed under Paragraph 22ZY(3)(e). It is essentially a public interest test to weigh up the public interest in the proper determination of a question of fact in the case against any adverse impact on a future investigation under the TSI Act. The other factor to be balanced against is the public interest in the protection of the privacy of members of crews of the aircraft. This may be the sole factor to be balanced against when the CVR is not likely to have any relevance to any investigation under the TSI Act.

Subclause 22ZY(5) allows the court to issue directions to prohibit or restrict publication and communication of the CVR information to any person. This subclause ensures that the 'audience' is restricted to only those persons necessary and keeps out other parties, for example, the media, who may take the CVR information out of context or use it for purposes other than relating to the proceedings.

Subclause 22ZY(6) clarifies that a person cannot be compelled by a court to disclose CVR information where prohibited by clause 22ZY. In addition, where a person discloses CVR information in contravention of Subclause 22ZY(1), that information cannot then be admissible as evidence, thus removing any doubt about the discretion of a court to admit such evidence.

Clause 22ZZ CVR information no ground for disciplinary action

Clause 22ZZ prevents any person from using CVR information as the basis for a disciplinary action against a crew member. This clause reinforces the notion that CVRs are there for

safety purposes and that while there may be relevant data from the CVR, it should not be used for disciplinary action such as dismissal or demotion.

Clause 22ZZA Admissibility of CVR information in criminal proceedings against crew members

Clause 22ZZA prohibits the admission of CVR information as evidence against a crew member in criminal proceedings other than in criminal proceedings for an offence against a law of the Commonwealth, a State or a Territory punishable by a maximum penalty of imprisonment for life or more than 2 years. This means that CVR information under the AN Act can be used against crew members in criminal proceedings for serious offences such as drug running, terrorism or murder but cannot be used in less serious (eg regulatory) prosecutions.

Clause 22ZZB Admissibility of CVR information in civil proceedings

Clause 22ZZB prohibits the admission of CVR information as evidence in civil proceedings unless the court makes a public interest order for its admission in damages proceedings. Subclause 22ZZB(2) allows a party to the damages proceedings to, before the proceedings have been determined, apply to the court to obtain that order.

Subclause 22ZZB(3) states the public interest test the court must apply to make the public interest order. The court must consider how the withholding of the CVR information will affect the proper administration of justice against the public interest in protecting the privacy of crew members and any adverse impact admission would have on a future investigation under the TSI Act. In considering how the withholding of the information will affect the proper determination of justice the court must take into account whether evidence can be obtained by other means to properly determine proceedings. It must further consider whether the CVR information or part of the CVR information, if admitted, will assist in the proper determination of a material question of fact. It is to be noted these two requirements are in addition to those covering the **disclosure** of CVR information for the purposes of damages proceedings under Clause 22ZY(4).

A court is expected to weigh whether the disclosure of CVR information in damages proceedings could have an adverse impact on future safety investigations (eg if its disclosure may result in aircraft crew rendering CVRs inoperative or failing to cooperate with an Annex 13 type safety investigation generally).

Clause 22ZZC Examination by a court of CVR information under subsection 22ZZB(3)
Clause 22ZZC places restrictions on who may be present while a court is examining CVR information for the purposes of making an order under Subclause 22ZZB(3). It also allows the court to issue directions to prohibit or restrict publication and communication of the CVR information to any person. This clause ensures that the ‘audience’ is restricted only to those persons necessary and keeps out other parties who may take the CVR information out of context or use it for purposes other than relating to the proceedings.

Clause 22ZZD Where a court makes an order under subsection 22ZZB(3)

This clause specifies that CVR information admitted in damages proceeding may not be used in evidence for the determination of the liability of a crew member where they are a defendant in the proceedings. CVR information may still be used to determine the liability of the employer of the crew member, e.g. the airline. There are no restrictions on the use of CVR information against non crew members in damages proceedings.

Clause 22ZZD also allows the court to issue directions to prohibit or restrict publication and communication of the admitted CVR information to any person.

Amendment 2

The amendment has the effect of exempting CVR information that is protected under the new Part 3A of the *Air Navigation Act 1920*, from the *Freedom of Information Act 1982* (FOI Act). The exemption is necessary to prevent litigants from relying on mechanisms under the FOI Act as a relatively inexpensive way to obtain information for purposes of lawsuits, thus frustrating the confidentiality scheme established by insertion of Part 3A into the AN Act.

APPENDIX FOUR

Transport Safety Investigation Bill 2002

(Government)

(1) Clause 13, page 16 (lines 18 and 19), omit “is a suitable person to exercise those powers”, substitute “satisfies the criteria prescribed by the regulations”.

[delegates]

(2) Clause 17, page 17 (line 21), after “international agreements”, insert “(as in force from time to time)”.

[international obligations]

(3) Clause 17, page 17 (after line 22), at the end of the clause, add:

(2) In exercising powers under this Act, the Executive Director must also have regard to any rules, recommendations, guidelines, codes or other instruments (as in force from time to time) that are promulgated by an international organisation and that are identified by the regulations for the purposes of this section.

[international obligations]

(4) Clause 22, page 20 (lines 23 to 28), omit paragraphs (c) and (d), substitute:

(c) the occurrence occurs outside Australia and any of the following apply:

(i) evidence relating to the occurrence is found in Australia;

(ii) the appropriate authority of another country has requested the Executive Director to conduct, or to participate in, an investigation into the occurrence;

(iii) the Executive Director considers that it is necessary to conduct, or to participate in, an investigation into the occurrence and the agreement of the appropriate authority of another country is obtained for the Executive Director to conduct, or to participate in, such an investigation;

(iv) Australia has a right or obligation, under an international agreement, to participate in an investigation into the occurrence.

[transport safety investigations]

(5) Clause 30, page 28 (lines 9 to 15), omit the clause, substitute:

30 Obligations of Executive Director before entering premises

(1) Before entering premises under this Part, the Executive Director must take reasonable steps to:

- (a) notify the occupier of the premises of the purpose of the entry; and
- (b) produce the Executive Director's identity card for inspection by the occupier.

(2) The Executive Director is not entitled to exercise any powers under this Part in relation to premises if the Executive Director fails to comply with the requirement under subsection (1).

[obligations upon entering premises]

(6) Clause 33, page 31 (lines 3 to 7), omit the clause, substitute:

33 Power to enter special premises without consent or warrant

(1) The Executive Director may enter special premises without the occupier's consent and without obtaining a warrant if:

- (a) the Executive Director believes on reasonable grounds that it is necessary to do so; and
- (b) the investigation is an investigation into an immediately reportable matter.

(2) The Executive Director may enter the special premises with such assistance, and by such force, as is necessary and reasonable.

(3) Before entering special premises under subsection (1), the Executive Director must take reasonable steps to give to the occupier of the premises a written notice setting out the occupier's rights and obligations under this Division in relation to the powers that may be exercised under section 36 upon entry.

(4) The Executive Director is not entitled to exercise any of those powers in relation to special premises the Executive Director has entered under subsection (1) if the Executive Director fails to comply with the requirement under subsection (3).

[special premises]

Transport Safety Investigation (Consequential Amendments) Bill 2002

No. , 2002

(Transport and Regional Services)

A Bill for an Act to make amendments consequential on the enactment of the *Transport Safety Investigation Act 2002*, and for related purposes

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DRAFT-IN-CONFIDENCE

This draft is supplied in confidence and should be given appropriate protection

OPC drafter to complete	
1. Does this Bill need a message? (See H of R Practice, third ed, pp392-397, and OGC advice.) If yes: <ul style="list-style-type: none"> • List relevant clauses/items— • Prepare message advice (see DD 5/2000, Attachment D) • Give a copy of the message advice to the Legislation area. 	No
2. Does this Bill need a notice? (See H of R Standing Order 291.) If no list relevant clauses/items—	Yes
3. Is there any reason why this Bill should not be introduced in the Senate? (See Constitution sections 53 and 55 and Drafting Direction 9/1994.)	No

A Bill for an Act to make amendments consequential on the enactment of the *Transport Safety Investigation Act 2002*, and for related purposes

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *Transport Safety Investigation (Consequential Amendments) Act 2002*.

2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, on the day or at the time specified in column 2 of the table.

Commencement information		
Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day on which this Act receives the Royal Assent	
2. Schedule 1	Immediately after the commencement of section 3 of the <i>Transport Safety Investigation Act 2002</i>	

Note: This table relates only to the provisions of this Act as originally passed by the Parliament and assented to. It will not be expanded to deal with provisions inserted in this Act after assent.

- (2) Column 3 of the table is for additional information that is not part of this Act. This information may be included in any published version of this Act.

3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Amendments***Air Navigation Act 1920*****1 Part 2A**

Repeal the Part.

2 Transitional

Despite the repeal of Part 2A of the *Air Navigation Act 1920*, that Part continues to apply in relation to any investigation commenced under that Part before the repeal (including an investigation that had been completed).

Air Services Act 1995**3 Paragraph 8(1)(c)**

Repeal the paragraph, substitute:

- (c) co-operating with the Executive Director of Transport Safety Investigation in relation to investigations under the *Transport Safety Investigation Act 2002* that relate to aircraft;

Australian Maritime Safety Authority Act 1990**4 After paragraph 6(1)(ca)**

Insert:

- (cb) to co-operate with the Executive Director of Transport Safety Investigation in relation to investigations under the *Transport Safety Investigation Act 2002* that relate to ships; and

Civil Aviation Act 1988**5 Paragraph 9(3)(a)**

Repeal the paragraph, substitute:

- (a) co-operating with the Executive Director of Transport Safety Investigation in relation to investigations under the *Transport Safety Investigation Act 2002* that relate to aircraft;

Freedom of Information Act 1982**6 Schedule 3**

Omit “*Air Navigation Act 1920*, subsection 19CU(1)”.

7 Schedule 3

Insert in the appropriate alphabetical position:

Transport Safety Investigation Act 2002, subsections 53(1) and (2) and 60(1), (2) and (3)

Navigation Act 1912

8 Paragraph 425(1)(ea)

Repeal the paragraph.

9 Subsection 425(1AAA)

Repeal the subsection.

APPENDIX FIVE



Office of the Deputy Prime Minister
and Minister for Transport and Regional Services
Leader National Party of Australia

Mr Ken Gowans
General Manager
QBE Insurance (Australia) Limited
310 Queen Street
MELBOURNE Vic. 3000

Dear Mr Gowans

Thank you for your letter of 28 November 2002 to the Deputy Prime Minister and Minister for Transport and Regional Services, the Hon John Anderson MP, concerning QBE's comments on the *Transport Safety Investigation Bill 2002* (TSI Bill). Mr Anderson has asked me to reply on his behalf.

I note that you did not discuss your concerns with the Australian Transport Safety Bureau prior to your submission to the Rural and Regional Affairs and Transport Legislation Committee that was copied to the Minister. I am advised that the ATSB's Director of Safety Investigations, Mr Rob Graham, spoke to a QBE representative at the recent Regional Airlines Association of Australia annual conference in Queensland on 23-25 October 2002 and invited QBE to discuss further its concerns at a mutually agreed time. I understand that QBE has not yet availed itself of that offer. In so far as the Committee's consideration of your comments is concerned, I am not at liberty to comment. To do so would constitute a breach of privilege. I understand the Committee will table its report on 11 December 2002.

I am advised by the ATSB that while QBE's submissions contain errors of fact, the Bureau recognises the legitimate role of insurers with respect to a safety occurrence being investigated by the ATSB because of the valuable technical expertise that they may bring to an investigation and the need for them to meet their commitments to owners and operators. Under current legislation, to ensure that evidence is properly protected, insurers do not have a right to enter accident sites without approval. Under the TSI Act, while there is still no right of entry, approval for insurers to enter accident sites must not unreasonably be withheld.

As regards your view that courts should continue to be able to subpoena sensitive ATSB safety records, the Government has made a considered and clear decision that the new legislation more clearly separate ATSB 'no blame' investigations from processes that seek to attribute blame or liability. The TSI Bill therefore safeguards OBR and restricted information gathered by the ATSB and an ATSB final report from use in adversarial proceedings. Such evidence should be gathered separately by police, regulators and others.

A detailed response more fully addressing your concerns is provided as an attachment.

Thank you for bringing this matter to the attention of the Minister.

Yours sincerely

Peter Langhorne
Chief of Staff

ATTACHMENT

Clause 24

To be guilty of hindering an investigation under Clause 24, a person would need to be proven reckless in their action or omission. In accordance with section 5.4 of the Criminal Code, recklessness requires intent or knowledge. Recklessness can also be proven where a person is aware of a substantial risk that their conduct will adversely affect an investigation, and having regard to the circumstances known to them, it is unjustifiable to take that risk. However, as well as needing to prove recklessness, the action or omission must **also** be proven to have adversely affected an investigation.

Clause 26

The provisions relating to the restrictions on the disclosure of a draft report do not preclude an owner/operator from seeking legal advice or conferring with an insurer with respect to making a submission to the ATSB on the draft report. However, in accordance with ATSB's policy, an insurer would not normally meet the definition of a Directly Involved Party and would not directly be issued a copy of the draft report. Clause 26(4)(a) specifically allows disclosure to '*any person*' for the purpose of '*preparing submissions on the draft report*' and for '*taking steps to remedy safety deficiencies that are identified in the draft report*'. (This clause has been derived from equivalent Canadian legislation).

Clause 33

The powers of entry to Special Premises (accident sites and vehicles, including aircraft) can **only** be exercised in relation a 'no blame' safety investigation (Clauses 28 and 7). In addition, evidential material can only be seized when the Executive Director believes on reasonable grounds that it is **directly** relevant and there is a real danger of that evidence being interfered with, concealed, lost, deteriorated or destroyed. This necessarily suggests that the matter is time critical and that it is not practicable to obtain a warrant. For example, a foreign operator may be involved in a serious incident (ie. no accident site in accordance with the ordinary meaning) late at night on arrival into Sydney and the ATSB would wish to have access to flight recorders. Obtaining a warrant in the time available before the operator departs Australian territory may not be possible and it may be necessary to board the aircraft to remove the FDR or CVR or to download the QAR. Additional measures are to be included as Government amendments to address the concerns of the Senate Scrutiny of Bills Committee including the need to inform the occupant of the purpose of entry, to show an identity card and to inform the occupier of their rights and obligations.

Clause 44

Nothing in the current legislation or the TSI Bill explicitly prevents owners/operators from gaining controlled access to an accident site involving their aircraft. The purpose of this clause is simply to ensure that, to the extent possible, the site is controlled in such a way as to ensure that perishable evidence is not inadvertently destroyed and that other evidence is made available to the investigation team for examination and analysis.

A secondary purpose of this and other clauses is to ensure that the integrity of the investigation process is not compromised. If an owner/operator or any other person with a direct interest in the occurrence, for example, insurer, were to be able to indiscriminately enter an accident site without restriction, some (including other parties to the investigation and courts) may wish to challenge whether evidence was tampered with or removed, thereby changing the outcome of the investigation, regardless of whether there is any truth to this matter or not.

Any reasonable request to enter and view the site is and would be accommodated in accordance with subclause 44(4), thus providing more certainty than current legislation. The ATSB only requires that the person/s be escorted for the reasons described above.

The circumstances you describe in relation to the incident in Tasmania are factually incorrect and do not fully explain the actual circumstances. In that instance, the insurer was informed that he had operated his aircraft within the exclusion zone in the area of the accident site as described in the NOTAM in force at the time. When made aware of his actions, the insurer claimed that he had no knowledge of the NOTAM. ATSB officers advised that he would need to exit the exclusion zone and then seek permission to enter. I understand that the insurer agreed to do this but did not subsequently return to the accident site or make contact with the ATSB officers. Had the insurer made contact with the ATSB officers, permission to access the site would have been granted, albeit under escort. I am also advised that the accident site was not guarded on the advice of the Tasmanian police who described the area as remote and, as such, would not provide a guard for the site based on the negligible risk of any interference with the wreckage.

Clause 45

As per the previous comment, nothing in the TSI Bill excludes insurers from observing the examination of evidence. Any reasonable request to enter and view such examinations would be accommodated. Again, the only requirement would be that the person would need to be escorted for the reasons described above.

Current legislation describes a maximum period for evidential material to be retained **only** where that material has been obtained under a warrant. Secondly, there is a mechanism within current legislation that provides for an extension to that period where *'the investigation has not been completed'*, in which case a further extension to that time can be negotiated. In practical terms, even though a formal process is prescribed in those circumstances, the ATSB is able to retain such material for as long as is necessary for the purpose of the investigation.

As you would be aware, other than at accident sites, most evidence is obtained with consent and the current legislation is silent in that area. However, the TSI Bill has sought to address this issue in a number of ways by including, for example, Clause 16 (in line with the Canadian model) where the Executive Director is to have *'regard to the desirability of*

minimising any resulting disruption to transport by means of transport vehicles'. This would be particularly relevant if it was considered necessary to examine an otherwise serviceable component. In the case of documents, it is ATSB policy to view and copy these where necessary, then return them to the owner as soon as possible (this is also acknowledged in Clause 45(3)). Clause 45(5) also states that the Executive Director '*must return the material when it is no longer needed*'

Clauses 65 and 66

The principles that govern the clauses on disclosure and use of sensitive safety information in the current legislation and, indeed within the TSI Bill, are based on the standards and recommended practices of Annex 13. To allow those principles to be eroded would be a retrograde step for aviation safety. The balance in the TSI Bill clauses is based on a careful whole-of-government consideration.

Clauses 65 and 66 relate to the non-compellability of current and former staff members in court proceedings other than coronial inquiries and not to evidential material. Having appropriate controls over disclosure and use of OBR and Restricted Information would be rendered meaningless and contrary to the principles of Annex 13 without also having appropriate control over the appearance of staff members in adversarial proceedings.

The Government and the public are concerned with both safety and justice and mechanisms must be in place in order for both those goals to be achieved without one unacceptably compromising the other. This duality is also accepted in Annex 13. For example, it is important to note that, with the exception of on-board-recordings (which would include in aviation, cockpit voice recordings) the restrictions on the disclosure and use of Restricted Information apply only to information that has been obtained by a staff member. Therefore, organisations, agencies and courts are at liberty to obtain this information separately if necessary though the Executive Director may release this information to those parties if he/she considers that it is not likely to adversely affect any current or future investigation. If the ATSB became the main conduit for such information, particularly to adversarial proceedings, its principles of 'no blame' and independence would be viewed as hollow and people, including owners and operators whom insurers represent, may in turn be less likely to be forthcoming in the future.

Reliability of ATSB investigations

I do not concur with your claims about the reliability of ATSB investigations. With respect to the WA helicopter fuel sample (VH-UXW), it can be noted that no-one at the inquest suggested that fuel was a contributing factor to the fatal accident. As regards the VH-SKC 'ghost flight' inquest, the Executive Director of the ATSB responded to Coroner Hope's report on the day it was released (see ATSB web site) and the Minister has noted in Parliament that a review by the Australian Government Solicitor has supported the ATSB's position.

