



ASSEMBLY — 35TH SESSION

TECHNICAL COMMISSION

- Agenda Item 24: ICAO Global Aviation Safety Plan (GASP)**
24.1: Protection of sources and free flow of safety information

PROTECTION OF COCKPIT VOICE RECORDINGS

(Presented by Australia)

SUMMARY

The paper provides an outline of how Australia's legislation operates to ensure the information on Cockpit Voice Recorders can be used for independent, no-blame transport safety investigation to assist in determining the factors that relate to a serious occurrence while preventing inappropriate use in other forums.

REFERENCES

Annex 13
Transport Safety Investigation Act 2003 (Commonwealth of Australia)
Civil Aviation Act 1988 (Commonwealth of Australia)

1. INTRODUCTION

1.1 Australian legislators have afforded the information on Cockpit Voice Recorders (CVRs) strong protections in recognition of the fact that the primary purpose of their installation in aircraft is to provide valuable safety information to assist in determining the causal factors that relate to a serious accident or incident and as a result improve aviation safety. Further, the rationale of protecting CVRs in domestic legislation, in accordance with Annex 13 — *Aircraft Accident and Incident Investigation* to the Convention on International Civil Aviation, is to ensure they are not used inappropriately in disciplinary, civil, administrative and criminal proceedings and the media. Incidents outside of Australia have clearly demonstrated that inappropriate use of CVRs can inhibit the free-flow of this type of information and other sensitive safety information to safety investigation bodies.

1.2 On 1 July 2003 Australia enacted the *Transport Safety Investigation Act 2003* (TSI Act) which now provides the Executive Director of the Australian Transport Safety Bureau (ATSB) and delegates with powers to conduct independent, no-blame aviation, marine and rail transport safety investigations. The TSI Act, together with Part IIIB of the *Civil Aviation Act 1988* (CA Act), ensures the ATSB can use CVR information for safety investigation purposes but the Acts strictly limit its use in other circumstances as detailed in this paper.

2. PROTECTIONS

2.1 The TSI Act and the CA Act offer similar protections for CVRs but apply at different times. The TSI Act applies if any part of the recording was made at the time of an accident or serious incident that the ATSB is investigating. The CA Act applies when the CVR is not covered by the TSI Act, i.e. when the ATSB is not investigating an accident or serious incident.

2.2 TSI Act Protections

2.2.1 Unless it is otherwise permitted by the TSI Act it is an offence for any person to copy or disclose CVR information. To guarantee that there are no other means to publicly obtain CVR information it is expressly excluded from the provisions of Freedom of Information legislation.

2.2.2 The TSI Act prevents the use of CVR information against crew members in criminal proceedings and it cannot be used against employees for disciplinary action. The use of CVR information is also heavily restricted in civil proceedings. CVR information can be disclosed or admitted in civil proceedings only if the Executive Director of the ATSB has used his/her discretion to issue a certificate stating the disclosure is not likely to interfere with *any investigation* (i.e. current or future). This broad test means that it will be unlikely that CVR information will be disclosed in civil proceedings. In the unlikely event of a certificate being issued, the court must conduct a public interest balancing test (as provided for in Annex 13 paragraph 5.12) to determine whether the information should be disclosed.

2.2.3 The only exception to the foregoing is a Coronial inquest where a CVR must be divulged to a Coroner where the Coroner requests it and the Executive Director believes the CVR will not have an adverse impact on the investigation to which the CVR relates. Disclosure of CVR information in coronial inquiries is controlled to ensure confidentiality of the information but access is not as restricted in recognition of the fact that Coroners share a similar objective to the ATSB of improving the safety of the public by establishing the factors leading to fatal accident.

2.2.4 Under the TSI Act the Executive Director of the ATSB has the power to disclose CVR information in the interests of transport safety. Normally this will only involve CVR information that is necessary to properly describe the circumstances of the transport safety matter in the final investigation report, including conclusions and safety recommendations drawn from the analysis of the CVR information. Because of the extremely sensitive nature of CVR information it will only be in exceptionally rare circumstances that such information is disclosed other than as part of an ATSB preliminary, interim factual or final investigation report.

2.3 CA Act Protections

2.3.1 Provisions were inserted into Part IIB of the CA Act to ensure that similar protections to those described above, apply to CVRs when the ATSB is not investigating an accident or serious incident. The CA Act though, does provide a different regime with regards to the potential use of CVR information against crew members in criminal proceedings. When there is serious criminal conduct occurring outside the course of the pilot's duties such as drug running or terrorism, it has accepted that an appropriate balance between the administration of justice and the interests of transport safety is to allow the use of the CVR as evidence in these circumstances. The provisions of the CA Act reflect this principle. Nonetheless, over all between the TSI Act and CA Act, the scheme for the protection of CVRs addresses the main concern of pilots regarding the possibility of a CVR being used as evidence against a pilot in criminal proceedings for conduct occurring in the course of their duties.

3. ANNEX 13

3.1 Australia believes that a great deal more discussion and clarity is required in relation to the circumstances under which access to CVRs other than by 'no blame' Annex 13 investigators may be appropriate. Paragraph 5.12 sets a standard for the disclosure of CVRs but the extent to which this occurs needs to be considered in relation to other references to cooperation with judicial authorities in Annex 13. For example, paragraph 5.10 provides that "*The State conducting the investigation shall recognize the need for coordination between the investigator-in-charge and the judicial authorities. Particular attention shall be given to evidence which requires prompt recording and analysis for the investigation to be successful, such as the examination and identification of victims and read-outs of flight recorder recordings.*" Note 2 then provides that "*Possible conflicts between investigating and judicial authorities regarding the custody of flight recorders and their recordings may be resolved by an official of the judicial authority carrying the recordings to the place of read-out, thus maintaining custody.*" Flight recorder is defined as "*Any type of recorder installed in the aircraft for the purpose of complementing accident/incident investigation*" and refers to relevant Annex 6 provisions. CVRs are included and their use by judicial authorities outside of the regime covered by paragraph 5.12 appears to be clearly contemplated under paragraph 5.10.

4. CONCLUSION

4.1 Australia adheres strongly to the principle of independent, no-blame transport accident and incident investigation, the object of which is to publish findings as to causal factors and recommended safety action solely in the interest of future transport safety. The continued availability of sensitive safety information such as that derived from CVRs is often crucial to an accurate and complete safety investigation. Australia's legislative regime for the protection of CVRs is structured to ensure they are treated confidentially and their limited use in other forums will not adversely affect the rights of pilots or transport safety investigations.

5. FINANCIAL IMPACT OF THE PROPOSED ACTION

5.1 Australia considers that the proposed review could be handled by a Secretariat Study Group. The cost of ICAO coordinating this group should be able to be borne under programme 2.3 Accident Investigation and Prevention.

6. ACTION BY THE ASSEMBLY

6.1 The Assembly is invited to:

- a) note the treatment given to the protection of CVRs when Australia developed its new transport safety investigation legislation and the issues raised in this paper; and
- b) request the Council to review paragraph 5.12 of Annex 13 to clarify when a CVR can be accessed by persons other than no-blame investigators.

– END –