

## **Rights and obligations when responding to CAA regulatory investigations**

In the Christmas 2011 edition of *NZ Aviation News* I wrote an article about the grounding of the *MV Rena* on the Astrolabe Reef off the Coast of Tauranga, and the parallels that may arise in the aviation context.

In this article I want to reinforce and expand on some of the comments that I made in that article about your rights and obligations when dealing with CAA investigators, particularly in the context of an aviation accident or incident.

It is imperative that participants understand that aviation accidents and incidents may be subject to different and sometimes multiple concurrent investigations, and that the objectives of these investigations, and your rights and obligations in responding to those investigations, differ.

### ***Safety investigations***

A safety investigation will broadly follow the International Civil Aviation Organisation (ICAO) Annex 13 mandate, which is not to apportion blame, but to establish the causes of an accident or incident to try and identify safety improvements so as to prevent the same thing happening again. This would particularly be the case in New Zealand for any investigation carried out by the Transport Accident Investigation Commission (TAIC). It is generally mandatory to comply with a TAIC investigation; however certain safeguards exist against prosecution, and use of evidence obtained by TAIC by other government agencies for other purposes is generally prohibited.

The CAA may also conduct a safety investigation pursuant to Part 12 of the Civil Aviation Rules (CARs). Part 12 imposes certain mandatory obligations on participants, including to report accidents and incidents, and to take all steps to preserve physical and electronic records on the aircraft at all times. Failure to meet these obligations could result in prosecution action. Operators may also be obliged to carry out their own internal investigation into an accident or incident.

However a CAA safety investigation does not necessarily have the same safeguards against use of evidence obtained during that process, for other purposes. Participants and operators should in particular be aware that information supplied by any person to a CAA safety investigation may be made available under CAR 12.63 for prosecution purposes if the safety investigation reveals conduct that amounts to unnecessary danger. There is also nothing preventing information obtained by a CAA safety investigation being passed on and used by CAA operational units, which could lead to other regulatory or “administrative” investigations or interventions by the CAA.

While participants may be obliged to cooperate with a CAA safety investigation, it is important that participants are wary of the CAA’s multiple hats. Participants should take particular care in “self-analysing” what occurred or proffering up explanations as to why “mistakes” were made. Unfortunately, I have seen this occur and have seen prosecution or other action being taken by the CAA, largely as a result of information volunteered by a pilot following the aftermath of an accident or incident.

In this regard I wish to repeat, with some minor modification, a comment I made in my earlier article:

*It is not uncommon when a pilot is suffering from shock, and particularly if he or she is feeling embarrassed or responsible for having caused damage to an aircraft or to persons or property, for the pilot to volunteer they were 'at fault' or to attempt to 'explain' how they have made a mistake or error of judgment that has caused the accident. 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. Proffering such explanations could, however, be very damaging and may be used against a person in supporting a prosecution action.*

I have acted for a pilot who fell into exactly this trap, of unnecessarily attempting to explain, while still recovering from post-accident injuries, why the accident occurred and hypothesising as to what he had "done wrong". Unfortunately, he did so in the mistaken belief that he was being interviewed by CAA safety investigators when he was in fact being interviewed by CAA law enforcement investigators – more on this below. I stress that, even in the context of a safety investigation, while there are certain obligations to co-operate and provide information, participants do not need to attempt to come up with an explanation as to exactly what they have done wrong or why – that is the CAA's job.

### ***Law enforcement investigations***

It is not mandatory in New Zealand to give a statement to a law enforcement officer investigating a possible civil aviation offence. While it may be advisable or in a participant's interests to give a statement to a law enforcement investigator in some cases, this decision is best made after legal advice has been sought. In the context of an aviation accident or serious incident, it is in my view vitally important that the person(s) involved take legal advice before agreeing to be interviewed for law enforcement purposes.

In this context, I must also caution participants to be conscious that the first contact with the CAA following an accident or incident may not necessarily be from a CAA safety investigator, and that the CAA may not in fact carry out a safety investigation at all. Any participant who receives a visit from a CAA investigator should therefore ask questions to establish why the investigator is there and in what capacity they wish to interview you.

In the aforementioned case I mentioned, the pilot concerned received a visit from two CAA investigators in the weeks immediately following a serious accident, when he was still suffering from his injuries. The pilot was not explicitly told that he was being interviewed by law enforcement investigators or for law enforcement purposes. He was told that he was being interviewed for the purposes of a CAA regulatory investigation. He was also explicitly told that they were interested in establishing whether any safety improvements could be identified to prevent a similar incident happening again, and in that context, he was encouraged to provide as much information as he could. He accordingly obliged, and was oblivious until the day he received a court summons, that he had been interviewed by law enforcement investigators whose sole or at least dominant purpose of interviewing him, was to ascertain whether he had committed any offence against the Civil Aviation Act (the Act) or CARs.

The CAA did not in fact conduct a safety investigation into that accident, and a prosecution case was mounted largely based on the pilot's own statements. To be fair, he was cautioned – that is, he was told he was not obliged to say anything and that anything he did say could be used in Court – this is usually a tell-tale sign that you are about to be interviewed by law enforcement investigators. However the subsequent overtures made clearly drew some reference to the objectives of a safety investigation and in the circumstances, my client unfortunately believed that he was being interviewed by safety investigators. That is not necessarily to say that the outcome of that case might have been any different, or that he would have declined to be interviewed. However, I trust that the point is made – ask questions to establish why an investigator is present and wants to talk to you – and seek legal advice if you are being asked to give a statement to a law enforcement investigator. Even if you think you would like to give a statement, you are not obliged to do so immediately, and a few minutes spent talking to a lawyer is well worth the time and cost.

Participants should be aware that the CAA does have powers to require certain information to be provided, including for law enforcement purposes, and it is mandatory to co-operate to that extent. This generally relates to the obligation to provide any information that is required to be kept under the Act or the CARs. Beyond that, while there may not necessarily be a mandatory obligation to provide other information, the CAA does have the ability and, if it considers necessary, will seek a Court warrant to search and seize other relevant evidence. This does not tend to be a pleasurable experience. Legal advice should therefore be sought if you have any questions or concerns about whether or not to provide information requested as part of any law enforcement investigation.

### ***Administrative/regulatory investigations***

It is possible that a participant may also find themselves subject to administrative investigation under s15A of the CA Act. Such investigations will be directed to determining whether an operator or individual participant has complied with the Act and CARs, 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. In my experience this can be a complex and difficult process, and deciding how to respond to such investigations involves many and sometimes conflicting considerations. It is not a process I would advise any participant to go through without seeking specialised legal advice and representation.

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