

## **Legal parallels and lessons from the Rena maritime accident**

In this edition of *The Legal Lounge*, I discuss some of the legal issues arising from the recent RENA maritime accident and the parallels that may arise in the aviation context, in particular with regard to obligations to cooperate with safety investigations, and how to respond to criminal enforcement or administrative investigations that may arise from aviation accidents and incidents.

### ***Domestic maritime law and regulatory environment***

As with aviation, domestic maritime law in New Zealand is sourced primarily from international conventions and treaties, which are codified to a greater or lesser extent in our domestic law. The Maritime Transport Act 1994 (MTA) is modelled on the Civil Aviation Act 1990 (CA Act), and the regulatory structure and powers of Maritime New Zealand (MNZ) and its Director broadly mirror those of the Civil Aviation Authority and its Director, in relation to their safety, administrative and enforcement functions. The MTA also contains extensive provisions concerning protection of the marine environment, and MNZ is charged with responsibility for overseeing and enforcing those provisions. The full breadth and scope of the functions, responsibilities and powers of MNZ and its Director have been in the spotlight since the RENA accident in early October this year.

### ***The state and regulatory response to the Rena accident***

The *MV Rena*, a 47,000 ton container vessel registered in Liberia and owned by the Costamare Shipping group, grounded itself on the Astrolabe Reef off the coast of Tauranga on 5 October 2011. Some containers were lost and some oil escaped from the vessel and washed onto local beaches. The government, MNZ and local port authorities swung into action to set up an exclusion zone around the harbour to minimise the risk of collision with loose containers and to prevent potential contamination of seafood catches, to assist the salvors to extract the remaining oil off the vessel, and to begin the cleanup of our beaches.

The Transport Accident Investigation Commission (TAIC) immediately commenced a safety investigation into the accident, and MNZ launched its own concurrent investigations under the MTA. Just over a week after the accident the master of the ship was arrested and charged with operating a vessel causing unnecessary danger to persons or property, and the second officer (who was reportedly in charge of the ship at the time when it grounded) was charged a few days later. Investigations continue, with MNZ reportedly considering whether to lay additional charges against the crew members, and the Shipping company operating the vessel. All well and good you might say, in light of the environmental damage sustained and the further potential damage that could have been caused from more oil spills, or that could still be posed by dangerous substances in a number of containers still on the ship (some of which it transpires were not disclosed as required by law), as well as the ongoing risk of more containers tipping into the harbour.

However, it should be a timely reminder to all participants in the aviation system that there is rarely, in the eyes of the law, such a thing as purely “an accident”, and that serious legal implications (civil and/or criminal) could follow from some aviation incidents or accidents.

## ***Investigation of aviation accidents and incidents***

TAIC is tasked with investigating rail, maritime and aviation accidents and incidents with a view to establishing the causes and making recommendations to prevent similar recurrences, and are not tasked with attributing blame. It is mandatory to cooperate with a TAIC investigation, but there are certain statutory protections that apply in respect of information obtained by TAIC in the course of its investigations that prevent such information and evidence gathered by it from being used in any civil or criminal proceedings.

However, the same limitations, statutory objectives and parameters do not apply to other government agencies and investigations. I discuss below the implications and issues that participants may need to consider in determining how to respond to what may potentially be multiple concurrent investigations with different statutory purposes and objectives.

### *CAA safety investigations*

It is not mandatory for TAIC to investigate all accidents or serious incidents and in many cases, particularly within the general aviation and private aviation sectors, the primary safety investigations are carried out by the CAA. Even where TAIC do investigate, in some cases the CAA safety investigation unit may also carry out its own concurrent safety investigation, albeit of a more limited nature. Under Part 12 of the Civil Aviation Rules (CARs) operators are also tasked with carrying out their own internal investigations and have obligations to report the results of this to the CAA.

Part 12 also imposes various other obligations on operators and participants in relation to incidents and accidents. It is important that operators ensure that all crew members are well schooled on the relevant requirements, in particular regarding the obligation to report incidents and accidents, and to take all steps to preserve physical and electronic records on the aircraft at all times. Failure to meet these obligations could themselves lead to criminal charges, particularly if there is any suspicion of deliberate concealment or destruction of records or evidence.

Even if TAIC or the CAA are conducting a full investigation, in my view operators should also be as thorough as possible in conducting their own internal investigation, as evidence and statements obtained while memories are still fresh could be important in preparing any subsequent response by the crew or operator, to a concurrent investigation or report, whether of a safety, criminal or administrative nature.

Participants and operators should also bear in mind that information supplied by any person to a CAA safety investigation may be made available under CAR 12.63 for prosecution purposes if:

- The information reveals an act or omission that caused unnecessary danger to any person or property (it should be noted that the concept of unnecessary danger is generally considered by the Courts to include actual danger, or a real risk of danger); or
- False information is supplied; or
- The CAA is obliged to release the information under another statute, or by Court order.

The latter situation could thus presumably include a court warrant obtained by another government agency such as the NZ police.

### *Law enforcement investigations*

Any participant involved in a serious aviation incident or accident should be prepared for the possibility of law enforcement investigation and possible prosecution action, whether by the CAA, or in some cases, the NZ police. For those participants engaged in international or offshore operations, the possibility of a criminal investigation by the host state should also be assumed, unless the situation is confirmed on legal advice to be otherwise. If operators regularly conduct off shore operations in other jurisdictions, proactive advice should be sought from local lawyers so that crew can be properly informed as to their rights and obligations, in particular regarding any obligation to cooperate with law enforcement authorities. Doing so would also ensure that, should an incident occur, the operator will be in a position to quickly obtain advice and if necessary instruct Counsel.

In the New Zealand context, there is no obligation to attend a law enforcement interview or to give a formal statement to a law enforcement officer. It is therefore important to ensure that the crew have ascertained what role a person is carrying out before agreeing to provide a statement. There may be cases where it is in the individual or operator's interests to cooperate with a law enforcement investigation in due course. However in most cases, it would probably be unwise to make a formal statement to a law enforcement officer in the immediate hours or even days post-accident. This is because it is not uncommon when a person is suffering from shock, and particularly if the person is feeling embarrassed or responsible for having caused damage to an aircraft or to persons or property, for the person to express the view that they are 'at fault' and to convey their disbelief at the 'stupidity' of their actions. Such statements may not in fact reflect the reality of the situation that occurred and may simply be driven by the emotions and feelings of the moment. Such statements if given to a law enforcement officer (particularly under caution or at a formal interview) could, however, be very damaging and may be used against a person in supporting a prosecution action. While it may well be advisable for a person to give a statement as part of a law enforcement investigation in due course, this decision is probably best made after at least a few days have passed and legal advice has been sought, and the person(s) involved have had an opportunity to recover from the initial shock, and sometimes extreme emotions, experienced in the immediate aftermath of a serious incident. In light of the provisions of CAR 12.63, participants should also be cautious about making unnecessarily incriminating statements to CAA safety investigators. However, even if such statements were made to a safety investigator in the immediate aftermath of an incident, it would certainly be my expectation that no such information would be supplied for prosecution purposes until at least a preliminary investigation had been completed, so that a proper assessment could be made of the likely causes of the incident and the weight that should be attached by safety investigators to such statements, in light of the circumstances under which they were made.

### *Administrative investigations*

It is possible that a person or operator may also find themselves subject to administrative investigation under s15A of the CA Act. Such investigations will be directed to determining whether an operator has complied with its obligations and whether it should be able to continue to operate, and/or as to whether any person is or remains fit and proper to exercise the privileges of their aviation documents or senior person roles. Once again, there is no mandatory obligation to attend an interview or provide a statement as part of a s15A investigation, although it is important to note that certain information if requested may be required to be supplied under the CA Act or CARs.

Any decision on whether to attend a s15A investigation interview may also be influenced by whether there is any concurrent law enforcement action taking place, and this can be a difficult assessment to make. On the one hand, attending an interview could risk providing potentially incriminating information for law enforcement purposes. On the other hand, refusing to give a statement or attend an interview with a s15 A team could lead to certain adverse inferences being drawn about the subject matters under investigation, or the person's FPP status in general. This may particularly be the case where adverse inferences may otherwise be taken from a lack of apparent willingness to make appropriate acknowledgements where a person clearly has fallen below expected standards of conduct applied to aviation participants. In my experience, it is often in the participant's own interests to "front up" to administrative investigations, and ultimately may assist in achieving a more positive outcome. However, the issue may be one of timing, particularly if the outcome of a law enforcement investigation is likely to have a significant influence on the course of any s15A investigation. Legal advice should therefore be sought if there are any concerns as to whether, or when, a person should agree to attend a s15A interview.

### ***Concluding comments about multiple investigations following an accident or serious incident***

The starting point must always be that full cooperation should be provided to any safety investigation conducted by the relevant authorities. Crew and operator training should ensure that crew know how to comply with their Part 12 obligations to the CAA following any incident or accident, although co-operating with a CAA safety investigation does not mean unnecessarily incriminating oneself. Caution should also be exercised in dealing with concurrent law enforcement or administrative investigations in the immediate aftermath of an incident. This is not to suggest that crew and operators should never agree to give statements or attend interviews as part of those investigations in due course. In most cases, it will usually be in a participant's interest to attend a s15A interview if requested to do so, although there may be an issue of timing. Whether a person should agree to participate in a formal law enforcement interview may depend on the facts of the case. What is important in approaching these matters, is that crew and operators do not provide knee jerk statements to CAA investigators in the immediate aftermath of an incident that could potentially be damaging down track; and that legal advice is sought at the earliest opportunity.

*The Legal Lounge* series will return next year, and will focus primarily on issues affecting aviation organisations. While I am happy to cover any civil aviation regulatory issues affecting organisations, I will also cover wider legal issues such as negotiation and drafting of commercial contracts, options to resolve commercial disputes, and dealing with tax audits by the Inland Revenue Department. Should readers have any ideas or suggestions for future columns, please also feel free to email me (see my ad for details), or if you prefer, send a confidential request to the editor of *Aviation News*.

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