



WORKING PAPER

**ACCIDENT INVESTIGATION AND PREVENTION (AIG)
DIVISIONAL MEETING (2008)**

Montréal, 13 to 18 October 2008

Agenda Item 1: Annex 13

1.7: Attachment E to Annex 13

ENHANCING THE SUSTAINABLE BENEFITS OF STANDARD 5.12

(Presented by Australia)

SUMMARY

This paper proposes that AIG recommend to the Commission that a Working Group be established to consider amendments to Standard 5.12 of Annex 13 with a view to enhancing its contribution to safety.

Action for the meeting is in paragraph 3.

1. INTRODUCTION

1.1 Australia has been a consistently strong supporter of the objective of Standard 5.12 and Attachment E to Annex 13 — *Aircraft Accident and Incident Investigation*, which is to ensure the availability of data and information for future safety. In achieving this objective, Australia agrees with the statement in paragraph 2.3 of Attachment E that national laws and regulations protecting safety information should ensure that a balance is struck between the need for the protection of safety information in order to improve aviation safety, and the need for the proper administration of justice.

1.2 At the same time, Australia recognises that a different balance also needs to be struck between the protection of such information for the purpose of improving aviation safety generally and over the longer-term, and the occasionally legitimate need for Annex 13 accident investigation agencies to share some safety information with relevant regulatory authorities in order to address a specific and immediate risk to air safety. On this basis, greater clarity is sought as to whether the ‘proper administration of justice’ includes forms of regulatory action necessary to eliminate or minimise a serious and imminent risk to safety, noting this might encompass a range of actions including, but not limited to, the variation, suspension or cancellation of a licence or operating certificate.

1.3 It may be too early to amend Attachment E. However, as submitted in Australia's 2007 Assembly paper, there are inconsistencies in the Annex and with Attachment E that require further consideration. Moreover, Standard 5.12 is couched so broadly in terms of the onus on the State, and the scope of material protected, that it risks undermining protection for really critical material such as CVR recordings, investigator interviews of operational staff, and analysis opinions. Grading the protections required in 5.12, with an emphasis on these records, could lead to a more sustainable regime for the future and greater State compliance.

1.4 Australia proposes that, after taking into account the analysis of the implementation levels of 5.12 and Attachment E to be provided at the meeting, the AIG should recommend to the Commission that a Working Group be established to review how sensitive safety information is to be protected under the framework provided by the Convention and Annex 13. Such a review could include consideration of the issues raised in paragraph 1.2 above. The Working Group should be given terms of reference to recommend revisions to the Convention and Annexes if deemed necessary.

2. DISCUSSION

2.1 Australia submitted Working Paper A36-WP/126 at the Assembly's 36th session in September 2007. Paragraphs 4.1 to 4.6 of the paper provide the reasoning for Australia's proposal that the framework for the protection of safety information needs to be properly reviewed in depth and revised. A36-WP/126 identifies obvious problems with the interpretation and workability of 5.12 and Attachment E. The Technical Commission's report to the 36th Assembly agreed that this matter should be referred to this AIG Divisional Meeting. On 9 May 2008, ICAO wrote to States seeking advice on whether Attachment E has provided any assistance with respect to the implementation of Standard 5.12. The analysis of the responses that the ICAO Secretariat receives will be beneficial for determining what needs to occur to ensure greater compliance. However, Australia expects that this analysis alone will not be sufficient for determining the full range of measures that need to be taken to improve the regime for the protection of safety information.

2.2 The letter to States asks for comment on whether Attachment E has provided States with any assistance with respect to compliance with Standard 5.12. However, asking the question assumes that Standard 5.12 is adequate and appropriate for protecting safety information in the interests of ensuring its free flow. Australia's position, as articulated in A36-WP/126, is that Standard 5.12 may not be adequate, appropriate or sufficiently clear, and that these considerations need to be examined. In examining the adequacy, appropriateness and clarity of 5.12, Australia suggests that the analysis and proposed revisions to the regime for the protection of information could be carried out effectively by a Working Group established with appropriate terms of reference for that purpose.

3. ACTION PROPOSED

3.1 Taking into account any analysis provided at the meeting of the implementation level of Standard 5.12 and Attachment E to Annex 13 the meeting is invited to:

3.1.1 Make a recommendation to the Commission that a Working Group is established to conduct a review of the regime for the protection of safety information provided by Standard 5.12. The recommendation would include charging the Working Group with proposing revisions it identifies as necessary or desirable and presenting any changes with an explanation.

3.1.2 If the meeting agrees to recommend to the Commission that a Working Group be established then the meeting also should suggest terms of reference for the Working Group. Depending on the views expressed at the meeting on any analysis provided of the implementation of Standard 5.12 and Attachment E, Australia suggests the following terms of reference:

- (a) Examine Standard 5.12 to determine whether it adequately and appropriately protects safety information in order to preserve its free-flow for safety purposes, including consideration of whether:
 - i. all the records require the same level of protection, taking into account the impact of their disclosure in blame or liability proceedings (focussing the primary protections on a subset of safety information such as CVR information, involved party interviews and investigation analysis could reduce the need for State differences and improve compliance by being more consistent with modern freedom of information laws);
 - ii. there are any other records that should be included in the Standard that require protection;
 - iii. 'inappropriate use' of safety information is adequately defined;
 - iv. the regime is too broad in requiring the State to protect information rather than requiring the State to ensure that certain organizations and individuals who collect safety information keep it confidential;
 - v. there is scope to clarify the regime in relation to making available information covered by Standard 5.12 for the purpose of enabling action to eliminate or mitigate serious and immediate risks to air safety without unacceptably compromising the free-flow of safety information.;
 - vi. there are any avoidable conflicts in the requirements of the regime;
 - vii. the administration of justice is properly balanced with the need to protect safety information, and the obligations and guidance is clear to ensure a workable and consistent approach to implementation;
 - viii. having regard to the balance referred to in sub-paragraph vii above, regulatory or administrative actions and proceedings intended specifically to eliminate or mitigate serious and immediate risks to air safety should be excluded from the concept of *inappropriate use* contemplated by sub-paragraph 1.5 c) of Attachment E to Annex 13 and Note 1 to paragraph 5.12.1 of Annex 13; and
 - ix. the regime is otherwise workable in practice; and
- (b) propose and draft amendments to the regime where the Working Group considers that it does not adequately and appropriately protect safety information.