

# NPRM Response Form

## AUSTRALIAN AIR TRANSPORT OPERATORS - CERTIFICATION AND MANAGEMENT – PROPOSED CASR PART 119

Please complete your response by **5 September 2012** and return it by one of the following means:

**Online (Preferred method)** [casa.gov.au/newrules/ors](http://casa.gov.au/newrules/ors)

**Fax** 1800 653 897 (free call)

**Post (no stamp required)**

CASA's Standards Development Branch

Reply Paid 2005

Canberra ACT 2601, Australia

**E-mail** [nprm0903os@casa.gov.au](mailto:nprm0903os@casa.gov.au)

\* A web-based online response form is offered as an alternative to the printed form in this NPRM. Online submission is the preferred method of sending your comments to CASA. If you are connected to the Internet, type [casa.gov.au/newrules/ors](http://casa.gov.au/newrules/ors) into your web browser and follow the links for this NPRM.

### Your Details

Please provide relevant information below and indicate your acceptance or otherwise of the proposal presented in this Notice of Proposed Rule Making by ticking [✓] the appropriate boxes.

Your name: Paul Tyrrell ARN\* (if known): \_\_\_\_\_

Organisation: Regional Aviation Association of Australia ARN\* (if known): \_\_\_\_\_

\*Aviation Reference Number, usually your CASA-issued licence or certificate number

Address: Unit 11, 26-28 Winchcombe Court

Mitchell ACT 2911

Your telephone number (optional): \_\_\_\_\_ (to enable the Project Leader to contact you as necessary)

Do you consent to have your name published as a respondent to this NPRM? YES [✓] NO [ ]

Signed: Paul Tyrrell

Date: 5 September 2012

How are you responding to this questionnaire/proposal, i.e. whose views are represented in your response?

- Private individual     Aviation industry body/association     Staff association/ union     Government agency/authority/ department/council     Aviation business owner/ service provider     Other

Please advise your **main** involvement in aviation:

- Passenger/ public consumer of aviation services     Air crew for passenger-carrying activities     Air crew for non-passenger-carrying activities     Ground support for passenger-carrying activities     Ground support for non-passenger-carrying activities     Other (specify below\*, e.g. parachutist)

\* Details: Industry Association

Are you satisfied with CASA's consultation on this issue?

- Very satisfied     Satisfied     No opinion     Dissatisfied     Very dissatisfied

### Key Change Proposals (refer to NPRM Section 3)

CASA invites you to advise your comments on the subject matter proposed in this NPRM by indicating your preference by ticking [✓] the appropriate box and commenting below:

***Key Proposal 1: Distinction between Charter and Regular Public Transport (RPT) operators to be minimised***

- proposal is acceptable without change
- changes would improve it, but it is acceptable (please provide details below)
- changes would make it acceptable (please provide details below)
- not acceptable under any circumstances

Comments or suggested changes (including an estimate of additional costs/impacts if applicable): \_\_\_\_\_

\_\_\_\_\_  
**See Attached**  
\_\_\_\_\_  
\_\_\_\_\_

***Key Proposal 2: Identification of an additional key person to those defined in the Civil Aviation Act 1988 - the establishment of a new key person identified as the Safety Manager***

- proposal is acceptable without change
- changes would improve it, but it is acceptable (please provide details below)
- changes would make it acceptable (please provide details below)
- not acceptable under any circumstances

Comments or suggested changes (including an estimate of additional costs/impacts if applicable): \_\_\_\_\_

\_\_\_\_\_  
**See Attached**  
\_\_\_\_\_  
\_\_\_\_\_

***Key Proposal 3: Making the Chief Executive Officer (CEO) responsible and accountable for safety and regulatory compliance***

- proposal is acceptable without change
- changes would improve it, but it is acceptable (please provide details below)
- changes would make it acceptable (please provide details below)
- not acceptable under any circumstances

Comments or suggested changes (including an estimate of additional costs/impacts if applicable): \_\_\_\_\_

\_\_\_\_\_  
**See Attached**  
\_\_\_\_\_  
\_\_\_\_\_

***Key Proposal 4: Requiring charter operators (presently covered by CAO 82.1) to develop and maintain a Safety Management System (SMS)***

- proposal is acceptable without change
- changes would improve it, but it is acceptable (please provide details below)
- changes would make it acceptable (please provide details below)
- not acceptable under any circumstances

Comments or suggested changes (including an estimate of additional costs/impacts if applicable): \_\_\_\_\_

\_\_\_\_\_  
**See Attached**  
\_\_\_\_\_  
\_\_\_\_\_

***Key Proposal 5: Requiring charter operators (presently covered by CAO 82.1) to conduct Human Factors (HF) Training for all operational safety critical personnel and Non-Technical Skills (NTS) training for flight and cabin crew***

- proposal is acceptable without change
- changes would improve it, but it is acceptable (please provide details below)
- changes would make it acceptable (please provide details below)
- not acceptable under any circumstances

Comments or suggested changes (including an estimate of additional costs/impacts if applicable): \_\_\_\_\_

\_\_\_\_\_  
**See Attached**  
\_\_\_\_\_  
\_\_\_\_\_

***Key Proposal 6: Requiring all operators to provide training and checking for flight crew and operational safety critical personnel, or to have conducted by an approved contracted CASR Part 142 operator***

- proposal is acceptable without change
- changes would improve it, but it is acceptable (please provide details below)
- changes would make it acceptable (please provide details below)
- not acceptable under any circumstances

Comments or suggested changes (including an estimate of additional costs/impacts if applicable): \_\_\_\_\_

\_\_\_\_\_  
**See Attached**  
\_\_\_\_\_  
\_\_\_\_\_

***Key Proposal 7: Requiring an operator to have an FDAP for all rotorcraft above 7 000 kg and aeroplanes above 27 000 kg***

- proposal is acceptable without change
- changes would improve it, but it is acceptable (please provide details below)
- changes would make it acceptable (please provide details below)
- not acceptable under any circumstances

Comments or suggested changes (including an estimate of additional costs/impacts if applicable): \_\_\_\_\_

\_\_\_\_\_  
**See Attached**  
\_\_\_\_\_  
\_\_\_\_\_

***Key Proposal 8: The requirements for an operator to prepare, have approved by CASA, maintain and operate to an exposition***

- proposal is acceptable without change
- changes would improve it, but it is acceptable (please provide details below)
- changes would make it acceptable (please provide details below)
- not acceptable under any circumstances

Comments or suggested changes (including an estimate of additional costs/impacts if applicable): \_\_\_\_\_

\_\_\_\_\_  
**See Attached**  
\_\_\_\_\_  
\_\_\_\_\_









5 September 2012

Andrew Ward  
CASA's Standards Development Branch  
Reply Paid 2005  
Canberra ACT 2601

Dear Mr Ward,

**NPRM 0903OS**  
**Australian Air Transport Operators - Certification and Management**

Please find attached the RAAA's response to the CASA NPRM 0903OS, Australian Air Transport Operators - Certification and Management.

**The RAAA and its Members**

The Regional Aviation Association of Australia (RAAA) was formed in 1980 as the Regional Airlines Association of Australia to protect, represent and promote the combined interests of its regional airline members and regional aviation throughout Australia.

The Association changed its name in July 2001 to the Regional Aviation Association of Australia and widened its charter to include a range of membership, including regional airlines, charter and aerial work operators, and the businesses that support them.

The RAAA has 28 Ordinary Members (AOC holders) and 64 Associate/Affiliate Members. The RAAA's AOC members directly employ over 5,000 Australians, many in regional areas. On an annual basis, the RAAA's AOC members jointly turnover more than \$1b, carry well in excess of 2 million passengers and move over 23 million kilograms of freight. Annex A lists the Ordinary Members of the RAAA.

RAAA members operate in all States and Territories and include airlines, airports, engineering and flight training companies, universities, finance and insurance companies and government entities. Many of RAAA's members operate successful and growing businesses providing employment and economic sustainability within regional areas.

Some examples of RAAA members' presence in regional Australia is the REX hub in Wagga Wagga, SkyWest in WA, Sharp Aviation in Hamilton, Airnorth and Chartair Northern Territory networks, West Wing Aviation in Mt Isa, Airlines of Tasmania in Hobart and Skytrans operations from Cairns, to name a few.

*Serving regional aviation, and through it, the people and businesses of regional Australia*

Unit 11, 26-28 Winchcombe Court, Mitchell ACT 2911

ABN: 23 008 568 054 Telephone: 02 6162 0305 Facsimile: 02 6162 0308 Email: [office@raaa.com.au](mailto:office@raaa.com.au) Website: [www.raaa.com.au](http://www.raaa.com.au)

## RAAA Charter

The RAAA's Charter is to promote a safe and viable regional aviation industry. To meet this goal the RAAA:

- ➔ promotes the regional aviation industry and its benefits to Australian transport, tourism and the economy among government and regulatory policy makers;
- ➔ lobbies on behalf of the regional aviation industry and its members;
- ➔ contributes to government and regulatory authority policy processes and formulation to enable its members to have input into policies and decisions that may affect their businesses;
- ➔ encourages high standards of professional conduct by its members; and
- ➔ provides a forum for formal and informal professional development and information sharing.

The RAAA provides wide representation for the regional aviation industry by direct lobbying of Ministers and senior officials, through parliamentary submissions, personal contact and by ongoing, active participation in a number of consultative forums.

## Comments to NPRM 0903OS

### CASR 119.420

This regulation should not be capable of being used as a substitute for accident or incident reporting or for aircraft defect reporting. Nor should it be capable of being used as an investigative tool for enforcement action. Accordingly, it requires a qualifying provision that the surveys or questionnaires may not request specific information covered by either of those reporting systems.

### CASR 119.425

RAAA has noted the "Note for consultation" at page 58 of the draft regulations. The RAAA firmly believes this duplication is unnecessary, especially if it will result in bringing in by the back door amendments to the TSI Regulations which the aviation industry has strongly objected to on the basis that they undermine the value and effectiveness of the "just culture" underlying the confidential reporting system.

We have attached a copy of the RAAA submission of 10 August 2012 to the ATSB on this matter, which sets out the RAAA's views in detail.

The RAAA is appreciative of the ability to respond to this NPRM. If you have any questions or require further information please do not hesitate to contact me on (02) 6162 0305 or email [ceo@raaa.com.au](mailto:ceo@raaa.com.au).

Regards



Paul Tyrrell  
Chief Executive Officer





## **RAAA SUBMISSIONS**

# **PROPOSED CHANGES TO MANDATORY AND CONFIDENTIAL REPORTING SYSTEMS**

**Dated: August 2012**

*Serving regional aviation, and through it, the people and businesses of regional Australia*

Unit 11, 26-28 Winchcombe Court, Mitchell ACT 2911

**ABN: 23 008 568 054 Telephone: 02 6162 0305 Facsimile: 02 6162 0308 Email: [office@raaa.com.au](mailto:office@raaa.com.au) Website: [www.raaa.com.au](http://www.raaa.com.au)**

## Table of Contents

<b>I.</b>	<b>EXECUTIVE SUMMARY .....</b>	<b>1</b>
<b>II</b>	<b>PROPOSAL TO PROVIDE SAFETY INFORMATION TO CASA.....</b>	<b>3</b>
	Just Culture .....	3
	Safety Regulation - Adoption of Safety Management Systems.....	3
	ICAO’s Position on Protection of Safety Information.....	4
	International Practice .....	5
	The ATSB – Its Role and Powers.....	6
	The Role of the ATSB.....	6
	ATSB must act in accordance with ICAO .....	7
	Use of Safety Information by CASA for Regulatory and Licensing Action.....	7
	The basis of the RAAA’s concerns .....	9
	Restricting CASA’s access does not impede CASA’s ability to regulate .....	10
	Conclusion .....	11
<b>III.</b>	<b>MANDATORY REPORTING CHANGES.....</b>	<b>12</b>
	The International Position .....	12
	The Proposed Changes .....	13
	Widening of Mandatory Occurrence Criteria .....	13
	Cost of Reporting .....	14
	Confidentiality.....	14
	Conclusion .....	14
<b>IV.</b>	<b>INDUSTRY RELATIONS.....</b>	<b>15</b>

*These submissions are made on a confidential basis and are not to be disclosed to any other party without the prior written consent of the Regional Aviation Association of Australia.*

# RAAA SUBMISSIONS

## PROPOSED CHANGES TO MANDATORY AND CONFIDENTIAL REPORTING SYSTEMS

Dated: August 2012

1. The Regional Aviation Association of Australia (**RAAA**) takes this opportunity to comment on the proposed changes to Australia's mandatory and confidential aviation reporting systems outlined in a *Reporting Consultation Paper* issued by the Australian Transport Safety Bureau (**ATSB**) in June 2012.
2. At the heart of this submission is the fact that there have been enormous improvements in safety in aviation and that this has been in part the result of the open and frank disclosure of safety-related information. As the Royal Aeronautical Society, the Académie Nationale de l'Air et de l'Espace and the Civil Aviation Services Organisation stated in a resolution of 17 October 2006:

*The aviation industry every day puts its safety reputation and human lives on the line, and has a remarkable safety record which is due in large measure to the current willingness of operators and manufacturers to co-operate fully and frankly with the investigating authorities.<sup>1</sup>*

### I. EXECUTIVE SUMMARY

3. The RAAA is opposed to any proposal to provide the Civil Aviation Safety Authority (CASA) with access to safety information provided to the ATSB through mandatory reporting.
4. In summary, the RAAA's position on this issue is as follows.
  - CASA has made it clear that regards any information it obtains, regardless of the circumstances by which that information is provided, as a potential basis for administrative action.
  - In this regulatory climate, providing CASA with open access to ATSB safety reports will critically undermine aviation safety by seriously undermining the free flow of safety information and the concept of just culture.

---

<sup>1</sup> *There seems to be little dispute about the truth of this statement or that the "benefit of gaining accurate information to increase safety standards and reduce recurring accident greatly outweighs the retributive satisfaction of a criminal prosecution, conviction and punishment. However, there seems to be a false assumption that the use of such information for regulatory purposes may have a lesser impact than the use for disciplinary or criminal purposes.*

- Just culture can only be protected by recognising and maintaining the separate and distinct roles of the ATSB and CASA in accordance with international practice. The ATSB's investigative powers and functions should not be used as a substitute for the regulator exercising its regulatory powers and regulating.
5. The RAAA is also opposed to the proposed changes to the *Transport Safety Investigation Regulations (TSI Regulations)*. The proposal to move away from prescriptive categories of reportable events to adopt broad, risk-based categories of "occurrences" and "incidents" that must be reported will undermine the workability of the regulations and impose unreasonable and unfair burdens on industry participants.
6. In summary, the RAAA's position on this issue is as follows.
- The current regime, based on a prescribed list, is working satisfactorily.
  - The purpose of mandatory reporting is to give information to the ATSB promptly after an occurrence to allow it to decide whether or not to conduct an investigation.
  - The prescriptive approach is consistent with the requirements in Annex 13 of the Chicago Convention and the approach used in the US and Europe.
  - It is not fair or reasonable to require responsible persons to undertake a subjective evaluation of risk in order to determine what is reportable and when, particularly when there are significant civil and criminal penalties (including imprisonment) for failing to make the "correct" assessment.
  - The prescriptive approach makes it clear what must be reported and when and there is no need to second guess the regulator.
  - The risk-based model will significantly increase the number of reportable events imposing significant time and costs burdens on the industry.
  - The *Reporting Consultation Paper* does not disclose why the ATSB would need access to such a significant number of reports to decide whether or not to conduct an investigation.

## II. PROPOSAL TO PROVIDE SAFETY INFORMATION TO CASA

7. The RAAA has serious concerns about the proposal to give CASA access to safety information provided to the ATSB through its mandatory reporting scheme. Specifically, the RAAA's position is that information disclosed by mandatory reports for safety purposes should not be used for any punitive or regulatory action (whether criminal, licensing or employment-related) without appropriate safeguards.
8. CASA has publicly stated that it will use any information it obtains to take action against a licensee or authorisation if it sees fit to do so. Accordingly, consistent with the principle of just culture, safety information should not be disclosed to CASA without protections as to its use.
9. Providing CASA with open access to these reports for the purpose of suspending or cancelling an authorisation to operate will undermine aviation safety by seriously undermining voluntary reporting and the concept of "just culture".

### **Just Culture**

10. Just culture is an important concept which encourages industry participants to come forward and report errors or mistakes within an organisational and regulatory climate that is conducive to such reporting in the interests of safety – a just culture.
11. Under just culture, individuals and organisations are not punished for honest mistakes but are only held accountable for wilful violations and gross negligence. The underlying logic is that individuals and organisations are not willing to share information about their own errors or other safety-related problems if they are afraid of being punished, prosecuted or deprived of their livelihood. The industry is then without the necessary information to identify and learn from the safety issue involved.

### **Safety Regulation - Adoption of Safety Management Systems**

12. CASA's approach to safety management is to require operators to implement a Safety Management System (**SMS**) (Civil Aviation Order 82.5 (**CAO 82.5**)). The Australian Government endorses the SMS approach to safety management and the *Civil Aviation Safety Regulations* 1998 (Cth) (**CASR**) require the application of the SMS principles.

13. A cornerstone of any SMS is the frank and open communication of safety-related information across the industry and with investigation and regulatory authorities. CAO 82.5 specifically requires operators to incorporate into their SMS a system that encourages the communication of safety-related information (s 2A.2(d)(ii)).
14. To ensure that safety-related information is communicated, CAO 82.5 also requires the identity of the person who provides information to be protected from disclosure to anyone other than the a person whose duty it is to analyse the information (2A.3(d)(i)) and operators are specifically prohibited from taking punitive action against a person who reports information (2A.3(d)(ii)).
15. In other words, just culture is an essential element of the SMS which is intended to encourage the communication of safety-related information and offers the twin safeguards of confidentiality and protection from punitive action. The importance of the free flow of information will be addressed further in these submissions.

### **ICAO's Position on Protection of Safety Information**

16. The International Civil Aviation Organization (**ICAO**) specifies that safety information includes information provided by mandatory reporting systems and that protection of safety information from inappropriate use is essential to ensure its continued availability<sup>2</sup>. ICAO does not distinguish between safety information obtained during a safety investigation and safety information obtained by mandatory reporting. Both are treated as forms of safety information requiring protection from misuse.
17. Just culture is the approach to aviation safety recommended by ICAO. ICAO regards the protection of safety-related information from inappropriate use, including administrative action<sup>3</sup>, as essential to ensure aviation safety.
18. During its 35th assembly, ICAO noted that existing national laws and regulations in many states did not adequately protect those disclosing information from administrative, disciplinary or criminal proceedings and that this was having an adverse effect on the disclosure of critical safety-related information.

---

<sup>2</sup> Attachment E to Annex 13 [at 1.4(d)].

<sup>3</sup> Attachment E to Annex 13 [at 3.5].



19. Accordingly, ICAO produced a series of principles in Attachment E to Annex 13 of the *Chicago Convention* to assist States when enacting national laws and regulations. In short, these principles provide that the purpose of protecting safety information from inappropriate use is to ensure its continued availability, since the use of safety information for other than safety-related purposes may inhibit the future availability of such information with an adverse effect on safety. Attachment E to Annex 13 also provides that safety information should not be used in a way different from the purpose for which it was collected and that any person seeking disclosure of safety information should justify its release, and justification would need to ensure that disclosure is necessary to correct conditions that compromise safety, that disclosure does not inhibit the future availability of information, and disclosure of the information is de-identified.

### **International Practice**

20. The ATSB in its letter to operators on the proposed new mandatory reporting regulations and in its *Reporting Consultation Paper* makes the representation that, “providing more open access to the regulator will be in line with international practice”.
21. The RAAA submits that this representation is wrong. There is no international practice for the release of safety information from independent investigation bodies to regulators for use in regulatory action. In fact the use of information involving or arising out of innocent mistakes for such action is directly in conflict with prevailing international practice.
22. The statement is inconsistent with the current guidance material issued by ICAO (which, as will be outlined in more detail later in this Submission the ATSB is obliged to follow) and is inconsistent with the procedures in the United States, the country with the largest aviation industry in the world.
23. The European Regulation also deals with confidentiality and provides that,
- in order to inform the public of the general aviation safety level, a safety review shall be published annually at national level. In this analysis, the sources of confidential information shall not be revealed.*

## The ATSB – Its Role and Powers

24. In considering the changes proposed by the ATSB it is important to bear in mind the role and powers of the ATSB.

## The Role of the ATSB

25. The *Transport Safety Investigation Act* (2003) (Cth), the Second Reading Speech for that Act and the Explanatory Memorandum reveal that:

- (i) The ATSB's primary role is as an independent safety investigator and its purpose is to conduct investigations and to identify and communicate factors that might affect safety<sup>4</sup>.
- (ii) Mandatory reports are provided to the ATSB to allow it to commence an investigation<sup>5</sup>.
- (iii) The ATSB's role does not include apportioning blame. In the Second Reading Speech the Minister said:

*[The ATSB] must not itself play a regulatory role in the industry.*

*[The ATSB's "no blame" approach] simply means that disciplinary action and criminal or liability assessment are not part of an ATSB safety investigation and should, if necessary, be progressed through separate processes. Witnesses, particularly operational crew may be in possession of vital safety information, must be free to provide this information to the ATSB without any self incrimination or retribution.*

*For those few occurrences where malice may be involved, regulators, police and others may conduct a parallel investigation to ascertain blame or fault so that wrongdoing is not tolerated. This is an important part of "just culture"<sup>6</sup>.*

26. The legislature recognised the importance of witnesses in possession of vital safety information being free to provide that information to the ATSB without fear of retribution and that regulatory investigations should be separate from and be no part of the ATSB's functions.

<sup>4</sup> s. 12AA of TSI Act and Explanatory Memorandum page 32

<sup>5</sup> Explanatory Memorandum page 41

<sup>6</sup> Hansard, Tuesday 15 October 2002 p 5143.



27. It is submitted that care must be taken not to confuse mandatory reporting under the TSI Act with mandatory reporting regimes in civil aviation such that is provided by CAR 51 under the *Civil Aviation Act 1988* (Cth). The civil aviation mandatory reporting schemes are intended to allow regulators to monitor safety and take appropriate action as necessary. The mandatory reporting regime under the TSI Act is for the purpose of allowing the ATSB to decide whether or not to conduct an investigation and if an investigation is conducted it is subject to requirements of confidentiality.
28. Given that the purpose of a mandatory report is to allow the ATSB to decide whether or not to conduct an investigation, it is submitted that the ATSB would be acting outside the intended purpose of mandatory reporting to disclose safety information obtained from mandatory reports to CASA for the purpose of regulatory action.
29. It is submitted that the “in parallel” but different mandatory reporting regimes in both the *Civil Aviation Act* and the TSI Act are consistent with the legislature’s intention that safety information provided to the ATSB should remain confidential and should not be used for regulatory or disciplinary action.

#### **ATSB must act in accordance with ICAO**

30. In exercising its powers the ATSB must act consistently with ICAO requirements and have due regard to ICAO recommendations (s.12AB TSI Act).
31. The release of information to CASA in the manner proposed by the ATSB would be in direct contravention of ICAO guidelines (see Attachment E to Annex 13 and the ICAO *Safety Management Manual* (Doc 9859) (2nd Edition – 2009) at [9.7]). The ICAO requirements include the protection of safety information (which expressly includes information provided by mandatory reports) from inappropriate use which includes use for regulatory action without appropriate safeguards to protect it from misuse.

#### **Use of Safety Information by CASA for Regulatory and Licensing Action**

32. In setting out CASA’s “proportional approach” to the use of safety-related information, the *Reporting Consultation Paper* suggests that CASA needs “open access” to mandatory reports of accidents and incidents because it may need to take legitimate action, including the “need to suspend and later cancel an authorisation to operate”.

33. In setting out precisely when CASA will take such action, the *Reporting Consultation Paper* suggests that CASA's approach will be consistent with paragraph 2.4.3 of its *Enforcement Manual*: namely, a proportional response to the identified breaches in the interests of safety.

34. Against this view, the RAAA submits that CASA's attitude is best revealed, not by paragraph 2.4.3 of its *Enforcement Manual*, but rather by what CASA has removed from that document in recent years.

35. Consistent with the requirement for conformity with the Chicago Convention and the resolutions of ICAO, CASA previously included the following statement in the foreword to its *Enforcement Manual*:

*A person who reports making an honest mistake generally should not be prosecuted or fined, nor should they have their license, certificate or authority suspended or cancelled.<sup>7</sup>*

36. This statement was removed from the *Enforcement Manual* published in November 2010.

37. More recently, in the September/October 2011 edition of CASA's safety journal, *Flight Safety Australia*, reservations were expressed about the utility of just culture:

*It is wrong to say that information that comes into our [CASA's] hands cannot be used as the basis for regulatory action in the interests of safety.<sup>8</sup>*

38. In other words, the references to a proportional response in the interests of safety in paragraph 2.4.3 of its *Enforcement Manual*, does not offer industry participants any protection from administrative action. If understood correctly, CASA's position is that use of safety information for safety purposes includes regulatory action against operators and individuals. The RAAA is aware of circumstances where CASA has represented that it is seeking information from an individual "for safety purposes" and has then used that information or the admissions given frankly by that individual in the interests of safety, to seek to revoke entitlements.

---

<sup>7</sup> See, for example, the *Forward to the 2008 manual*.

<sup>8</sup> 'Accidental Justice: Just Culture and Criminalisation of Accidents', *Flight Safety Australia*, Issue 82 Sept-Oct 2011, page 12.

39. The contention by CASA that a “safety purpose” includes regulatory action against an individual or an organisation is, on the basis of international experience, groundless and is rejected by the RAAA and its members.
40. Further, as Australia has not adopted any measures for the protection of safety information, even if the ATSB was acting within the scope of its power to release information in mandatory reports to CASA, it could not do so in compliance with s.12AB of the *TSI Act* until such time as “just culture” protections had been included in either the *TSI Act* or the *Civil Aviation Act*.

### **The basis of the RAAA’s concerns**

41. Safety information should only be used for safety purposes. Safety purposes do not include regulatory action against an individual or organisation.
42. Australia has no legislative regime to ensure that principles of just culture are followed by CASA. If punitive action is taken for honest and reasonable mistakes it will degrade the effectiveness of safety management systems. It is human nature to avoid punishment and when people operate in fear that they, their colleagues, or even their employer, could be punished or their livelihoods threatened for what are normal mistakes, there is a risk that errors and unsafe actions will remain hidden and organisations and regulators will lose opportunities for improvement and prevention.
43. This view was recently confirmed by Sofia Michaelides-Mateou and Andres Mateou in their book, *Flying in the Face of Criminalisation*<sup>9</sup>. Based on their research, the authors concluded that “a large majority of aviation professionals” would be reluctant to participate in the investigation subsequent to an aviation accident or serious incident in circumstances where there was the prospect of legal consequences and punitive measures following the outcome of the investigation (at [155]-[157]). Moreover, all interviewees for the book, except one, were adamant that criminalisation had no positive effect, but rather impeded safety. As one pilot quoted in the book put it, “blaming and punishing someone will not help aviation safety. How can safety lessons be learnt if everyone is too scared to report an error or mishap?” (at [155]).

---

<sup>9</sup> *Flying in the Face of Criminalisation: Safety Implications of Prosecuting Aviation Professionals for Accidents* (Ashgate: 2010).

44. For example, if a young pilot is threatened with the loss of his licence for reporting a significant safety breach, the loss of his licence will in all likelihood be perceived by the young pilot as something as serious as a criminal prosecution. In this situation, there would be a significant motivation on the part of the young pilot not report the critical safety information.
45. Safety must be paramount. Giving CASA any discretion about use of safety information for punitive action will have a detrimental effect on safety information.

### **Restricting CASA's access does not impede CASA's ability to regulate**

46. The *Civil Aviation Act* already provides CASA with very broad regulatory powers that enable it to fulfil its function of establishing a regulatory framework for maintaining, enhancing and promoting the safety of civil aviation.
47. If CASA has any concern about the standards of safety or the level of compliance within an organisation or on the part of an individual, it has a raft of effective measures to audit, supervise, test, evaluate, investigate and for surveillance.
48. In view of the powers granted to CASA under the *Civil Aviation Act*, the RAAA submits that CASA does not need access to safety information to perform its function as a regulator. There is no immunity from regulatory action granted to a person who makes a report to the ATSB. At issue is whether or not CASA can use information provided in a mandatory report. The existing legislative framework allows the ATSB to make safety recommendations to CASA. CASA can conduct its own investigation into accidents or incidents. If it had a concern that a pilot, engineer or organisation lacks the expertise or aptitude to perform a particular role, CASA can audit, interview, counsel or even re-examine the particular party.
49. If there is a deficiency of standards such that it would be unsafe for the party to continue to hold an aviation authorisation, CASA has a suite of powers to allow it, if exercising its functions properly, to identify the deficiency and take appropriate action without using safety information and threatening the free flow of this information.

## Conclusion

50. Just culture is essential to the effective operation of a safety management system. People must be confident that disclosure of an honest mistake not involving deliberate or reckless conduct, will not result in punishment whether that be from an employer, regulator or prosecutor.
51. Any requirement the organisations guarantee just culture or confidentiality to their employees within a safety management system will be undermined if individuals know that just culture ends the moment information passes to the ATSB or CASA. All those who are experienced in safety management know that information will dry up unless just culture exists at all levels. It is no answer to say that individuals will not be named because individuals can, in the aviation industry, often be identified from circumstances and in any event the loss of a job because of damage to the operator is also a disincentive to frank disclosure.
52. The concept of just culture should be enshrined in the legislation to protect it from manipulation. The protection should ensure safety information is used for the purpose for which it was provided, that of safety. It should not be disclosed to CASA for the purpose of taking administrative action.
53. The boundaries should be defined as clearly as possible so people understand the consequences of their actions. This means that individuals in the aviation sector must know that when they are asked to provide information to the ATSB or their employer in the interests of safety, that information will not be used against them by CASA in subsequent administrative action.
54. Just culture must be protected by ensuring that information provided to the ATSB is used only for the purpose for which it was provided, namely, safety, it should not be used as a substitute for the regulator regulating.



### III. MANDATORY REPORTING CHANGES

55. The RAAA submits that the proposed changes to the *TSI Regulations* are contrary to the purpose of the *TSI Act*, are unnecessary and will undermine the workability of the regulations. The current regulations are consistent with the requirements in Annex 13 and the reasons for the proposed changes, as disclosed in the *Reporting Consultation Paper*, are not accepted by the RAAA.

#### The International Position

56. The ATSB submitted to the Senate Inquiry into the *Transport Safety Investigation Amendment (Incident Reporting) Bill 2010*, that mandatory reporting requirements in the US and in Europe are prescriptive with respect to accidents or incidents that must be reported<sup>10</sup>.
57. In the United States, Federal Regulations (49 CFR 830) require operators to notify the NTSB immediately of aviation accidents and certain incidents. In accordance with Annex 13, an accident is defined as an occurrence associated with the operation of the aircraft that takes place between the time a person boards the aircraft with the intention of flight and the time when all such persons have disembarked, and during which time a person suffers death or serious injury or the aircraft receives substantial damage. An incident is an occurrence other than an accident that affects or could affect the safety of operations. These Federal Regulations also include prescriptive lists of reportable matters.
58. In addition, aviation industry participants in the United States are encouraged to submit confidential, voluntary, and non-punitive reports when they have been involved in, or observe, an accident or situation in which aviation safety may have been compromised to the Aviation Safety Reporting System (**ASRS**), which is administered by the National Aeronautics and Space Organisation (**NASA**) in conjunction with the Federal Aviation Administration (**FAA**).
59. Significantly, the reporting requirements in the US not only rely on the definitions in Annex 13 but, equally importantly, do not require a responsible person to undertake a subjective assessment of “risk” in order to determine what is reportable and when – the requirements are prescriptive and are clearly set out in the legislation.

---

<sup>10</sup> ATSB Submission, para. 75.

## The Proposed Changes

60. The *Reporting Consultation Paper* suggests that the proposed changes to the *TSI Regulations* are intended to improve the workability of the Regulations by replacing the lists of prescribed events with broad, risk-based categories of “occurrences” and “incidents” that must be reported.
61. In response, the RAAA submits that the proposed changes undermine the workability of the *Regulations* precisely because of this less prescriptive approach.
62. The RAAA submits that it is not fair or reasonable to require responsible persons to undertake a subjective evaluation of “risk” in order to determine what is reportable and when, particularly when there are significant penalties – criminal and civil<sup>11</sup> – for failing to make what a regulator (often informed by hindsight) might regard as an accurate and timely assessment.
63. Even the *Reporting Consultation Paper* acknowledges that the more prescriptive the reporting requirements, the more effective they are in ensuring compliance. Specifically, the *Reporting Consultation Paper* notes that the current regulations have not been as effective as they might have been precisely because “there have been times when it hasn’t been clear whether an incident should be reported because it is not listed in the regulations”.
64. The RAAA agrees. In order to ensure that industry participants are clear about what to report and when, the regulations need to be clear, precise and as prescriptive as possible.

### Widening of Mandatory Occurrence Criteria

65. The current regulations make it clear which occurrences and incidents must be reported. By contrast, the proposed regulations identify only a relative small number of reportable occurrences and incidents specifically and rely, for the most part, on broad categories of occurrences and incidents that are defined relative to degrees of risk. By making the reporting criteria less prescriptive and dependent on a subjective assessment of risk, the proposed regulations significantly widen the mandatory occurrence reporting criteria.

---

<sup>11</sup> Sections 18 and 19 of the *Transport Safety Investigation Act 2003*.

66. The adoption of a risk-based criteria for reporting will dramatically increase the volume of reports submitted to the ATSB. The RAAA and its members believe the reporting requirements will be similar to the criteria for occurrence reports under an operator's SMS and consequently the volume of reports required to be submitted to the ATSB will increase by tenfold.
67. It is difficult to see why, when determining whether or not to investigate the matter, the ATSB would need access to such a significant volume of reports.

### **Cost of Reporting**

68. The increased cost of reporting is not warranted unless the ATSB can show that the current reporting system is not operating satisfactorily. Operators should not be put to any additional expense unless there is a problem with the current reporting regime.

### **Confidentiality**

69. The ATSB does not propose to introduce any confidentiality protections despite significantly increasing the amount of information required to be produced. This is a relevant factor in objecting to the increased reporting obligations.

### **Conclusion**

70. The current reporting regime is working satisfactorily giving the ATSB sufficient information to decide whether or not to conduct an investigation.
71. Bearing in mind that the reporting obligations are mandatory, that it is a criminal offence to fail to comply with the reporting obligations and the obligation can involve the disclosure of sensitive information which is not protected from disclosure pursuant to the Freedom of Information Regime, the reporting obligations should not be broadened unless there is good reason to do so.
72. Additionally, the change from a prescriptive list to a risk-based reporting regime is inconsistent with the guidance material promulgated by ICAO and the ATSB would be acting contrary to its obligations in the TSI Act.



#### **IV. INDUSTRY RELATIONS**

73. The issues above are complex and require careful handling. Any mishandling of these issues could damage the ATSB/industry relationship to a point that would be significantly detrimental to both parties.
74. The ATSB enjoys currently a sound relationship with the regional aviation industry. The ATSB should not be compromised by a change in reporting behaviour for the reasons detailed above. In the long term, such a change could have negative safety consequences. Individuals and entities will only provide quality data if they feel free of external or third-party threat. This is the basis of the ATSB/industry relationship and it must not be diluted.

# Annex A: RAAA Ordinary Members

