



Australian International Aviation College Pty Ltd v Zheng

NSW Supreme Court, Court of Appeal, Case No 2025/00090612

Applicant's Reply Submissions

INTRODUCTION

1. The first defendant and Applicant on the appeal, the Australian International Aviation College Pty Ltd (**AIAC**), makes the following submissions in reply to the Respondent's Response to the Application for Leave to Appeal (**Response**).

FACTUAL BACKGROUND

2. The following short points may be made relevant to the factual background.
3. **First**, it is either not correct or not complete to say that it is an "*unchallenged fact*" that the AIAC Report was prepared for commercial reasons so that it could recommence flying (Response [12](a)). That is at least if the First Respondent is to be understood as contending that *the Court found* as a fact that the AIAC report was prepared "*not for the purposes of the ATSB investigation, but rather as part of a parallel process conducted by the applicant for its own commercial purposes*" (Response [19]). In any event, the submission needs to be put into its proper context.
4. This present focus is on the information contained within the AIAC Report and not merely the AIAC Report as such. The Applicant contended at first instance (e.g. Applicant's Written Submissions [85]-[96] [**White 637-639**]; T29.33-38, T30.4-13), and contends on appeal, that the critical point was that the AIAC Report was underpinned by, and included an analysis of, information that had been provided to the AIAC by the Australian Transport Safety Bureau (**ATSB**) in the course of its (the ATSB's) transport safety investigation: Applicant's Written Submissions [23]-[25] [**White 619-621**]. In particular, the ATSB provided the data contained within two pieces of electronic monitoring equipment on the aircraft: the G1000 and the ECU. The First Respondent does not make any submission that the data cards or the data from those devices were not in fact seized by the ATSB or were not in fact provided by the ATSB to the AIAC. The evidence is that the ATSB provided the AIAC with that material and then compelled the production of that material in a form that could be considered and analysed by the ATSB. It is that information that then forms a central part of the resulting AIAC Report and that information which means that the ultimate report (and the expert opinion relying on it) is said not to be admissible in these proceedings.
5. Therefore some care needs to be taken in considering any alleged factual finding about the AIAC's purpose or intention in preparing a report in a case where the critical question is what *the ATSB* was doing and, in particular, what the ATSB was doing when it allowed the AIAC to access

the G1000 and EECU data. The communicated intentions of the AIAC as to what it was doing was in writing and was relevant but only as context to resolve the more important and critical question about the ATSB. The Applicant contends that, informed by the contemporaneous communications between the AIAC and the ATSB, the conclusion is that the ATSB was authorising access to the AIAC within the meaning of s 62 of the TSI Act because it (the ATSB) considered it necessary or desirable to do for the purposes of its (the ATSB's) investigation. The ATSB appeared not to have the expertise or equipment to analyse the G1000 and ECCU data and so authorised the AIAC to access it as that would serve the investigatory purposes of the ATSB. This is consistent with the example provided in the Revised Explanatory Memorandum to the amending Bill (discussed further below).

6. As to the intentions of AIAC, the Court found that the AIAC had the commercial imperative of resuming flying operations (at [60], [84] [**White 33-34 and 39**]) and that the purpose of preparing and providing the AIAC Report was to identify how the accident occurred and what steps needed to be taken to resume flying operations (at [83] [**White 39**]). The Court did not address the fact that the AIAC also sought to assist the ATSB in relation to the ECU and G1000 devices, nor did the Court find that the AIAC in preparing its report did not also have the intention to assist the ATSB investigation. That a commercial operator might have a commercial incentive later to recommence flying does not mean that they are not seeking to achieve that ultimate goal by, or including by, participating in an ATSB investigation. Likewise, an expert consultant engaged by the ATSB may participate in an ATSB investigation even if on one view they are doing so only because they are being remunerated (and thus are acting in their own commercial interests). The objectives are not mutually exclusive.
7. The AIAC's position, consistent with contemporaneous communications with the ATSB outlined in the Applicant's Summary of Argument, was stated in the AIAC Report itself. The AIAC Report commenced with a notice that stated that "[t]he information contained within this report contains restricted information" being used by the ATSB for its statutory purposes of investigation and that any person with access to the report was subject to the provisions of the TSI Act and was required to treat the report as "*restricted information*" (**White 522**). The analysis in the report made clear that the ECU data and G1000 data was information that the ATSB had "*allowed the AIAC to utilise*" for the AIAC's own purposes and openly discussed the material that had been exchanged with the ATSB (**White 525**). The fact that AIAC sought to achieve its commercial goals by participating in the ATSB investigation or to use its participation in the ATSB investigation to ensure it was operating its business safely does not change the ultimate fact that the ATSB allowed the AIAC to access the information in question pursuant to s 62 of the TSI Act.

8. **Second**, it is wrong to say that no challenge is made to the finding that the AIAC Report is not “*restricted information*” in the hands of the Civil Aviation Safety Authority (CASA) (Response [12](d)) or that the AIAC was not a person within the classes of person in s 60(1)-(3) and 62 of the TSI Act (Response [12](f)). This is a case where the Applicant’s evidence was admitted without objection, largely in documentary form, and the dispute was as to the conclusions to be drawn from that evidence. The findings relied upon by the First Respondent are questions of legal characterisation based on the accepted evidence as opposed to factual findings.
9. However characterised, and even if they are properly characterised as factual findings, they are plainly challenged in the present appeal. The Applicant’s position is, and has consistently been, that the ECU and G1000 data was “*restricted information*” that the ATSB allowed the AIAC to have access to within the meaning of s 62 of the TSI Act. The TSI Act incorporates no concept of ‘waiver’ akin to legal professional privilege. It is more akin to a kind of public interest immunity where the restriction exists not for the benefit of one party but for a public purpose. The AIAC Report was provided to CASA either with the implied authorisation of the ATSB under s 62 of the TSI Act or in breach of s 60(3) of the TSI Act; either way, the information remains “*restricted information*” prohibited from disclosure pursuant to s 60(3) of the TSI Act.
10. **Third**, the First Respondent wrongly submits that the AIAC asserts for the first time on appeal that it was authorised by the ATSB to have “*restricted information*” under s 62 of the TSI Act: Response [21]. This was a matter squarely and repeatedly submitted at first instance: e.g. Applicant’s Written Submissions [81]-[96] [White 636-639]; T39.5-43, T40.15-20; T54.46; T58.23 and T63.40. The position put at first instance and on appeal is that the report was provided to CASA with the implied authority of the ATSB or alternatively in breach of the TSI Act.

FURTHER SUBMISSIONS IN REPLY

Grounds 1 and 2

11. The following further submissions in reply are made relevant to Grounds 1 and 2.
12. **First**, as noted above, the First Respondent does not appear to challenge the submission that the ATSB in fact provided the AIAC with the G1000 and ECU data: Response [19]-[20]. It is not clear what response is mounted to the error alleged by way of Ground 1 of the appeal.
13. **Second**, and otherwise, the response to Grounds 1 and 2 appears to be to argue for the first time that the ATSB did not allow the AIAC access to the G1000 and ECU data *pursuant to s 62 of the TSI Act* but, rather, disclosed that data to the AIAC *pursuant to s 61 of the TSI Act*: Response [20], [22]-[25]. This was not a contention put at first instance by the First Respondent and no notice of contention has been filed by the First Respondent in the appeal. Nowhere in the correspondence from the ATSB does the ATSB mention s 61 of the TSI Act. The First Respondent

seeks nonetheless to defend the Court's reasoning at first instance on the basis that a disclosure under s 61 of the Act would have the consequence that the confidentiality provisions in s 60(3) of the TSI Act do not attach to restrict the use of the information.

14. A review of both section 62 and section 61, together with the Revised Explanatory Memorandum to the *Transport Safety Investigation Bill 2002 (Revised EM)*, makes clear that the two powers are in fact quite different and distinct. In particular:

- a. The power under s 61 is a power to 'publicly' disclose information (with no confidentiality obligations thereby attaching) where the wider publication of information serves a relevant safety purpose (such as issuing a public report to make known certain safety issues).
- b. Section 62 is a power to authorise access to information (with confidentiality obligations thereby attaching) such as where a non-staff member's expertise may be needed for the purposes of an ATSB investigation. The Revised EM uses an example very similar to the present case where the ATSB requires assistance to access the data from an on-flight recording device.

15. Section 62 provides:

ATSB may authorise persons to have access to restricted information

The ATSB may authorise a non-staff member to have access to restricted information if the ATSB considers that it is necessary or desirable to do so.

Note: The non-staff member is subject to the confidentiality requirements of section 60.

16. The Revised EM provides as follows in relation to clause 62 (at p 72):

This clause provides for authorisation, at the Executive Director's discretion, of a person who is not a staff member, to allow general access to restricted information either generally or in relation to a specific occurrence. Such a person may, for example, be a temporary staff member who is not an APS employee, or a contractor or consultant who does not have delegated powers under this Bill. For further explanation, refer also to Explanatory Memorandum comments at Clause 52.

17. The discussion in the Revised EM in relation to clause 52 is as follows (at p 67):

This clause provides the Executive Director with a discretionary power to grant general access to OBR information to a person who falls outside the definition of staff member either generally or in relation to a specific occurrence. Such a person may, for example, be a temporary or non-ongoing employee who is not an APS employee, or a contractor or consultant who does not have delegated powers under this Bill. This may become necessary in cases, for example, where experts other than staff members are required to assist with replaying and analysing the contents of the OBR. For example, an interpreter may be needed if the contents of the OBR are in a foreign language, or an expert in voice analysis may be required to provide expert opinion on the content of the OBR. In accordance with international agreements, there may be other persons considered appropriate to have access to OBR information. In most instances, the Executive Director

will consider such a need on a case by case basis. Those persons will be subject to the confidentiality provisions under Clause 53 in relation to OBR information.

18. Section 61 provides:

Release of restricted information in the interests of transport safety

- (1) The ATSB may disclose restricted information to any person if the ATSB considers that the disclosure is necessary or desirable for the purposes of transport safety.*
- (2) However, the ATSB may only disclose restricted information that is, or that contains, personal information in the circumstances prescribed by the regulations.*
- (3) In this section:*
"personal information" *has the same meaning as in the Privacy Act 1988 .*

19. The Revised EM provides as follows in relation to clause 61 (at p 72):

This clause provides the Executive Director with a discretionary power to publicly disclose restricted information for the purposes of transport safety. Such release may be by way of publishing a report under Clause 25 containing such information, or by any other methods. One of the only means to ensure that safety issues arising from an investigation into a transport safety matter reaches the broadest possible audience is to publicly release relevant safety information. Transport operators, transport regulatory agencies and the transport industry in general, have the capacity to address those safety issues and therefore must have this information made available to them. In addition, the Government and the travelling public expect an open and transparent process regarding the communication of and actions to address, safety issues. This is important in order to achieve public confidence in the safety of transport.

20. The two provisions exist in the context of a legislative scheme that goes to great lengths to protect “restricted information”. While the statutory scheme has been analysed in submissions at first instance (Applicant’s Written Submissions [33]-[79] [**White 622-635**]), the following points may briefly be noted. The TSI Act:

- a. expressly provides that it is not the function of the ATSB to “apportion blame for transport safety matters”, “to provide the means to determine the liability of any person in respect of a transport safety matter” or “to assist in court proceedings between parties (except as provided by this Act, whether expressly or impliedly)” (s 12A(3));
- b. not only restricts but criminalises the disclosure, even to a Court, of “restricted information” in breach of s 60(1), (2) and (3) of the TSI Act; and
- c. the ATSB may issue a certificate which renders an ATSB staff member not even ‘compellable’ to attend court and give evidence in relation to matter that has been investigated: s 66.

21. The Revised EM explains that the purpose of this regime is to prioritise a ‘no fault’ inquiry process where participants are not disincentivised to cooperate with the ATSB for fear that such cooperation will be used against them in ‘blame’ inquiries such as criminal or civil proceedings

or an inquest. The provisions of the Act are carefully designed to restrict the extent to which using information against participants in an investigation may harm the capacity of the ATSB in the future conduct of investigations and harm the primary goal of ensuring public safety. Jealously guarding the line between blame inquiries and the ATSB inquiries is “*to ensure a continued free flow of safety information*” to the ATSB: Revised EM p 71. Further relevant extracts of the Revised EM can be found in the Applicant’s written submissions at first instance: see [55]-[58] [White 626-628].

22. Seen in this context and in line with the usual principles of statutory construction that an overall harmonious interpretation needs to be achieved (*ICAC v Cunneen* (2015) 256 CLR 1 at 20-21; *Project Blue Sky Inv v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382), the power under s 61 should not be given such a broad reading as to leave s 62 with no work to do and to undercut the clear legislative intention to protect the free flow of information to the ATSB. It should also be construed in a context where the ATSB will frequently (if not always) not be compellable to give evidence as to the particular power being exercised.
23. Were too broad a view taken as to the power under s 61, it would be fundamentally unclear when (if ever) s 62 access was being granted and would undermine the confidence that the industry would have that “*restricted information*” would indeed be restricted. A brief to a non-staff member as an expert, for instance, would be something to which no confidentiality would attach. Information provided to another Commonwealth agency to compare information would likewise be able to be then disclosed. That would in turn undercut the goal of the Act to ensure the free flow of information to the ATSB and hamper future investigations. The present case is a good example. It demonstrates AIAC working constructively and proactively with the ATSB to assist its investigation. Were the First Respondent’s contention adopted, an operator might not come forward and offer to assist the ATSB by downloading and analysing the data in the G1000 and ECCU units and the ATSB’s investigation would thereby be compromised or limited.
24. The better interpretation is that s 61, consistent with both the ordinary words used in the section and as contemplated in the Revised EM, is that it is a power that may be used where it is the very disclosure of the information that is necessary for a public safety purpose. The second use of the word “*disclosure*” makes this clear. To paraphrase the example in the Revised EM, a release of information to the broadest possible audience might be necessary to inform the industry of a particular safety issue that must be addressed. It can readily be seen there why it is the very disclosure that is the object of the provision. This is consistent with two other aspects of s 61(2):
 - a. the fact that s 61(2) includes a provision for protecting certain private information (i.e. which will most naturally be a concern arising when a wider or more public disclosure is being contemplated); and

- b. the fact that confidentiality does not attach to such a disclosure (which again will most naturally arise where the very point of the disclosure is to destroy the confidentiality that would otherwise inhere in the information and where confidentiality is by necessity not in the public interest).
25. By contrast, s 62 should be construed more broadly. It would readily contemplate the situation where the ATSB provides another party, typically a more narrow subset of parties, with access to restricted information for any number of purposes not being restricted to where the disclosure itself is necessary for a transport safety purpose. Providing data to an expert or consultant is not a case where the disclosure itself is necessary for a safety purpose. It is a situation where the access or disclosure is only a means to achieve the true end which is the access to the relevant evidence the ATSB needs to conduct its investigation. The section also would contemplate a factual scenario which may not be readily characterised as a ‘disclosure’ of information (e.g. facilitating another party’s access to data held on a particular recording device).
26. In the present case, the ATSB’s provision to the AIAC of access to the G1000 and ECCU data, plainly, must have been pursuant to s 62 of the TSI Act. The dynamic of providing a person with the physical means to access information is more readily described as ‘granting access’ rather than disclosing. It does not make sense that the ATSB would consider it to assist public safety to ‘disclose’ data that the ATSB could not even access. Further, it is not in the category of case where disclosure itself has a public safety purpose; it is in the category of case where the disclosure is to a more limited number of parties for the purposes of progressing an ATSB investigation (something which is by its very nature confidential). It is ultimately information that would flow back to the ATSB that would or may be beneficial to its investigation that was sought by the ATSB and was not a disclosure which of itself advanced public safety.

Ground 3

27. The following further submissions in reply are made relevant to Ground 3.
28. **First**, the First Respondent wrongly states that the ground should be viewed in light of the fact that the ATSB correspondence was in the Applicant’s evidence: Response [34]. This disregards the manner in which the evidence came to be tendered at the hearing.
29. Prior to the hearing, a note was served taking objection to the ATSB evidence: T2.31-34. At the hearing, the First Respondent tendered its evidence first and objection was taken on the basis of inadmissible opinion evidence and the unfair prejudice of not being able to test the evidence: T2.27-T3.18. The Court then ruled that the evidence was admissible, stating at the time that the concerns raised were matters going to weight given the interlocutory nature of the hearing: T2.8 and T.20. The Applicant then took the course that the balance of the objections would follow

from the Court's ruling: T2.24-26. There was therefore no need to either not tender the ATSB correspondence or to seek a limitation of that evidence in light of the Court's ruling.

30. **Second**, the First Respondent seeks to mount a new argument for the first time that the evidence was in fact able to be tested as a subpoena could have been issued: Response [33]. Objection was taken by the Applicant to the evidence at the hearing and at no stage was it said by the First Respondent that a subpoena could be issued to the ATSB. Indeed, the First Respondent appeared to accept the limitations inherent on this evidence: T15.8-10. Despite not having been raised below, the First Respondent now says that a subpoena could have been issued to the ATSB and that, technically speaking, the author would be required to comply with it because the ATSB has not issued a certificate under s 65 of the TSI Act. That submission is entirely artificial.
31. In the first place, it was the First Respondent who put the correspondence before the Court in a hearsay form and did not produce an affidavit from the author. It is not incumbent on a party to subpoena the author of a hearsay letter produced by another party on an interlocutory application.
32. Further, it is difficult to envisage a circumstance where a s 65 certificate would not have inevitably been issued were there to have been any attempt to subpoena the ATSB. The ATSB is an organisation that, expressly, does not have a function to assist in court proceedings between parties: s 12AA(3)(c) TSI Act. When the Applicant's solicitor provided further material to the ATSB and pressed the ATSB as to the opinion expressed in the letter of 8 June 2023 [**White 562-565**], the ATSB declined to engage, stating expressly that "[t]he ATSB has no interest in the abovementioned legal proceedings" and responded as a matter of professional courtesy only: ATSB Letter 27.7.23 [**White 580**]. The only requirements of a certificate being issued is that it "state[s] that a specified person who is or has been a Commissioner, staff member or consultant, is involved, or has been involved, in an investigation under this Act into a specified matter". As such, there is every indication that, consistently with the function of the ATSB, a person with any involvement in the investigation would have been the subject of a certificate should any subpoena have been issued.
33. **Third**, the First Respondent now on appeal contends that the Court placed "limited" weight on the ATSB correspondence in reaching a decision: Response [31]. At first instance, the First Respondent submitted something very different to the trial judge. At first instance, the First Respondent:
 - a. made clear that he was relying upon the substance of the opinion expressed by the author (T2.36-47); and

- b. relied heavily on the ATSB's opinion in oral submissions, describing the ATSB's response as an "*an important response*" (T14.29-T15.24) and again referring to the correspondence as the "*short answer*" to the application (T16.30-42).
34. Reading the ordinary words of the Court in referring to this material in an unqualified way and particularly doing so in light of the emphasis put on the material at first instance, this is not a case where it can be said the Court put limited (or non-material) weight on the ATSB correspondence. This question is of particular importance in circumstances where one would anticipate it would be the ordinary course in issues of this kind that the ATSB would not appear and give evidence.
35. **Fourth**, the First Respondent says that the weight put on the evidence was a matter for the trial judge (Response [32]) but does not say what weight could reasonably be placed onto an opinion provided by the ATSB where the facts relied upon and the reasoning deployed was not exposed and the ATSB had refused to substantively respond when it was tested on its position in correspondence. It is not clear what facts the ATSB had in mind and, in particular, whether the relevant officer of the ATSB had considered the provision of the G1000 and ECU data to the AIAC in forming any relevant opinion. If so, it is not clear what reasoning process was adopted.

Ground 4

36. The First Respondent baldly asserts without elaboration that the primary judge's construction is correct: Response [36]-[38]. The Applicant relies on the submissions made in the Summary of Argument and at first instance: for the latter, see Applicant's Written Submissions [75]-[79] [White 634-636].



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