

EXPLANATORY STATEMENT

Select Legislative Instrument 2012 No. 263

Issued by Authority of the Minister for Infrastructure and Transport

Transport Safety Investigation Act 2003

Transport Safety Investigation Amendment Regulation 2012 (No. 1)

Section 71 of the *Transport Safety Investigation Act 2003* (TSI Act) provides that the Governor-General may make regulations prescribing matters required or permitted by the TSI Act to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the TSI Act.

Section 18 of the TSI Act requires reporting of serious incidents ('immediately reportable matters') to the Australian Transport Safety Bureau (ATSB). The TSI Act also provides that the *Transport Safety Investigation Regulations 2003* (TSI Regulations) prescribe which matters must be reported, by whom and the means by which the report is to be made. Currently, Part 4 of the TSI Regulations prescribes that only the most serious matters are to be reported. Rail owners, operators, track access providers and train crews all may be required to report. The report may be made to a State or Territory Regulator who must then pass details of the report to the ATSB. Subject to minor limitations, the current requirements apply only to rail operations on the Defined Interstate Rail Network (DIRN) running from Brisbane to Perth and Adelaide to Darwin. While section 19 of the TSI Act provides for reporting of less serious matters to the ATSB ('routinely reportable matters') the TSI Regulations currently do not prescribe what these matters are for rail and consequently these are currently not reported to the ATSB. The confined jurisdiction acknowledges that, largely, rail has hitherto been the responsibility of the states and territories.

The Intergovernmental Agreement on Rail Safety Regulation and Investigation Reform (the IGA) was signed at the Council of Australian Governments (COAG) meeting on 19 August 2011. The IGA committed to the establishment of a National Rail Safety Regulator (Regulator) through the *Rail Safety National Law (South Australia) Act 2012* (RSNL). It was also agreed that individual States and Territories will apply the RSNL in their own legislation. The IGA committed the ATSB to becoming the national rail safety investigator. As part of those reforms, all reports of rail incidents and occurrences across Australia must be made to both the ATSB and the Regulator.

The Regulation substitutes a new Part 4 in the TSI Regulations to align them with the notification requirements of the RSNL. The outcome is a harmonisation of the reporting requirements for the rail industry under both the TSI Act and under the RSNL. This would provide for the reporting of both immediately reportable and routinely reportable matters to the ATSB and also the Regulator.

The reporting framework for the purposes of the TSI Act is:

- (a) Immediately reportable matters (IRMs) notified by telephone to the ATSB and, within 72 hours of the telephone notification to the ATSB, in writing to the Regulator who would then pass details of the written report to the ATSB. The types of incidents in this category would be prescribed by Regulation under the RSNL and the Regulation adopts these by reference; and
- (b) Routinely reportable matters (RRMs) notified in writing to the Regulator within 72 hours. The Regulator would then pass details of the written report to the ATSB. The types of matters would also be prescribed by the RSNL and are also adopted by the Regulation.

The types of matters that are likely to be prescribed by the RSNL were set out in a draft of the *Rail Safety National Law National Regulation 2012* released for public consultation by the National Transport Commission (NTC) in September 2012.¹ Matters that are immediately reportable would be classified as Category A matters under the RSNL, while all other matters would be classified as Category B matters under the RSNL.

Examples of IRMs/Category A notifiable occurrences would be:

- (a) An accident or incident that has caused death, serious injury or damage;
- (b) A running line derailment (a derailment on a track other than in a siding or rail yard);
- (c) A running line collision between rolling stock (a vehicle that runs on railway track);
- (d) A collision at a road or pedestrian level crossing between rolling stock and either a road vehicle or a person.

Examples of RRM/Category B notifiable occurrences would be:

- (a) A derailment other than a running line derailment;
- (b) A collision involving rolling stock other than a collision in (c) above;
- (c) A collision at a road or pedestrian level crossing other than a collision in (d) above;
- (d) The passing of a stop signal, or a signal with no indication, by rolling stock without authority.

The Regulation commences on 20 January 2013 to coincide with the establishment of the Regulator from January 2013.

A Regulatory Impact Statement was not required. A RIS (Exemption), reference number 2012/13856 has been obtained from the Office of Best Practice Regulation.

The TSI Act specifies no conditions that need to be met before the power to make the Regulation may be exercised.

¹ These may be accessed at www.ntc.gov.au

Details of the Regulation is at **Attachment A**. A Statement of Compatibility with Human Rights for the purpose of the *Human Rights (Parliamentary Scrutiny) Act 2011* is at **Attachment B**

The Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Authority: Section 71 of the *Transport Safety Investigation Act 2003*

ATTACHMENT A**Details of *Transport Safety Investigation Amendment Regulation 2012 (No. 1)***Section 1 – Name of regulation

This section provides that the title of the Regulation is the *Transport Safety Investigation Amendment Regulation 2012 (No. 1)*.

Section 2 – Commencement

This section provides that the Regulation commences on 20 January 2013. The timing is to suit the operational requirements of the Australian Transport Safety Bureau (ATSB) and to coincide with the commencement of the National Rail Safety Regulator (the Regulator) from January 2013.

Section 3 – Amendment *Transport Safety Investigation Regulations 2003*

This section provides that the *Transport Safety Investigation Regulations 2003* (Principal Regulations) are amended as set out in the Schedule.

Schedule 1 – Amendments**Item [1] Part 4**

This item substitutes Part 4 of the Principal Regulations.

Subsection 4.1 – What this Part applies to

This subsection sets out the circumstances in which Part 4 apply to reportable matters for rail transport. This subsection provides that Part 4 applies to investigable matters where the ATSB has jurisdiction under subsection 11(3) of the TSI Act and where the *Rail Safety National Law 2012* of South Australia (as enabled by the States and Territories “RSNL”) applies.

Subsection 4.2 – Definitions

Subsection 4.2 provides definitions that are applicable to terms used in Part 4. These definitions adopt those in the RSNL where these would be used in Part 4.

Subsection 4.3 – Reportable matters defined

Subsection 18(1) of the *Transport Safety Investigation Act 2003* (TSI Act) provides that an immediately reportable matter (IRM) must be reported as soon as practicable to the ATSB. Subsection 19(1) of the TSI Act provides that a written report of a IRM must be made within 72 hours. Subsection 19(1) also provides that a written report of a routinely reportable matter (RRM) must be made within 72 hours. For the purposes of section 18 of the TSI Act, an IRM must be reported as soon as practicable to the

ATSB by telephone². A written report of an IRM or and RRM must be made within 72 hours of the matter happening.

Section 3 of the TSI Act provides that the list of immediately and routinely reportable matters that must be reported under sections 18 and 19 are as prescribed by the TSI Regulations.

This subsection provides that an IRM is any notifiable occurrence that is immediately reportable under the RSNL, while an RRM is any other notifiable occurrence. While the list of matters that are immediately reportable, and otherwise, under the RSNL were not prescribed at the time of the finalising of this Regulation, the National Transport Commission released an Exposure Draft of the *Rail Safety National Law National Regulation 2012* in September 2012. In the Exposure Draft of that Regulation, matters likely to be immediately reportable under the RSNL were proposed to be Category A notifiable occurrences while all other notifiable occurrences were proposed to be Category B. The matters for each Category are derived from the Guideline for the Top Event Classification of Notifiable Occurrences – Occurrence Classification – Guideline One (OC-G1), and also the Guideline for the Reporting of Notifiable Occurrences – Occurrence Notification – Standard 1 (ON-S1). OC-G1 and ON-S1 support uniform classification and uniform reporting of rail safety occurrences across Australia.

Subsection 4.4 – Responsible persons defined

Under sections 18 and 19 of the TSI Act, persons with reporting obligations are termed 'responsible persons'. Section 3 of the TSI Act provides that 'responsible persons' who are required to report to be prescribed by the regulations. For the purpose of the Regulation, "responsible persons" are rail transport operators (RTOs).

Subsection 4.4 applies the definition of RTO from the RSNL. An RTO is defined under the RSNL as:

- rail infrastructure managers,
- rolling stock operators
- and a person who is both a rail infrastructure manager and rolling stock operator.

This subsection also provides that, in order to enhance the ATSB's ability to obtain further information about an occurrence, employees of operators and crew members may also be required to provide information. That would only be in limited circumstances, such as where the ATSB considered that it required extra information for the purposes of conducting an investigation or deciding whether to conduct an investigation.

Subsection 4.5 – Particulars for reports of reportable matters

Sections 18 and 19 of the TSI Act require responsible persons who have knowledge of IRMs and RRM to report particulars of these. The TSI regulations prescribe the

² If telephone communication is not reasonably available, by another form or telecommunication or radio communication – see subregulation 5.4.

particulars that must be reported for IRMs and RRM. The purpose of prescribing the relevant particulars that must be reported, when a report of an IRM is made, is to ensure that the ATSB receives adequate information in relation to an IRM, rather than just a report of the occurrence of an IRM. Reports of IRMs in accordance with subsection 18(1) will be used by the ATSB to determine whether the IRM is one that is to be investigated under the Act. The ATSB needs to have sufficient information in order to make a decision about whether or not to investigate.

This subsection provides that the particulars prescribed for reports under subsections 18 (1), 19 (1) and (4) of the TSI Act are the same particulars as the Regulator would require for a report about a notifiable occurrence under the RSNL. This reflects the harmonisation of the TSI Act and Regulations with the RSNL. It also recognises the reporting responsibilities of rail transport operators and avoids duplication with the Regulator's requirements.

The particulars that the Regulator requires have not yet been prescribed, however it is expected that these will include details of the reporter, location of the incident, details of the operation, injuries/fatalities/property damage and a brief summary of the incident.

This subsection also provides that if the Regulator does not prescribe the particulars that must be provided, then the particulars set out in subparagraphs 4.5(2)(a)-(k) must be provided in the alternative. Those particulars include details of the reporter, location of the incident, details of the operation, injuries/fatalities/property damage and a brief summary of the incident.

Subsection 4.6 – Nominated officials for receiving reports

Section 20 of the TSI Act requires that the regulations prescribe a list of persons who are 'nominated officials' for receiving reports of reportable matters. These are persons to whom reports must be given. Subparagraph 4.6(2)(a) lists a staff member of the ATSB, for the purpose of an IRM being reported by telephone. For all written reports or IRMs or RRM subparagraph 4.6(2)(b) specifies the Regulator as the nominated official. This subsection supports the reporting framework of the Regulation, reflects the harmonisation of the reporting requirements under the TSI Act and the RSNL and avoids duplication in reporting.

Subsection 4.7 – Staff member to pass report on to Regulator

This subsection requires the ATSB to provide details of reports it receives to the Regulator as soon as practicable after receiving the report. This ensures that the Regulator is not deprived of safety related information and can make an early assessment of whether it will conduct its own investigation under its own legislation.

The details that the ATSB will pass on to the Regulator will be the particulars that it receives when it takes the initial telephone call of the IRM. However the Regulator will receive the written report of the IRM and this information will essentially confirm the information that has already been provided.

Subsection 4.8 – Regulator to pass report on to staff member

This subsection requires the Regulator to provide a copy of the written report or details of reports it receives to the ATSB as soon as practicable after receiving the report. This ensures that the ATSB also has full access to all safety related information in a timely fashion and is able to confirm information that it has received as an oral report. As a written report is not required until 72 hours after the reportable occurrence, with IRMs it is expected that much of the required information will have already been obtained. However, the written report is still necessary for confirmation and may be used to pick up inconsistencies with other reported information. It may also be used for statistical purposes and research and analysis.

Subsection 4.9 – On-board recordings

The definition of On Board Recording (OBR) information under section 48 of the Act is broad and could possibly capture recordings that were not intended to receive the protection of OBR information. Section 48 of the Act, therefore, allows for regulations to prescribe that a recording is not to be an OBR even though it may be claimed that it falls within the definition under section 48.

This subsection provides that the recordings specified in subsection 4.9 are not in the category of recordings that need to be protected in the same manner as an OBR under the Act. This is because the sensitivity of the information is not the same as a Cockpit Voice Recorder (CVR) information in an aircraft which may be classified as an OBR under the TSI Act.

The recordings listed in this subsection will receive protection under the TSI Act as restricted information, including a broad range of confidentiality provisions, where they are associated with a transport vehicle that is or was the subject of an investigation.

Under the TSI Act both OBR information and Restricted Information are protected from copying and disclosure. The restrictions on copying and disclosure of OBR information apply to everyone whereas limitations on the copying and disclosure of restricted information apply principally to ATSB personnel. These protections are unchanged from the previous Part 4.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

Transport Safety Investigation Amendment Regulation 2012 (No. 1)

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

Overview of the Legislative Instrument

The purpose of the Legislative Instrument is make amendments to the Principal Regulations made necessary by reforms concerning the establishment of a National Rail Safety Regulator (Regulator) and committing the Australian Transport Safety Bureau (ATSB) to becoming the national rail safety investigator in relation to rail incidents and accidents across Australia. As part of those reforms all mandatory reports of rail incidents and occurrences across Australia are to be made to the ATSB and the Regulator.

This Legislative Instrument will provide that immediate reports of the most serious incidents and accidents on Australia's rail networks (except for those specifically excluded) are to be made to the ATSB by telephone. The ATSB will pass on details of those reports to the Regulator. The Legislative Instrument will also provide that written reports of the most serious matters and routine matters are to be made to the ATSB via the Regulator.

The purpose of the Legislative Instrument is to align Part 4 of TSI Regulations to the legislation establishing the Regulator, the *Rail Safety National Law (South Australia) Act 2012* (RSNL) and the Regulation to be made under that law. The outcome will be a harmonisation of the reporting requirements for the rail industry under both the TSI Act and TSI Regulations and under the RSNL and Regulation.

Human rights implications

Right to protection against arbitrary and unlawful interferences with privacy

This Legislative Instrument engages the right to protection from arbitrary and unlawful interferences with privacy in Article 17 of the International Covenant on Civil and Political Rights (ICCPR), to which Australia is a party.

Article 17 provides that no one shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation, and that everyone has the right to the protection of the law against such interference or attacks. The right to protection against arbitrary and unlawful interferences with privacy will be engaged in situations where agencies collect, use, store and share personal information.

The right to privacy may be subject to permissible limitations. In order for an

interference with the right to privacy to be permissible, the interference must be authorised by law, be for a reason consistent with the ICCPR and be reasonable in the particular circumstances. Reasonableness, in this context, incorporates notions of proportionality, appropriateness and necessity.

Under the Legislative Instrument initial reports of the most serious matters have to be provided to the ATSB. Where the ATSB receives an initial report it must pass on details of the report, as soon as practicable, to the Regulator. Those details will include personal information such as the details of the reporter, location of the accident, details of the type of rail operation involved and any injuries or fatalities (subregulation 4.5). The Legislative Instrument provides that details from those reports must be provided to the Regulator within 72 hours as a written report. The Instrument also provides that details of less serious matters must also be provided to the Regulator within 72 hours. Where the Regulator receives a written report it will be obliged to provide the report or details from the report to the ATSB.

Consistent with the Information Privacy Principles under the *Privacy Act 1988*, where the ATSB receives a report the reporter will be advised that all information that is provided will be provided to the Regulator. The name of the reporter and other personal details will be stored by the ATSB in accordance with its obligations under the Privacy Act. Other than to the Regulator the ATSB would not, unless authorised or required by law, disclose that information to any other person or organisation. Privacy is legislatively protected by the Regulator to the extent required by confidentiality protections in section 244 of the RSNL. Section 244 of the RSNL prohibits the disclosure of information or a document or using information or a document for any purpose. The prohibition is subject to limitations that are consistent with the Information Privacy Principles. These include disclosure being permitted if a person named consents to such disclosure, the disclosure is required by law, the disclosure is necessary for the exercise of a function or power under the RSNL or is necessary to lessen or prevent a serious risk to public health or safety.

The reporting requirements in the Legislative Instrument mirror reporting requirements under the National Rail Law. Taken as a whole the reporting requirements create a system of concurrent compliance for reporting rail matters. The purpose of this approach is to avoid duplication of function.

The retention and disclosure of personal information permitted by this Legislative Instrument may limit protections from arbitrary and unlawful interferences with privacy. However, these limitations are permissible because they are required by law, will achieve legitimate objectives and are reasonable, necessary and proportionate to achieving these objectives, discussed below.

The legitimate objective of the Regulation is to promote transport safety by ensuring that both the ATSB and the Regulator have timely access to such information as may be necessary to establish whether either body needs to conduct an investigation into a matter. A further legitimate objective is to ensure that the ATSB has access to complete and accurate safety information for the purposes of safety reporting more generally as well as for research and analysis and research investigations

There is a rational connection between the limitation relating to disclosure and the objective in that it is important that the ATSB receive the immediate oral report so

that the ATSB can quickly gain the first hand knowledge required to make an informed decision on whether or not to investigate. In order to ensure that the Regulator also has access to important rail safety information and can ascertain whether it needs to conduct its own investigation it is important that it receive the same information as the ATSB. The most effective and efficient way to achieve this and ensure no duplication for industry is to have the ATSB provide details of the initial report to the Regulator. This is also consistent with the ATSB's function of cooperating with other bodies or organisations that have functions or powers relating to transport safety; or who have functions affected by the ATSB's function of improving transport safety (see paragraph 12AA(2)(a) of the TSI Act).

Further, paragraphs 12AA(1)(a)-(g) of the TSI Act set out the means by which the ATSB may discharge that function, which include receiving and assessing reports of transport safety matters and reportable matter, independently investigating transport safety matters and identifying matters that affect or might affect transport safety. The ATSB maintaining a database of information received under the reporting requirements of the Legislative Instrument serves that purpose.

The information that the ATSB receives will only be detailed enough to ensure that a decision can be made quickly as to whether to commence a safety investigation. This is only the information that the ATSB would disclose to the Regulator. It is information that rail transport operators are used to providing under current reporting requirements to state and territory regulators. Due to the requirements under the Legislative Instrument to provide written reports to the Regulator the information that the ATSB will initially provide to the Regulator will be information that the Regulator will ultimately receive in any event.

Conclusion

This Legislative Instrument is compatible with human rights and to the extent that it limits the right to privacy these limitations are reasonable, necessary and proportionate to achieving the legitimate objective of ensuring transport safety.