The Failure of Aviation Safety in New Zealand: An Examination of New Zealand's Implementation of Its International Obligations under Annex 13 of the Chicago Convention on International Civil Aviation

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THE FAILURE OF AVIATION SAFETY IN NEW ZEALAND: AN EXAMINATION OF NEW ZEALAND'S IMPLEMENTATION OF ITS INTERNATIONAL OBLIGATIONS UNDER ANNEX 13 OF THE CHICAGO CONVENTION ON INTERNATIONAL CIVIL AVIATION

SAMANTHA SHARIF*

"It could have happened to any of us."

THESE SOBERING words were spoken by Captain Gordon Vette after New Zealand's worst air disaster, the Mount Erebus tragedy, where, almost 20 years ago to the day, an Air New Zealand aircraft flew straight into the side of Mount Erebus in Antarctica, killing all 257 passengers on board.

I. AN INTRODUCTION TO THE DEBATE

This paper examines the issue of aviation safety in New Zealand. More particularly, this paper analyses New Zealand's implementation of its international obligations under the Chicago Convention on International Civil Aviation1 in relation to the protection of aviation safety records, and the provisions of the Transport Accident Investigation Amendment Bill, intended to implement those obligations. This paper also argues that New Zealand has thus far failed to effectively promote aviation safety.

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In any industry, one of the most valuable tools for the promotion of safety is the ability to learn from previous mistakes. In the aviation context, this entails effectively analysing any aviation incident or accident and implementing appropriate procedures to minimise the potential for a recurrence. Clearly, the more information that is available on the circumstances and causes of an aviation accident, the more comprehensive any subsequent safety analysis is likely to be.

With this aim in mind, a cockpit voice recorder, often colloquially referred to as an aircraft’s black box, is commonplace in commercial aircraft worldwide today. The installation of such a device was driven by a pilot initiative to promote aviation safety by providing aviation accident investigators with an extremely useful tool to aid the determination of the circumstances and causes of an aviation accident, and consequently to devise appropriate safety measures to minimise the potential for a similar recurrence.

The installation of such potentially intrusive devices was based on the clear understanding that the records generated would be used solely for the purposes of aviation safety. This international accord has been reflected in the provisions of Annex 13 to the Chicago Convention, which requires that aviation safety information which is collected for safety purposes can be used solely for such purposes. In addition, to prevent the misuse of information derived from cockpit voice recorders and other safety information, the International Civil Aviation Organisation, commonly known as ICAO, has promulgated a Standard, requiring signatory states to the Chicago Convention, including New Zealand, to prevent aviation safety information from being used for other purposes.

The utility of aviation safety records is not limited merely to assisting in determining the circumstances and causes of any particular aviation accident, but more importantly, such records are integral to the application of a more fundamental systemic approach to aviation safety. The requirements of a systemic approach to aviation safety are outlined below.

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2 A cockpit voice recorder is a device that records sounds in a cockpit during at least the previous 30 minutes of flight, including conversations between the flight crew and voice communications to and from the aircraft, for example, with air traffic controllers.

3 Aircraft Accident and Incident Investigation, Annex 13 to the Convention on International Civil Aviation (8th ed. 1994) [hereinafter Annex 13].

4 Id.
During the past century risk management analysis of inherently hazardous activities has gone through a process of increasing sophistication. Efforts that were initially directed at addressing operational issues, such as mechanical reliability, subsequently progressed to identifying and addressing issues relating to human factors, such as human reliability. Over the last decade the emphasis has evolved to identifying and addressing organisational factors generating the systemic causes of risk. Other things being equal, the more complex the industry, the greater the necessity for an effective systemic analysis.\(^5\)

Essentially, a systemic analysis requires identification, not merely of the immediate causes of any accident, but more importantly, a consideration of the culmination of causative events, referred to as latent failures, which may allow an accident to occur. A systemic analysis will often trace two or three embedded failures as the root cause of any major accident. Such failures can manifest as organisational factors, such as decisions by the board of an organisation, or ultimately government policies.

The traditional legal approach to determining causation, and thereby legal culpability, essentially relies on establishing proximate cause,\(^6\) such as pilot error. This approach is too unsophisticated to be of any material use in the promotion of aviation safety.

Two decades ago, the Mahon report on the Mount Erebus disaster pioneered the application of systemic analysis to the issue of aviation safety.\(^7\) In fact, the ICAO has expressed the view that other high technology disasters such as Chernobyl and Bhopal might have been averted if the lessons from Mount Erebus had been adopted sooner by the international safety community.

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5 Essentially, the more sophisticated the industry, the greater the degree of interacting networks that are likely to be present. The more interactions that are present, the greater the potential for error, and the greater the need for systemic analysis of such networks.

6 As illustrated by the following example, determining legal liability tends to operate on a domino theory of causation. A caused B which in turn caused C and D, which caused the accident. D would be the proximate cause. From a fault perspective, other causes are likely to be considered too remote to be directly relevant.

To date, New Zealand has failed, both legislatively and at common law, to effectively implement its international obligations under the Chicago Convention on International Civil Aviation with regard to the protection of aviation safety records. Furthermore, despite the recommendations of the Mahon report and the current Minister of Transport’s recent public proclamation regarding the desirability of such an approach, New Zealand’s failure to protect such records has thus far failed to create an environment that will allow for an effective systemic analysis of aviation risk. In so doing, the objective of aviation safety has been compromised.

The remaining Chapters of this paper consider specific aspects of the promotion of aviation safety in New Zealand. In particular, this paper examines the common law and legislative protections afforded to aviation safety information, and provisions of the Transport Accident Investigation Amendment Bill, which, at the time of writing, was before the Transport and Environment Select Committee. The primary objective of that Bill is to implement the provisions of the Chicago Convention on aviation safety into New Zealand law.

II. THE CHICAGO CONVENTION ON INTERNATIONAL CIVIL AVIATION

This Chapter examines the provisions of the Chicago Convention on International Civil Aviation that relate to the protection...
of aviation safety information. It then discusses the rationale underlying the internationally expressed desire to protect such information against disclosure and use for any purpose other than the promotion of aviation safety.

A. The Chicago Convention on International Civil Aviation: Annex 13

All civil aviation matters in New Zealand are based on international standards and recommended practices set by the International Civil Aviation Organisation, commonly known as ICAO. The ICAO was formed by the 1944 Chicago Convention, to which New Zealand, along with some 185 other States, is a party. The main purpose of the Convention was to create a comprehensive legal and institutional framework for civil aviation to "meet the needs of the peoples of the world for safe, regular, efficient and economical air transport."

The Chicago Convention established the legal framework for international civil aviation by facilitating the removal of domestic legislative barriers to international civil aviation, such as customs, immigration, and health. In addition, the Convention created the framework for the ICAO and its comprehensive legislative processes.

More specifically, the executive body of ICAO, the ICAO Council, has legislative power to adopt international standards

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11 Civil aviation matters include matters such as air space, air traffic control services, air navigation, and air accident and incident investigation. For the treatment of non-civil aviation matters, see Chicago Convention, supra note 1, art. III, 15 U.N.T.S. at 298.
12 Id. art. XLIII, 15 U.N.T.S. at 324.
13 Id. art. XLIV, 15 U.N.T.S. at 326. This also became one of the objectives of ICAO.
14 Id. art. XLIII, 15 U.N.T.S. at 298.
15 The ICAO creates a Plenary body (the ICAO Assembly) and an Executive body (the ICAO Council), plus a number of other bodies, including the ICAO Legal Committee, which has produced the texts for many of the significant aviation treaties adopted since 1944. In addition, the ICAO has proved to be a very successful mechanism for administering and updating the Chicago Convention to recent technological developments. See generally id. art. XLIII-LXIII, 15 U.N.T.S. at 324-40. For example, in May 1998, the ICAO convened a global conference relating to the implementation of Satellite Navigation and Air Traffic Management Systems (CNS/ATM). Whilst such systems could not have been foreseen by the framers of the Chicago Convention, nevertheless, the Convention has proved readily adaptable to such recent technologies. See K.I. Murray, The Law Relating to Satellite Navigation and Air Traffic Management Systems - a View from the South Pacific, The Royal Aeronautical Society CNS/ATM Forum, Sydney (April 1998).
and recommended practices regarding civil aviation. This power provides the primary mechanism by which minimum and uniform aviation safety and other standards are promulgated for international civil aviation. Such adopted standards and recommended practices, generally known as SARPS, become Annexes to the Convention that are then forwarded to Contracting States. Contracting States are then bound to "collaborate in securing the highest practicable degree of uniformity" in implementing the adopted standards and recommended practices.¹⁶

There are currently eighteen Annexes to the Convention, covering a wide range of matters of technical detail.

Clearly, the Chicago Convention recognises the paramount importance of cockpit voice records when conducting comprehensive aviation safety analyses. Accordingly, Annex 13 recommends the universal installation and use of relevant cockpit voice recorders and similar devices.¹⁷ However, as a corollary to this, Annex 13 also reflects the international accord that the information derived from cockpit voice recorders, and other information recorded for the purpose of aviation safety, should only be used for the purposes of aviation safety.¹⁸ To this end, Annex 13 also codifies the standards and recommended practices adopted by the ICAO for aircraft accident and incident safety investigations.¹⁹

To minimise the potential misuse of such aviation safety information, Annex 13 expressly requires signatory States to prevent aviation safety information from being used for other non-safety purposes.²⁰ More specifically, Annex 13 prevents this informa-

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¹⁶ Chicago Convention, supra note 1, art. XXXVII, 15 U.N.T.S. at 320. Where such Annexes contain international standards they become binding on Contracting States 60 days after adoption by the ICAO Council, unless, within that period any contracting State has notified a difference, that is, any departure, from any non-mandatory Annex provisions. Chicago Convention, supra note 1, art. XII, 15 U.N.T.S. at 304. Note that contracting States cannot notify any differences with respect to certain standards declared mandatory pursuant to Art. 12, such as the Rules of the Air in Annex 2. See Thomas Buergenthal, Law-Making in the International Civil Aviation Organisation (1969).

¹⁷ Annex 13, supra note 3, at para. 5.7.

¹⁸ Id. at para. 5.12.

¹⁹ Annex 13 constitutes a comprehensive code which has been amended on a number of occasions. Annex 13, supra note 4, at vii. Earlier versions of Annex 13 only applied to aviation accidents having an international aspect. However, whilst this is not expressly stated in the document, the view taken by the ICAO is that the current eighth edition of Annex 13 (July 1994), applies to domestic accidents as well.

²⁰ Id. at para. 5.12.
tion from being used as evidence in proceedings against aviation professionals.\textsuperscript{21} The key provision in this regard is paragraph 5.12 of Annex 13, which provides as follows:

The State conducting the investigation of an accident or incident, wherever it occurred, shall not make the following records available for purposes other than accident or incident investigation, unless the appropriate authority for the administration of justice in that State determines that their disclosure outweighs the adverse domestic and international impact such action may have on that or any future investigations:

a) all statements taken from persons by the investigation authorities in the course of their investigation;

b) all communications between persons having been involved in the operation of the aircraft;

c) medical or private information regarding persons involved in the accident or incident;

d) cockpit recordings and transcripts from such recordings; and
e) opinions expressed in the analysis of information, including flight recorder information.\textsuperscript{22}

Whilst Annex 13 allows for disclosure in limited circumstances, such an occurrence is extremely unlikely. Aviation safety information may only be disclosed for non-safety purposes when disclosure outweighs the adverse domestic and international impact that disclosure will have on aviation safety. In reality, any interests that may exist in the disclosure of aviation safety information for opposing prosecutory purposes will always be outweighed by the resulting adverse impact on aviation safety.

B. The Uses of Aviation Safety Information

The international aviation community commonly accepts that whenever information recorded for safety purposes is disclosed for other purposes, it will have some adverse effect on safety because the disclosure will prejudice the continuous flow of such essential safety information in the future. Aviation professionals will naturally be reluctant to engage in free and frank communications when so doing may result in such communications being used to incriminate them. Facing incrimination, aviation pro-

\textsuperscript{21} Id. at paras. 3.1, 5.12.
\textsuperscript{22} Id. at para. 5.12. Immediately following paragraph 5.12 is an explanatory note in these terms: “These records shall be included in the final report or its appendices only when pertinent to the analysis of the accident or incident. Parts of the records not relevant to the analysis shall not be disclosed.” Id.
professionals would instead invoke the common law privilege against self-incrimination.

Furthermore, even if such communications are made compulsory, it is unlikely to prevent the rational response of aviation professionals of adjusting their communications to a minimum. Consequently, it is accepted internationally that, in this context, the public interest in the pursuit of aviation safety and the public interest in the pursuit of individual legal liability cannot easily be reconciled. In order to carry out the test set out in paragraph 5.12 of Annex 13, and determine whether aviation safety information should be made available for other conflicting purposes, the relative public interest in the conflicting objectives of aviation safety and aviation proceedings must be compared. This comparison will help to determine which objective bears the greater public interest and should prevail.

C. THE PUBLIC INTEREST IN AVIATION SAFETY AND AVIATION PROSECUTIONS

The effective promotion of aviation safety requires the application of systemic analysis to identify all of the factors contributing to the risk of an aviation incident or accident. Such systemic analysis recognises the inherent limitations of determining causation under a traditional legal approach. Traditional legal analysis is generally confined to identifying the proximate cause of an event, and thus dismisses other causes as legally too remote.

Whilst the argument is sometimes mounted that the sanction of criminal or civil prosecution will encourage increased compliance by aviation professionals, thereby enhancing aviation safety, this is, at best, questionable. In fact, such an argument is a manifestation of what has been described as "the fallacy of the perfectibility approach."23 The threat of prosecution cannot prevent human error. Moreover, it would seem that the threat of almost certain death, for the aviators and their passengers should they fail, would be a far greater encouragement to compliance. Further, if the ultimate objective of prosecution is to enhance aviation safety, then the pursuit of criminal or civil prosecution will fail to achieve this. Such prosecutions are outcome-based; that is, they punish an outcome, regardless of the

degree of culpability of the person who physically produced that outcome.\footnote{For example, under § 44 of the Civil Aviation Act 1990, no intent element is required for the offence.}

The majority of aviation incidents and accidents are not caused by intentional non-compliance by aviation professionals. The occasions on which a pilot might be considered to have deliberately crashed an aircraft are extremely rare. Rather, in a highly complex industry such as aviation, such incidents and accidents are more likely to be attributable to a complex culmination of systemic factors, with the pilot merely being the last causative link in the chain.

If prosecution is intended to promote aviation safety, then it should be directed at addressing low reliability and other human factors relevant to systemic risk analysis. As prosecution is not aimed at addressing such factors, it has little role in the pursuit of aviation safety.

Not only is the threat of prosecution of questionable efficacy as a promoter of aviation safety, it is also rarely likely to be exercised. An intentional offense on the part of aviation professionals is extremely rare. Further, those who might potentially have attracted any degree of traditional legal liability will often have perished.

Moreover, public interest is more concerned with advancing safety than in punishing error. Proceedings to determine culpability for a specific aviation incident or accident impacts the few people concerned, such as the pilot and flight crew. Preventing that aviation incident or accident from occurring affects all of the persons carried on the relevant aircraft, if not the aviation public more generally. To state the issue from a law and economics perspective, the public interest in securing any individual prosecution through the use of aviation safety information is outweighed by the greater public good of safer air transport. In the words of a former air accident investigator, "I suspect if you gave an air traveler the choice of a better chance to arrive safely at the other end, or the chance to pillory the pilot should he not arrive, the answer would favour improved safety."\footnote{Dmitri Zotov, We Need More Aviation Safety, Not More Lawsuits, The Independent, Aug. 4, 1999. Mr. Zotov is the former Inspector of Air Accidents with the Office of Air Accidents Investigation.}

Whilst, clearly, the public interest in the pursuit of aviation prosecutions also involves the wider public interest in securing
the proper administration of justice, this wider public interest does not need to be taken into account in balancing the relevant interests of aviation safety and aviation prosecutions in accordance with paragraph 5.12. This is because in determining that the public interest in aviation prosecutions is outweighed by the public interest in aviation safety, it is not being suggested that the public interest in securing the proper administration of justice should be compromised, just as it is not suggested that aviation professionals should have immunity from criminal or civil proceedings.

The rationale expressed in Annex 13, that information recorded for the purposes of aviation safety should only be used for those purposes, does not require that any aviation professional should have immunity from proceedings. What is required is that any aviation communication which is mandatorily, or by agreement, recorded for the purpose of promoting safety in aviation should not then be available by way of collateral advantage to a prosecutory agency for other conflicting purposes. Whilst it is accepted that the contents of such aviation safety records will often provide the most conclusive source of evidence, this is not an inherent reason to make such information available to prosecuting agencies. Accordingly, if a prosecutory agency wishes to establish criminal or civil responsibility on the part of any aviation professional, that agency should have to proceed in the same way as it would in all other cases where such information is not automatically recorded.

Whilst the opinion of the international aviation community as expressed in Annex 13, that the public interest in the pursuit of aviation safety and the public interest in the pursuit of aviation prosecutions cannot be reconciled, can be questioned, in doing so, a convincing alternative should be given. That is, the point at which the objective of aviation safety can be reconciled with the objective of aviation prosecutions should be clearly identified.

It is sometimes argued that since New Zealand has filed a notification of non-compliance with paragraph 5.12 of Annex 13,\textsuperscript{26} it therefore should not be considered bound by its international

\textsuperscript{26} In 1982, New Zealand filed a notification of non-compliance with paragraph 5.12 of Annex 13 to the ICAO stating that: "No absolute guarantee can be given that the records listed in paragraph 5.12 will not be disclosed. All practical steps will be taken, however, to minimise the extent and occurrence of such disclosures." For this procedure, see Chicago Convention, \textit{supra} note 1, art. XXXVIII, 15 U.N.T.S. at 322.
obligations to collaborate in securing the highest practicable degree of uniformity in relation to protecting aviation safety information. But the reasons behind the filing of this notification are entirely unconnected with the issue of access to aviation safety information. Moreover, as a signatory and party to the Chicago Convention, New Zealand should not lightly disregard the opinions of the international aviation community expressed therein or its obligations thereunder. New Zealand should faithfully reflect the purposes and provisions of Annex 13 to the Convention by protecting aviation safety information in its domestic law, unless there are compelling reasons for departure.

III. COMMON LAW APPLICATION OF THE CHICAGO CONVENTION ON INTERNATIONAL CIVIL AVIATION IN NEW ZEALAND

At common law, New Zealand has consistently been unwilling to recognise and implement its obligations under Annex 13, and correspondingly unwilling to recognise the necessity for affording comprehensive protections for aviation safety information against disclosure and use for other purposes. Furthermore, despite the recommendations of the Mahon report and the current Minister of Transport publicly proclaiming the desirability of such an approach, New Zealand’s failure to adequately protect such records has thus far prohibited the creation of an environment that will allow for an effective systemic analysis to the issue of aviation risk. In so doing, the primary objective of aviation safety underlying Annex 13 to the Chicago Convention has been compromised.

A. THE JUDICIAL PERSPECTIVE

The Mount Erebus Inquiries

The first significant common law decision in which these issues were considered is not, in fact, a decision by a judicial tribunal, but a decision from the Office of the Ombudsmen. The

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27 The reason for the filing of the notification is that when the Official Information Act was passed, the Crown Law Office advised the then Office of Air Accidents Investigation that the previous policy guaranteeing witness anonymity was now uncertain. This made it likely that any demand under the Official Information Act for access to witness statements would be upheld. Accordingly, as the protection of witness statements was no longer possible, the notification had to be filed.

28 Hon. Maurice Williamson, Minister of Transport, Speech to the Aviation Industry Association Conference, Dunedin (July 30, 1999).
Office of the Ombudsmen concluded that there was no reason to prevent aviation safety information, in the form of cockpit voice records, from being made available for proceedings.  

The Mount Erebus decision revolved around the unfortunate circumstances of New Zealand’s worst air disaster, where an Air New Zealand DC10 aircraft flew straight into the lower slopes of Mount Erebus in Antarctica on November 28, 1979, killing all 257 people on board. Understandably, this tragedy generated a great deal of compelling controversy. The discussion below, however, is confined to an analysis of the issues relating to the status of the aviation safety information relevant to this accident.

Post-accident, the New Zealand Office of Air Accidents Investigation carried out a standard investigation into the causes of the accident pursuant to the aviation accidents legislation in force at the time. That legislation expressly gave effect to Annex 13 of the Chicago Convention and thus, clearly reiterated the rationale of the international aviation community that, in order to effectively promote aviation safety information recorded for the purposes of aviation safety should only be used for such purposes. “[T]he main purpose of accident investigations is to determine the circumstances and causes of the accidents with a view to avoiding accidents in the future, rather than to assign blame or liability to any person.”

After completing its investigation, the Office of Air Accidents Investigation published a detailed and authoritative official accident report that comprehensively analysed, not only the immediate causes of the accident, but also more importantly, the systemic failures surrounding the accident.

Due to the scale of the tragedy, the Government later decided that it would be in the public interest to hold a Royal Commis-

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29 Whilst the Ombudsmen’s decisions are not legally binding on either the Ombudsmen’s Office itself or any other tribunal, its decisions are published, and are persuasive. Certainly, the Ombudsman’s decision in this case received an inordinate degree of public and media focus and debate due to the controversy of the issues, and the extraordinary circumstances involved.

30 For a detailed analysis of all the circumstances relevant to the accident, see the Report of the Royal Commission to inquire into the crash on Mount Erebus, Antarctica, of a DC10 aircraft operated by Air New Zealand Limited 1981.

31 The predecessor to the Transport Accident Investigation Commission.


33 The Civil Aviation (Accident Investigation) Regulations 1978, at reg. 5.

34 Office of Air Accidents Investigation Report No. 79-139.
sion of Inquiry into the accident. However, the Royal Commission was given far wider terms of reference than those that applied to the Office of Air Accidents Investigation. In particular, those terms of reference did not repeat the purposive statement contained in the relevant accident investigation legislation, but by contrast, clearly implied that an investigation into culpability was expected. Controversially, the Royal Commission's final report substantially disagreed with the conclusions of the Office of Air Accidents Investigation regarding its interpretation of the cockpit voice recorder tapes and the meanings to be derived therefrom. This again highlights the issue that the analysis of aviation safety information necessarily involves a degree of subjective interpretation that will be influenced by the particular aims of the interpreter.

The impact and status of the Royal Commission's report on the Office of Air Accidents Investigation official accident report remains unclear. This is partly attributable to the fact that the Royal Commission's report had, until very recently, never been officially recognised by tabling in Parliament.

Nevertheless, it is clear that in requiring the Royal Commission to carry out an aviation accident inquiry, where one of the main purposes of that inquiry was to determine culpability, the New Zealand Government was prepared to disregard and undermine New Zealand's international obligations with respect to the purposes and use of aviation safety information as expressed in Annex 13. Furthermore, New Zealand was prepared to take

35 In particular, the Commission's terms of reference required the Commissioner to inquire and report inter alia upon:

(g) Whether the crash of the aircraft or the death of the passengers and crew was caused or contributed to by any person (whether or not that person was on board the aircraft) by an act or omission in respect of any function in relation to the operation, maintenance, servicing, flying, navigation, maneuvering, or air traffic control of the aircraft, being a function which that person had a duty to perform or which good aviation practice required that person to perform?

Paragraph (i) of the terms of reference also required the Royal Commission to inquire and report on "the existing laws and procedures relating to (i) the investigation of accidents and (ii) the making available to interested persons of information obtained during the investigating of air accidents." The Royal Commission, however, only made very brief comments in response to this term of reference.

36 The current Minister of Transport had recently indicated an intention to table the Mahon report in November 1999, on the 20th anniversary of the publication of the report, although the writer understands that the report was actually tabled prior to this date.
such action even though its international obligations had been incorporated, at least in part, into domestic legislation.

A similar disregard for New Zealand's domestic and international obligations relating to aviation safety information was evidenced by the Ombudsman requesting access to the cockpit voice recorder tape. After the accident, the Office of Air Accidents Investigation received a request under the Official Information Act of 1982 for access to the cockpit voice recorder tape from the aircraft for the purposes of civil litigation. As would be expected, the Office of Air Accidents Investigation declined to provide access to the tape for prosecutorial purposes on the grounds of New Zealand's international obligations. The Office also argued that making the information available for such purposes would prejudice the future supply of such information, and that it was in the public interest that such information continue to be supplied.

The decision not to allow the cockpit voice recorder information to be made available for prosecutorial purposes was appealed to the Ombudsman. The use of cockpit voice recorder information was, and until very recently remained, governed primarily by the terms of the relevant employment contract; as such, the Ombudsman consulted with the relevant party to that contract, the New Zealand Airline Pilots' Association (NZALPA), regarding the release of this information. The union's view was that the installation of potentially intrusive devices such as cockpit voice recorders was based on the clear understanding that the records generated would be used solely for the purposes of aviation safety. Consequently, in their view, to allow the cockpit voice recorder tape to be made available for a prosecution would lead to justified industrial action and the disabling of cockpit voice recorders.

Despite such strong representations, the Ombudsman did not think that there was a significant possibility that the future use

37 Pursuant to both the Civil Aviation (Accident Investigation) Regulations 1978 and the collective employment contract between NZALPA and Air New Zealand.
38 Pursuant to Annex 13, supra note 3.
39 Section 9(2)(ba) of the Official Information Act provides that information may be withheld "where the making available of the information would be likely to prejudice the supply of similar information... and it is in the public interest that such information should continue to be supplied... or would be likely otherwise to damage the public interest." Official Information Act § 9(2)(ba) (1982).
40 Similar views were expressed in Australian Nat'l Airlines Comm'n v. Commonwealth, (1975) 132 CLR 582, 584. See Chap. VIII, infra.
of cockpit voice recorders would be prejudiced, and the cockpit voice recorder tape was made available for the civil proceedings.\(^{41}\)

In so doing, the Ombudsman chose to ignore the generally held view of the international aviation community that whenever information recorded for safety purposes could be disclosed for other purposes, it would adversely affect safety by prejudicing the continuous flow of such essential safety information in the future. Accordingly, as the greater public interest in the pursuit of aviation safety outweighs the public interest in the pursuit of prosecution, such information should not be made available for prosecutory purposes.

The Ansett Dash 8 Accident

The most significant recent case to consider the application of Annex 13 in New Zealand, and the protections afforded to aviation safety information under New Zealand law, involved the crash of an Ansett Dash 8, just outside Palmerston North, in June 1995. This accident brought the issues surrounding the protection of aviation safety information in New Zealand into sharp and controversial focus.

In this accident the cabin attendant and three passengers died and a number of the other 17 passengers suffered serious injuries when the crew, distracted by faulty landing gear, allowed the aircraft to continue a descent that resulted in it impacting hilly terrain some 16 kilometres from the airport.\(^{42}\)

Post-accident, the Transport Accident Investigation Commission\(^{43}\) carried out an investigation into the causes of the accident pursuant to the Transport Accident Investigation Commission Act. This legislation replaces the Civil Aviation Act of 1964 referred to above, and similarly gives express effect to Annex 13 and reiterates the rationale of the international aviation community, as expressed in Annex 13 and in the previous legislation, that in order effectively to promote aviation safety, information recorded for the purposes of aviation safety should only be used for such purposes.

\(^{41}\) The Ombudsman’s preliminary ruling was set out in a detailed letter to the Secretary for Transport dated 27 November 1987.

\(^{42}\) The accident was subject to a very detailed investigation by the Transport Accident Investigation Commission, which resulted in an undated official accident report No. 95-011.

\(^{43}\) The successor to the Office of Air Accidents Investigation.
After the accident, the Transport Accident Investigation Commission received a request for access to the cockpit voice recorder tape for the purposes of litigation. On this occasion, however, the litigation contemplated was a criminal prosecution, and the tape was sought, not specifically under the Official Information Act of 1982, but by way of a search warrant obtained by the police. As would be expected, the Transport Accident Investigation Commission similarly relied on the Official Information Act and declined to provide access to the tape for prosecutory purposes on the grounds of New Zealand's international obligations and that to make the information available for such purposes would prejudice the future supply of such information. Just as the Office of Air Accidents Investigation before them, the Transport Accident Investigation Commission felt that it was in the public interest that such information should continue to be supplied.

The decision not to allow the cockpit voice recorder information to be made available for prosecutory purposes was taken to the High Court and later to the Court of Appeal. During the High Court stage of the proceedings, Justice Panckhurst devoted considerable time to reviewing the potential relevance of New Zealand's international obligations under Annex 13 with regard to the protection and uses of aviation safety information. His Honour noted that there were a number of instances where international instruments had been considered directly applicable to New Zealand law without the need for express incorporation. However, His Honour took the view that such direct applicability could generally only relate to considerations of fundamental human rights, which did not apply to the obligations

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44 The Police sought access to the cockpit voice recorder by search warrant for the purpose of obtaining evidence for possible criminal charges against the flight crew.

45 Section 9(2)(ba) of the Official Information Act provides that information may be withheld "where the making available of the information would be likely to prejudice the supply of similar information . . . and it is in the public interest that such information should continue to be supplied . . . or would be likely otherwise to damage the public interest." Official Information Act § 9(2)(ba) (1982).

46 Substantial civil proceedings, for example, against the undercarriage and GPWS system manufacturers commenced after the accident. However, such claims have almost entirely been struck out as barred by New Zealand's no-fault accident compensation legislation. See McGrory v. Ansett New Zealand (Unreported Judgment of Smellie, J., Dec. 11, 1997, Auckland Registry CP 228/97).

in Annex 13. Given that Annex 13 essentially enshrines the well-established fundamental right of the privilege against self-incrimination, it is respectfully submitted that this conclusion is perhaps debatable.

In fact, Justice Panckhurst seems to question this conclusion himself later in the judgment, where he states that, despite the conclusion that Annex 13 does not form part of New Zealand law, in considering whether to allow seizure of aviation safety information by way of search warrant for use in potential criminal proceedings, regard must be given to New Zealand’s international obligations. Further, the test to be used to determine whether seizure of such information should be allowed was that set out in Annex 13, namely, whether the need for a search warrant “outweighed the adverse domestic and international impact such action may have on that or any future investigations.”

However, the suggestion that Annex 13 might be relevant to determining whether aviation safety information should be available for prosecutory purposes in New Zealand law was emphatically rejected by the Court of Appeal. After considering the means by which international instruments could be incorporated into domestic law, the conclusion was reached that:

The broad point is that some of the provisions of the Convention and Annexes are appropriate in their subject-matter and drafting for direct application in the law of New Zealand, others require detailed national legislation, while still others do not call for national legislation at all . . . The conclusion is clear: the Chicago Convention as a whole does not form part of the law of New Zealand.

Further, after rejecting any direct applicability for the provisions of Annex 13 itself, the Court of Appeal was also unwilling to entertain the notion that analogous protections for aviation safety information might be available under the common law. This attitude was evidenced by the court’s statement:

[T]his Court in developing the law of public interest immunity over the last 35 years has increasingly emphasised the need to examine closely the issues and ambience of the particular case in order to decide if there is good reason to uphold the objection to release . . . Parliament has manifested a similar reluctance to

48 Annex 13, supra note 3, at para. 5.12.
50 Id. at 285 (citing Law Commission, A New Zealand Guide to International Law and its Sources, NZLC R34 1996, at ch. 2).
recognise a class approach in the Official Information Act 1982.\textsuperscript{51}

It is submitted that New Zealand's reluctance to protect aviation safety information either by way of direct applicability or by the application of analogous common law protections is misguided. The conclusion that Annex 13 should not be of direct applicability is debatable. Further, the mischief at which the erosion of common law principles such as class public interest immunity is aimed, and the sentiment behind the passage of the Official Information Act 1982, is to increase the availability of official information in order to encourage participation by the electorate in governmental decision-making, and to promote executive and bureaucratic accountability.

Increasing the availability of aviation safety information to parties with interests opposed to the enhancement of aviation safety is unlikely to have any direct impact on the promotion of accountability and participation by the electorate in governmental policy processes. Further, given that the public interest in securing any individual prosecution is overridden by the greater public interest in encouraging full and frank communications in order to preserve and promote the integrity of the aviation system, it is submitted that common law protections should apply to protect aviation safety information.\textsuperscript{52}

The decisions discussed above clearly show that, at common law New Zealand has consistently disregarded and undermined its domestic\textsuperscript{53} and international\textsuperscript{54} obligations governing the purposes and use of aviation safety information. New Zealand has proved correspondingly unwilling to recognise the necessity for

\textsuperscript{51} Id. at 292-93 (citing Brightwell v. Accident Comp. Corp. [1985] 1 N.Z.L.R. 132, 139). In Australia, a class claim to protect official documents was not upheld in the criminal case of Sankey v. Whitlam (1978) 142 CLR 1. Until recently, the United Kingdom has been more prepared to allow claims on a class basis. See Air Canada v. Secretary of State for Trade [1983] 2 A.C. 394. However, on December 18, 1996, the Lord Chancellor and the Attorney General advised Parliament that in the future, class claims would not be made and public interest immunity would only be claimed if a particular document would cause "real damage or harm." See Shawcross & Beaumont Air Law, ch. VI, at para. 65, note.

\textsuperscript{52} A recent case in which a public interest immunity argument was successful is the Australian case of Rogers v. Jacobsen (1995) 61 F.C.R. 57. In that case, public interest immunity was granted because the court believed that the grant of a search warrant would prejudice cooperation between an industry and a regulatory agency.

\textsuperscript{53} Pursuant to legislative and employment contract obligations.

\textsuperscript{54} Pursuant to Annex 13 of the Chicago Convention.
affording comprehensive protections against the disclosure and use of aviation safety information for non-safety purposes.

B. OTHER COMMON LAW PERSPECTIVES

This section examines whether aviation safety information may be afforded protection against disclosure and use for purposes other than the promotion of aviation safety under other provisions of the common law.

Employment Law

The introduction of cockpit voice recorders in New Zealand was driven by a pilot initiative to promote aviation safety. The installation of such potentially intrusive devices was based on the clear understanding, as reflected in the Chicago Convention, that aviation safety information recorded for such purposes would be used solely for such purposes. This intention is further reflected in relevant employment contracts relating to the use of aviation safety information. These contracts state that such information is only to be used for safety purposes.\(^5\)

Consequently, the collective view expressed by the providers of aviation safety information is that the use of such information for other purposes would be a clear breach of such employment contracts and international agreements protecting the use of aviation safety information, which would likely lead to justified industrial action and the disabling of aviation safety recording devices.\(^6\) If this were to occur, it would clearly prejudice the continued supply of essential aviation safety information.

Accordingly, in the absence of express legislation compelling the disclosure of aviation safety information for prosecutorial purposes, or any clear public policy considerations\(^7\) that might preclude the enforcement of the relevant employment contract provisions, it is surprising and inequitable that New Zealand has been prepared to permit the disclosure and use of aviation

\(^5\) See, for example, clause 75 of the Air Traffic Controllers' Collective Employment Contract with Airways Corporation of New Zealand Limited.

\(^6\) Similar views were expressed by the New Zealand Airline Pilots' Association during the Mount Erebus Inquiries, supra notes 29-41 and accompanying text, and the Australian National Airlines case, supra note 40. The Australian National Airlines case is also discussed infra, Ch. VIII.

\(^7\) Whilst it would generally be against public policy for such agreements to attempt to oust the jurisdiction of the courts, immunity from proceedings before the courts, or any other tribunal, is not intended by such provisions.
safety information for conflicting prosecutory purposes. In so doing, the courts and other tribunals have apparently disregarded the express terms of the voluntary agreements that govern the recording and use of such information, thus jeopardizing the continued supply of such essential aviation safety information to the international aviation community.

Common Law Principles

Privilege

The public interest in the proper administration of justice requires that all information which may be relevant to the conduct of litigation be disclosed to each party prior to the proceedings through the discovery process. However, certain exceptions to this general principle exist. In particular, an exception exists when the public interest in full disclosure is outweighed by a greater public interest in maintaining the confidentiality of particular communications. Such exceptions to the general principle of availability fall under two main headings, namely, the common law principles of privilege and public interest immunity.

The common law principle of privilege comprises the legal professional privilege and the privilege against self-incrimination. The legal professional privilege is based on the premise that the public interest in full pre-trial disclosure is outweighed by the greater public interest in encouraging full and frank communications to legal advisors to promote the greater public good of preserving and promoting the integrity of the justice system. The privilege against self-incrimination, on the other hand, is based on the premise that the public interest in full pre-trial disclosure is outweighed by the greater public interest in not compelling a person to give evidence which might incriminate that person.

The decisions discussed above appear to disregard the potential application of the privilege against self-incrimination as it applies to the issue of release of aviation safety information. However, the courts have also refused to permit an airline em-

58 See The Mount Erebus Inquiries, supra notes 29-41 and accompanying text.
59 Note that this privilege only applies in the context of criminal proceedings. This right has also been incorporated into the 1990 New Zealand Bill of Rights Act, which states that anyone charged with an offence has the right "not to be compelled to be a witness or to confess guilt." New Zealand Bill of Rights Act § 25 (1990) (emphasis added).
ployer to use its proprietary cockpit voice records\textsuperscript{60} as the basis for any potential disciplinary action against its own staff members. These decisions are apparently based on the presence of the privilege against self-incrimination.\textsuperscript{61} In fact, somewhat perversely, the courts have seemingly adopted an expansionist approach in applying the doctrine in this context. For example, in the context of the Ansett Dash 8 accident, the employer airline was estopped from using its cockpit voice records, not only until the Transport Accident Investigation Commission report into the accident was published and the ensuing civil litigation was concluded,\textsuperscript{62} but also until any potential criminal prosecutions were completed, including any appeal processes. The police, however, had already obtained access to the cockpit voice recorder, and were therefore capable of making an independent assessment of whether sufficient evidence of culpability existed. As a result, the individuals concerned have remained suspended from duties, on full pay by their employer, for over three years, with no likely conclusion of this matter in sight.\textsuperscript{63}

Given that the private interest in securing any individual prosecution is outweighed by the greater public interest in encouraging full and frank communications in order to create an environment which will allow for a systemic analysis of aviation risk, it is submitted that the privilege against self-incrimination should, in principle, apply to aviation safety information.

Public Interest Immunity

Similar to the common law principles of the privilege against self-incrimination, the common law principle of public interest immunity is based on the premise that the public interest in full pre-trial disclosure is outweighed by the greater public interest

\textsuperscript{60} Although ownership of cockpit voice recorders can be a complex legal issue, it is generally accepted that the aircraft owner or current operator owns the cockpit voice recorder records.

\textsuperscript{61} An injunction was granted against the employer because the right to silence in a police investigation would be undermined if evidence given in the disciplinary process was able to be accessed by the police.

\textsuperscript{62} The airline employer, Ansett New Zealand Limited, actually agreed not to institute any disciplinary proceedings until the Transport Accident Investigation report was finalised, and then again agreed to defer disciplinary action until the civil litigation was concluded.

\textsuperscript{63} Peter Cullen, \textit{Staff Discipline Called Off Until Criminal Charges Resolved}, Employment Matters, \textit{The Dominion} (2d ed.) June 16, 1999.
in preserving the confidentiality of particular information. There are two categories of public interest immunity: class immunity and contents immunity. The class immunity principle applies public interest immunity to information within a defined class, such as Cabinet documents. The contents immunity principle applies public interest immunity to specific information, rather than information within a general class. The scope of both class and contents immunity has significantly eroded over the last decade, essentially due to a paradigm shift away from secrecy and towards increasing transparency in central government policy processes.

The erosion of the public interest immunity interlocutory defence is aimed to encourage participation by the electorate in governmental decision-making and to promote bureaucratic and executive accountability. This is also the sentiment behind the passage of the Official Information Act.

Clearly, increasing the availability of aviation safety information to parties with interests opposed to the enhancement of aviation safety is unlikely to have any direct impact on the promotion of executive and bureaucratic accountability and participation by the electorate in governmental policy processes. Further, given that it is commonly accepted internationally that the public interest in securing any individual prosecution is outweighed by the greater public interest in encouraging full and frank communications between aviation professionals to create an environment that allows for a systemic analysis of aviation risk, it is submitted that class and contents public interest immunity should, in principle, apply to aviation safety information.

The fundamental principle of the Chicago Convention provides that all aviation safety information should be inherently protected as a class to promote the integrity of the international aviation system. Whilst contents public interest immunity may remain available for certain aviation safety information on the basis of an analysis of the specific aviation information contained in a specific record, it is submitted that adopting such an approach undermines that principle. Consequently, the contents of any particular aviation safety record are irrelevant. To

64 In relation to the application of the doctrine of public interest immunity, see Ex parte Wiley [1994] 1 A.C. 274. In this case before the House of Lords in Britain, Lord Woolf identified several general principles regarding the application of the doctrine.

65 The class immunity defence is also possibly available to a limited extent under statute. Supra note 51 and accompanying text.
permit the examination of any particular aviation record to determine whether confidentiality should apply completely undermines that fundamental principle.

Accordingly, it is suggested that the recent New Zealand pronouncements on this topic which preclude the availability of class, and possibly also contents, public interest immunity for cockpit voice records and other aviation safety information, are perhaps misguided. Such decisions have failed to appreciate that the fundamental rationale underlying the general erosion of the public interest immunity defence does not apply in the context of the protection of aviation safety information.\textsuperscript{66}

By contrast, more recent decisions of the Office of the Ombudsmen have accepted the legitimacy of applying public interest immunity on a class basis to aviation safety information.\textsuperscript{67} For example, earlier this year the Office of the Ombudsmen accepted that the public interest in ensuring the future availability of aviation safety information required that such information be protected as a class. This current approach of the Office of the Ombudsmen regarding the application of public interest immunity, although unlikely currently to be supported by the New Zealand courts, is the correct one.

\section*{IV. LEGISLATIVE APPLICATION OF THE CHICAGO CONVENTION ON INTERNATIONAL CIVIL AVIATION IN NEW ZEALAND}

This Chapter considers the legislative effect in New Zealand of the relevant provisions of Annex 13 to the Chicago Convention and the protections afforded to aviation safety information. Aviation specific statutes are considered first, and then relevant generic legislation.

\begin{notes}
\item[66] A recent case in which a public interest immunity argument was successful is the Australian case of \textit{Rogers v. Jacobsen} (1995) 61 F.C.R. 57. In that case, public interest immunity was granted because the grant of a search warrant would prejudice cooperation between an industry and a regulatory agency.
\item[67] Interestingly, the Official Information Act of 1982 expressly excludes the availability of public interest immunity in some instances. For example, the immunity is excluded when refusing to answer any question in relation to any Ombudsman investigation or a statutory judicial review.
\end{notes}
A. Aviation Specific Legislation

Civil Aviation Act 1990

All air traffic services within New Zealand airspace are governed by the Civil Aviation Act 1990, which is administered by the Civil Aviation Authority. This government agency is accountable to the Minister of Transport, and is specifically responsible for New Zealand's aviation safety and security.

Whilst the Act does not expressly incorporate any aspect of the Chicago Convention, the long title to the Act recognises that one purpose of the legislation is "to ensure that New Zealand's obligations under international aviation agreements are implemented."68

More particularly, the Minister of Transport is given the specific function of administering New Zealand's participation in the Chicago Convention,69 and ensuring that any rules made under the Act are not inconsistent with standards of the International Civil Aviation Organisation and New Zealand's international aviation obligations.70 In addition, the Minister is given the power to incorporate by reference standards, requirements, or recommended practices of international aviation organisations.71

However, whilst the Civil Aviation Act clearly provides the necessary mechanism for the incorporation of New Zealand's obligations under the Annex 13 standard, the Civil Aviation Authority is unsupportive of the rationale underlying Annex 13. In this context, aviation safety and aviation prosecutions are competing objectives, and the objective of aviation prosecution must be subjugated to the greater public good of enhancing aviation safety and the creation of an environment which will allow for a systemic analysis of aviation risk.

In fact, the Civil Aviation Authority adamantly adopts the view, opposed by the international aviation community, that prosecution will encourage aviation safety, and, for example, has strongly argued for the retention of broad prosecution privi-

68 Civil Aviation Act of 1990.
69 Id. § 14(2)(a).
70 Id. § 31(1).
71 Id. § 36.
leges under the Transport Accident Investigation Amendment Bill.\textsuperscript{72}

Moreover, as discussed in Chapter II above, the contention that prosecutions are integral to the promotion of aviation safety is belied by the Civil Aviation Authority's own statistics. The Authority's most recent annual report proclaims that, in pursuing its objective of aviation safety, a mere four percent of the Authority's resources are utilised in prosecutions.

The Civil Aviation Authority's reluctance to accept the validity of the requirements of Annex 13 with respect to the disclosure and use of aviation safety information means that whilst the statute which it administers allows the mechanism for incorporation of New Zealand's international obligations under the Chicago Convention with respect to the protection of such information, effective implementation of those obligations under the statute seems unlikely to occur.

\textit{Transport Accident Investigation Commission Act 1990}

The Transport Accident Investigation Commission Act 1990 established the Transport Accident Investigation Commission (TAIC) as an independent Crown entity. The Commission's functions are, in part, to perform New Zealand's obligations under the Chicago Convention with respect to aviation accident investigation. The statute specifically incorporates the rationale expressed in Annex 13. The Act provides that the principal purpose of the Commission is to perform New Zealand's obligations under Annex 13 in accordance with the rationale underlying that Standard. That is, the Commission's primary function is to determine the circumstances and causes of accidents and incidents primarily to attempt to avoid similar occurrences in the future, rather than to ascribe blame to any person.\textsuperscript{73}

The Act provides the Commission with extensive powers to enable it to perform its functions. For example, the Commission has the power to seize and retain any material that it believes, on reasonable grounds, will assist in establishing the cause of an accident or incident.\textsuperscript{74} Such material cannot then

\textsuperscript{72} See the Civil Aviation Authority of New Zealand's submission to the Transport and Environment Select Committee on the Transport Accident Investigation Amendment Bill.

\textsuperscript{73} \textit{Transport Accident Investigation Commission Act} § 4 (1990).

\textsuperscript{74} \textit{Id.} § 12(1)(b). For example, the aircraft operator or owner would own the cockpit voice recorder at all times, but after an accident, the Commission's power
be accessed or examined by any other person or entity without the Commission’s consent.\textsuperscript{75}

By contrast with the Civil Aviation Authority, the Commission is fully supportive of the rationale underlying Annex 13 that, in this context, aviation safety and aviation prosecutions are competing objectives, and that the objective of aviation prosecution must be subjugated to the greater public good of enhancing aviation safety and the creation of an environment which will allow for a systemic analysis of aviation risk.

Accordingly, the Commission has a strict policy of refusing to disclose aviation safety information for any purpose other than the promotion of aviation safety, and has gone to court on a number of occasions to seek to enforce this policy.

In fact, the Commission is so concerned with enforcing New Zealand’s international obligations to ensure appropriate access to aviation safety information, and to address aviation safety rather than culpability, that it has been publicly criticised for being overly concerned with attempting to avoid assigning blame.\textsuperscript{76}

The extensive powers afforded to the Commission under the Transport Accident Investigation Commission Act, and the Commission’s approach to the exercise of those powers, provide the mechanism to allow the Commission to effectively implement New Zealand’s obligations under the Chicago Convention with respect to aviation accident investigation and to protect relevant aviation safety information. But judicial inroads in this area undermine the Commission’s attempts to maintain the integrity of the aviation accident investigation process, and, correspondingly, the effective implementation of New Zealand’s obligations under the Chicago Convention.

\section*{B. Generic Legislation}

\textit{Official Information Act 1982}

The purpose underlying the Official Information Act is to increase the availability of official information to promote effective public participation in law and policy development and

\footnote{to seize the cockpit voice recorder gives it exclusive rights of possession and control until the investigation is complete.}

\footnote{\textit{Id.} § 14.}

\footnote{\textit{See} Bill Guest, \textit{Secretive Accident Investigation Process Hampers Justice}, \textit{The Independent}, July 7, 1999.}
administration, and to promote executive and bureaucratic accountability.

The policy underlying the Official Information Act, as expressed in the long title to the Act, is to promote the availability of official information.77 Any information which comes into the possession of any government-owned entity in any form, including, for example, oral advice, is essentially deemed to be official information, regardless of the wishes of the proprietor of such information, the purposes for which such information was acquired, or the function of that organisation. Accordingly, all aviation safety information which comes into the possession of any of the organisations fulfilling aviation safety functions in New Zealand, including the Transport Accident Investigation Commission and the Civil Aviation Authority, as discussed above, plus Airways Corporation of New Zealand Limited, a commercial company responsible for the operation of New Zealand’s air navigation systems, but currently retaining the government as its shareholder, would be considered official information for the purposes of the Act.78

The Official Information Act would generally require any aviation safety information acquired by such organisations to be made publicly available on demand to any third party. As the principle underlying the Act is to promote the availability of official information, there are extremely limited grounds available under the Act for withholding such information.79 Furthermore, even if it is established that one or more of the grounds for withholding such information apply, such information must nevertheless be made publicly available if the public interest in disclosure is considered to override those reasons.80

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77 The Official Information Act 1982 provides as follows:
An Act to make official information more freely available, to provide for proper access by each person to official information relating to that person, to protect official information to the extent consistent with the public interest and the preservation of personal privacy, to establish procedures for the achievement of those purposes, and to repeal the Official Secrets Act 1951.

78 All of these organisations are currently owned by the New Zealand government. Whilst Airways Corporation is a limited company, its shareholder is currently the New Zealand Government.


80 See id. § 9(1). Note that the public interest is taken to mean being of legitimate concern to the public, as opposed to matters which are merely interesting to the public. See Sir Brian Edward & Anand Satyanand, The Ombudsmen’s Role in Investigating and reviewing Decisions to Withhold Official Information, OMBUDSMEN Q.
If New Zealand's international obligations under Annex 13 to the Chicago Convention were expressly incorporated into domestic law, then the Official Information Act would correspondingly protect against the disclosure of such information. However, until this occurs, New Zealand's international obligations cannot generally be relied upon to resist disclosure under the Act.  

Whilst the limited grounds under the Act have been successfully relied upon by Airways Corporation of New Zealand to decline to provide access to air traffic control tapes on the grounds of New Zealand's international obligations and employment contract obligations with respect to the use of such information, effectively applying public interest immunity on a class basis to such information, more recent judicial decisions in this area suggest that aviation safety information is unlikely to be generally protected from disclosure under the Official Information Act.  

Furthermore, regardless of whether the Official Information Act is applied generally to protect aviation safety information from disclosure, this will provide little real protection for aviation safety information against disclosure and use for prosecutorial purposes. Grounds for withholding information under the Act clearly cannot be applied to resist seizure of information under a search warrant.  

Privacy Act 1993  
The policy underlying the Privacy Act 1993 is to protect the privacy of natural persons.  
It appears generally accepted that privacy rights attach to individuals recorded on, at least, certain aviation safety information, for example, cockpit voice records. However, whether privacy

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81 However, this position may now have changed subsequent to the enactment of the Transport Accident Investigation Commission Amendment Act 1999. See infra Ch. VII.  
82 Official Information Act § 18(c) (i) provides grounds for refusing to disclose official information on the basis that "the making available of the information requested would be contrary to the provisions of a specified enactment." Official Information Act § 18(c) (i) (1982).  
83 Id. § 9(2)(ba)(i).  
84 For example, common law protections against disclosure are similarly unlikely to apply. See supra Ch. III.  
85 See The Mount Erebus Inquiries, supra Ch. III.
rights attach more generally to communications, part of which may already be in the public domain, for example air traffic control records,\(^{86}\) is more controversial.

In general terms, the Privacy Act requires that persons whose privacy may be affected by the public release of information be given the right of access to and correction of such information, and the right to veto the disclosure and use of such information. In the context of aviation safety information, this would mean that, for example, flight crew should be able to prevent the disclosure and use of cockpit voice records for purposes opposed to aviation safety. However, there are a number of limitations on such privacy rights which mean that the Privacy Act is unlikely to provide a generally effective tool against the disclosure and use of aviation safety information.

First, privacy rights attach solely to individuals and are not generally considered to be transferable or assignable. Consequently, where, as in many aviation accidents, those relevant individuals are deceased, any privacy rights will correspondingly be extinguished.

Second, the right to prevent the disclosure or use of information cannot be used where that disclosure or use relates to one of the reasons for which the information was originally obtained.\(^{87}\)

Accordingly, it is probable that privacy rights could not be relied upon to prevent the disclosure or use of aviation safety information for aviation safety purposes. For example, the publication of an aviation transcript within a Transport Accident Investigation Commission investigation report, as that would be one of the purposes for which the information had been obtained.\(^{88}\)

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\(^{86}\) Communications between air traffic control and flight crew are broadcast on public VHF frequencies.

\(^{87}\) Principle 11 provides:

*Limits on disclosure of personal information.* An agency that holds personal information shall not disclose that information to a person or body or agency unless the agency believes, on reasonable grounds, that the disclosure of the information is one of the purposes in connection with which the information was obtained or is directly related to the purposes in connection with which the information was obtained . . .


\(^{88}\) See, e.g., Office of the Privacy Commissioner, Case Note No. 15972, available at http://www.privacy.org.nz/people/cn15972.html (last visited June 1, 2003). The New Zealand Privacy Commissioner decided that publishing an edited cock-
Correspondingly, if the underlying rationale of the Chicago Convention that aviation safety information should not be available for other purposes continues to be rejected by the New Zealand Government and the New Zealand courts, then it is probable that the Privacy Act will similarly be unavailable to prevent the disclosure or use of aviation safety information for prosecutory purposes.

*Judicature Amendment Act 1972*

Judicial review by the courts under the Judicature Amendment Act 1972, or at common law, could potentially be used as a mechanism to ensure that, in the administration of the legislation referred to above, or more generally in the exercise of governmental decision-making, relevant obligations under Annex 13 to the Chicago Convention are taken into account.

For example, it has been recently suggested that judicial review may be available to require international obligations which have not been domestically incorporated, nevertheless to be taken into account by decision-makers.

Recent case law suggests that the courts may be prepared to hold that certain international obligations are implied mandatory considerations for decision-makers exercising relevant powers, even though that particular statute is silent on such matters and the relevant international instruments have not been incorporated into domestic law.\(^89\)

However, given the prevailing attitude of the New Zealand courts and other agencies towards the potential for direct incorporation of the obligations under Annex 13 discussed in this Chapter and Chapter III above, effective recognition of New Zealand’s international obligations via the judicial review process is, at least currently, unlikely to occur.

**V. POLICY DEVELOPMENT OF THE TRANSPORT ACCIDENT INVESTIGATION AMENDMENT BILL**

This Chapter examines the policy development of the Transport Accident Investigation Amendment Bill. Though two revis-
sions of the policy proposal have moved New Zealand closer to the Chicago Convention’s intent of a systemic approach to aviation safety, significant lapses remain.

A. THE FIRST POLICY PROPOSAL

The Ministry of Transport’s first discussion document on the use of aviation safety information was published in October 1997.91

The impetus for the discussion document stemmed from the Ansett Dash 8 accident and ensuing litigation, discussed in Chapter III above. In particular, the issue of whether a prosecutory authority should be permitted to seize aviation safety information by way of search warrant prompted the Transport Accident Investigation Commission to make specific recommendations on these topics in its formal accident investigation report.92

In that report, the Commission recommended to the Minister of Transport that the provisions of Annex 13 to the Chicago Convention relating to the use of aviation safety information should be expressly incorporated into New Zealand domestic law to protect from disclosure cockpit voice recorders and other evidence obtained by the Commission, that retention and use of cockpit voice recorders should be made mandatory as a matter of urgency, and that April 1999 should be regarded as a deadline for compulsory installation of cockpit voice recorders in commercial aircraft.93

It is clear from the discussion document that its primary policy focus was intended to be the implementation of the relevant international standards contained in the Chicago Convention. This was purportedly achieved by maintaining the primary purpose of accident and incident investigation records as safety and educational tools, whilst allowing for the courts to determine on a case by case basis according to certain criteria whether such a record would be available for prosecutory purposes.

90 The Ministry of Transport is the government department responsible for administering New Zealand’s civil aviation legislation.
92 This report was published in July 1997. See supra Ch. III.
93 Similar sentiments were expressed by the Transport Select Committee during its consideration of the Civil Aviation Amendment Bill 1996. In its report, the Committee considered that primary legislation giving effect to Annex 13 was needed with regard to the use of aviation safety information.
In so doing, the first discussion document ignored the generally held view of the international aviation community that whenever information recorded for safety purposes may be potentially disclosed and used for other purposes, it will have some adverse effect on safety as it will prejudice the continuous flow of such essential safety information in the future.

The discussion document similarly ignored the rationale underlying Annex 13, which, in this context, is that the public interest in the pursuit of aviation prosecutions is far outweighed by the public interest in the pursuit of aviation safety, so that the public interest in prosecution must be subjugated to the greater public good of safer air transportation.

In failing to recognise and address this fundamental issue, the policy development underlying the Bill has failed effectively to address New Zealand's international obligations under Annex 13, and similarly has failed to create an environment supportive of an effective systemic analysis of aviation risk.

By contrast, if the initial policy consideration of these issues led the New Zealand government to the conclusion, opposed by the majority of international safety experts, that there is, in fact, a point at which the conflicting interests of aviation safety and aviation prosecutions can be reconciled, without compromising the objective of aviation safety, a convincing alternative should be given. That is, the point at which the objective of aviation safety can be reconciled with the objective of aviation prosecutions, should be clearly identified.

However, rather than doing so, the first discussion document abrogated responsibility for such a determination to the judiciary, requiring the courts to decide on a case by case basis, guided only by certain vague and imprecise criteria,\(^94\) whether an aviation safety record could also be used for prosecutorial purposes.\(^95\)

Moreover, whilst aviation safety information could only be made available for serious criminal offences (such as murder, manslaughter or specific aviation crimes, such as hijacking), no limitations were contained for the severity of the offence in civil proceedings, potentially allowing aviation safety records to be obtained for any minor civil offence.\(^96\) Furthermore, the first proposal would clearly fail to address the primary issue leading

\(^94\) Ministry of Transport, supra note 91, at 8, para. c.
\(^95\) Id. at Foreword.
\(^96\) Id. at 7, para. (b)(i).
to the necessity for the Transport Accident Investigation Amendment Bill, as it expressly stated that it would not prevent the police from obtaining access to accident records by search warrant.\textsuperscript{97}

Despite the claim to the contrary,\textsuperscript{98} it is clear that the first discussion document would not have effectively implemented New Zealand's obligations under Annex 13, nor provided appropriate protections for aviation safety information. After considering submissions on the original proposal, the Ministry of Transport published a revised proposal in February 1998, which provides the framework for the current Bill.

\textbf{B. THE REVISED PROPOSAL}

Whilst the revised proposal moved further towards adopting the view of the international aviation community, it failed to effectively expand protections for aviation safety information in the far more significant area of potential criminal proceedings. The original proposal clearly considered that a broad approach to the definition of aviation safety information was necessary to achieve the objective of enhanced aviation safety. The revised proposal adopted a far more limited interpretation of aviation safety information, with no explanation therefor. The first discussion document expressly considered information protection issues relating to cockpit voice recorders and air traffic control records as analogous, such that similar protections should be afforded to both categories of records: "Under the proposal, certain air traffic control records are protected because their disclosure could jeopardise the future supply of that information to accident and incident investigations, in the same way as disclosure of cockpit voice recorder and other records. . ."\textsuperscript{99} However, air traffic control records are, with no explanation, omitted from the definition of aviation safety records in the revised proposal.

Similarly, the second proposal failed to address the main issue resulting from the Dash 8 accident and recommended to be addressed by the Transport Accident Investigation Commission accident report, as it also would not prevent the police from obtaining access to accident records by search warrant.\textsuperscript{100}

\textsuperscript{97} \textit{Id.} at 7, para. (a).
\textsuperscript{98} \textit{Id.} at 1.
\textsuperscript{99} \textit{Id.} at 10.
\textsuperscript{100} See \textit{id.} at 7, para. (a).
After reviewing submissions on the revised proposal, the resultant draft legislation, the Transport Accident Investigation Commission Amendment Bill, was published.

VI. THE PROVISIONS OF THE TRANSPORT ACCIDENT INVESTIGATION AMENDMENT BILL

The Transport Accident Investigation Amendment Bill endeavours to achieve its purpose of implementing the requirements of Annex 13 of the Chicago Convention by introducing specific restrictions on the disclosure and admissibility of aviation safety records. But rather than extending comprehensive protections to all aviation safety records, the Bill divides such records into two categories: those that are given absolute protection from disclosure and admissibility, and those that are only given qualified protection.

Essentially, the Bill draws a fundamental distinction between records that are generated in the course of a formal accident investigation after an aviation accident or incident has occurred, which are given absolute protection against disclosure and admissibility, and records generated prior to any such investigation, which are only given qualified protections.

As noted above, aviation records given absolute protection are limited to records generated after an aviation accident or incident has occurred. Such records may only be disclosed for the purpose of a formal investigation into an aviation accident or incident to which the particular record relates, and are not admissible in any proceedings.

By contrast, aviation records given qualified protection are generally records generated prior to any formal aviation accident investigation. Such records can only be disclosed by or-

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101 Transport Accident Investigation Amendment Bill, cl. 14B.
102 Id. cl. 14C.
103 More specifically, these records are: any statement or submission made to an investigator in the course of an investigation; any recording or transcript generated after an accident or incident in the course of an investigation; any investigator’s note or opinion generated after an accident or incident in the course of an investigation; and any information relating to an investigation that is provided in confidence by an investigator to another person (unless that information is a record subject to qualified protection).
104 Proceedings are given an extended definition to cover not only any court proceedings, but also a coronial inquiry, an arbitration under the Arbitration Act 1996, and a court-martial.
105 More specifically, these records are: communications between the flight deck and air traffic control or other person involved in the operation of the air-
der of the High Court in the case of certain defined serious civil or criminal\textsuperscript{106} proceedings.

To prevent a recurrence of the situation arising as a result of the Court of Appeal's decision in the \textit{Ansett} case\textsuperscript{107} and the resulting recommendations of the Transport Accident Investigation Commission that a prosecutor can seize aviation safety records by way of search warrant, the Bill provides that no search warrant may be issued for both records subject to absolute protection, and records subject to qualified protection.\textsuperscript{108} Whilst it may be that this provision would be sufficient to reverse the current common law position,\textsuperscript{109} the provision may be insufficient to afford appropriate comprehensive protection for such records, as they may still be subject to disclosure in civil proceedings, for example under a witness summons.

Clearly, the Bill attempts to draw a distinction between records generated during the course of a formal aviation accident investigation as inherently requiring greater protections

\textsuperscript{106} Disclosure of criminal proceedings is available for certain aviation records on a balance of probabilities test, that is that there are reasonable grounds to believe an offence has been committed, and the offence cannot be investigated without that evidence. Transport Accident Investigation Amendment Bill, cl. 14E(4). A disclosure order can be obtained for certain serious offences. These offences are set out in clause 14E(a)-(d) of the Bill and are as follows: any offence against the Crimes Act 1961, the Aviation Crimes Act 1972, and the Crimes (Internationally Protected Persons and Hostages) Act 1980 that is punishable by imprisonment for a term of 10 years or more; an offence against §§ 190, 296, 297, 300, or 303 of the Crimes Act 1961; an offence against § 11 of the Aviation Crimes Act 1972; and an offence against the Armed Forces Discipline Act 1971. Note that under § 155 of the Crimes Act 1961, which relates to the duty of persons doing dangerous acts, and § 156, which relates to the duty of persons in charge of a dangerous thing, pilots are subject to the legal duty to take precautions against danger, and to use reasonable care to avoid danger, when operating an aircraft. A person may be found guilty of manslaughter if a person dies as a breach of this duty without lawful excuse. The Justice and Law Reform Select Committee is at present considering a bill recommending amendments to the Crimes Act which would impact this legal duty. The Crimes Amendment (No. 5) Bill seeks to amend the Crimes Act by providing that "a person is criminally responsible for omitting to discharge or perform a legal duty only if, in the circumstances of a particular case, the omission or neglect is a major departure from the standard of care expected . . ." If enacted, this amendment will mean that only the most serious cases of negligence will be the subject of manslaughter charges.

\textsuperscript{107} See infra Ch. III.

\textsuperscript{108} Transport Accident Investigation Investigation Bill, cl. 140.

\textsuperscript{109} Currently, it is unlikely that the common law would protect against compelled disclosure in the context of actual proceedings.
against disclosure and admissibility than other types of aviation records.

It is presumed that the Bill draws such an arbitrary distinction in an attempt to reconcile New Zealand's obligations under the Chicago Convention to restrict the use of aviation safety records to aviation safety purposes with the competing objective of permitting the use of aviation safety information for prosecutorial purposes.

In so doing, New Zealand has again apparently disregarded the commonly accepted views of the international aviation community that the interests of aviation safety and aviation prosecution cannot be easily reconciled. Accordingly, as the public interest in aviation safety outweighs the public interest in aviation prosecutions, the objective of aviation prosecution must be subjected to the greater public good of safer air transport and the creation of an environment conducive to the application of a systemic analysis to aviation risk.

In attempting to implement New Zealand's obligations under the Chicago Convention and achieve the objective of aviation safety, the Bill makes the assumption that records generated during an aviation accident investigation are considered to be more integral to the promotion of aviation safety than other types of aviation records, which may or may not subsequently be required for such an investigation.

Such an assumption is misguided. The most effective means of enhancing aviation safety requires a systemic analysis of aviation risk. A comprehensive approach to such systemic analysis necessitates the protection of all aviation information recorded for safety purposes, in order to identify all of the factors relevant to the risk of an aviation accident, regardless of whether such information may subsequently be required for a formal accident investigation.\(^{110}\)

In particular, a systemic approach to aviation safety recognises the primary importance of analysing and addressing latent fail-

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\(^{110}\) The Bill also adopts a much narrower definition of aviation safety records than either that adopted in the policy development stage of the Bill or set out in Annex 13. For example, a restrictive interpretation of air traffic control records covered by the Bill is adopted. Annex 13 requires that, in relation to air traffic control, protections be extended to "[a]ll communications between persons having been involved in the operation of the aircraft." Annex 13, supra note 13, § 5.12(b). This is generally interpreted to mean that protections should extend to all communications between air traffic controllers, as well as communications between air traffic control and aircraft.
ures. That is, those embedded risks relating to human or organisational factors which, if undetected and unaddressed, create an environment in which a major accident may occur. Such latent failures can be earliest identified by an effective examination of the more frequent, but less serious, aviation incidents, which may never form part of a formal accident investigation. The effective identification of such latent failures will minimise the potential for systemic failure to manifest in a major air catastrophe, which would then become the subject of a formal aviation accident investigation.\textsuperscript{111}

Consequently, comprehensive protections for aviation records generated prior to any formal aviation accident investigation are at least as fundamental to the effective promotion of systemic aviation safety as comprehensive protections for records generated during such investigations.\textsuperscript{112} In failing to recognise this, the Bill prejudices the primary objective enshrined in Annex 13 of the Chicago Convention, which is the promotion of systemic aviation safety.

Similarly, the concept in the Bill of permitting the disclosure of certain aviation safety records for particular categories of civil or criminal offences is inherently misconceived. The view taken by the New Zealand government, and opposed by the international aviation community, that, in this context, the fundamentally conflicting objectives of aviation safety and aviation prosecutions can be reconciled, has resulted in the Bill adopting a misguided and arbitrary list of so-called serious offences for which aviation safety information can be made available. If the New Zealand government, in implementing its obligations under the Chicago Convention, has made the policy determination that there is a point at which the conflicting interests of aviation safety and aviation prosecutions can be reconciled, that point should be clearly identified in the legislation.

Rather than bear the potential political cost of engaging in such contentious decision-making, in a classic manifestation of

\textsuperscript{111} Clause 2 of the Bill defines an investigation as an investigation under either § 13 of the Civil Aviation Act 1990, which is carried out by TAIC, or § 72B(2)(d) of the Civil Aviation Act 1990, which is carried out by the CAA. Section 72B(2)(d) investigations are not limited to safety investigations. However, clause 2 of the Bill limits the definition of investigation to § 72B investigations that are carried out for safety purposes.

\textsuperscript{112} This is inherently recognised in the Chicago Convention, which does not draw any distinction between protections for pre and post investigation records. See Chicago Convention, \textit{supra} note 1.
public choice theory, the government has chosen to abrogate its responsibility for such policy determination to the judiciary. In doing so, the Bill places a constitutionally inappropriate expectation on the judiciary to exercise policy decisions about the disclosure and use of aviation safety information which should more appropriately be made by Parliament.

As evidenced below, the courts' task is further complicated by the ambiguity and illogicality of the disclosure parameters as are adopted by the Bill, and by the potential for easy manipulation of such criteria on the part of prosecution agencies, that could simply assume when gathering evidence that a relevant serious offence has occurred. For example, disclosure for civil proceedings is available for certain aviation records where the level of damages claimed exceeds the current district court limit. However, the adoption of this arbitrary limit is not explained, and can be easily circumvented by inflating the damages claim by adding a claim for general damages for distress and inconvenience sufficient to take the total claim beyond the district court limit.

Further, the Bill's test for disclosure does not allow the court to weigh the public interest in an individual aviation prosecution against the public interest not just in that particular information, but more importantly, in the future availability of aviation safety information.

The courts' task is further complicated by the fact that there is no definition of disclosure, and the Bill does not specify all the circumstances in which disclosure is available, or the circumstances in which further disclosure of a disclosed record would be permitted.

The uncertainty created by the above factors will further undermine the potential effectiveness and efficiency of the pro-

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113 In simple terms, public choice is the application of economics to political science. See generally Farber & Frickey, supra note 9, at 878.
114 Although, in public choice terms, this would actually be the rational decision for the government to make, rather than prejudice its chances of being re-elected by being perceived to make unpopular policy decisions.
115 It is unclear whether it is confined to disclosure of an original document, or extends, for example, to an oral disclosure of some or all of the contents of the record other than in accordance with cls. 14B(3) or 14C(5). In addition, a current reference to protected aviation records in judgments and coroners' findings could constitute disclosure.
116 Clauses 14B(1)(a) and 14C(1)(a) allow a record to be disclosed by an investigator or other person for the purposes of the investigation into the accident or incident to which the record relates.
posed legislation by unjustifiably increasing agency costs as a result of policy decisions having to be exercised by the courts on an individual basis, rather than having statutory guidelines of general application.  For example, in the Australian National Airlines case, discussed in Chapter VIII below, it was recorded that arguments on disclosure and admissibility occupied one and a half days.

The Bill has failed to effectively create an environment supportive of a comprehensive systemic approach to aviation safety. Despite the primary objective to implement New Zealand's international obligations under Annex 13 to the Chicago Convention, the underlying assumptions are that the conflicting objectives of aviation safety and aviation prosecutions can easily be reconciled by the courts and that only certain types of aviation safety records are integral to the promotion of aviation safety. This fundamentally compromises the objective of aviation safety.

VII. THE TRANSPORT ACCIDENT INVESTIGATION COMMISSION ACT

The Transport Accident Investigation Amendment Bill passed into law in early September 1999 as the Transport Accident Investigation Commission Amendment Act.

The Act contains a number of significant departures from the original Bill. Those amendments are the result of recommendations of the Transport and Environment Select Committee following its consideration of the Bill.

The Select Committee identified the central issue for its consideration as being whether aviation safety would be best served by a regulatory regime which encourages the use of cockpit voice recorders and similar devices for safety investigative purposes only, or by providing for possible disclosure in criminal proceedings against flight crew.

In a radical departure from the provisions of the original Bill, the Select Committee came to the view that cockpit voice recorders should not be available at all for disclosure or use

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117 Under the Bill this will occur, at least in the short term, until general precedents become established. Moreover, as clause 14L of the Bill preserves all other grounds of inadmissibility, those same arguments may then be relitigated in the context of a challenge to admissibility on the grounds of public interest immunity and then again in any future case.

118 This mirrors the approach adopted in Canada and Australia.
against flight crew in either criminal or civil proceedings. In so doing, the Select Committee clearly accepts the proposition set out in this paper, at least in relation to cockpit voice records, that the public good of enhancing aviation safety outweighs the interest in making aviation information recorded for safety purposes available for a prosecution.

In fact, in recognising the fundamental importance of the need to maintain free and frank communications between aviation professionals, the Select Committee took the view that the Civil Aviation Authority should not be permitted access to such aviation safety records, even for safety investigations, because the Authority also has a separate prosecutorial role, which could potentially prejudice the continued supply of aviation safety information.

The Select Committee’s comprehensive approach to protecting cockpit voice recorder information is a far better approach to the implementation of New Zealand’s obligations under Annex 13 than that previously adopted in the Transport Accident Investigation Amendment Bill. Unfortunately, such a comprehensive approach is not adopted for other aviation safety information, such as air traffic control records.

Inconsistently, the Select Committee adopted the view that aviation safety would be better served by allowing prosecutorial authorities access to such records for the purpose of bringing enforcement actions. This is difficult to reconcile with the sentiments expressed by the Select Committee relating to the protection of cockpit voice recorder information, and is inconsistent with the original policy approach to the legislation which recognised that disclosure issues relating to cockpit voice records and air traffic control records were analogous.

The Select Committee adopted the view that omitting protections for air traffic control records would preserve the legal status quo in relation to the protection of such records. Given that specific protections for air traffic control records have now been expressly rejected by Parliament, it is probable that any attempts to protect such records against disclosure and use for prosecutorial purposes are less likely to succeed. ¹¹⁹

Accordingly, whilst the Transport Accident Investigation Commission Act 1999 represents a significant improvement towards the policy objective of implementing New Zealand’s obli-

¹¹⁹ Previously, the Official Information Act 1982 had been successfully used to protect air traffic control records from such disclosure. See supra Ch. IV.
gations under Annex 13 to the Chicago Convention, the limited scope of aviation safety information adopted by the Act fails to create an environment supportive of a comprehensive systemic approach to aviation safety, thereby still compromising the objective of aviation safety.

VIII. THE COMPARATIVE DIMENSION—INTERNATIONAL PRACTICE

In many countries which are party to the Convention, specific legislation regulating the extent to which aviation safety information may be disclosed and used for other purposes has existed for a number of years. Whilst there is no uniformity of approach to the implementation of each State’s obligations under Annex 13, most leading commonwealth aviation countries provide some degree of legislative protection against the inappropriate disclosure and use of aviation safety records.

In particular, Australia and Canada provide comprehensive protections against both disclosure and use of aviation safety information in criminal and civil proceedings. The protections afforded to aviation safety information in Australia and Canada, plus those afforded in the United Kingdom, Europe, and Scandinavia, are examined below.

AUSTRALIA

The most significant case in Australia examining the protections afforded to aviation safety information is the *Australian National Airlines* case, which bears a close resemblance to the issues raised in the Ansett Dash 8 accident. In this case, an Australian National Airlines aircraft and a Canadian Pacific Airlines aircraft collided on a runway. As in the Ansett Dash 8 accident, access was subsequently sought to the cockpit voice records of the aircraft for prosecutory purposes. Despite representations from both the Assistant Secretary of Civil Aviation and the Minister of Transport that it would be contrary to the public interest to disclose such aviation safety records, the Australian High Court flatly rejected such arguments and concluded that the public interest would be better served by allowing rather than refusing inspection of the cockpit voice recorder tape. In so doing, the Australian High Court similarly expressly precluded the

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121 Sitting as a first instance court.
application of either class and/or contents public interest immunity to such information, stating that such a defence would only be available in exceptional cases, which were very unlikely to apply in the case of aviation safety information. The Court stated:

...Crown privilege...embrac[es] a group of “exceptional cases” in which the public interest in the proper administration of justice has been outweighed by a superior public interest of a self-evident and overwhelming kind...

The CVR [cockpit voice recorder] tape does not fall within the first category of documents attracting Crown privilege. Its contents have no intrinsic importance to the working of government, national defence or foreign relations. No harm will ensue to the nation if the citizenry becomes aware of what Captain James said as TJA careened down the runway on 19 January 1971. Nor does the tape fall within the second category of documents privileged from production.122

The Australians subsequently implemented legislation which became part of the Australian Air Navigation Act 1920, specifically incorporating the relevant provisions of the Chicago Convention into Australian law.123 This legislation provides comprehensive protections against both disclosure and use of certain aviation safety information in criminal and civil proceedings. More specifically, the statute states that a cockpit voice recording made during the flight of an aircraft operated by an Australian operator is not admissible in any criminal or civil proceedings against a crew member.124 In addition, disciplinary proceedings cannot be brought against an employee on the basis of any information in a cockpit voice recording or transcript.

CANADA

Canada has recently enacted legislation analogous to that in Australia, which similarly provides comprehensive protections against both disclosure and use of cockpit voice records against flight crew in criminal, civil, or disciplinary proceedings. No

122 Australian Nat'l Airlines, 132 C.L.R. at 584.
123 Australian Air Navigation Act § 19HA-HL (1920).
124 The inadmissibility of cockpit voice recordings in an Australian Court is limited by § 19HE to “recordings made during the flight by an aircraft of an Australian operator.” Id. § 19E.
person can be compelled to give evidence with respect to a cock-
pit voice record in any court proceeding.\cite{125}

Prior to this, all flight deck recordings were considered to be
privileged under the common law, could not be used in any
criminal proceedings, and could only be used in civil proceed-
ings if a court determined that the public interest in the proper
administration of justice outweighed the privilege attached to
the cockpit voice record.

In addition, specific legislation exists to protect other aviation
safety records, for example, air traffic control records, from
disclosure.\cite{126}

UNITED STATES OF AMERICA

In the United States, a cockpit voice record or transcript\cite{127}
which was not previously disclosed in the formal accident inves-
tigation report may only be disclosed in court proceedings if the
court determines that such disclosure is necessary for a party to
obtain a fair trial. If disclosure is ordered, the court will also
issue a protective order limiting the use of the recording or tran-
script to those specific proceedings.\cite{128}

UNITED KINGDOM

The United Kingdom has recently passed legislation which
provides that a cockpit voice record or transcript which has not
been previously disclosed in the formal accident investigation
report may not be disclosed for purposes other than accident or
incident investigation, unless a court is satisfied that the inter-
est of justice outweigh the adverse domestic and international
impact that disclosure may have on that or any further accident
investigation.\cite{129}

EUROPE AND SCANDINAVIA

In France, Austria, Denmark, Finland, Iceland, the Nether-
lands, Norway, Sweden, and Switzerland, there is no legislation
specifically preventing the use of aviation safety information in

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\begin{itemize}
\item \cite{125} Transportation Safety Board Act § 28 (1989).
\item \cite{126} Transportation Accident Investigation and Safety Board Act § 29 (1989).
\item \cite{127} The transcript may only be disclosed for that purpose if the original record-
ing is not available.
\item \cite{128} 49 U.S.C. § 1154 (2002).
\item \cite{129} Civil Aviation (Investigation of Air Accidents and Incidents) Regulations
\end{itemize}
judicial proceedings, although in Denmark a court order to allow the disclosure and use of such information would be required.

Clearly, a number of countries have had specific legislation governing the issue of protection of aviation safety record for a number of years, and both Australia and Canada have implemented comprehensive protections for such information.

Whilst many of these countries clearly have not specifically implemented the relevant provisions of Annex 13, New Zealand has made the policy decision to implement its obligations under Annex 13 with respect to the protection of aviation safety information. It should faithfully reflect the purposes and provisions of the Chicago Convention in so doing, and accordingly, provide comprehensive protections for aviation safety information.

IX. CONCLUSION

This paper has examined New Zealand’s implementation of its international obligations under Annex 13 of the International Convention on International Civil Aviation in relation to the protection of aviation safety information and the provisions of the Transport Accident Investigation Amendment Bill, and more recently, the Transport Accident Investigation Commission Amendment Act 1999, intended to implement those obligations, and argues that to date, New Zealand has failed to effectively implement its international obligations, or to comprehensively promote aviation safety.

The effective promotion of aviation safety, which is the objective underlying Annex 13 of the Chicago Convention, requires the application of systemic analysis to identify all of the factors contributing to the risk of an aviation incident or accident. The revelation of these factors is only to be used to promote aviation safety, however. Though the information acquired in a systemic analysis of an accident may be relevant to the prosecution of individuals associated with that accident, public policy and the intent of Annex 13 weigh against such disclosure. The greater public good of safer air transport subjugates the narrow pursuit of individual legal liability.

However, this paper demonstrates that, both at common law and legislatively, New Zealand has consistently been unwilling to recognise and implement its obligations under Annex 13, and correspondingly unwilling to recognise the necessity for afford-
ing comprehensive protections for aviation safety information against disclosure and use for other purposes.

Most recently, in the Ansett Dash 8 case, the New Zealand Court of Appeal rejected any direct applicability for the provisions of Annex 13 itself and was also unwilling to entertain the notion that protections for aviation safety information might be available under the common law, for example, by virtue of the common law principles of class or contents public interest immunity.

Whilst some existing domestic legislation provides the necessary mechanism for the incorporation of New Zealand’s obligations under Annex 13, the prevailing domestic attitude towards the protection of aviation safety information means that effective implementation of New Zealand’s international obligations via such legislation is unlikely to occur.

Similarly, whilst the provisions of the Transport Accident Investigation Bill are intended to implement New Zealand’s obligations under the Chicago Convention with respect to the protection of aviation safety records, New Zealand’s failure fully to support the underlying rationale of Annex 13, that the conflicting objectives of aviation safety and aviation prosecution cannot be reconciled, means that the necessary protections for aviation safety information have not been achieved.

Whilst the recently enacted Transport Accident Investigation Commission Amendment Act 1999 represents a significant improvement towards the implementation of New Zealand’s obligations under Annex 13, the limited scope of aviation safety information adopted by the Act fails to create an environment supportive of a comprehensive systemic approach to aviation safety.

To conclude, in this paper it is submitted that New Zealand has failed, both legislatively and at common law, to effectively implement its international obligations under the Chicago Convention on International Civil Aviation in relation to the protection of aviation safety information. Furthermore, despite the recommendations of the Mahon report into the Mount Erebus tragedy, and the current Minister of Transport recently publicly proclaiming the desirability of such an approach,\textsuperscript{130} in failing to adequately protect aviation safety information, New Zealand has thus far failed to create an environment which will allow for an

\textsuperscript{130} Hon. Maurice Williamson, Minister of Transport, Speech to the Aviation Industry Association Conference, Dunedin (July 30, 1999).
effective systemic analysis to the issue of aviation risk. In so doing, the fundamental objective of aviation safety has been compromised to the detriment of us all.