

EXPLANATORY STATEMENT

Issued by authority of the Deputy Prime Minister and Minister for Infrastructure, Transport and Regional Development

Subject - *Transport Safety Investigation Act 2003*
Transport Safety Investigation Regulations 2021

The *Transport Safety Investigation Act 2003* (the Act) provides for the investigation of transport safety matters in the aviation, marine and rail modes of transport. This includes provisions for the conduct of independent transport safety investigations by the Australian Transport Safety Bureau (ATSB), the reporting of transport safety matters, the making of safety action statements including safety recommendations to address safety deficiencies identified by investigations, the publication of investigation results and the protection of sensitive safety information.

Authority

Section 71 of the Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Purpose and overview of the instrument

The purpose of the *Transport Safety Investigation Regulations 2021* (TSI Regulations 2021) is to prescribe those matters required to give effect to provisions in the Act, such as defining specific occurrences constituting reportable matters, listing persons responsible for reporting and nominating officials for receiving reports.

Aircraft Operations

The TSI Regulations 2021 includes Remotely Piloted Aircraft (RPA) as a specific category of operation or include specific requirements for reporting transport safety occurrences related to their operations. This has not previously been a requirement and the inclusion of RPAs in these Regulations provides greater certainty for operators by clarifying the requirements to make reports to the ATSB, and the matters that they are required to report.

RPAs that have been certified against relevant airworthiness standards (type certification), large and medium RPAs are an emerging form of commercial aviation that will benefit from investigation into systemic safety issues to help prevent future accidents. Under these Regulations, this types of unmanned aircraft operations will be required to provide immediate reports to the ATSB of occurrences including:

- a. death or serious injury;
- b. accidents;
- c. loss of a separation standard between aircraft; and
- d. third party property destroyed or seriously damaged.

Operations involving smaller type 2 RPAs and those without type certification will have less reporting requirements. This is on the basis that ATSB investigations are unlikely for these

operations unless there is serious risk of harm to people or significant third-party property. These Regulations will limit immediate reporting requirements to death or serious injury related to this operation.

Marine Operations

Prior to the commencement of this instrument, Part 3 of the TSI Regulations 2003 included descriptions of vessel types and their operations based on the repealed *Navigation Act 1912*, which did not reflect terminology in the current Navigation Act. Updating the terminology in the TSI Regulations 2021 ensures consistency with the current Navigation Act and means that the following vessel types will have reporting requirements:

- a. regulated Australian vessels (within the meaning of the Navigation Act) in the course of relevant marine navigation;
- b. foreign vessels (within the meaning of the Navigation Act) in certain Australia waters and in the course of relevant marine navigation, and
- c. domestic commercial vessels as defined in the *Marine Safety (Domestic Commercial Vessel) National Law* that are on an interstate voyage.

These regulations align the reporting requirements of safety occurrences under the TSI Regulations with marine incidents under the Navigation Act. This is achieved by adopting the types of marine incidents that must be reported to the Australian Maritime Safety Authority as reportable matters for the purpose of the Regulations. These marine incidents encompass the current immediately reportable matters in Part 3.

The approach reflects current arrangements. The ATSB does not receive direct reports of marine incidents. Incidents are reported to AMSA and then forwarded to the ATSB. The regulations do not impose any additional reporting requirements on the marine industry.

The Regulations continue to exclude domestic commercial vessels from the requirement to make reports to the ATSB unless they are on an interstate voyage.

Consultation

On 8 April 2021, the Chief Commissioner of the ATSB wrote to key stakeholders and industry bodies to invite comments on the draft instrument, a copy of the draft was also made available on the ATSB's website. The ATSB met with a number of interested parties to facilitate further discussion. Feedback received as part of this process was incorporated into the TSI Regulations 2021.

The ATSB was satisfied that consultation was undertaken to the extent appropriate and reasonably practicable, in accordance with section 17 of the *Legislation Act 2003*. This consultation drew on the knowledge of persons having expertise in fields relevant to the instrument and ensured that persons likely to be affected by the instrument had an adequate opportunity to comment on the content. The Office of Best Practice Regulation Review (OBPR) was consulted and due to the minor impact on business and the community a Regulation Impact Statement was not required (OBPR 26467). A certification letter was provided to OBPR.

Details of the Regulations are set out in the [Attachment A](#).

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

A statement of Compatibility with Human Rights is at [Attachment B](#).

Incorporation by reference

In accordance with paragraph 15J (2) (c) of the *Legislation Act 2003* and subsection 3 (2) of the Act, the TSI Regulations 2021 applies, adopts or incorporates matters contained in other instruments or writing as in force from time to time.

Subsection 3(2) of the Act provides, among other things, that regulations made for the purposes of the definition of ***immediately reportable matter*** or ***routine reportable matter*** may prescribe the matter by applying, adopting or incorporating any matter contained in any other instrument or writing as in force from time to time.

Both of these definitions, and the power to prescribe matters by incorporation, are engaged in sections 11, 12, 20, 28 and 29 of the TSI Regulations which have the operative effect of prescribing immediately reportable matters or routine reportable matters. The instruments or writing incorporated by reference are:

- in item 8 of subsection 12 (1) and item 6 of subsection 12 (2) – use of the term ***approved flight envelope*** (defined in section 6) which incorporates the following writing approved, from time to time, by CASA or the appropriate authority of another country:
 - aircraft’s flight manual;
 - aircraft’s cockpit placards;
 - other operating documents;
- in item 5 of subsection 11 (1) and item 5 of subsection 12 (3) – use of the term ***separation standard*** (defined in section 6) which incorporates the following as in force from time to time:
 - the Australian Flight Information Region specified in the *Aeronautical Information Publication* produced by Airservices Australia;
 - the Manual of Air Traffic Services produced by Airservices Australia and the Department of Defence;
 - ICAO document 4444 (also published and referred to as ICAO Doc 4444);
 - if an aircraft is operating outside the Australian Flight Information Region – the local standard;
- in item 3 of subsection 12 (1) – use of the term ***below minimum altitude*** (defined in sections 8, 9 and 10) which incorporates the following as in force from time to time:
 - certain provisions referenced in the *Civil Aviation Regulations 1988*;
 - certain provisions referenced in the *Civil Aviation Safety Regulations 1998*;
 - if an aircraft is operating outside the Australian Flight Information Region – the local standard;
 - in the absence of any local standard – ICAO document 4444 (also published and referred to as ICAO Doc 4444);
- in sections 28 and 29 – use of the term ***Rail Safety National Law*** (defined in section 26) which incorporates the following as in force from time to time:

- the Rail Safety National Law as set out in Schedule 1 to the *Rail Safety National Law (South Australia) Act 2012* – specifically Category A notifiable occurrences and Category B notifiable occurrences within that law;
- a law of a State or Territory that corresponds to the Rail Safety National Law;
- a regulation made under the Rail Safety National Law (or its corresponding State or Territory law).

The incorporated documents are described below, together with a description of how they may be obtained.

Aircraft flight manual, cockpit placards and other operating documents

The aircraft flight manual comprises the flight manual, checklists of normal, abnormal and emergency procedures for the aircraft and any operating limitation, instructions, markings and placards (such as cockpit placards) relating to the aircraft. Together, these form the instructions for safe operation of a specific aircraft. Typically, these documents are proprietary information belonging to the aircraft designers and manufacturers and are themselves incorporated in operations manuals which are approved by National Aviation Authorities (such as CASA or other foreign regulators) and carried on board the aircraft. Aircraft flight manuals are publicly accessible but attract access charges from the publishing manufacturer. Access to other aircraft-specific operating documents, which may contain commercial-in-confidence information, is subject to permission from air operators.

The ATSB does not control or routinely carry these operational documents which have regulatory underpinnings and are approved by the aviation safety regulator. To the extent that the ATSB has a copy of a document of this nature, it will reasonably make available the document for viewing by prior arrangement at an ATSB office or by virtual appointment, having regard to the ATSB's primary role as independent safety investigator. The ATSB understands that access, by prior arrangement, is also available through contacting CASA.

Aeronautical Information Publication (AIP)

The AIP is part of the Aeronautical Information Package published by Airservices Australia in its role as an Aeronautical Information Service provider under air services legislation to disseminate information on safe air navigation. The AIP is primarily used by flight crew to assist air navigation and operational planning activities. The AIP is copyright of Airservices Australia but is freely available online via: www.airservicesaustralia.com/aip/aip.asp.

Manual of Air Traffic Services

The Manual of Air Traffic Services is an operational document based on Part 172 of *the Civil Aviation Safety Regulations 1998* and International Civil Aviation Organization (ICAO) standards. The document is copyright of Airservices Australia and the Department of Defence but is freely available to download from the Airservices Australia website and may be accessed via: <https://www.airservicesaustralia.com/mats/default.asp>.

ICAO Doc 4444

ICAO Doc 4444 is a document published by ICAO setting out procedures and standards for air navigation services. The document is publicly available but subject to copyright that belongs to ICAO. It is made available by ICAO for a fee from the ICAO store via: <https://store.icao.int/>. The ICAO store sells commercial products, including ICAO Doc 4444,

for which there is a cost to obtain a copy. The costs are not considered unreasonably onerous for operators that would otherwise be required, in conducting their regulated aviation activities, to have regard to the standards and requirements.

The ATSB also notes that persons required to comply with relevant reporting obligations under Part 2 of the TSI Regulations 2021 are sophisticated readers with pre-requisite knowledge to operate in the aviation industry (an alternative, public voluntary reporting scheme is established separately under the *Transport Safety Investigation (Voluntary and Confidential Reporting Scheme) Regulation 2012*). To that end, ICAO Doc 4444 was also referenced in the prior *Transport Safety Investigation Regulations 2003* without concern from industry about access and ability to secure a correct interpretation.

As best practicable to afford public access to an incorporated document subject to copyright, the ATSB will make available the document for viewing, free of charge, at any ATSB office or through virtual appointment, by prior arrangement.

References to other Commonwealth, State and Territory legislation

Civil aviation legislation such as the *Civil Aviation Act 1988* and the *Civil Aviation Safety Regulations 1998* that is mentioned or cross-referenced in operative provisions in the TSI Regulations 2021 may be accessed on the Federal Register of Legislation.

State-based or Territory-based legislation which is incorporated, in particular the Rail Safety National Law, is available from the website of the Office of the National Rail Safety Regulator (ONRSR) which contains a directory via:

<https://www.onrsr.com.au/publications/rail-safety-national-law-related-legislation>.

Details of the *Transport Safety Investigation Regulations 2021*

Part 1 - Preliminary

Section 1 - Name

This section provides that the title of the instrument is the *Transport Safety Investigation Regulations 2021* (TSI Regulations 2021).

Section 2 - Commencement

This section provides for the whole of the instrument to commence on 30 September 2021.

Section 3 - Authority

This section identifies that the instrument is made under the *Transport Safety Investigation Act 2003* (the Act).

Section 4 – Schedules

This section makes provision for the amendment or repeal of an instrument listed in the Schedule.

Section 5 – Definitions

The section lists defined terms and identifies the relevant section where these definitions are located.

Part 2 – Aircraft Operations

Part 2 of these regulations prescribes those matters that are required for the mandatory reporting of aviation accidents and incidents. This includes occurrences that are reportable matters, the particulars to be provided in a report and who a report is to be provided to.

Section 6 – Definitions for Part 2

This section provides definitions that are applicable to the terms used in Part 2 of these Regulations. The definitions in this section largely replicate definitions used in the current TSI Regulations 2003 with some additional items to define types of remotely piloted aircraft. This consists of a type 1 RPA, which is defined in this section as:

- a. an RPA that is,
 - i. a large RPA (within the meaning of the *Civil Aviation Safety Regulations 1998*) which refers to an RPA with a gross weight of more than 150kg; or
 - ii. a medium RPA (within the meaning of the *Civil Aviation Safety Regulations 1998*) which refers to an RPA with a gross weight of more than 25kg but not more than 150kg.
 - iii. an RPA for which a type certificate (within the meaning of the *Civil Aviation Safety Regulations 1998*), is in force, which means that the RPA meets specified airworthiness standards; and

- b. that is not:
 - i. an excluded RPA (within the meaning of the *Civil Aviation Safety Regulations 1998*); or
 - ii. a micro RPA (within the meaning of the *Civil Aviation Safety Regulations 1998*) which refers to an RPA with a gross weight of not more than 250 grams.

In a similar manner, a type 2 RPA is defined as:

- a. an RPA that is not:
 - i. a type 1 RPA; or
 - ii. an excluded RPA (within the meaning of the *Civil Aviation Safety Regulations 1998*); or
 - iii. a micro RPA (within the meaning of the *Civil Aviation Safety Regulations 1998*).

Both of the definitions refer to RPA's that are not an 'excluded RPA'. This term is defined in regulation 101.237 of the *Civil Aviation Safety Regulations 1998* and refers to RPA when operated in accordance with a constrained set of operating conditions known as the standard RPA operating conditions. These conditions in regulation 101.238 of the *Civil Aviation Safety Regulations 1998* include limits on altitude, proximity to people and population, requirements for line of sight and where the RPA may be operated.

When subject to the standard RPA operating conditions, an excluded RPA may include the following types of operations:

- a. aerial spotting;
- b. aerial photography;
- c. agricultural operations;
- d. aerial communications retransmission;
- e. the carriage of cargo;

provided that it is being operated by or on behalf of the RPA owner, over land owned or occupied by the RPA owner and where no remuneration is received.

In addition, subregulation 101.237(8) of the *Civil Aviation Safety Regulations 1998* provides that an RPA is an excluded RPA if it is being operated by a person for the purpose of the person receiving training from an RPA operator who holds the relevant certificate and in accordance with the operator's documented training procedures.

A type 2 RPA is defined by excluding a range of types RPA from the definition, including a large RPA, excluded RPA and a micro RPA. Subject to these exclusions, the types of RPA that meet the definition of type 2 include those listed in regulation 101.022 of the *Civil Aviation Safety Regulations 1998*:

- a. very small RPA - an RPA with a gross weight of more than 250 g, but not more than 2 kg; and
- b. a small RPA - an RPA with a gross weight of more than 2 kg, but not more than 25 kg.

The inclusion of definitions for different types of RPA allows these regulations to provide for different reporting requirements for safety incidents based upon the specific RPA type. Accordingly, section 11 of these regulations provides that the larger type 1 RPA will have greater reporting obligations than a smaller type 2 RPA.

Section 7 – Application of Part 2

This section makes it clear that Part 2 only relates to matters involving the operation of an Australian aircraft in the course of relevant air navigation. For the purposes of these regulations, relevant air navigation is defined in subsection 7(2) as ‘air navigation in relation to which, under subsection 11(1) of the Act, the ATSB’s powers may be exercised’. Section 11(1) of the Act sets out the constitutional limitations of this Act, and allows for the powers, so far as they relate to aircraft and air navigation to be exercised for the broad range of specified purposes. There will be no practical exclusion of any type of aircraft operation by the reference to the constitutional limitations.

The requirement for aircraft to be operating in the course of relevant air navigation means that Australian registered aircraft are subject to the requirements of Part 2 regardless of where they are operating in the world, whereas foreign registered aircraft are only subject to Part 2 where it is operating in Australian territory.

Subsection 7(3) also provides that Part 2 does not apply to an Australian defence aircraft (an aircraft used by the Australian Defence Force), and an exempt foreign aircraft (an aircraft used in the military, customs or police services of a foreign country). Definitions for these aircraft types are in section 3 of the *Transport Safety Investigation Act 2003* (TSI Act). Subsection 7(3) does also not apply to a RPA that is not a type 1 or 2 RPA and accordingly these aircraft are not required to report transport safety matters.

Despite this, an Australian defence aircraft could be investigated at the request of an appropriate authority of the Australian Defence Force under subsection 22(3) of the Act. Given the limited jurisdiction to investigate these aircraft under the Act it is not necessary to subject them to reporting requirements of Part 2 of the regulations.

Subsection 7(4) makes it clear that where a reportable matter occurs involving an aircraft excluded by subsection 7(3) and an aircraft not excluded by subsection 7(3), the latter aircraft is still subject to the reporting requirements of Part 2 of the Regulations.

Subsection 7(5) provides the circumstances when the matters under Part 2, involving manned aircraft operations applies. This requirement is based upon the definition of the term ‘Accident’ set out in Annex 13 to the Convention on International Civil Aviation which refers to occurrences associated with the operation of the aircraft occurring within a specified period of operation.

For a manned aircraft, subsection 7(5) requires that an immediately reportable matter under section 11, or a routine reportable matter under section 12, need only be reported where it occurs during the period beginning when the aircraft is being prepared for take-off and ending after all the passengers and crew members have disembarked after the flight.

For an unmanned aircraft, subsection 7(6) specifies a similar period whereby matters need only be reported where they occur between the period, beginning when the aircraft is ready to move for the purpose of flight and ending when the aircraft comes to rest at the end of the flight and the primary propulsion system is shut down.

The only exception to this period is subsection 7(7) where a death or serious injury arises later but has occurred as a result of an occurrence during the period defined in subsection 7(5) or 7(6).

Section 8 – Meaning of below minimum altitude – aircraft operating in the Australian Flight Information Region before 2 December 2021

Flight below the minimum altitude is a routine reportable matter for air transport operations and specified in item 3 of the table in section 12 of these regulations. Section 8 of these regulations provides a methodology for determining when an aircraft in the Australian Flight Information Region (AFIR) flies below the minimum altitude by reference to the relevant provisions in the *Civil Aviation Regulations 1988* (CAR) for aircraft flying under Visual Flight Rules (VFR) at night or under Instrument Flight Rules (IFR).

This provision is applicable until 2 December 2021 which is when the provisions of the CAR that this section relies upon will be repealed.

Section 9 – Meaning of below minimum altitude – aircraft operating in the Australian Flight Information Region on or after 2 December 2021

On 2 December 2021, the *Civil Aviation Safety Amendment (Part 91) Regulations 2018* will replace the provisions of the CAR relating to minimum heights relied on by section 8 above. Accordingly, section 9 of these regulations includes a revised methodology for minimum altitude that reflects these amendments.

After 2 December 2021, Section 9 of these regulations identifies the meaning of below minimum altitude for aircraft in the AFIR by reference to the relevant provisions in the *Civil Aviation Regulations 1988* (CAR) for aircraft flying under Visual Flight Rules (VFR) at night or under Instrument Flight Rules (IFR).

Section 10 – Meaning of below minimum altitude – aircraft operating outside the Australian Flight Information Region

This section provides that when an aircraft outside the AFIR flies below the minimum altitude by reference to the local standard that is in force in the place where the aircraft is operating. Where there is no local standard in force, the minimum altitude will be specified in ICAO document 4444.

Section 11 Aircraft operations – immediately reportable matters

Section 18 of the Act requires a responsible person with knowledge of an immediately reportable matter to report it to a nominated official as soon as is reasonably practicable.

Section 3 of the Act leaves the list of immediately reportable matters to be reported under section 18 to be prescribed by regulations. Section 11 of these Regulations includes a list of transport safety matters that are immediately reportable for aviation. These reportable matters replicate those that are reportable under the current TSI Regulations 2003. This extends to death, serious injury, the aircraft being missing or suffering serious damage or a breakdown of separation standards.

To account for the addition of RPA in Part 2 of these regulations, section 11 is broken up into matters to be reported by:

- a. all aircraft operations other than an excluded aircraft or a type 2 RPA (section 11(1));
- b. by aircraft engaged in *air transport operations* (section 11(2)); and
- c. type 2 RPA operations (section 11(3)).

The more significant reporting responsibilities attached to aircraft engaged in air transport operations is consistent with the TSI Regulations 2003. Greater safety implications are foreseeable, in particular, where an aircraft is engaged in the carriage of fare paying passengers. Where the aircraft is carrying fare-paying passengers it is operating as part of a global air transport system and it is therefore possible that there may be broader systemic issues.

Immediate reporting for small RPAs is limited to the few occurrences types where there is the potential for the ATSB to investigate in this category if the nature of the occurrence indicates that there may be broader systemic issues.

Consistent with the TSI Regulations 2003, subsection 11(4) excludes death and serious injury occurring in certain circumstances from being an immediately reportable matter under paragraphs 11(1)(a) or 11(4)(a). The investigation of a death or serious injury in the circumstances outlined in these instances would be unlikely to enhance the safety of aircraft operations in the future. In such cases the death or serious injury would either be too remotely connected with, or not the result of, a transport safety matter (i.e. it may be a security or a criminal issue). However, the death of, or serious injury to, a flight crew member from natural causes is not excluded in the regulation. The flight crew member has duties essential to the flight management of the aircraft. Therefore, the death of, or serious injury to, a flight crew member from natural causes is a transport safety matter and would be reportable.

Section 12 Aircraft operations – routine reportable matters

Section 3 of the Act leaves the list of routine reportable matters to be reported under section 19, as a written report, to be prescribed by regulations. Under section 19, the written report must be provided to a 'nominated official' within 72 hours.

Accordingly, this section is broken up into routine reportable matters for:

- a. Air Transport Operations other than an excluded aircraft or a type 2 RPAS (section 12(1));
- b. aircraft operation (other than air transport operation or an operation of an excluded aircraft or a type 2 RPAS));
- c. Type 2 RPAS.

The occurrences listed as routine reportable matters replicates the list used for this purpose in the TSI Regulations 2003.

Section 13 Aircraft operations – responsible persons

Section 3 of the Act leaves the list of 'responsible persons' who are required to report immediately and routine reportable matters to be prescribed by regulations. This section provides a list of persons who, by the nature of their qualifications, experience or professional association with a particular transport vehicle, or number of transport vehicles, would be likely to have knowledge of an immediately or routine reportable matters in aviation, should one occur.

The list does not preclude any other person from making a report, for example, a member of the public. However, as they are not 'responsible persons', they are not subject to penalties under sections 18 and 19 of the Act for not making a report.

Section 14 Aircraft Operations - particulars for immediate reports

This section prescribes the particulars that must be reported when an immediate report of an Immediately Reportable Matter for the purposes of section 11 including accidents, such as death or serious injury, as well as serious incidents.

In accordance with section 18 of the Act, these matters need to be reported as soon as is reasonably practicable by a responsible person prescribed in the regulations. This section provides the relevant particulars that must be provided when making this report. The particulars remain the same as those required under the TSI Regulations 2003.

The purpose of prescribing the relevant particulars is to ensure that the ATSB receives adequate information in relation to the immediately reportable matter, rather than just a report of the specific occurrence. Reports of IRMs in accordance with subsection 18(1) are 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.

The information specified in section 14 of these Regulations is limited to the information which provides an overview of the 'what', 'where', 'when', 'how' and 'why' the aviation immediately reportable matter occurred. Section 18(1) of the Act makes it clear that the particulars are reportable only to the extent that they are known by the person reporting them.

Section 15 Aircraft operations – particulars for written reports

Section 19 of the Act requires that a 'responsible person' who has knowledge of an immediately or routine reportable matter must, within 72 hours, give a written report to a 'nominated official'. Section 19 leaves the content of the written report to be prescribed by regulations. This section of the TSI Regulations 2021 sets out the information required to be reported to a 'nominated official'.

The list of information to be included in the report follows the current requirements of the TSI Regulations 2003 and is applicable to both immediate and routine reportable matters. As a written report is not required until 72 hours after the reportable occurrence, with immediately reportable matters it is expected that much of the required information would have already been obtained as a result of the reporting requirements under section 18 of the Act. However, the written report is still necessary for confirmation and may be used to identify inconsistencies with other reported information.

For routine reportable matters, the information provided would be used to decide whether an investigation is necessary. If an investigation is considered to be necessary, the information contained in the report would be used for commencing the investigation. If an investigation is not considered necessary, the information could be used for statistical purposes and safety research and analysis.

Section 16 Aircraft operations – nominated officials

Section 20 of the Act requires that the regulations prescribe a list of persons who are 'nominated officials' in relation to reportable matters. This section prescribes staff members

or a member of the staff of the Australian Maritime Safety Authority (AMSA) as a nominated official.

A staff member is defined in the TSI Act to include the CEO, ATSB staff engaged under the *Public Service Act 1999*, staff of the Commonwealth or a State and Territory Government who have been made available to the ATSB to perform services in connection with the performance of the ATSB's functions or the exercise of its powers and certain delegates.

While the ATSB remains the prime agency for receiving reports, subsection 16(b) includes a staff member of AMSA as 'nominated officials' because they do receive reports of aviation occurrences through the Australian Search and Rescue Coordination Centre. They would be made 'nominated officials' for receiving reports so that 'responsible persons' can meet statutory requirements under the Act without changing their existing reporting practices.

Section 17 Aircraft operations – reports to be given to staff member

This section includes an administrative requirement on a staff member of AMSA who receives a report under section 18 or 19 of the TSI Act, to pass on this report to a staff member (as described in section 3 of the TSI Act) as soon as is practicable.

Part 3 – Marine Operations

Section 18 Definitions for Part 3

This section provides definitions that are applicable to the terms used in Part 3 of these Regulations. The definitions in this section include a number of references to terms that are defined in the Navigation Act.

Section 19 Application of Part 3

This application provision provides the jurisdictional requirement for vessel types that must make reports to the ATSB using descriptions and terminology consistent with the Navigation Act. This section differs from the application provision in the TSI Regulation 2003 which rely upon terminology and descriptions of vessel types that were used in the repealed *Navigation Act 1912*.

The vessel types that are included in Part 3 of these Regulations are those types of vessel that are involved in operations that have national or global consequences for marine safety. The commercial activities that these vessels are engaged in also means that there may be broader systemic issues if they are involved in an immediately reportable matter listed in section 20.

This section limits the application of Part 3 of the TSI Regulations 2021 to matters involving the operations of particular vessel types. These vessel types are:

- a. a regulated Australian vessel (within the meaning of the Navigation Act) in the course of relevant marine navigation;
- b. a foreign vessel (within the meaning of that Act) in the course of relevant marine navigation, if the foreign vessel is:
 - i. in an Australian port; or
 - ii. entering or leaving an Australian port; or

- iii. in the internal waters of Australia; or
 - iv. in the territorial sea of Australia;
- c. the operation of a domestic commercial vessel (within the meaning of the Marine Safety (Domestic Commercial Vessel) National Law) on an interstate voyage.

The vessel types with reporting obligations under Part 3 are subject to the limitations specified in subsection 19(1), including the requirement for a regulated Australian vessel and foreign vessels within Australian waters as described in subparagraph 19(1)(b)(i) – (iv) to be in the course of ‘relevant marine navigation’.

The term ‘relevant marine navigation’ is defined as:

- a. marine navigation conducted in the course of trade or commerce with other countries or among the States; or
- b. marine navigation:
 - i. outside Australia; or
 - ii. within a Territory, or to or from a Territory; or
 - iii. within a Commonwealth place, or to or from a Commonwealth place; or
 - iv. on a ship owned or operated by a constitutional corporation or Commonwealth entity.

The *Marine Safety (Domestic Commercial Vessel) National Law* is based on the policy established through the Council of Australian Government (COAG) Inter-governmental Agreement on Commercial Vessel Safety Reform and established the Australian Maritime Safety Authority on behalf of the Commonwealth, as the regulator for domestic commercial vessels. A policy decision was made not to include a reference to the ATSB as the national investigator for domestic commercial vessels as part of the COAG national reforms. On this basis, the reporting requirements for domestic commercial vessels in the TSI Regulations 2021 is limited to those vessels on an interstate voyage which is commensurate with the requirements specified in the TSI Regulations 2003, that were based on the now repealed *Navigation Act 2012*.

Subsection 19(3) provides that where an occurrence involves a ship to which Part 3 applies and a ship to which Part 3 that does not, the limitation provision in subsection 19(1) will not prevent the matter being a reportable matter for the first ship. This is consistent with the current application provisions set out in the TSI Regulations 2003.

Subsection 19(4) further limits the application of Part 3 so that matters must only be reported where they have occurred during the period beginning when the first person to board the ship for the purposes of performing duties as a crew member does so and ending when the last crew member to disembark from the ship does so.

To provide for autonomous ships, a further period is specified in subsection 19(5) so that matters must only be reported where they have occurred during a period beginning when the ship is ready to move with the purpose of conducting a voyage, and ending when the ship comes to rest at the end of the voyage and the primary propulsion system is shut down

There are exceptions to the period in subsection 19(6), where death or serious injury would still be reportable if it arises as a later stage but has occurred as a result of an occurrence during the periods defined in subsections 19(4) or (5).

Section 20 Marine operations – immediately reportable matters

Section 18 of the Act requires a responsible person with knowledge of an immediately reportable matter to report it to a nominated official as soon as is reasonably practicable. Section 3 of the Act leaves the list of immediately reportable matters to be reported under section 18 to be prescribed by regulations.

This section of the Regulations provides a list of transport safety matters that are immediately reportable for Marine operations. This list replaces the list of matters in the TSI Regulations 2003 with a new list of matters that reflect marine incidents that must be reported to AMSA under the Navigation Act.

Subsection 20(1) provides that an investigable matter, of a type listed in the table in subsection 20(2), is an immediately reportable matter if that matter has affected, or is likely to affect, the safety, operation or seaworthiness of a ship, or the matter involves:

- a. the death of a person; or
- b. serious injury to a person; or
- c. the loss of a ship; or
- d. the loss of a person from a ship; or
- e. significant damage to a ship; or
- f. loss of cargo of a ship.

The limitations on those investigable matters is included to ensure that the reporting requirements under these Regulations align with those reporting requirements for marine incidents that are set out in section 185 and 186 of the Navigation Act.

Subsection 20(3) provides that damage to an AMSA aid to navigation is an immediately reportable matter without the additional limitations in subsection 20(1). This ensures consistency with the reporting requirements under section 208 of the Navigation Act where a person or the master of a vessel must report damage to an AMSA aid to navigation as soon as practicable.

Subsection 20(4) of these regulations limits the requirement for foreign vessels within the territorial in the course of innocent passage to only report investible matters that:

- a. affect or are likely to affect the safety of navigation;
- b. involve a collision with, or the fouling or damaging of any facility, installation, navigational aid, pipeline or submarine cable.

This provision ensures that the reporting requirements for foreign ships in the course of innocent passage are consistent with the United Nations Convention on the Law of the Sea.

Section 21 Marine operations – responsible persons

Section 3 of the Act leaves the list of 'responsible persons' who are required to report immediately and routine reportable matters to be prescribed by the regulations. Consistent with the TSI Regulations 2003, this section provides a list of persons who, by the nature of their qualifications, experience or professional association with a particular transport vehicle, or number of transport vehicles, would be likely to have knowledge of an immediately reportable matter in marine transport, should one occur.

The list does not preclude any other person from making a report, for example a member of the public. However, they are not a 'responsible person' and are not subject to penalties under sections 18 and 19 of the TSI Act for not making a report.

Section 22 Marine operations – particulars for immediate reports

This section prescribes the particulars that a responsible person with knowledge of an immediately reportable matter are required to report to a nominated official immediately. Under this section, the particulars that must be reported to the ATSB as soon as is reasonably practicable are specified, including:

- a. vessel details;
- b. incident details;
- c. type of activity being undertaken at the time of the incident;
- d. consequences of the incident, including death, injury or loss of any person.

These particulars reflect those that must be provided to the Australian Maritime Safety Authority under section 338 of the Navigation Act for the purpose of giving a report under section 185 or 186 of that Act.

Section 23 Marine operations – particulars for written reports

Section 19 of the TSI Act requires that a 'responsible person' who has knowledge of an immediately reportable matter must, within 72 hours, provide a written report to a 'nominated official'. This section of the TSI Regulations 2021 prescribes the particulars that must be provided in a written report as a follow up to the immediate report required by section 22 of the TSI Regulations 2021

These particulars include:

- a. vessel details;
- b. incident details;
- c. type of activity being undertaken at the time of the incident;
- d. consequences of the incident, including death, injury or loss of any person;
- e. Details as to why the person reporting the incident thinks that the incident occurred;
- f. Details of what has been done to prevent the incident from reoccurring;
- g. Details of the person completing the report and contact details;
- h. Details of any affected person

which are those particulars that are specified in the form approved by the Australian Maritime Safety Authority under section 338 of the *Navigation Act 2012* for the purpose of giving a report under section 185 or 186 of that Act.

Section 24 Marine operations – nominated officials

This section prescribes a list of people who are nominated officials in relation to receiving reports of reportable matters. This list includes a staff member or a member of the staff of the Australian Maritime Safety Authority (AMSA) as a nominated official.

A staff member is defined in the TSI Act to include the CEO, ATSB staff engaged under the *Public Service Act 1999*, staff of the Commonwealth or a State and Territory Government who have been made available to the ATSB to perform services in connection with the performance of the ATSB's functions or the exercise of its powers and certain delegates.

Staff members of AMSA are responsible for receiving a reports of a 'marine incident' under the Navigation Act and on this basis are most likely to receive reports that include immediately reportable matters. This means that a responsible person may provide a report to AMSA as part of their reporting obligations under the Navigation Act which also satisfies the requirements of these Regulations.

Section 25 Marine operations – reports to be given to staff member

Subsections 25(1) requires a member of the staff of AMSA who receives a report of an immediately reportable matter under the TSI Act to pass that report to a staff member as soon as soon as is practicable. In accordance with subsection 25(2), this requirement would not apply where the recipient of the report believes on reasonable grounds that a responsible person has already given, or will give a report to a staff member that relates to the same incident.

Subsection 25(3) of the TSI Regulations also allows a member of the staff of AMSA to pass on a report to a staff member that has been received under section 185 or 186 of the Navigation Act. This is not required where the recipient of the report believes on reasonable grounds that that a responsible person has already given, or will give a report to a staff member that relates to the same incident.

Part 4 – Rail Transport

The requirements in this part for rail reporting would remain unchanged from the TSI Regulations 2003, incorporating the amendments made in 2019.

Section 26 – Definitions for Part 4.

This section would provide definitions that are applicable to terms used in Part 4 of the TSI Regulations 2021.

Section 27 – Application of Part 4

This subsection would provide 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.

The effect of this provision is that an investigable matters would only need to be reported if the ATSB has jurisdiction over that matter and it occurs on a railway line where the RSNL applies.

Section 28 Rail transport – immediately reportable matters

This subsection provides a definition of what constitutes an immediately reportable matter for the purposes of subsection 3(1) of the Act. This type of reportable matter is described as 'investigable matters that are Category A notifiable occurrences, within the meaning of the Rail Safety National Law, as in force from time to time'.

Category A notifiable occurrences are listed in paragraph 57(1)(a) of the RSNL as:

- a. an accident or incident that has caused death, serious injury or significant property damage;
- b. a running line derailment;
- c. a running line collision between rolling stock;
- d. a collision at a level crossing between rolling stock and either a road vehicle or a person;
- e. a suspected terrorist attack;
- f. an accident or incident involving a significant failure of a safety management system that could have caused death, serious injury or significant property damage;
- g. any other accident or incident likely to generate immediate or intense public interest or concern.

Section 29 Rail Transport – routine reportable matters

This section defines the investigable matters that are routine reportable matters for the purposes of subsection 3(1) of the Act. This definition provides that routine reportable matters are investigable matters that are Category B notifiable occurrences, within the meaning of the Rail Safety National Law, as in force from time to time.

Category B notifiable occurrences are set out in paragraph 57(1)(b) of the Rail Safety National Law National Regulations which lists the following items:

- a. a derailment, other than a running line derailment;
- b. a collision involving rolling stock, other than a collision described in paragraph (a)(iii) or (iv);
- c. an incident at a level crossing, other than a collision described in paragraph (a)(iv);
- d. an incident in which a vehicle or vessel strikes an associated railway track structure;
- e. the passing of a stop signal, or a signal with no indication, by rolling stock without authority;
- f. an accident or incident where rolling stock exceeds the limits of authorised movement given in a proceed authority;
- g. a rolling stock run-away;
- h. a failure of a signalling or communications system that endangers, or that has the potential to endanger, the safe operation of trains or the safety of people, or to cause damage to adjoining property;
- i. any slip, trip or fall by a person on railway premises;
- j. a person being caught in the door of any rolling stock;
- k. a person suffering from an electric shock directly associated with railway operations;
- l. any situation where a load affects, or could affect, the safe passage of trains or the safety of people, or cause damage to adjoining property;
- m. an accident or incident involving dangerous goods that affects, or could affect, the safety of railway operations or the safety of people, or cause damage to property;

- n. any breach of a network rule;
- o. any breach of the work scheduling practices and procedures set out in the rail transport operator's fatigue risk management program;
- p. the detection of an irregularity in any rail infrastructure (including electrical infrastructure) that could affect the safety of railway operations or the safety of people;
- q. the detection of an irregularity in any rolling stock that could affect the safety of railway operations;
- r. a fire or explosion on, in, or near, rail infrastructure or rolling stock that endangers the safety of railway operations or the safety of 1 or more people, or causes service terminations or track or station closures;
- s. any incident on railway property where a person inflicts, or is alleged to have inflicted, an injury on another person;
- t. a suspected attempt to suicide;
- u. the notification that a rail safety worker, when required to do so under the drug and alcohol management program of a rail transport operator, has failed to submit to a test in accordance with the testing regime set out in the operator's drug and alcohol management program;
- v. the notification that a rail safety worker has returned a result to a test undergone by the worker in accordance with the testing regime set out in the drug and alcohol management program of a rail transport operator that suggests that the worker was in breach of the operator's drug and alcohol management program at a relevant time;
- w. the infliction of wilful or unlawful damage to, or the defacement of, any rail infrastructure or rolling stock that could affect the safety of railway operations or the safety of people;
- x. a security incident associated with railway premises that affects the safety of railway operations, including an act of trespass, vandalism, sabotage or theft that could affect the safety of railway operations.

Section 30 Rail Transport – responsible person

Section 3 of the Act provides that the list of 'responsible persons' who are required to report matters is to be prescribed by the Regulations. This section provides a list of persons who, by the nature of their qualifications, experience or professional association with a particular transport vehicle, or a number of transport vehicles, would be likely to have knowledge of an immediately reportable matter in rail, should one occur.

The list does not preclude any other person from making a report, for example, a member of the public. However, they are not 'responsible persons' and are not subject to penalties under sections 18 and 19 of the Act for not making a report.

Section 31 Rail Transport – particulars for reports of reportable matters

In accordance with section 18 and 19 of the TSI Act, this section prescribes the particulars to be included in relation to a report. The purpose of prescribing the relevant particulars is to ensure that the ATSB receives adequate information in relation the immediately reportable matter, rather than just a report of the specific occurrence. These particulars are:

- a. the information required to be provided under the RSNL, for the purpose of providing the report to the National Rail Safety Regulator about a notifiable occurrence; or
- b. if information is not required under the RSNL, the responsible person must provide the particulars that are set out in subsection 31(2). This includes an overview of the what, where, when, how and why of the rail safety matter.

Section 32 Rail transport – nominated officials for reportable matters

Section 20 of the Act requires that the regulations prescribe a list of persons who are 'nominated officials' in relation to immediately reportable matters. This section prescribes the National Rail Safety Regulator and a staff member as nominated officials for reportable matters under section 18 of the Act (immediate reports).

Subsection 32(b) of these Regulations provides that the National Rail Safety Regulator is the only nominated official for immediately reportable and routine reportable matters that are reported under section 19 of the Act, as written reports provided within 72 hours of the occurrence.

The effective operation of these provisions is contingent upon the National Rail Safety Regulator being able share information with the ATSB. Provision for cooperation and the sharing of information is provided for as one of the functions of the Regulator in section 13 of the RNSL.

Section 33 Rail Transport – certain reports to be given to National Rail Safety Regulator

This section allows a staff member who receives a report under section 18 (immediate report) of the Act to give the report to the National Rail Safety Regulator as soon as practicable.

Section 34 Rail Transport – certain reports to be given to staff member

This section allows the National Rail Safety Regulator to give a report received under section 18 (immediate report) or section 19 (written report) of the Act to a staff member as soon as practicable.

Part 5 – General

Section 35 – Delegation by the ATSB or the Chief Commissioner

In accordance with section 63B of the Act, the ATSB may delegate all of its powers under the Act (other than the power to publish a report) to any person. In a similar manner, section 63C of the Act provides that the Chief Commissioner may delegate all or any of their powers to any person other than the power to appoint a special investigator.

These powers of delegation are subject to the limitations in subsections 63B(2) and 63C(5) of the Act whereby the ATSB or Chief Commissioner must not delegate their respective powers unless they are satisfied that a person meets the criteria prescribed by the Regulations.

This section of the Regulations specifies the criteria, one of which a person must satisfy to be delegated powers by the ATSB or Chief Commissioner. This criteria is to ensure that the person has appropriate experience or qualifications to be involved in one or more aspects of a transport safety investigation. Subsection 35 (b) also requires that where the power to be

delegated is a power under Division 2 or 3 of Part 5 of the Act, a person must have received appropriate training and briefing which would ensure that they are made aware of the extent of their powers and the circumstances in which they are to be used.

Section 36 – Delegation by the Chief Executive Officer

This section requires that any person delegated powers of the Chief Executive Officer under section 63D of the Act, must have knowledge of, and experience in implementing, the requirements of the *Public Governance, Performance and Accountability Act 2013* and the *Public Service Act 1999*. This requirement is to ensure that any person exercising these powers has sufficient skills and experience to undertake the relevant function.

Section 37 - Special Investigators

In accordance with section 63E of the Act, the Chief Commissioner may appoint a person as a special investigator whether they are satisfied that the person meets criteria prescribed by the Regulations.

For the purposes of prescribing the relevant criteria, this section requires a person to satisfy one of the criteria in paragraph 35(a) of these Regulations. This would ensure that a person who holds this appointment has appropriate skills and experience to undertake the relevant requirements.

Section 38 – Functions of ATSB

Section 12AA of the Act sets out the ATSB's functions to improve transport safety, and those things that are not functions of the ATSB. Paragraph 12AA(1)(a) of the Act specifies the means for improving transport safety which includes receiving reports of transport safety matters, reportable matters and other safety information that is prescribed by regulation.

For the purpose of this paragraph, section 38 prescribes the 'other safety information' as:

- a. information obtained or generated under the REPCON scheme established under section 7 of the *Transport Safety Investigation (Voluntary and Confidential Reporting Scheme) Regulation 2012*; and
- b. information obtained or generated under Subpart 13.K of Part 13 of the *Civil Aviation Safety Regulations 1998*.

This provision follows the arrangements provided under the TSI Regulations 2003.

Section 39 – International Obligations

Section 12AD(1) of the TSI Act provides that the ATSB must ensure that its relevant powers are exercised in a manner that is consistent with Australia's obligations under international agreements that are identified in the Regulations.

Section 12AD(2) of the TSI Act provides that the Chief Commissioner must ensure that their powers are exercised in a manner that is consistent with Australia's obligations under international agreements (as in force from time to time) that are identified by the regulations.

For the purposes of subsections 12AD(1) and (2) of the Act, the Regulations would specify the following obligations under international agreements:

- a. articles 26, 37 and 38 of the Convention on International Civil Aviation, done at Chicago on 7 December 1944, in so far as they relate to aviation safety investigation, and Annex 13 to that Convention;
- b. article 23 of the International Convention on Load Lines, done at London on 5 April 1966;
- c. the Treaty between Australia and the Democratic Republic of Timor-Leste Establishing their Maritime Boundaries in the Timor Sea, done at New York on 6 March 2018;
- d. article 94(7) of the United Nations Convention on the Law of the Sea, done at Montego Bay on 10 December 1982; and
- e. the following provisions of the International Convention for the Safety of Life at Sea, done at London on 1 November 1974 (SOLAS Convention):
 - a. Regulation 21 of Chapter I of the Annex to the SOLAS Convention;
 - b. Regulation 6 of Chapter XI-1 of the Annex to the SOLAS Convention;

These provisions of the SOLAS Convention make Parts I and II of the Code of the International Standards and Recommended Practices for a Safety Investigation into a Marine Casualty or Marine Incident (Marine Casualty Code) mandatory.

Subsection 12AD(3) of the Act also provides that in exercising any powers under the Act, both the ATSB and Chief Commissioner must also have regard to any rules, recommendations, guidelines, codes or other instruments that are promulgated by an international organisation (such as the International Maritime Organization) that are identified in the Regulations.

For this purpose, section 39 of these Regulations would specify Part III of the Marine Casualty Code. Part III of the Code contains guidance and explanatory material for investigations involving marine casualties for ships covered by the International Convention for the Safety of Life at Sea (SOLAS), 1974 and would replace the previous version of the Code set out in the TSI Regulations 2003.

Section 40 – Immediate reports

Section 18 of the Act states that regulations will prescribe the means by which an immediate report is to be made by a 'responsible person' to a 'nominated official'. This section prescribes telephone or another form of telecommunication or radio communication because they constitute the quickest forms of communication and the means through which reports are presently received. These forms of communication allow timely decisions to be made about whether to investigate and take actions necessary to preserve perishable evidence.

Section 41 Written reports

Section 19 of the Act provides that the Chief Commissioner may give a notice to a person which requires them to give a written report in relation to an immediately or routine reportable matter within a specified timeframe by the means specified in the Regulations.

For this purpose, this section prescribes email, electronic lodgement or data transfer in a format approved by the ATSB as means for providing a written report.

Section 42 – Identity cards

Section 29 of the Act states that the identity card must be in a form prescribed by regulations. This section of the Regulations sets out information to be included in an identity card that appropriately identifies a person who has been delegated investigation powers under the Act when they are exercising those powers.

Section 43 – Fees for attending before ATSB

Section 32 of the Act enables the ATSB to require the attendance of a person for the purpose of an investigation or require a person to produce entitled to be paid fees and allowances for to this in accordance with the Regulations.

In specifying an amount, this section takes into account that a person may be called upon to appear before the ATSB in their professional capacity and should be eligible to be remunerated for the wages, salary or fees that the person would normally be paid up to a maximum amount. It also provides an eligibility for remuneration for a person who is called upon to appear before the ATSB for reasons other than their professional capacity but who nevertheless may forgo their wages, salary or fees in doing so. Where a person is not remunerated in their occupation by wages, salary or fees this section would make them eligible for a fee for their attendance.

The section ensures that a person called to appear before the ATSB has an entitlement to fair compensation for expenses such as accommodation and travel. When the Chief Commissioner is considering what is a reasonable allowance for these expenses, the section requires him or her to have regard to the rates (if any) determined for public service employees by the Australian Public Service Commission. Further, the entitlement for these allowances will only exist if the person seeks approval from the Chief Commissioner before booking the accommodation and travel.

Section 44 – Recordings that are not on-board recordings (OBRs)

The definition of OBR information under section 48 of the Act is reasonably broad and could possibly capture recordings that were not intended to receive the protections associated with this type of information. Subsection 48(3) of the Act, therefore, allows the 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 section lists those recordings for each mode of transport that do not need to be protected in the same manner as an OBR under the Act as:

- a. Aircraft:
 - i. an oral communication recorded by an air traffic service or a certified air-ground radio service for the purpose of directing or monitoring the progress of an aircraft; or
 - ii. an oral communication recorded by the Australian Maritime Safety Authority.
- b. Ships:
 - i. an oral communication recorded by a ship reporting system or a marine vessel traffic control system for the purpose of directing or monitoring the progress of a ship; or
 - ii. an oral communication recorded by the Australian Maritime Safety Authority.

- c. Rail Transport: a recording of oral communications made by a rail traffic control service provider for the purpose of directing or monitoring the progress of a rail vehicle

The sensitivity of these types of recordings is not the same as a Cockpit Voice Recorder in an aircraft or voice component of a marine voyage data recorder which would constitute an OBR under the Act.

The recordings listed in this section may receive protection under Part 6 of the Act as restricted information, including a broad regime of confidentiality provisions, where they are associated with a transport vehicle that is or was the subject of an investigation

Section 45 - Release of OBR information

Section 51 of the Act allows the ATSB to disclose OBR information to any person if it considers that the disclosure is necessary or desirable for the purposes of transport safety. Subsection 51(2) also states that the ATSB may only disclose OBR information that is, or that contains, personal information in the circumstances prescribed by regulations.

This section provides that the ATSB would only disclose OBR information that is or contains personal information when it is required to do so by an international agreement mentioned in regulation set out in section 39 of these Regulations. The additional restriction on the disclosure of personal information is consistent with the Commonwealth's privacy law policy. It ensures that the privacy of individuals concerned will not be unnecessarily compromised even where the ATSB considers that the release of OBR information is necessary or desirable for the purposes of transport safety.

Section 46 – Release of restricted information

Section 61 of the Act allows the ATSB to disclose restricted information to any person if the Executive Director considers that the disclosure is necessary or desirable for the purposes of transport safety. Subsection 61(2) also states that the ATSB may only disclose Restricted information that is, or that contains, personal information in the circumstances prescribed by regulations.

The additional restriction on the disclosure of personal information is consistent with the Commonwealth's privacy law policy. It ensures that the privacy of the individuals concerned will not be unnecessarily compromised even where the ATSB considers that the release of restricted information is necessary or desirable for the purposes of transport safety. Where the restricted information is, or contains personal information, subsection 46(1) of these Regulations allows its release for the purposes of transport safety where the Executive Director is required to do so because of an international obligation referred to in section 39 of these Regulations.

Subsection 46(2) allows the ATSB to disclose a limited category of restricted information, that is or contains personal information, to a relevant body where it is for the purpose of transport safety data sharing, reporting, investigation of a transport safety matter or conducting a coronial inquiry. The information must also assist the relevant body in carrying out a statutory obligation. A relevant body is defined in the Act as another Department, an agency of the Commonwealth, a State or Territory Government, an agency of a State or Territory, or a coroner.

The information is only released to the defined relevant bodies for the purposes stated. Such specificity recognises the importance of the privacy of individuals and is consistent with the spirit of the Commonwealth's privacy law.

Section 47 – Fees for attending coronial inquiry

Section 67 of the Act allows for regulations to prescribe the fees and allowances to be paid by the relevant State or Territory to the Commonwealth for a staff member under the Act attending a coronial inquiry. This section requires that they are attending as a witness, giving an expert opinion and have been issued a certificate under section 65 of the Act to confirm their involvement in an investigation into a specified matter.

This section would set out a fair payment to be made to the Commonwealth for expenses incurred by the staff member's attendance. The Commonwealth is to be paid a fee equivalent to the staff member's salary, within the monetary limitations set out in the regulation, for the staff member's attendance at the coronial inquiry up to a maximum fee payable. The fee also includes remuneration for reasonable costs incurred by the staff member for transport and accommodation for attendance at the coronial inquiry.

Paragraph 47(1)(d) provides a discretionary mechanism for the ATSB to seek to recover legal costs that a staff member may incur while attending a coronial inquiry. The legal representation of staff members at coronial inquiries is provided for by section 68 of the Act. Legal representation in some cases may be necessary to allow staff members to focus on their role as an assistant to the coroner in providing expert opinion, or as a witness, and not in defending the findings of the investigation to legal representatives with interests other than transport safety.

Schedule 1 – Repeals

Item [1] – The whole of the instrument

Section 4 of these Regulations provides for an instrument listed in the Schedule will be amended or repealed as set out in the applicable items in the Schedule.

Schedule 1 would list the *Transport Safety Investigation Regulations 2003* which would repeal the entire instrument. The repeal of that instrument would allow for new regulations to be made pursuant to section 71 of the TSI Act.

Statement of Compatibility with Human Rights

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

Transport Safety Investigation Regulations 2021

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 *Transport Safety Investigation Regulations 2021* (the instrument) is to prescribe matters required to give effect to provisions in the *Transport Safety Investigation Act 2003* (TSI Act), such as defining specific occurrences constituting reportable matters, listing persons responsible for reporting and nominating officials for receiving reports.

Human rights implications

Right to protection against unlawful or arbitrary and interferences with privacy – Article 17 of the International Covenant on Civil and Political Rights

This 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.

Reportable matters

Part 3 of the TSI Act sets out the requirements for the compulsory reporting of accidents to a nominated official as an immediately or routine reportable matter, while the instrument prescribes various matters to facilitate these reporting requirements. Provisions in parts 2,3 and 4 of this instrument detail the types aviation, marine and rail incidents that must be reported either immediately (as soon as is reasonably practicable) or as a routine matter within 72 hours by a responsible person.

The compulsory nature of these reporting requirements limits the right to protection against interference with privacy in that a person is required to report those matters prescribed by this instrument, including personal information to the ATSB. The personal information that is collected as part of this process includes:

- a. name and contact details of the person making a report;
- b. name and contact details of crew, including nationality;
- c. in the event of death, passengers names and nationalities.

The TSI Act makes it an offence not to report a reportable matter to the ATSB including the particulars prescribed by the TSI Regulations 2021.

Any interference or limitation on the privacy of an individual through the reporting of information to the ATSB is reasonably required in the interests of transport safety by ensuring that the ATSB has timely access to such information that is necessary to establish whether it is required to conduct an investigation into a matter. Information collected by the ATSB is handled in accordance with the requirements of the *Privacy Act 1988*, including the collection, storage, security, use, disclosure and quality of personal information.

Information that is collected by the ATSB may also be ‘restricted information’ for the purposes of part 6 of the TSI Act which provides a number of protections in relation to the use or disclosure of this information. This includes that a person cannot be required by a court to disclose restricted information, and any information disclosed in contravention of the Act is not admissible on civil or criminal proceedings.

Provision of information to the ATSB.

The TSI Regulations 2021 provides for a person to report a reportable matter to a nominated official prescribed by these regulations. For aviation and marine matters, this means that a report may be made directly to the Australian Maritime Safety Authority (AMSA). Where the report is submitted directly to AMSA, the instrument requires AMSA to pass the report to the ATSB as soon as is reasonably practicable.

In a similar manner, a responsible person may also report an immediately or routine rail reportable matter to the National Rail Safety Regulator. Where a report is made directly to the regulator, the instrument establishes that report may be provided to the ATSB.

In this instance, the passing of reports from AMSA or the National Rail Safety Regulator to the ATSB may interfere with the privacy of an individual in that personal information provided as part of the reporting requirements may be shared across agencies.

Any interference or limitation on the privacy of an individual through the sharing of information between agencies is reasonably required in the interests of transport safety by ensuring that the ATSB has timely access to such information that is necessary to establish whether it is required to conduct an investigation into a matter. This information will also be handled in accordance with the *Privacy Act 1988*, and subject to the type of information, may have the protections regarding the use or disclosure specified in Part 6 of the TSI Act.

Any limitation on this human right is reasonable and permissible when considered against the ATSB’s functions set out in section 12AA of the TSI Act. This section provides that it is not a function of the ATSB:

- a. to apportion blame for transport safety matters;
- b. to provide the means to determine the liability of any person in respect of a transport safety matter;
- c. to assist in court proceedings between parties (except as provided by this Act, whether expressly or impliedly);
- d. to allow any adverse inference to be drawn from the fact that a person was involved in a transport safety matter.

Accordingly, the use of any information received by the ATSB is limited to independently investigating transport safety matters. These function and limitations ensure that any collection, storage or use of personal information is not arbitrary or unlawful and is only for the purposes of ensuring the safety of transport operations.

Provision of information to Regulators

Where the ATSB receives a report of an immediately reportable matter for rail operations, section 33 of the instrument provides that the ATSB may pass on the details of the report, as soon as practicable, to the National Rail Safety 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.

In a similar manner, the ATSB may provide information that it receives to the Civil Aviation Safety Authority and AMSA about serious accidents and incidents, including operator names, registration numbers, times, dates, locations and a description of the event. This information is provided to ensure that these regulators have sufficient information about an occurrence to decide whether to initiate its own, independent regulatory inquiries, and so that necessary safety action can be taken. A person making a report to the ATSB is advised that any information may be to the regulator, and the ATSB aims wherever possible to avoid directly identifying any individuals.

The provision of information to regulators in these circumstances is consistent with the ATSB's functions set out in subsection 12AA(2) of the TSI Act, including:

- a. cooperating with agencies of the Commonwealth, a State or Territory that has functions or powers relating to transport safety or functions affected by the ATSB's function of improving transport safety, and
- b. doing anything incidental to its function of improving transport safety.

While the sharing of information between agencies under this provision may engage this human right, any limitation is reasonably necessary to promote transport safety by ensuring that both the ATSB and the relevant Regulator have timely access to such information as may be necessary to establish whether either body needs to conduct an investigation into a matter. In this instance the information that the ATSB receives (prescribed by this instrument), will only be detailed enough to ensure that a decision can be made quickly as to whether to commence a safety investigation.

Conclusion

This 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.