

EXPLANATORY STATEMENT

Select Legislative Instrument 2012 No. 265

Issued by Authority of the Minister for Infrastructure and Transport

Transport Safety Investigation Act 2003

Air Navigation Act 1920

Navigation Act 1912

Transport Safety Investigation (Voluntary and Confidential Reporting Scheme) Regulation 2012

Section 71 of the *Transport Safety Investigation Act 2003* (TSI Act), section 26 of the *Air Navigation Act 1920* and section 425 of the *Navigation Act 1912* all provide that the Governor-General may make regulations prescribing matters required or permitted by the respective Acts to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the respective Acts.

In 2009 amendments were made to the TSI Act. These included inserting a new section 20A. The new section 20A provided that regulations may establish a scheme for the voluntary and confidential reporting of issues that affect or might affect transport safety.

The Regulation repeals the *Air Navigation (Confidential Reporting) Regulations 2006*, and the *Navigation (Confidential Marine Reporting Scheme) Regulations 2008*. These established confidential reporting (REPCON) schemes for aviation and marine transport respectively. The Regulation replaces those schemes with a consolidated scheme that encompasses aviation, marine and rail transport. Rail is being included consistent with reforms to the rail regulatory sector that committed the ATSB to becoming the national rail safety investigator and the States and Commonwealth Government to establish the National Rail Safety Regulator (the Regulator). These reforms arise from the signing of the Intergovernmental Agreement on Rail Safety Regulation and Investigation Reform (the IGA) at the Council of Australian Governments (COAG) meeting on 19 August 2011.

The Regulation applies to the voluntary and confidential reporting of issues that affect or might affect transport safety in respect of aircraft, marine and rail transport. The Regulation provides confidentiality similar to that provided under the previous schemes for a reporter to encourage reporting of safety concerns. Additionally, the Regulation provides confidentiality for any person referred to in a report about a safety concern.

All material reported, obtained or generated under the scheme is 'restricted information' as defined by subsections 3(h) to (j) of the TSI Act. Part 6, Division 2 of the TSI Act prohibits copying or disclosure of restricted information to persons external to the ATSB or to courts unless otherwise authorised by the TSI Act. The prohibitions on copying and disclosing restricted information exist in the TSI Act to encourage persons to cooperate with the ATSB in a safety investigation knowing that the information they provide will not be used against them, such as in evidence in

court proceedings. Similarly, in confidential reporting, the prohibitions on disclosure are to encourage persons who fear reprisal to make a report, knowing they are protected from this outcome.

While there needs to be limitations on copying and disclosing restricted information, there also needs to be some exceptions in order for investigations and confidential reporting to be effectively able to communicate safety issues to the industry. The Regulation makes provision for disclosure of that material in particular circumstances, such as to transport operators and regulatory and law enforcement organisations, balanced with protections limiting the disclosure of an individual's personal information. Protection of the information ensures that the scheme established is directed toward providing information to industry to address a safety issue rather than prosecuting individuals. That is consistent with the functions of the ATSB under section 12AA of the TSI Act. Keeping the focus of the scheme on improving safety systems rather than penalising individuals also limits the possibility of the scheme being used for vexatious purposes and reputations being unnecessarily tarnished.

Concerns involving a serious and imminent threat to transport safety or to a person's health or life, or about a criminal offence, are not reportable under the Regulation. Such concerns should be reported directly to the responsible body (e.g. the Police). The REPCON scheme's general restrictive confidentiality requirements, covering both the reporter and any person referred to in the report, make it inappropriate for the scheme to collect information about these matters. Also, it would be unacceptable for the confidentiality requirements to restrict information from release that could prevent an imminent death or serious injury or resolve a serious crime. Consequently, these matters do not receive any guarantee of confidentiality.

The Regulation commences on 20 January 2013. The timing is to suit the operational requirements of the ATSB and the simultaneous commencement of the national rail safety reforms and the provision of national confidential reporting to rail transport for the first time.

A Regulatory Impact Statement was not required. A RIS (Exemption), reference number 2011/13136 has been obtained from the Office of Best Practice Regulation.

Details of the Regulation are 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 Act specifies no conditions that need to be met before the power to make the Regulation may be exercised.

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*

Section 26 of the *Air Navigation Act 1920*

Section 425 of the *Navigation Act 1912*

ATTACHMENT A**Details of the Transport Safety Investigation (Voluntary and Confidential Reporting Scheme) Regulation 2012**Section 1 – Name of Regulation

This section provides that the title of the Regulation is the *Transport Safety Investigation (Voluntary and Confidential Reporting Scheme) Regulation 2012*.

Section 2 – Commencement

This section provides that the Regulation commences on 20 January 2013. The timing is to suit the operational requirements of the ATSB and the simultaneous commencement of the national rail safety reforms and the provision of national confidential reporting to rail transport for the first time.

Section 3 – Repeal

This section repeals the *Air Navigation (Confidential Reporting) Regulations 2006* and *Navigation (Confidential Marine Reporting Scheme) Regulations 2008* (the **Old Regulations**).

Section 4 – Transitional

This section provides that the Old Regulations will continue to apply to any REPCON report received and not finalised by the ATSB prior to the commencement of the Regulation.

Section 5 – Definitions

This section provides definitions of words and expressions used in the Regulation. Some definitions from the Old Regulations have been carried over to the New Regulations. There are also new definitions that reflect the making of these regulations under the *Transport Safety Investigation Act 2003* (TSI Act) and which take up definitions used in the TSI Act.

To reflect the multi-modal nature of the Regulation there is a generic description of ‘transport safety authority’ that means the Civil Aviation Safety Authority (CASA), the Australian Maritime Safety Authority (AMSA) and the Office of the National Rail Safety Regulator (ONRSR). The definition also includes any other authority of a State or Territory or other body that has functions relating to transport safety. That has been done to ensure that the ATSB has the flexibility to deal with reports of safety concerns that may be better dealt with by a State or Territory body. This may arise, for example, where a marine matter is reported that would be better dealt with by a Ports Authority or local Harbour Master, which generally are under State or Territory jurisdiction.

Defining transport safety authority broadly will allow the ATSB to approach the most appropriate organisation for a response to an identified safety concern. Section 8 of the Regulation provides that one of the purposes of the scheme is to ensure the ATSB

can inform transport safety authorities about unsafe procedures, practices and conditions in the relevant transport mode.

Similarly, the ATSB may approach an emergency services organisation such as in circumstances where the ATSB receives a report concerning the capacity of a fire service to fight on-ship fires while a ship is in port. 'Emergency services' has been defined to include the following:

- (a) a police force or service;
- (b) a fire service;
- (c) an ambulance service;
- (d) a service for dispatching a force or service mentioned in paragraph (a), (b) or (c).

As the definition is inclusive it will extend to other services, particularly in the marine mode, such as fire fighting tugboats or other vessels that are permanently stationed and on contract to provide such services.

Section 6 – Information taken to be part of report

This section makes clear that information obtained or generated by the ATSB in the course of considering a report and records of analysis of information contained in a report will be taken to be part of a report.

Section 7 – Establishment and application of Scheme

Section 7(1) provides that the scheme is for the voluntary and confidential reporting of issues that affect or might affect transport safety and is applicable to aircraft, ship and rail operations.¹

Section 7(2) provides in relation to which matters the REPCON scheme applies. These are as follows:

Aviation

The Regulation applies to aircraft operations involving all manned aircraft and some classes of unmanned aircraft. The broad range recognises the breadth of aircraft operations in Australia covering all piloted and pilotless aircraft, including the full range of UAVs or Unmanned Aerial Vehicle. This means that a report could be made to REPCON about an issue that affects or might affect transport safety about practically any form of aircraft.

Marine

The Regulation only applies to marine to the extent that the operation is covered by Part 3 of the *Transport Safety Investigation Regulations 2003* (TSI Regs). Due to a

¹ Section 3 of the TSI Act defines transport safety as the safety of transport vehicles and, in turn, a transport vehicle is defined as an aircraft, ship or rail vehicle.

number of exclusions, coverage is limited to a small range of ships. Part 3 of the TSI Regs does not currently apply to trading ships on intrastate voyages, Australian fishing vessels on domestic voyages, fishing fleet support vessels on domestic voyages, pleasure craft, inland waterways vessels, pleasure craft, offshore industry mobile units that are fixed to the seabed or Australian defence ships or exempt foreign ships. In the future, it is possible that a wider class of vessels will be covered.

Rail

The Regulation applies to all rail operations over which the ATSB has jurisdiction under subsection 11(3) of the TSI Act. In practice, this encompasses all accredited rail operations, and activities and things relating to those operations on the metropolitan and country networks as well as Tourism and Heritage operations. As the scheme is for the reporting of things that affect or might affect transport safety, all above and below-rail aspects of operations would be within scope. This includes all rolling stock and rail track infrastructure.

Section 8 – Purposes of scheme

Section 8(1) states that the primary purpose of the scheme is to:

- provide a means for the voluntary and confidential reporting of issues that affect or might affect transport safety;
- use the reports made under the scheme to identify unsafe procedures, practices or conditions; and
- give information to the aviation, maritime or rail industry or a transport safety authority or to an emergency services organisation about unsafe procedures or conditions to facilitate action and awareness about transport safety issues and improvements in transport safety.

Section 8(2) recognises that some reports about safety concerns may have implications for security and that such issues should be brought to the attention of the appropriate person or organisation. It is not intended that REPCON be a voluntary and confidential reporting scheme for security matters. The Regulation simply acknowledges that security issues can occur in conjunction with safety issues and there needs to be a means of dealing promptly with that information.

Section 9 – Functions of ATSB

Section 9 provides an overview of the functions and powers that the ATSB may perform or exercise under the Regulation. These functions and powers are essentially the same as those set out in the Old Regulations.

This section also includes a broad function of identifying issues and factors from reports that affect or might affect transport safety and communicating those issues and factors to a range of transport stakeholders. These stakeholders include industry transport operators, as well as the relevant national transport regulator (i.e. CASA, AMSA, ONRSR) and, in some circumstances, State and Territory organisations that have functions relating to transport safety. These organisations may receive de-identified reports. Those are reports from which details of reporters and persons

referred to in reports have been removed, along with any information that might identify those persons.

Where necessary, information may also be provided to an emergency services organisation. That is typically done where the concern raised would be better dealt with by one of those organisations and the ATSB needs to be able to pass the information on.

In disclosing any information in accordance with its functions, the ATSB is bound by the Use and Disclosure provisions of Part 5 and 6 of the Regulation.

Section 10 – What may be reported

Section 20A of the TSI Act provides that the regulations may establish a scheme for the reporting of issues ‘that affect, or might affect, transport safety’. This is mirrored in section 10. Anything that comes within that broad scope would be a reportable safety concern. This general approach avoids prescription and, therefore, the unintentional exclusion of safety issues.

To assist reporters in identifying what might be a matter of safety concern, the ATSB has guidance material on its website: www.atsb.gov.au

The following are examples of what may be reported under the scheme across the modes. It is illustrative and not exclusive of other matters:

- (1) a procedure, practice or condition that a reasonable person would consider endangers, or, if not corrected, would endanger, the safety of those operations, for example:
 - (i) poor training, behaviour or attitude displayed by an aircraft, marine or rail operator;
 - (ii) insufficient qualifications or experience of employees of the operator
 - (iii) scheduling or rostering that contributes to the fatigue of employees of the operator
 - (iv) an operator bypassing, or requiring their employees to bypass safety procedures because of operational or commercial pressures

Exclusions from the REPCON Scheme

The Regulation provides exclusions to what may be reported. Those exclusions are contained in paragraphs 10(2) (a) to (c):

- (a) matters showing a serious and imminent threat to transport safety or a person’s health or life;
- (b) industrial relations issues; and
- (c) criminal conduct. This is defined in subsection (3) as an offence against a law of the Commonwealth, a State or a Territory, and includes a terrorist

act or an act of unlawful interference with aviation that would constitute an offence).

It is not appropriate to allow these matters to be reported under the REPCON scheme and receive the confidentiality protections that apply in relation to the reporter's identity and anyone else referred to in the report. The reasons are further explained below:

Serious and imminent threat to transport safety or health or life

Matters showing a serious and imminent threat to transport safety or a person's health or life are of an urgent and grave nature. There is unlikely to be an opportunity to conduct a full inquiry before some sort of action is taken to lessen or prevent that threat. Further, the ATSB is not in the best position to act on such a report. It may be necessary to disclose identities in order to prevent or lessen the threat and it would therefore be inappropriate to provide a guarantee that such information would be kept confidential.

Where the ATSB receives a report showing a serious and imminent threat to a person's health or life, or transport safety, the ATSB will ask the reporter to report the matter to a more appropriate authority. If it seems unlikely that the reporter will pass on the information, the ATSB will be in position to take this action.

Industrial Relations

Industrial relations matters are excluded as these matters should not take the ATSB's resources away from focussing on safety concerns. However, while these matters are excluded, it is acknowledged that it can sometimes be difficult to separate safety concerns from industrial relations matters. Where it is clear that a report contains a genuine safety concern it will be accepted.

Criminal offences

In the aviation and marine REPCON schemes under the Old Regulations, reports of criminal conduct attracting penalties of at least two years in prison are not reportable. The ATSB also has the discretion to pass on details, including personal information of reporters and persons named in reports, to regulators without confidentiality. Under the new Regulation all reports of matters involving a criminal offence will be unreportable. The ATSB's discretion whether to pass on personal information has been retained. This information would only be disclosed if the ATSB reasonably believes it to be necessary for reporting, investigation or prosecuting the matter.

The change, broadening the exclusion for reports of criminal conduct, has been initiated following feedback the ATSB received during consultation at the end of 2011 and in 2012. Some stakeholders raised concerns that breaches of the law carrying a penalty of less than 2 years imprisonment can still be of a serious nature. It was suggested that REPCON is not a suitable scheme for receiving reports where the law may have been broken, even where there may be an associated issue of transport safety. Consequently it would not be appropriate for the ATSB to have information about a criminal offence of any nature that it could not disclose if it was felt that the

matter needed to be dealt with by an authority such as the police or a regulator.

The Regulation will continue to require the ATSB to determine whether the REPCON scheme is the most suitable avenue for making a report. In making such an assessment, the ATSB will ensure that the reporter is aware that reporting the matter under the REPCON scheme does not absolve the reporter of any compulsory reporting requirement under the TSI Act or other applicable legislation.

This means that a report could not be made to REPCON in respect of a matter that must be reported under the TSI Act mandatory reporting requirements.² As a matter of operational procedure, the ATSB will also enquire whether the reporter had raised the matter with the relevant transport operator or a regulator or under a similar reporting scheme.

Section 11 – How report must be made

Section 11 requires that a REPCON report made to the ATSB must be in writing. This includes via email as well as by a web-based form hosted on the ATSB website. However, where an oral report is made, the ATSB must reproduce the report in writing.

Written reports are an important aid in the verification of the contents of a report. Therefore, if the ATSB reproduces an oral report in writing the ATSB will seek to confirm its contents with the reporter.

As subsection 13 (b) requires the ATSB to have a reasonable belief that the report is true before accepting it, the ATSB as part, of the process of being satisfied of this, needs to confirm that the written record of the oral report is accurate.

Section 12 – Information to be included in report

All reports to the ATSB must contain a basic level of information. This enables the ATSB to assess and verify the report and maintain contact with the reporter for as long as may be necessary to deal with the report. The information that the ATSB requires will be the name of the person reporting, a description of the safety concern and at least the person's postal or email address or telephone or fax number.

Section 13 – Accepting report

Section 13 requires the ATSB to accept a report if the ATSB:

- (a) is satisfied that REPCON is the most suitable avenue for making the report; and
- (b) reasonably believes that the matter described in the report is a reportable safety concern; and
- (c) reasonably believes the report to be true.

² See sections 18 and 19 of the TSI Act.

Paragraph 13(a) is necessary to ensure that REPCON does not impede the effectiveness of other reporting schemes in the transport industries. For example, consistent with the principle of REPCON not being a substitute for other reporting, a person who has an obligation to make a report of a safety matter under subsections 18(1) or 19(1) of the TSI Act, may not use the REPCON scheme to avoid or discharge their reporting obligations under that Act. That is because the purpose of the mandatory reporting scheme, established under the TSI Act, would be defeated if the person was allowed to report the matter under REPCON. The ATSB will ensure that reporters are made aware that reporting the matter under the REPCON scheme does not absolve them of any compulsory reporting requirement under other legislation.

Other examples of the REPCON scheme not being the most suitable avenue for a person to make a report could include a situation where a person does not require the confidentiality of REPCON, or where the person is working for an operator that has an appropriate reporting scheme to deal with the issue. That would also be the case if the reporter had reported the matter under a similar scheme, such as that operated by the Office of Transport Safety Investigation in New South Wales. If, however, the person desired the confidentiality and independence of REPCON, or the ATSB believed that the reporter would not report the matter elsewhere, then the ATSB will be likely to consider the REPCON scheme as the most suitable avenue for the person to make the report.

Where the ATSB does not accept the report, the ATSB will be able to forward information from the report to a more suitable recipient, subject to the scheme's confidentiality requirements. The ATSB will consult with the reporter about the action it intends to take with an unaccepted report.

Paragraphs 13(b) and 13(c) require the ATSB to reasonably believe that the report constitutes a reportable safety concern and is true before accepting it. In practice, when the ATSB receives a report, an assessment would be made about whether what has been reported constitutes a reportable safety concern, i.e. does it constitute a matter that affects or might affect transport safety?

The ATSB will seek to verify the information contained in the report. This may involve contacting the reporter and other involved parties to discuss its contents. The ATSB will be mindful of the need to protect personal information in accordance with the confidentiality requirements. Therefore, it is very unlikely that the ATSB would accept an anonymous report because of the difficulties that would be associated with assessing its reliability and verifying its contents. An exception may be if the matters raised in the report constituted a serious issue. Section 14 of the Regulation provides the means for the ATSB to deal with reports, regardless of whether they have been accepted.

Section 14 – Dealing with report

This section applies to how a report must be dealt with, regardless of whether the report has been accepted as a REPCON report. Essentially this section adopts the requirements in the Old Regulations for dealing with reports that have been accepted.

Paragraph 14(1)(a) requires the ATSB determine what information drawn from a

report is to be included in databases maintained for the purposes of the REPCON scheme. This includes safety related information on reports that have been accepted and also includes safety related information that may be within non-reportable matters, such as criminal conduct.

Paragraph 14(1)(b) requires the ATSB to determine whether to disclose any information from the report in accordance with the TSI Act and the Regulation and act accordingly. This is a broad power to deal with the report. The ATSB may disclose information from a report as an information brief or alert bulletin to the industry so that safety issues may be addressed, or through direct contact with a person or organisation that is in the best position to immediately correct the safety matter. However, information in the report is still subject to the requirements of section 16.

Once the ATSB has transferred the necessary information into any databases and determined what to disclose, paragraph 14(1)(c) requires the ATSB to deal with the report in accordance with the paragraph. That paragraph requires the ATSB return to the reporter the report or that part that they supplied, or if a part were supplied by another person, to return that part to the other person. The ATSB would also have the option to destroy the report, or any part of the report.

Disposal of a report is subject to section 15, which requires retention of a report. This is for the purpose of possible future prosecution, where it is determined that the reporter knew that the information they supplied was false or misleading.

Sections 17 and 21 also affect any decision made under paragraph 14(1)(b). Section 17 gives a person or organisation mentioned in a report an opportunity to comment before disclosure of a report to a transport safety authority or an emergency services organisation. Section 21 sets out how certain reports that concern criminal conduct³ may be processed by the disclosure of the information without confidentiality.

Subsection 14(2) requires the ATSB ensure that personal information about a reporter, or any person referred to in the report, is only kept on any database:

- (a) should it be not be possible to remove the information without adversely affecting the quality of the safety information; or
- (b) for as long as it is necessary to keep in contact with the reporter or a person or organisation referred to in the report.

Subsection 14(3) requires that the ATSB permanently erase any personal information that is used as contact information when the ATSB is satisfied that it is no longer necessary or desirable to retain it.

Section 15 – Dealing with report containing false or misleading information

This section obliges the ATSB to retain a report for a relevant period where the ATSB reasonably believes the making of the report constitutes an offence against section

³ Unlawful interference with aviation, act of terrorism – marine and rail.

137.1 of the *Criminal Code Act 1995* (CTH). The relevant period is two years after the date that the report was made, or as long as required if a prosecution is commenced within that period.

Section 137.1 of the Criminal Code makes it an offence for a person knowingly to supply false or misleading information to the Commonwealth, thereby acting as a deterrent against people who make vexatious or deliberately false or misleading reports and thereby harm the integrity of the scheme. Section 15 is an important component of this deterrent. It provides that evidential material necessary for proving the offence is not destroyed prematurely. This section operates in conjunction with paragraph 16(3)(a) and subsection 19(2).

Section 16 – Disclosure of restricted information by ATSB

All information received or generated under the Regulation is ‘restricted information’ as defined by subsections 3(i) to (k) of the TSI Act. Section 60 of the TSI Act contains prohibitions on the copying or disclosure of restricted information. It also provides exceptions to those prohibitions.

The Regulation works in with the regime of prohibitions and exceptions for the copying and disclosure of restricted information. This includes paragraph 60(4)(a), as amended by the *Transport Safety Investigation Amendment Act 2012* (commencing 18 December 2012), which allows for copying and disclosure in accordance with:

anything done by a person in performing functions or exercising powers under, or in connection with the Act or regulations.

Consistent with section 20A of the TSI Act, section 16 sets out some specific requirements for the use and disclosure of restricted information, that is personal information. The requirements in section 16 apply to all reports received by the ATSB.

When the ATSB has received a report, paragraph 14(1)(b) requires the ATSB determine whether to disclose information from that report and act accordingly. Paragraph 16(1)(a) requires that the ATSB remove all personal information from the disclosed information, except in the specific circumstances identified in subsections 16(2) and (3).

Under the *Privacy Act 1988*, personal information is:

information or opinion, whether true or not and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.

Therefore, paragraph 16(1)(a) requires the removal of all information that may identify the reporter as well as anyone named in the report or able to be identified by information contained within the report. Confidentiality for the reporter is an integral element of the scheme, necessary to encourage industry participation without fear of reprisal. Confidentiality for any person referred to in a report, or identifiable through the report, would guarantee that the scheme is directed towards providing information

to the industry to address a safety issue rather than prosecuting individuals.

Subsection 16(2) allows personal information to be disclosed where the personal information could not be removed without defeating the purpose of the disclosure. However, any person identifiable by the information is protected through two conditions that, together, must be met before such disclosure is authorised under the new Regulation. The first condition is that disclosure of personal information would have to be for a purpose of the scheme, as described in either paragraphs 8(1)(b) or (c) or subsection 8(2)— an example being to facilitate safety action to remove an unsafe practice identified in a report. The second condition is that before disclosure of the information, the person to whom the information relates must provide their consent.

Subsection 16(3) contains four exceptions to the requirement not to disclose personal information: (a) where a reporter knowingly gives false or misleading information; (b) to lessen or prevent a serious and imminent threat to transport safety or a person's health or life. (b) in relation to an act of terrorism or unlawful interference with aviation; and (d) in relation to criminal conduct other than an act of terrorism or unlawful interference with aviation.

Paragraph 16(3)(a) operates in conjunction with section 15 which prevents the destruction of a report made by a reporter who knowingly provides false or misleading information (section 137.1 of the *Criminal Code* makes such acts an offence). Paragraph 16(3)(a) allows disclosure of personal information for an investigation where a person has knowingly supplied false and misleading information. It is important for the viability of the REPCON schemes that it does not become an avenue for vexatious reporting. Subsection 14(3) ensures this outcome is achieved by facilitating the use of section 137.1 of the *Criminal Code* as a deterrent.

Paragraph 16(3)(b) allows disclosure where the ATSB believes on reasonable grounds that disclosure is necessary to lessen or prevent a serious and imminent threat to transport safety or a person's health or life. Reports, where a person or many persons' health or lives may be in danger are of an extremely urgent nature. There may also be a serious threat to transport safety, such as damage to a transport vehicle by an act of vandalism or natural causes. The scheme could not be justified if the confidentiality regime of the scheme were applied to these reports. Further explanation on the rationale for this measure can be found under the explanation for section 8.

Paragraph 16(3)(c) allows disclosure where a report involves criminal conduct that comprises an act of unlawful interference or a terrorist act (as addressed in section 21). These matters cannot be reported under the REPCON scheme. Protecting the identity of a person engaged in such activities would be inappropriate.

Paragraph 16(3)(d) allows disclosure of personal information from a report where the report relates to criminal conduct other than that which is required to be disclosed under Part 6 of the regulations. The information, and associated personal information, would be able to be disclosed for the investigation of the possible offence. That is because the purpose of the scheme is to facilitate safety awareness and safety action through the dissemination of safety information that de-identifies the reporter and any person named in a report. Accepting and protecting reports about criminal conduct does not fit within that objective. It would also be inappropriate for the ATSB to

receive that information and not be able to pass on details to an appropriate authority.

Although the ATSB would be able to disclose personal information without consent in the limited circumstances described in the Regulation, subsection 16(3) does not mandate that the ATSB must make the disclosure. Such disclosure is discretionary as in the Old Regulations. The ATSB would necessarily be concerned to protect the scheme when making any decision, being aware that maintaining the industry's trust in the scheme is vital to ensuring that the industry continues to use it. It is unlikely that, except for the most serious matters, personal information is likely to be disclosed.

Section 16 enhances the requirements for confidentiality that exist in the Old Regulations. This is to ensure the scheme is non-punitive, and directed at identifying safety concerns that the industry needs to address. It is important to emphasise that, where allegations are made against an individual, that individual is not exposed to any potential punitive processes and the identity of the person who made the allegation is similarly protected.

Section 18, 19 and 20 of the Regulation also affects what use may be made of information in reports.

Section 17 – Named person or organisation to comment on report

Where, in the interests of transport safety, the ATSB proposes to send information to a transport safety authority or an emergency services organisation, section 17 sets out preconditions that must be met before information is disclosed.

If practicable, the ATSB must, while complying with the confidentiality requirements regarding personal information in section 16, provide a person or organisation named in the report with a copy of the report (paragraph 17(2)(a)).

Paragraph 17(2)(b) provides that the person or organisation has 5 working days to comment on the report. The ATSB is required by subsection 17(4) to consider those comments. This is intended to provide an assurance to the parties who may be affected by a third party's assessment of the safety concern that their comments are reflected in any material the ATSB provides to a transport safety authority.

Persons who may be affected will be advised of the ATSB's decision to refer information derived from a report to a transport safety authority or emergency services organisation. Section 17 also ensures that a person or organisation identified in the report receives the opportunity to respond, and so is afforded procedural fairness or natural justice.

Paragraph 17(3)(a) exempts the ATSB from compliance with the 5 day comment period if the requirement to consult before passing the information to that person or organisation would reduce reporting to the scheme or reduce the ability of the ATSB to achieve a purpose of the scheme. For example, it may be impossible to provide information from a report to a person or organisation named in the report without identifying an individual. In such cases, complying with paragraph 17(2)(a) could compromise the REPCON scheme. Further it would be a breach of section 16 if

information was passed on that reveals the identity of an individual without their consent. Subsection 17(3) ensures that the requirement to consult with the parties concerned does not apply in such circumstances, preserving the confidentiality of the scheme.

Paragraph 17(3)(b) exempts the ATSB from complying with section 17 if compliance is impractical. That might be the case if a ship is in port for a short period and will depart before the five working days have expired. If the ship departs before it is possible to address the safety concerns raised in the REPCON report, then a purpose of the scheme to facilitate safety awareness and safety action would be defeated. That would make compliance with section 17 impractical.

Section 18 – Disciplinary action and making administrative decisions

Confidential reporting schemes are one component of a safety system based on the principle of a ‘just culture’ to promote the advancement of transport safety. A ‘just culture’ encourages the reporting of safety related information and provides the protection of confidentiality and non-punitive response, where appropriate, to support the advancement of transport safety.

Section 18 is a protective provision that reinforces the non-punitive nature of voluntary and confidential reporting. Paragraph 18(1)(a) prevents information from a report about a reportable safety concern being used by a person as the basis for taking disciplinary action against an employee of the person. Paragraph 18(1)(b) also prevents information from a report being used as the basis for making a decision of an administrative character against someone.

Section 18 does not prevent disciplinary or administrative action from being taken. Subsection 18(2) identifies that the reporting of an event does not quarantine that event from disciplinary or administrative proceedings; however, such proceedings would need to gather their own evidence exclusive of REPCON reports.

These protections operate consistently across aviation, marine and rail transport.

Section 19 – Information not admissible in evidence

Section 19 prevents reports, or evidence of the content of a report, about a reportable safety concern from being admissible in evidence in a court. This is consistent with arrangements under the Old Regulations. The rationale for this provision is similar to the rationale for section 18. Information from reports about reportable safety concerns is for addressing safety issues; not as a source of evidence in court proceedings. There may be a negative impact on the REPCON scheme if information from reports about reportable safety concerns was used as evidence in a court. Therefore, parties involved in court proceedings need to gather their own evidence separately from the REPCON scheme.

Section 19 contains two exceptions to the use limitation with respect to court proceedings. Subsection 19(2) provides an exemption for proceedings in relation to whether the making of a report constituted an offence against section 137.1 of the Criminal Code. This ensures that in a prosecution for that offence, the REPCON

report may be used in evidence.

The other exception is in subsections 19(4) and (5). Subsection 19(4) provides that where an administrative action or disciplinary proceeding has been instituted using information derived from a REPCON report, then that report, or evidence as to its contents is admissible in an appeal against the outcome of the administrative or disciplinary proceeding as evidence of misuse of the report. Additionally, in accordance with subsection 19(5) for the evidence to be admitted, the ATSB has to issue a certificate to the court stating that there is not likely to be a negative effect on REPCON or that any negative impact is outweighed by the public interest in permitting the use of the report.

Subsection 19(3) clarifies that information derived from a source that is not a report is admissible. This brings section 19 into line with section 18. This means that while the report itself or evidence of what is in the report will not be admissible, evidence obtained independently of the report may be used.

It is, however, unlikely that an administrative decision or disciplinary action could be made, or taken against an individual based on a report about a reportable safety concern. The strong confidentiality requirements in the TSI Act and the Regulation mean that it would be very difficult to ascertain a person's identity from the information that would be disclosed in the course of processing the report.

Section 20 – Use to be for same purpose as for disclosure

Section 20 requires that a person, body or agency to whom personal information is disclosed must not use or disclose the information for a purpose other than the purpose for which the information was given to the person, body or agency. Wording similar to this caveat is in Information Privacy Principle (IIP) 11.3, under section 14 of the *Privacy Act 1988*. However, the IIPs only apply to Commonwealth and Australian Capital Territory Government persons, bodies and agencies. Given that a guarantee of confidentiality is essential to the success of REPCON it is necessary that other persons, bodies and agencies who receive personal information in accordance with the scheme only use and disclose it in the manner intended.

The requirements described above, for the protection of personal information, are made more stringent than those provided in IIP 11, under section 14 of the *Privacy Act*, on the grounds that the privacy protections need to be tailored to suit the scheme. However, except for the tighter restrictions, the Regulation does not put the REPCON scheme outside the regime of the *Privacy Act*.

Section 21 – Reports relating to terrorism or unlawful interference with aviation

This section ensures that the appropriate authority can deal with security threats, which are outside the scope of REPCON.

Subsection 21(1) provides a procedure for dealing with criminal conduct that is either an act of terrorism or an act or threatened act of unlawful interference with aviation that constitutes a criminal offence. While these matters are excluded from being reportable it was the case that the ATSB became aware of these matters through

REPCON under the Old Regulations. Therefore, there must be a process to deal with those matters.

Subsection 21(1) provides that the ATSB is required to inform the Department of the report where it reasonably believes it has received information relating to an act of unlawful interference with aviation or an act of terrorism. Subsection 21(2) provides that, if requested by the Department, the ATSB may send the information to the Department. Subsection 21(3) authorises the ATSB to disclose personal information to the Department and also for the purpose of reporting, investigating or prosecuting such matters.

In this section, “Department”, relying on s.19A of the *Acts Interpretation Act 1901* and the Administrative Arrangement Orders means the Department administered by the Minister responsible for administering the TSI Act. This is currently the Department of Infrastructure and Transport.

Section 22 – Delegation of powers of the ATSB

Section 22 empowers the ATSB to delegate any function, power or duty of the ATSB (other than the power of delegation) to the Chief Commissioner of the ATSB or to staff of the ATSB who has duties relating to the administration of the REPCON scheme. As a matter of operational practice the ATSB engages staff with duties specific to and relating to the administration of the REPCON scheme. This is a limited class of staff member. Staff members who do not have such duties will not be a delegate for the purposes of this section.

ATTACHMENT B**Statement of Compatibility with Human Rights**

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

Transport Safety Investigation (Voluntary and Confidential Reporting Scheme) Regulation 2012

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 to establish a scheme for the voluntary and confidential reporting of issues that affect or might affect transport safety in aviation, marine or rail transport. Under the scheme any person who observes or becomes aware of a safety concern may make a report of that concern to the ATSB. This information is retained by the ATSB and may be provided to Commonwealth, State or Territory authorities, emergency services organisations and transport industry with a view to improving transport safety. To preserve confidence in the scheme, information that may identify a reporter or any person named in a report may not be disclosed, except in very limited circumstances.

This Legislative Instrument consolidates existing schemes for aviation, under the *Air Navigation (Confidential Reporting) Regulations 2006*), and marine, under the *Navigation (Confidential Marine Reporting Scheme) Regulations 2008*) while establishing a scheme for rail. The consolidated scheme seeks to preserve the confidentiality protections that exist under the current schemes. Protections for reporters and persons named in reports have not been weakened by this Legislative Instrument.

Human rights implications

This Legislative Instrument engages with the following rights or freedoms:

- (a) Prohibition on interference with privacy;
- (b) Fair trial and fair hearing rights.

Right to protection against arbitrary and unlawful interferences with privacy

The Legislative Instrument engages the right to protection against arbitrary and unlawful interferences with privacy contained 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 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.

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.

Information gathered, obtained or generated in the course of processing a report, including the report itself is ‘restricted information’ as defined by subsections 3(h) to (k) of the *Transport Safety Investigation Act 2003* (TSI Act). That information, where it contains personal information, may only be disclosed in limited circumstances under the Act and under the Legislative Instrument. The Legislative Instrument also authorises retention of restricted information that is or contains personal information, but only in limited circumstances.

Disclosure of personal information

Under the Legislative Instrument, information from reports to transport operators, regulators and other organisations, including emergency services organisations, is used to foster safety awareness or to facilitate the taking of safety action.

Protection of the identity of the person who makes the report and any individual referred to in a report is a primary element of the scheme. The Legislative Instrument requires that the ATSB de-identify reports prior to any disclosure and does not permit to the disclosure of personal information except in very limited circumstances.

Those circumstances are:

- Where it is not possible to remove personal information from the information to be disclosed without defeating the purpose for which the disclosure may be made, it is necessary or desirable having regard to paragraph 8(1)(b) and (c) and subsection 8(2)⁴ and the person identified gives consent;
- Where a reporter has knowingly provided false or misleading information in breach of section 137.1 of the Commonwealth Criminal Code;
- Where the ATSB believes on reasonable grounds that disclosure is necessary to lessen or prevent a serious and imminent threat to transport safety or a person’s life or health. This is a non-reportable matter;
- Where the report relates to criminal conduct, being an offence against a law of the Commonwealth, a State or Territory or that comprises an act of unlawful

⁴ These are the identification of unsafe procedures etc, providing information where necessary to improve transport safety and to enable the disclosure of security related information that is ancillary to a safety report.

interference with aviation or a terrorist act. This is also a non reportable matter.

In each of the circumstances above this Legislative Instrument does not require that the information be disclosed. The ATSB retains a discretion to disclose the details of individuals. That discretion would unlikely be exercised except in the most extreme and serious circumstances. The ATSB has internal operational guidance and procedures to assist in decision making in those circumstances.

The Legislative Instrument also provides for safeguarding information disclosed under this scheme. The Instrument provides that a person, body or agency to whom personal information is disclosed in accordance with the regulation must not use or disclose the information for a purpose other than the purpose for which the information was given to the person, body or agency.

Wording similar to this caveat is in Information Privacy Principle (IIP) 11.3, under section 14 of the *Privacy Act 1988*. However, the IIPs only apply to Commonwealth and Australian Capital Territory Government persons, bodies and agencies. Given that a guarantee of confidentiality is essential to the success of REPCON it is necessary that other persons, bodies and agencies who receive personal information in accordance with the scheme only use and disclose it in the manner intended.

The requirements described above, for the protection of personal information, are made more stringent than those provided in IIP 11, under section 14 of the *Privacy Act*, on the grounds that the privacy protections need to be tailored to suit the scheme. However, except for the tighter restrictions, the Legislative Instrument does not put the REPCON scheme outside the regime of the *Privacy Act*.

Retention of personal information

This Legislative Instrument allows for the retention of restricted information that is or contains personal information. As with disclosure of personal information, retention is only allowed in very limited circumstances.

For safety related material this is where:

- (a) the ATSB proposes to retain the information in the data base for safety related purposes and it is not possible to remove the personal information without adversely affecting the safety related information; or
- (b) the retention of the personal information is necessary to keep in contact with the reporter or a person mentioned in a report. When contact with the person is no longer necessary, the ATSB must remove that contact information.

Where the ATSB reasonably believes that the report is false or misleading such as to constitute an offence against s.137.1 of the Criminal Code the ATSB must retain the report for 2 years after the day the report is made. If a prosecution for a breach of s.137.1 of the Criminal Code is commenced during that 2 year period, the ATSB must retain the information until the report is no longer required for the purpose of the prosecution.

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

The first legitimate objective is ensuring that the ATSB can properly provide a voluntary and confidential reporting scheme for issues that affect or might affect transport safety and use the reports made to identify unsafe practices, procedures or conditions and pass that information on to transport stakeholders.

The second legitimate objective is that where the ATSB becomes aware of security issues as a by-product of the scheme it must be able to provide that information to an appropriate authority.

The third legitimate objective is that where the ATSB receives information that may constitute an offence against s.137.1 of the Criminal Code, concerns a serious and imminent risk to transport safety or a person's health of life, concerns criminal conduct, including unlawful interference with aviation or a terrorism offence, it must be able to deal promptly with that information.

There is a rational connection between the limitation and the objective in that disclosure is permitted in circumstances where there are legitimate transport safety concerns that require addressing, and a person identified has consented, and therefore been provided with an opportunity to comment. This is emphasised by the provisions in the Legislative Instrument that require the ATSB accord natural justice to persons named in a report prior to passing the report on to another body, such as a regulator. It is also emphasised by the Legislative Instrument limiting the use to which reports may be put. This means that protection of the identity of individuals is paramount when addressing legitimate safety concerns and thus encourage reporting under the scheme without fear of reprisal.

Retention of personal information is only allowed to the extent necessary to remain in contact with the reporter or a person named in a report, or where the deletion of the information would adversely affect its quality as safety information. Retention of personal information is not permitted for any other purpose except for where the information may be required where a false and misleading report has been made, in breach of s.137.1 of the Criminal Code. That however is consistent with the objective of ensuring that the scheme is for the provision of safety related information and not abused by persons making of malicious reports.

Disclosure is also only permitted where it would be inappropriate for the scheme's confidentiality requirements to prevent the ATSB passing on the information to a person or organisation better placed to deal with the matter, such as the Police, Transport Safety Authority or an Emergency Services Organisation.

The limitations are proportionate. The prima facie position is that the ATSB must de-identify material unless particular exceptions apply that are directly linked to the objectives of the scheme. That seeks to encourage the reporting of safety related information without fear of reprisal and allows retaining only that material that is

connected with a legitimate safety concern or dealing with information that the confidentiality requirements of the Legislative Instrument ought not, on public interest grounds, protect.

Fair Trial

Article 14(1) of the ICCPR provides that all persons are entitled to a fair and public hearing before a competent, independent and impartial court or tribunal established by law. A key part of ensuring that a hearing is fair is to ensure that all evidence relevant to the proceedings is available to the court.

The REPCON scheme will encourage voluntary and confidential reporting of issues affecting transport safety in aviation, marine or rail transport and ensure that persons are able to report without fear of reprisal. As a result, this Legislative Instrument engages the right as it limits the ability of courts to receive REPCON reports into evidence to ensure the efficacy of this scheme.

There are two important exceptions to this exclusion. The first is where a person may have been subject to administrative or disciplinary action as a result of having made a report and seeks to introduce the report to assist in demonstrating that the report has been misused. This exception is consistent with the Legislative Instrument providing that administrative or disciplinary action may not be taken against a person on the basis of information contained in a report. This is to ensure that information from reports is used only for safety related and not punitive purposes and thus encourages reporting.

The second is where a person is subject to prosecution for knowingly supplying false or misleading information to the Commonwealth under section 137.1 of the Criminal Code. This will ensure that there is a deterrent to prevent the making of vexatious or deliberately false or misleading reports and thereby harm the integrity of the scheme. This exception applies in circumstances where the report may reasonably be required where a person has made a false and misleading report. It would not be appropriate if the scheme's confidentiality requirements prevented evidence of the offence being inadmissible.

In respect of a person's right to a fair trial, the restrictions on the admissibility of reports do not limit the substantive operation of that right and are aimed at ensuring the efficacy of the reporting system to ensure transport safety.

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.

