

In recent years there have been a number of instances of death or injury arising from major military aircraft accidents and/or incidents. When they occur, a sizeable body of material is collected by various agencies that may be of significant value in the prosecution of actions seeking compensation for death or personal injury.¹ This paper examines the processes by which such material is gathered and the use to which such material may be put in its primary form.

Boards of inquiry and military aviation accidents

their evidentiary value in actions for personal injury



Following any major aircraft accident or incident the initial response is to appoint a team to undertake an investigation of the accident and report upon the event. Generally following that investigation, a Board of Inquiry will be conducted. The process mirrors the process undertaken in the event of a civil aviation accident or incident wherein the ATSB is employed to initially investigate and report on the accident before a subsequent coronial inquiry is conducted.

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Principles governing the process of inquiry

In the context of military aviation accidents, confusion often arises between the role and conduct of a Board of Inquiry (BOI) and that of the Accident Investigation Team (AIT). To the uninitiated there is an appearance of duplication of effort, sometimes without any apparent benefit. The underlying principles, however, are common to those that exist in the civil sphere.

The Commonwealth is a signatory to the Convention on International Civil Aviation (ICAO Convention - more commonly known as the Chicago Convention) which specifically incorporates Annex 13.² The Commonwealth's adoption of the convention binds it both in its military and civil capacity. The operation of Annex 13 is adopted by the *Air Navigation Act* (Cth) wherein section

3A provides for the ratification of the Chicago Convention. By operation of defence legislation its application extends to investigation of incidents concerning military aircraft.³

Significantly, Annex 13 details an internationally accepted regime for the conduct of aviation accident/incident investigations. The object of the Annex is to advance the safety of air navigation. Chapter 5 of the Annex deals expressly with investigations. It provides machinery for determining which National Government leads the conduct of investigations, conducts autopsies, notifies local authorities, oversees the independence of the investigation and has unrestricted authority over its conduct.

The investigation includes the gathering, recording and analysis of all available relevant information, if possible the determination of the causes, and the completion of the final report followed, if

appropriate, by safety recommendations.

To encourage full and frank disclosure of information, even potentially self-incriminating information, Chapter 5 of Annex 13 contains a significant caveat in clause 5.12. Clause 5.12 provides that the State conducting the investigation shall not make its records available for purposes other than the accident or incident investigation unless a court determines that their disclosure outweighs the adverse domestic and international impact such action may have on that or any further investigation.⁴ (See also section 19HC *Air Navigation Act*.)

What is the Accident Investigation Team (AIT)

The AIT is an organ appointed pursuant to DI(AF) OPS 6 - 12 to conduct an investigation and to report to its appointing authority.⁵ Importantly the conduct of such investigation is not bound by Defence Inquiry Regulations (DIRs).

The composition of the AIT is one of far-reaching aviation expertise and experience and personnel selection is often based on the circumstances of the matter under investigation. Its duty is to commence its investigation as soon as practicable after an accident/incident and it is to report on the cause of an occurrence and, save when a BOI is appointed, to make recommendations on actions required to prevent a recurrence. Its role is similar to an accident investigation team appointed by the ATSB to investigate a civil aviation accident.

From a legal perspective the AIT has a duty to comply with the principles of administrative law and, significantly, the duty to afford natural justice. However as the AIT cannot be compelled to turn over its investigatory records to demonstrate breaches of those principles where they occur, enforcing rights in this regard can give rise to difficulties. It should be appreciated that the survivors of the deceased particularly have a concern to protect the memory of their deceased loved ones as well as consider their compensation options.

Additionally the AIT is not appointed under DIRs. To do so would give rise to an immediate conflict between it and Annex 13 as the DIRs compel a person

to answer questions put in the course of an investigation subject to limited exceptions. No such requirement exists under Annex 13.⁶

The product of the AIT is its report. Such a report will contain conclusions. In many respects, however, its compilation must remain a mystery. Furthermore it is a report produced in circumstances of urgency for often command requires a swift answer to a military aircraft accident for operational and safety purposes.

Given the nature of this investigation, why subsequently conduct a Board of Inquiry? On their face both appear to be "investigations" conducted in terms of Annex 13; both are conducted by the Commonwealth through its agency Defence: and both appear to be constituted with a view to furthering aviation safety. But are they?

The Board of Inquiry (BOI)

The BOI is an investigation promulgated under the DIRs. Significantly, the DIRs generally require a BOI to take evidence on oath⁷; appearance of a witness before a BOI are compellable by summons⁸; production of documents are compellable before the BOI by summons⁹; witnesses before the BOI are not excused from answering questions, even in the case of self incrimination¹⁰; where a person may be affected by the Inquiry that person may be entitled to appear before the BOI - usually by a lawyer¹¹; appearance entails the right of cross-examination of witnesses.

Upon the conclusion of its hearings, the BOI is required to produce a report setting out findings and usually because it is directed to do so, recommendations. Finally, those who participate in BOIs are afforded the usual protection that attaches to court-like proceedings.

It can be seen from the regime that a BOI, unlike an AIT, conducts its business in a particularly transparent manner. All the evidence is presented, persons interested in the outcome have a right of appearance and a report that is justified upon established facts has to be produced. If there is a failure by the BOI to produce this outcome without offending principles of administrative law, an auditable trail exists to enable a court to

review the process.

However, you ask, aren't these just the same issues revisited by a different person; and if so, won't the result be the same? The answer is yes, maybe - but it all depends upon the evidence.

Evidence before the AIT and the BOI

Neither the processes of an AIT or BOI are governed by the rules of evidence. However to say, as a rule, that there are no rules is a tautology. Suffice to say, absent even strict application of the rules of evidence there remain underlying rules governing evidence. Essentially the test of evidence in the absence of rules concerning admissibility falls to notions of fairness governing weight.

In an article entitled 'Dispensing with the Rules of Evidence' by Justice Giles of the NSW Supreme Court¹² his Honour observed:

a statutory direction that a tribunal is not bound by the rules of evidence does not mean that no rules excluding otherwise probative material can be or will be applied: it means that the tribunal is not required to apply them by force of the law of evidence.

The following questions arise where the tribunal of fact is expressly not bound by the rules of evidence.

First, is the freedom from the rules of evidence complete, or must the tribunal nonetheless pay some regard to those rules as rules of evidence?

Secondly, what is meant for its purpose by the rules of evidence? Is the only test for the evidence

which the tribunal may receive that of relevance, or do some of the exclusionary rules traditionally regarded as rules of evidence still control it?

Thirdly, is there some other principle controlling the tribunal of fact in arriving at its decision, such that the freedom from the rules of evidence does not leave it unfet-

tered in its reception of relevant evidence?"

In answering his somewhat rhetorical questions his Honour later stated:

there remains a powerful control over the reception of evidence by a tribunal which is not bound by the rules of evidence. That is that the tribunal must not in its reception of evidence deny natural justice to the parties. What natural justice (or as is now called, procedural fairness) requires depends upon the particular circumstances - obviously enough natural justice will require that the tribunal hear both sides, at least where it is appropriate to have a hearing, or give both sides the opportunity of commenting on the material before the tribunal. If the tribunal informs itself in the absence of the parties, at least as a general rule it must give the information so obtained to the parties to permit them to express their views upon it.

Commonly, natural justice will require that the opposing party be allowed to test the evidence by some form of cross-examination but natural justice does not necessarily require testing by cross-examination and fairness may be met by an opportunity to contradict a document.

Natural justice may go so far as to require that evidence which is relevant nonetheless be excluded because it would be unfair to admit it.

Given the BOI has the luxury of time it can therefore afford a process which furnishes the production

and analysis of information in a more detached and considered environment. This is as opposed to the pressure cooker environment to which the AIT is subjected to achieve its results.

Evidence taken before both the AIT and BOI will often be in a strictly non-admissible form. The weight of that evidence can, however, be challenged during a BOI and legally reviewed subsequent to it. Not surprisingly, occasions

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thus arise where the AIT and BOI will reach different conclusions following their respective inquiries.

Thus the BOI permits a transparency of process of which the AIT cannot. In the contemporary environment of public sector accountability this is a critical issue.

Practice and procedure

BOIs are conducted in a manner similar to coronial inquests. The proceedings are not adversarial but investigatory. In some respects the proceedings can be conducted "on the papers" in that non-contentious evidence may be adduced by affidavit.

By and large, (and unlike the AIT) a BOI will convene formal sittings which, as a minimum, will involve the calling of witnesses who may be the subject of examination extending beyond a prepared statement.

Subject to the direction of the instrument of appointment, BOIs may be either conducted publicly or in camera. Although the practice to date concerning the conduct of aircraft accidents has been mixed the prospect is that in the foreseeable future such inquiries will be conducted publicly.

In recent times another practice has also developed of appointing a Counsel Assisting. The presence of a competent Counsel Assisting serves to lighten the burden upon the Board in the execution of the administrative and legal tasks associated with the conduct of BOIs.

Board membership

The membership of the Board will be selected by the BOI's convening Authority. It can generally be anticipated that the Board's members will traverse a breadth of skills required to address the task at hand. Additionally recent trends indicate that future Boards will also include a civilian member of appropriate aviation expertise to enhance the perception of transparency of the process.

The record of the proceedings

Notwithstanding that a Board may be conducted publicly, the record of the proceedings and its report is subject to rules of disclosure. Material gathered by a BOI and its report may not be publicly

available at first instance.¹³ However the practice has developed of providing a releasable version of the report through the office of the Minister for Defence. Save for deletions required in accordance with the provisions of the *Privacy Act* and for deletions of matters of security interest, an otherwise unedited report is made available. This release will also generally include evidentiary material including the initial accident investigation team report. Were it not to be released there is nothing preventing application to the Minister for its release.

Conclusion

Following the occurrence of a military aviation accident a sizeable body of material is collected and examined at two distinct stages. The processes and law governing these investigations and examinations mirror civil law process and procedure. A sound policy basis exists for the conduct of a two-staged process of investigation and examination. Much of the material collected is accessible and of value to persons advising in later actions for compensation, military or otherwise. ■

Footnotes:

- ¹ Military Aircraft are not subject to the no fault provisions of the *Damage By Aircraft Act 1999 (Cth)* – see Sec 9 (2). Often times however liability may not be an issue because personnel concerned are covered by entitlements under the Commonwealth Employees Rehabilitation and Compensation Act or the Veterans Entitlements Act. Ceilings for compensation provided for under the Warsaw Convention (presently AUD\$500,000 per claim) adopted by the *Civil Aviation (Carriers Liability) Act* similarly do not apply to accidents involving military aircraft.
- ² The Convention on International Civil Aviation, International Standards and Recommended Practices - Aircraft Accident and Incident Investigation.
- ³ Sec 2B of the *Air Navigation Act* excludes the operation of that Act (and by extension the Ratified Chicago Convention) to state aircraft. - state aircraft are defined to

include military aircraft. However Defence Instruction DI (AF) OPS 6-12 promulgated pursuant to Sec 9A (3) of the *Defence Act* extends the convention operation to military aircraft. Paragraph 56 mandates the application of Air Standard Coordination Committee Air Standard 85/2A which itself applies the Chicago Convention (similar instructions govern the procedure to be employed in both the Army and Navy aviation branches).

- ⁴ Matters relevant to the use of information contained in the course of investigation and in particular the use of material secured by use of the coercive powers of accident investigators is continued within the various provisions contained in Part 2A of the *Air Navigation Act*.
- ⁵ The Appointing Authority is usually the appropriate military formation commander responsible for the assets involved in the accident ie. Operational aircraft fall within Air Commander Australia's responsibility.
- ⁶ An AIT closely resembles an Investigating Officer's investigation provided for under the DIRs. Regulation 74 provides an exception in the event the answer may disclose a secret process of manufacturer or be prejudicial to the defence of the Commonwealth. Reg 74A provides any disclosure made in such case is not admissible in evidence in proceedings against the person before service tribunal.
- ⁷ DIR Regulation 31(2)
- ⁸ DIR Regulation 32
- ⁹ DIR Regulation 32(4)
- ¹⁰ DIR Regulation 32(5); *Defence Act* Sec 124 (2A), (2B) and (2C) contemplates a requirement by a witness before a BOI to answer any question save for one which concerns one in respect of a matter which is the subject of a pending charge. Otherwise there is an immunity against the admissibility of use of such evidence in proceedings against the deponent. This applies in a manner similar to the Corporations Law. See *Hamilton v Oades* (1989) 166 CLR 486.
- ¹¹ DIR Regulation 33
- ¹² 1992 *Building and Construction Law Journal* 88
- ¹³ DIR Reg 63(2) embargoes any material which comes before a BOI subject to ministerial authority from the Minister for Defence authorising its release – Reg 63 (3)