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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**TRANSPORT SAFETY INVESTIGATION AMENDMENT BILL 2012**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Infrastructure and Transport,  
the Honourable Anthony Albanese, MP)

# TRANSPORT SAFETY INVESTIGATION AMENDMENT BILL

## OUTLINE

The Transport Safety Investigation Amendment Bill proposes amendments to the *Transport Safety Investigation Act 2003* (TSI Act) to:

- give state and territory government Ministers with a responsibility for rail a right to request the Australian Transport Safety Bureau (ATSB) to conduct an investigation in their jurisdiction; and
- clarify the ATSB's capacity to conduct investigations within, or to or from, a Commonwealth Territory;
- provide that On-Board recording and restricted information may be disclosed in accordance with the regulations.

The first two proposed amendments relate to the implementation of commitments contained in the Intergovernmental Agreement on Rail Safety Regulation and Investigation Reform (the IGA). The IGA was signed at the Council of Australian Governments (COAG) meeting on 19 August 2011 and is available online at <http://www.coag.gov.au>.

In addition to the separate establishment of a National Rail Safety Regulator (NRSR), the IGA commits the ATSB to becoming the national rail safety investigator. Fulfilment of this commitment does not require extensive amendments to the TSI Act as the Act already provides the ATSB with the necessary jurisdictional coverage. The ATSB has been investigating rail occurrences under the TSI Act since 1 July 2003.

However, in accordance with agreed policy, the ATSB has limited the focus of its investigation to the rail track that is the defined interstate rail network, running from Brisbane to Perth and Adelaide to Darwin. The confined jurisdiction acknowledges that rail has been the responsibility of the states and territories.

This environment will change by 1 January 2013 when the NRSR comes into being through complementary state and territory legislation. In the new operating environment, the ATSB will need to have the same national jurisdiction as the regulator to fulfil its corresponding role as the national investigator.

The proposed amendment to provide for the states and territories with the statutory means to request the ATSB to conduct an investigation, recognises the contribution the states and territories will make to the expansion of the ATSB's investigation activities. In accordance with the IGA, states will pay for ATSB investigatory services in their jurisdiction or, if they already have an established investigator, meet their own costs and contribute their investigation services.

The amendment relating to the ATSB's capacity to investigate within a territory would be made to clarify the ATSB's existing jurisdiction in this area.

The final amendment in the Bill provides that it is a defence to any prohibition on copying or disclosing restricted information and On-Board Recording (OBR) information if it is done so by a person performing functions or exercising powers under, or in connection with, the TSI Act or Regulations. Restricted information covers information obtained or generated through an investigation as well as information produced as a confidential report. OBR information includes information from a cockpit voice recorder. The main purpose of the amendment is to clarify the position with respect to regulations made under the TSI Act that contain ATSB functions or powers.

## **FINANCIAL IMPACT STATEMENT**

The cost of an investigation, arising from a request from a state or territory Minister, will be met by the relevant state or territory. The cost incurred will vary depending upon the scale of the investigation.

Clarifying the ATSB's capacity to conduct investigations within, or to or from, a Commonwealth Territory will have no financial impact.

More generally, the Commonwealth Government has contributed \$11.2 million to the ATSB to enable it to prepare for a national role as Australia's no-blame rail and maritime safety investigator. By 1 January 2013, the ongoing costs of conducting rail investigations outside the interstate track will be met through cost recovery from the states and territories or through the commitment of existing resources retained by a state and made available to the ATSB by agreement.

In New South Wales and Victoria, where there are existing safety investigation bodies, agreements will be put in place to provide for the states to make their resources available to the ATSB.

The amendment addressing the disclosure of restricted information in accordance with the regulations will have no financial impact.

## **REGULATION IMPACT STATEMENT**

The Office of Best Practice Regulation (OBPR) has advised that a Regulation Impact Statement (RIS) is not required (*OBPR Reference: 12994*).

As a part of the process for deciding on the ATSB as the national rail safety investigator, a RIS was prepared by the National Transport Commission. The RIS can be accessed at: <http://www.ntc.gov.au>.

## **Statement of Compatibility with Human Rights**

The Bill is compatible with human rights. It provides a defence a defence to the prohibition on disclosure of restricted information where the disclosure is in accordance with the regulations. To the extent that the disclosure involves personal information the right to privacy may be engaged. However, this will be the subject of any prescribed regulations rather than the subject of the Bill itself. The regulations will be subject to the requirement to provide a statement of compatibility with human rights.

However, to the extent that any regulations do engage the right to privacy they are expected to advance the right. The object of the restricted information provisions is to ensure the free-flow of information to the ATSB for safety purposes. The provisions achieve this by protecting rights such as privacy.

The Bill is fully compatible with human rights as defined in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

**Minister for Infrastructure and Transport, the Hon Anthony Albanese MP**

## NOTES ON CLAUSES

### Clause 1 – Short Title

This clause provides that the Bill, once enacted, may be cited as the *Transport Safety Investigation Amendment Act 2012*.

### Clause 2 – Commencement

This clause provides that:

- sections 1 to 3 of the Act commence on the day the Act receives the Royal Assent;
- schedule 1 (which contains the amending provisions) will commence on the later of:
  - (a) the day after this Act receives the Royal Assent; and
  - (b) 18 December 2012.

The timing of 18 December 2012 is intended to coincide with the anticipated start date for the other national rail safety reforms, including the commencement of the national rail safety regulator.

### Clause 3 – Schedule(s)

This clause provides that each Act that is specified in a Schedule to this Bill is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item has effect according to its terms.

## SCHEDULE 1

### Amendments

#### Items 1 & 2

Section 11 of the *Transport Safety Investigation Act 2003* (TSI Act) provides the limitations for the exercise of powers under the Act in relation to each of the aviation, maritime and rail transport modes by making reference to relevant constitutional heads of power. For rail, subsection 11(3) states that the powers in the Act, so far as they relate to rail vehicles and rail transport, can only be exercised in relation to matters including:

- rail transport conducted in the course of trade or commerce among the states; and
- rail vehicles and rail track owned or operated by a constitutional corporation.

The Constitution's interstate trade and commerce power (s.51(i)) and constitutional corporations power (s.51(xx)) already provide sufficient jurisdiction for the ATSB to conduct safety investigations in the Australian rail industry. The industry's commercial nature means that practically all rail vehicles are owned or operated by constitutional corporations (i.e. foreign corporations and trading and financial corporations formed within the Commonwealth).

While noting the broad jurisdictional coverage provided by the references to the interstate trade and commerce power, and the corporations power, subsection 11(3) also refers to the territories power in the Constitution (s.122). Paragraph 11(3)(b) states that the powers in the Act can be exercised in relation to rail transport conducted to or from the Northern Territory. The wording is inconsistent with the wording for comparative provisions governing the aviation and maritime modes of transport. Subparagraphs 11(1)(b)(ii) and 11(2)(b)(ii) state that the powers in the Act can be exercised in relation to air/marine navigation within a territory, or to or from a territory.

For consistency, it is proposed that subsection 11(3) should be amended so the reference to the Territories power for rail is consistent with the references in similar subsections for aviation and maritime. The amendment would avoid any confusion surrounding the ATSB's jurisdiction in relation to rail travel occurring within the territories.

In this regard, item 1 of the Bill would omit paragraph 11(3)(b) of the Act. Item 2 would insert a new paragraph 11(3)(c)(ia). The new paragraph would clarify that the powers in the Act could be exercised in relation to rail transport conducted within a territory, or to or from a territory.

### **Item 3**

Item 3 of the proposed Bill would insert new section 21A into the TSI Act. Section 21A would provide for state and territory Ministers, who have a responsibility for rail safety, with a power to request the ATSB to commence a TSI Act investigation into a rail transport safety matter occurring in their jurisdiction. Once the request is received, the ATSB is obliged to make a decision under section 21 of the TSI Act as to whether it will investigate the matter.

In responding, the ATSB must take into account the reasons set out in the request and any resourcing arrangement in place to cover the requested investigation.

As a matter of practice, it should be extremely rare for a State or Territory Minister to need to issue a request. Provided the necessary resourcing arrangements are in place, the ATSB will be performing its function in the rail safety system and meeting expectations to investigate serious accidents and more minor occurrences where there are potential systemic hazards and risks.

The Intergovernmental Agreement on Rail Safety Regulation and Investigation Reform (the IGA) sets out the expectations for the national rail safety investigator. Clause B5 requires that while having regard to the need for an investigation to advance transport safety, the types of matters the ATSB will investigate will generally include:

- (a) accidents involving fatalities, including significant accidents at level crossings;
- (b) significant mainline derailments and collisions;
- (c) significant incidents involving passenger train operations which had the potential to result in fatalities or a significant derailment or collision.

Similar to equivalent investigation bodies around the world the ATSB is not resourced to investigate every possible rail safety occurrence. The categories above will be primary trigger points for the ATSB to conduct an investigation. However, the ATSB will also seek to identify additional occurrences for investigation which are indicative of emerging hazards and risks that have the potential to lead to more serious consequences in the rail safety system. The ATSB will be assisted in fulfilling this function by having access to all notifications of accidents and incidents.

## **Items 4 & 5**

Items 4 and 5 propose, respectively, to omit paragraphs 53(3)(a) and 60(4)(a) of the TSI Act and replace them with new paragraphs to provide a defence to any prohibition on copying or disclosing restricted information and On-Board Recording (OBR) information. The defence is available if the copying or disclosing was done by a person performing functions or exercising powers under, or in connection with, the TSI Act or Regulations.

The definition of restricted information in subsection 3(1) of the TSI Act covers information obtained or generated by the ATSB in the course of conducting a transport safety investigation under the Act. Restricted information also covers information from a report provided in accordance with a confidential reporting scheme established through regulations made under section 20A. OBR information includes information from an aircraft's cockpit voice recorder.

The prohibitions on copying and disclosing OBR and 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. Similarly, in confidential reporting, the prohibitions on disclosure are to encourage persons who fear reprisal to make a report.

However, while there needs to be limitations on copying and disclosing OBR and 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.

Existing paragraphs 53(3)(a) and 60(4)(a) already provide a defence with respect to performing functions or exercising powers under or in connection with the Act. The amendment would add to this by including a reference to performing functions and exercising powers under or in connection with the regulations as well.

Regulation 5.7 of the Transport Safety Investigation Regulations 2003 already provides for disclosing OBR information that contains personal information in accordance designated international agreements. Similarly, regulation 5.8 of the Regulations provides for disclosing restricted information that contains personal information in accordance with designated international agreements. Regulation 5.8 also allows for the disclosure of restricted information containing personal information where it is provided to an authority with responsibility for transport safety matters (however, information coercively acquired is excluded).

The amendment will also be applied to new regulations which are proposed to be made in accordance with section 20A of the Act to establish a voluntary and confidential reporting scheme for the aviation, maritime and rail industries.

The new scheme will replace the existing aviation scheme under the *Air Navigation (Confidential Reporting) Regulations 2006* and the existing maritime scheme under the *Navigation (Confidential Marine Reporting Scheme) Regulations 2008*. There is no existing national scheme for rail.

The new regulations will need to provide a regime for management and disclosure of restricted information that is confidential reporting information. It is necessary that a person who is exercising powers or performing functions under the regulations have defence to the general prohibition on disclosure under the Act.

#### **Item 6**

Item 6 states that proposed new section 21A of the TSI Act, to be inserted by item 3, would apply in relation to a transport safety matter occurring on or after the commencement provisions in clause 2 of the Bill. This would be the latter of:

- (a) the day after this Act receives the Royal Assent; and
- (b) 18 December 2012.