

CONFIDENTIAL REPORTING:

MOVING FORWARD

This paper accompanies the unofficial draft Transport Safety (Confidential Reporting Scheme) Regulations prepared by the ATSB for the purpose of consultation. The ATSB is seeking to consult on the unofficial draft for the purpose of a proposal to replace existing regulations for aviation and maritime confidential reporting schemes (REPCON)¹ while incorporating rail confidential reporting for the first time. Providing for rail confidential reporting is consistent with a framework of national reforms for the rail mode of transport.²

The objective of the paper and the Explanatory Statement at Annexure 1 is to raise the subject of confidential reporting and the role it can play within a safety system. The paper looks at the existing REPCON schemes operated by the ATSB and explains how they will be consolidated and incorporate rail. At the same time, subjects are raised for consultation which participants may wish to make comments about in the interests of making adjustments to most effectively address the needs of their industry.

Stakeholders are invited to provide comment by **16 December 2011**. A further draft will be provided for consultation in 2012. Final consolidated regulations would not commence before January 2013 in order to work with the timings for the national rail reforms.

WHAT IS THE ROLE OF CONFIDENTIAL REPORTING?

Confidential reporting schemes play an important role in gathering safety information for the purpose of hazard and risk identification. They work in conjunction with other information collection systems including mandatory reporting, safety investigations, and audit and compliance related activities, to create a complete picture of the health of a safety system. It is important to have each one of them playing its part to full effect. This includes confidential reporting, which because of its very nature, will be able to capture some information the others cannot.

Confidential reporting captures information the other systems sometimes cannot because it protects the reporter's identity. In this environment, the reporter may feel more confident about coming forward with safety concerns where they may otherwise be worried about relationships with employers, work colleagues and others in the industry. Unsafe procedures, practices and conditions may come to light, which otherwise would have remained uncovered.

For example, someone may feel uncomfortable about openly raising a safety concern

¹ For more information about the existing ATSB REPCON schemes see:

REPCON Aviation: <http://www.atsb.gov.au/voluntary/repcon-aviation.aspx>

REPCON Marine: <http://www.atsb.gov.au/voluntary/repcon-marine.aspx>

² At its meeting in May 2011, the Australian Transport Council agreed to forward the Council of Australian Governments an Intergovernmental Agreement to establish a National Rail Safety Regulator and make the ATSB the national safety investigator for rail accidents and incidents.

about how his or her company addresses fatigue management. A confidential reporting system would give this person a secure way of putting their concern forward. Once the worry is aired, there is the opportunity to do something about it.

With the advent of ‘just cultures’ principles forming part of many transport operator safety systems, confidentiality may not always be required. A ‘just culture’ is present in an organisation where there is a clear distinction between acceptable and unacceptable behaviour and people are treated accordingly. Sometimes though, that extra level of protection still helps with people coming forward, which is the reason why confidential reporting exists. Often transport operators will provide for confidential reporting internally to fulfil this need.

Increasingly around the world, confidential reporting is also providing a means for hazard and risk identification by administrative bodies, which have responsibility for regulating and/or providing safety information to an industry as a whole. As noted above, confidential reporting is not replacing other forms of hazard and risk identification (i.e. mandatory reporting), it is seeking to pick up information that other systems may not capture and integrate the data. Further, where administrative organisations operate confidential reporting their sole focus is not on trying to improve safety within one organisation. Their overarching objective is to disseminate the safety information to all industry operators (while protecting identities) so that knowledge about how risks and hazards may eventuate, and be resolved, becomes shared knowledge.

CONFIDENTIAL REPORTING ADMINISTERED BY A ‘NO-BLAME’ INVESTIGATOR

The ATSB commenced its involvement with confidential reporting in the aviation industry 1988. Since then the ATSB has entered into maritime confidential reporting and its systems have evolved to include legislative protections for confidentiality.

Organisational Learning

The legislative protections are aligned with the ATSB’s ‘no-blame’ investigation principles. Industry and regulatory bodies are supplied de-identified information from reports to facilitate safety awareness and safety action rather than for the purpose of impugning an individual through a ‘dobbing’ type arrangement.³ Instead an ATSB confidential reporting system is focused on assisting with organisational learning.⁴

The value that the ATSB brings to confidential reporting and delivering outcomes at the organisational level includes the expertise of its personnel in the aviation, maritime and rail modes of transport. Investigators and researchers with modal

³ Other reporting systems are better placed to deal with taking direct action against an individual where it is required. For example, in aviation the Civil Aviation Safety Authority operates a Hotline which allows persons to make reports of suspected breaches of regulatory requirements while protecting their identity.

⁴ Examples of how the ATSB works to improve safety through organisational learning in the investigation sphere are contained in the ATSB Report: *Safety Issues and Safety Actions Identified through ATSB Transport Safety Investigations: 2009 – 2010 financial year* (see: <http://www.atsb.gov.au/publications/2010/xr-2010-001.aspx>).

experience are available to assess information from reports.

Further, a report sent to the ATSB can be assessed in the context of broader trends that are being monitored through accident and incident investigation as well as information made available from mandatory reporting databases. The ATSB is well placed to identify safety issues from reports and work with the industry to find the best way to facilitate safety action.

Examples of Confidential Reporting Outcomes

Examples that demonstrate how an approach to confidential reporting works, which is focused on delivering organisational learning, are provided below. The aviation and maritime examples are derived from the ATSB's REPCON schemes. As the ATSB does not currently provide confidential reporting for the rail industry, one rail example is provided from the CSIRS scheme operated by the Office of Transport Safety Investigation (OTSI) in New South Wales.⁵ The other rail example is taken from CIRAS which is a rail confidential reporting scheme in the United Kingdom.⁶

REPCON Aviation

Example 1 A reporter advised that the duplication of Common Traffic Advisory Frequency (CTAF) at various aerodromes over a large land area was leading to frequency congestion and increasing flight crew workload at a very busy and safety critical phase of flight. The reporter experienced significant difficulties in ascertaining a comprehensive picture of the traffic situation at Armidale due to the continuous cross over transmissions from another location CTAF.

The time to gain a proper situational awareness of traffic in the circuit area reduced every time a call was not readable.

The Civil Aviation Safety Authority (CASA) was supplied with a de-identified copy of the report. CASA agreed with Airservices Australia to change the CTAF at Armidale.

The change came into effect in June of 2011.

Example 2 A reporter advised that members of a gliding club were parking their aircraft inside the gable markers on a flight strip at an aerodrome, resulting in aircraft having to use the crosswind runway. When lined up on the crosswind runway, aircraft at the other end were not visible.

CASA and the aerodrome operator were supplied with a de-identified copy of the report. CASA reviewed operations at the airstrip and advised that it will undertake additional surveillance.

The aerodrome operator also issued a Notice to Airmen (NOTAM) to reduce the airstrip width when gliders are using the airstrip to prevent the situation recurring.

⁵ CSIRS stands for 'Confidential Safety Information Reporting Scheme'. See: <http://www.otsi.nsw.gov.au/CSIRS>

⁶ CIRAS stands for 'Confidential Incident and Reporting Analysis System'. See: <http://www.ciras.org.uk/Pages/Home.aspx>

REPCON Marine

Example 1 A reporter advised that a bulk carrier contained a number of defects. The ship owner and the Australian Maritime Safety Authority (AMSA) were provided with a de-identified copy of the report. The ship owner did not respond. AMSA advised that an alert was placed in AMSA's system. When the ship returned to Australian waters it was detained and inspected. The ship was released once corrective action had been taken to address identified defects. The alert was subsequently cancelled.

Example 2 A reporter advised of a concern about the ability of the fire brigade to deal with a fire if it occurred on board one of the increasing number of ocean liners visiting a Western Australian harbor. The reporter was concerned that there was:

- (a) no dedicated, specially trained, fire fighting teams with the required equipment to fight a fire on board a ship; and
- (b) no arrangements for coordination with other emergency services in the event of a fire on board a ship.

The fire service provided a very detailed response to the safety concerns to the effect that there was a well-developed fire fighting capacity for on-board ship fires. In addition there were well established procedures, co-ordination protocols and training programs in place. AMSA considered the response and advised that these more than adequately addressed the safety concerns expressed.

Rail (Examples from NSW and UK authorities)

Example 1 NSW OTSI received a report that a track machine was parked overnight on a sloping section of track. There was a potential risk of it running away and placing persons and property at risk.

*CSIRS
(OTSI NSW)*

OTSI investigated and verified the report. The operator was notified and remedial action taken to remove the potential hazard. OTSI also retained the report for future trend analysis.

Example 2 CIRAS received a report concerning communication difficulties with using defective radios in areas where mobile telephone reception is not available on certain parts of the line. This was problematic for track workers. Satellite telephones were tested on the areas of track where mobile telephone reception was poor. Satellite phones were found to be a success and were subsequently ordered.

(CIRAS UK)

The report summaries demonstrate that confidential reports can be used to generate positive safety outcomes with industry participants acting on the information made available. With consolidated Aviation and Maritime REPCON schemes, the ATSB's objective will be to continue to build on the accessibility and effectiveness of the scheme. With the incorporation of rail, the ATSB will be seeking to offer this industry access for the first time to a national scheme. Consistent with the aviation and maritime modes, rail confidential reporting will work in conjunction with information available from a national database of mandatory reports of accidents and incidents to provide a better view of emerging trends and safety issues. Having the three modes represented in the one scheme will also increase the effective use of resources and knowledge.

REPCON's COVERAGE OF THE AVIATION, MARITIME AND RAIL INDUSTRIES

The REPCON scheme will allow for the reporting of safety concerns in respect of:

- all aircraft operations for manned aircraft and certain unmanned aircraft operations;
- maritime operations concerning interstate and overseas shipping; and
- effectively all rail operations involving accredited rail operators in Australia.

The broad coverage in aviation reflects the Commonwealth's jurisdiction in this transport mode. For rail, it is proposed that the scheme will have broad coverage to match the ATSB jurisdiction once the national regulatory and investigation reforms are completed. The proposed maritime coverage is aligned with the Commonwealth's current regulatory jurisdiction under the *Navigation Act 1912*.

COMMUNICATING SAFETY INFORMATION

The ATSB already has an active role in publishing de-identified information from REPCON reports so that the industry as a whole can learn from safety issues that have arisen for different operators. In aviation, for example, the ATSB publishes details from REPCON in the industry publication *Flight Safety Australia*. This publication is available in hardcopy and online.⁷ The information the ATSB receives from REPCON reports also forms part of the ATSB's research and analysis publications where particular trends have been identified.⁸ Information from a REPCON report may also be included in an ATSB investigation report.⁹

Section 12AA of the ATSB's *Transport Safety Investigation Act 2003* (TSI Act) clearly defines the ATSB's functions to include the improvement of transport through the identification of factors affecting safety and communicating those factors to industry and the public. This is something the ATSB wants to continue to do better and is the reason why the Bureau is engaging with social networks like twitter and blogging on its own website when it is conducting a major investigation. The ATSB will look to use a broad range of communication tools with the new REPCON scheme to get the message out there. The message just has to get to the right people.

As part of the consultation process the ATSB would appreciate receiving the views of people in the aviation, maritime and rail transport industries on how they would like to see information from REPCON reports presented. The question is: how can the ATSB best get the information to the people who need to use it to manage risks and hazards in conjunction with information other collection systems?

⁷ See the CASA website at:

http://www.casa.gov.au/scripts/nc.dll?WCMS:STANDARD::pc=PC_91346

⁸ See the ATSB website at: <http://www.atsb.gov.au/research.aspx>

⁹ See the ATSB website at:

Rail: <http://www.atsb.gov.au/publications/safety-investigation-reports.aspx?mode=Rail>

Maritime: <http://www.atsb.gov.au/publications/safety-investigation-reports.aspx?Mode=Marine>

Aviation: <http://www.atsb.gov.au/publications/safety-investigation-reports.aspx?mode=Aviation>

CONFIDENTIALITY: HOW DOES IT WORK?

The information kept confidential from a REPCON report is personal information. This is any information used to identify an individual.

When a report is received, the ATSB fully de-identifies the report before seeking comment from an operator, passing the details to a regulator, or communicating with the public. Protecting the identity of reporters and persons named in a report is a paramount consideration. Further, the report itself self cannot be used to take disciplinary or administrative action against an individual.¹⁰

Ensuring confidentiality for reporters and persons named in a report, and prohibiting reprisals, is important to ensure that reporters feel confident about contacting the ATSB with a concern. Protecting the identities of third parties in reports also limits the possibility of someone being unfairly maligned and their reputation tarnished. This means though that there may be circumstances where it will be difficult to facilitate corrective action because of the need to preserve confidentiality.

While there may be some limitations to what REPCON can do, as mentioned at the start of this paper, it is not a ‘dobbing scheme’. REPCON is designed to work with the industry to uncover latent safety risks within an organisation that haven’t been identified and acted upon through other safety information collection schemes.

Nonetheless, it is important to get the balance right when there are such strict confidentiality requirements. For this reason not everything will be reportable under the scheme.

Concerns involving a serious and imminent threat to a person’s health or life and criminal conduct, will not be reportable. It would be unacceptable for the confidentiality requirements of the scheme to restrict information from release that could prevent an imminent death or serious injury or resolve a serious crime. As these matters are not reportable, they will not receive a guarantee of confidentiality. The new Regulations make provision for the ATSB to pass on details of such matters to the appropriate authorities. Further, REPCON will not be a means for airing industrial relations issues.

IS CONFIDENTIAL REPORTING A SUBSTITUTE FOR MANDATORY REPORTING?

As stated earlier in this paper, REPCON is not a substitute for other safety information collection systems, such as mandatory reporting. REPCON will complement these systems and seek to ensure the widest possible net is cast to identify risks and hazards.

However, the way confidential reporting and mandatory reporting interact going forward is open for consultation. To assist with making submissions a short overview

¹⁰ However, it should be remembered that this does not prevent a regulatory body or an operator collecting the information from alternative sources about the particular incident for these purposes. REPCON is not meant to interfere with legitimate safety action being taken.

of the mandatory reporting under the TSI Act is provided here, including the variances between aviation, maritime and rail.

Mandatory Reporting under the TSI Act

In aviation, it is mandatory to report accidents, serious incidents and incidents to the ATSB. This obligation is placed directly on operators, pilots, maintenance engineers, air traffic controllers and other personnel who perform safety functions. In rail and maritime the situation is different because the ATSB does not have the same jurisdiction.

In maritime, there is a demarcation between the Commonwealth's jurisdiction and the jurisdiction of the States and Territories (i.e. the Commonwealth is mainly limited to interstate and overseas shipping). In this environment, only accidents and serious incidents are reportable to the ATSB. Further, because the regulator, AMSA, has a similar set of reporting requirements, the industry reports direct to AMSA. AMSA then refers the report immediately to the ATSB so the ATSB can make a decision about whether or not to investigate.

In rail, due to the national reforms, the situation for the future is not yet settled. However, in the current rail environment the ATSB has its own set of reporting requirements under the TSI Act for accidents and serious incidents. State and Territory regulators have a similar set of reporting requirements and the industry reports directly to the relevant regulator. The regulator then passes the report on to the ATSB immediately so the ATSB can make a decision about whether or not to investigate.

Where a person is required to report to the ATSB, they may be excused if they hold a reasonable belief that another person with reporting obligations will report to the ATSB within the required timeframe. Where a person does not comply with their reporting obligations, there are some offence provisions.

Managing the Interaction of Confidential and Mandatory Reporting

Under REPCON, it will be possible to report any issue that affects, or might affect, transport safety. Within this broad ambit, there will clearly be a cross over between what must be reported under the mandatory scheme and what can be reported under the confidential reporting scheme. However, making a report under REPCON will not absolve a person with a legal obligation to make a mandatory report from their responsibility to do so. Under the mandatory system their identity would be protected to the extent practicable but their personal information may need to be used in some circumstances. These circumstances would include the situation where the ATSB is conducting a safety investigation.

It may not be possible to conduct a full safety investigation without being able to refer to persons who were involved in the accident or incident and hence it would not be appropriate to provide a guarantee of confidentiality for these reports.

CONCLUSION

The ATSB is looking forward to working with the rail, aviation and maritime

industries over the coming months to shape a confidential reporting scheme which will enhance the safety system's capacity to identify risks and hazards and then manage them. The unofficial draft of the regulations along with the Explanatory Statement, are intended to provoke thought and discussion on this subject. The comments we receive during the consultation process will be invaluable designing a confidential reporting scheme for the future.

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EXPLANATORY STATEMENT

Part 1.	PRELIMINARY	10
	The Regulations will be made under the <i>Transport Safety Investigation Act 2003</i> (TSI Act). This is the Act that provides the ATSB with its powers to conduct transport safety investigations. In 2009 section 20A was inserted which allows for the creation of regulations to provide for a confidential reporting scheme.....	10
Regulation	1. Name of Regulations.....	10
Regulation	2. Commencement	10
Regulation	3. Repeal and Transitional.....	10
Regulation	4. Interpretation.....	10
Regulation	5. Application	10
Part 2.	THE REPCON SCHEME	11
Regulation	6. Establishment and Purposes of Scheme	11
Regulation	7. Powers and functions of the ATSB.....	12
Part 3.	REPORTING	12
Regulation	8. What may be reported?	12
Regulation	9. How are reports to be made?	14
Regulation	10. Can a report be made orally?	14
Part 4.	ASSESSMENT AND ACCEPTANCE OF REPORTS	14
Regulation	11. Processing of reports	14
Regulation	12. Dealing with reports that have been accepted	16
Regulation	13. Reports the making of which may have constituted an offence	17
Part 5.	DISCLOSURE AND USE OF REPORTS AND INFORMATION IN REPORTS	17
Regulation	14. Release of Restricted Information that is or contains personal information	18
Regulation	15. Opportunity to comment on reports in certain circumstances.....	20
Regulation	16. Report not to be ground for disciplinary action etc	20
Regulation	16A. Reports not to be admissible in evidence	21
Part 6.	NON-REPORTABLE CRIMINAL CONDUCT	21
Regulation	17. Acts of Terrorism and Acts of Unlawful Interference with Aviation	22
Regulation	18. Authorisation of disclosures of personal information for this part	22
Part 7.	MISCELLANEOUS.....	22
Regulation	19. Delegation by ATSB	22
Regulation	20. Committees	22

PART 1. PRELIMINARY

The Regulations will be made under the *Transport Safety Investigation Act 2003* (TSI Act). This is the Act that provides the ATSB with its powers to conduct transport safety investigations. In 2009 section 20A was inserted which allows for the creation of regulations to provide for a confidential reporting scheme.

Regulation 1. **Name of Regulations**

This regulation provides that the title of the Regulations is the *Transport Safety Investigation (Confidential Reporting Scheme) Regulations 2013* (the **New Regulations**).

Regulation 2. **Commencement**

This regulation provides for the commencement of the Regulations. This will not be before January 2013.

Regulation 3. **Repeal and Transitional**

This regulation repeals the *Air Navigation (Confidential Reporting) Regulations 2006* and *Navigation Act (Confidential Marine Reporting Scheme) Regulations 2008* (the **Old Regulations**). The Old Regulations will continue to apply to any report received and not finalised by the date the New Regulations commence.

Regulation 4. **Interpretation**

This regulation provides definitions of words and expressions in the New Regulations. Some of the definitions from the Old Regulations are adopted in the New Regulations.

There are a few new definitions included such as, the ATSB, National Rail Safety Regulator (NRSR) and Rail Transport Operator. A generic definition of Regulatory Authority will apply to the Australian Maritime Safety Authority (AMSA), the Civil Aviation Safety Authority (CASA), the NRSR and any other body established in the State and Territories for the purpose of regulating aviation, maritime or rail safety. The ATSB will need to work with these bodies to improve transport safety through the use of information obtained from REPCON reports.

Regulation 5. **Application**

The regulations apply to the following:

Aviation

The new REPCON scheme will apply to aircraft operations involving all manned aircraft and some classes of unmanned aircraft. Essentially, the regulations will apply to the same class of aircraft as the ATSB's mandatory reporting scheme. The ATSB consulted on proposed amendments to this scheme from December 2010 to February 2011. The consultation package is still available online at: http://www.atsb.gov.au/about_atsb/legislation/tsi-amend.aspx. Following the consultation period the ATSB has been working with the Office of Legislative Drafting and Publishing to prepare a consultation draft.

Marine

In REPCON marine, the regulations only apply to the operation or safety of a ship to which the *Navigation Act 1912* applies. Due to a number of exclusions, current coverage under REPCON marine is limited to a small range of ships. These include ships on interstate and overseas voyages and other ships to which the *Navigation Act 1912* applies. The scheme does not currently apply to pleasure craft, inland waterways vessels or fishing vessels (unless they are involved in an incident concerning a ship to which the Act does apply).

In the future, it is possible that a wider class of vessels will be covered. However, this is dependent on regulatory reform in the maritime sector.

Rail

The New Regulations will apply to all rail operations over which the ATSB would otherwise have jurisdiction. This encompasses all accredited rail operations on the metropolitan and country networks. There is only one or two hobby type rail operations that will not be covered.

PART 2. THE REPCON SCHEME

This part establishes the REPCON scheme and identifies the purposes of the scheme. It nominates the ATSB as the administrator of the scheme. The ATSB's powers and functions are specifically identified. This part reflects the establishment of the scheme under section 20A of the TSI Act.

Regulation

6. Establishment and Purposes of Scheme

The scheme is for the reporting of issues that affect or might affect transport safety and is applicable to aircraft, ship and rail operations.¹¹ The name 'REPCON' stands for 'Report Confidentially'.

REPCON will be managed by ATSB staff members who will have the necessary powers to undertake a range of REPCON functions.

The primary purpose of the scheme will be to provide for the confidential reporting of safety concerns, and to use the reports made under the scheme to identify unsafe procedures, practices or conditions. The information will be used in conjunction with other information collected from different sources to prevent or lessen the likelihood of accidents and incidents.

¹¹ Section 3 of the Act defines transport safety as the safety of transport vehicles and, in turn, a transport vehicle is defined as an aircraft, ship or rail vehicle.

The New Regulations recognise that some reports about safety concerns may have implications for security and that such issues should be brought to the attention of the appropriate organisation. However, it is not intended that REPCON is a confidential reporting scheme for security matters. The regulations simply acknowledge that security issues can occur in conjunctions with safety issues.

Regulation

7. Powers and functions of the ATSB

Regulation 7 provides an overview of the functions and powers that the ATSB will be able to perform under the scheme. This includes the function of accepting and processing reports and communicating information to garner safety action.

PART 3. REPORTING

Regulation

8. What may be reported?

Section 20A of the TSI Act provides that the regulations may establish a scheme for the reporting of issues “that affect, or might affect, transport safety”. Essentially anything that comes within this broad ambit will be a reportable safety concern. This general approach avoids prescription and therefore the unintentional exclusion of safety issues.

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

The following are examples:

Aviation

- (1) an incident or circumstance that affects the safety of aircraft operations;
- (2) a procedure, practice or condition that a reasonable person would consider endangers, or, if not corrected, would endanger, the safety of aircraft operations, for example:
 - (i) poor training, behaviour or attitude displayed by an aircraft operator, airport operator or air traffic control service provider; or
 - (ii) insufficient qualifications or experience of employees of the aircraft operator, airport operator or air traffic control service provider; or
 - (iii) scheduling or rostering that contributes to the fatigue of employees of the aircraft operator, airport operator or air traffic control service provider; or
 - (iv) an aircraft operator, airport operator or air traffic control service provider bypassing safety procedures because of operational or commercial pressures

Marine

- (1) an incident or circumstance that affects the safety of marine navigation, for example:

- (i) the ship nearly being stranded or involved in a collision; or
- (ii) the ship suffering a loss of stability to the extent that the safety of the ship is, or could be, endangered;
- (2) a procedure, practice or condition that a reasonable person would consider endangers, or, if not corrected, would endanger, the safety of marine navigation, for example:
 - (i) the ship having unsafe handling characteristics; or
 - (ii) unsafe navigation; or
 - (iii) deviation from established collision-avoidance procedures; or
 - (iv) inadequate passage planning.

Rail

- (1) an incident or circumstance that adversely affects the safety of rail operations;
- (2) a procedure, practice or condition that a reasonable person would consider endangers, or, if not corrected, would endanger, the safety of rail operations, for example:
 - (i) poor training, behaviour or attitude displayed by a rail transport operator; or
 - (ii) insufficient qualifications or experience of employees of a rail transport operator; or
 - (iii) scheduling or rostering that contributes to an unacceptably high risk of fatigue of employees of a rail transport operator; or
 - (iv) a rail transport operator bypassing safety procedures because of operational or commercial pressures.

Non Reportable Matters

Sub-regulation 8(2) excludes certain matters from being reportable under REPCON. The exclusions are:

- (a) industrial relations matters;
- (b) matters showing a serious and imminent threat to a person's health or life; and
- (c) non-reportable criminal conduct.

Those matters are not reportable due to the confidential nature of the scheme. For example, a matter showing a serious and imminent threat to a person's health or life is of an urgent and serious nature. It may be necessary to disclose identities in order to prevent or lessen the threat and it would therefore be inappropriate to provide a guarantee that such information will be kept confidential.

To exemplify, the ATSB should not be required to receive a report, and maintain confidentiality with respect to a pilot, ship's Master or rail vehicle operator preparing to perform duties while heavily intoxicated. Such action is not only a serious offence but it also endangers others. Staff of the ATSB would be in an untenable position if required to accept such reports and then maintain confidentiality with respect to them.

Currently, if the ATSB receives a report showing a serious and imminent threat to a person's health or life, the ATSB normally asks the reporter to report the matter to a more appropriate authority (e.g. a Regulatory Authority or the Police). If it seems unlikely that the reporter will pass on the information the ATSB will be in position to take this action.

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

Regulation 9. How are reports to be made?

The New Regulations provide that a report must be in writing and include the reporter's name, preferred means of contact from the ATSB and a description of the matter that constitutes the reportable safety concern. Reporters may use a form recommended by the ATSB that will be available on the ATSB's website.

Regulation 10. Can a report be made orally?

Under the New Regulations, reports can be made orally, such as over the telephone. The ATSB will reduce the report to writing.

PART 4. ASSESSMENT AND ACCEPTANCE OF REPORTS

This Part identifies when a report will be accepted into the REPCON scheme, and once accepted or rejected, what must happen to the report. Part 4 also specifically identifies the process of dealing with a false or vindictive report that has been knowingly submitted by a reporter.

Regulation 11. Processing of reports

Subregulation 11(1) requires the ATSB to accept a report if the following conditions are met:

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

Paragraph 11(1)(a) is necessary to ensure that REPCON does not impede the effectiveness of other reporting schemes in the transport industries. For example, consistent with the principle of REPCON not being a substitute for other reporting, a person who has an obligation to make a report of a safety matter under subsections 18(1) or 19(1) of the TSI Act, should not be able to use the REPCON scheme to avoid their obligations under that Act. It would be unlikely that the ATSB would accept a

report of a matter by someone who had an obligation to report it under the TSI Act.

The purpose of the mandatory reporting scheme, established under the TSI Act, would be defeated if the person was allowed to report the matter exclusively under REPCON. In making such an assessment, the ATSB will ensure that the reporter is made aware that reporting the matter under the REPCON scheme does not absolve them of any compulsory reporting requirement under other legislation.

Other examples of the REPCON scheme not being the most suitable avenue for a person to make a report could include a situation where a person does not require the confidentiality of REPCON, or where the person is working for an operator that has an appropriate reporting scheme to deal with the issue. If, however, the person desired the confidentiality and independence of REPCON, or the ATSB believed that the reporter would not report the matter elsewhere, then the ATSB would be likely to consider the REPCON scheme as the most suitable avenue for the person to make the report.

Where the ATSB did not accept the report, the ATSB would be able to forward information from the report to a more suitable recipient, provided it is done in accordance with the scheme's confidentiality requirements. The ATSB will consult with the reporter about the action it intends to take with an unaccepted report.

Paragraphs 11(1)(b) and 11(1)(c) require the ATSB to reasonably believe that the report constitutes a reportable safety concern and is true before accepting it. In practice, when the ATSB receives a report, an assessment would be made about whether what has been reported constitutes a reportable safety concern, i.e. does it constitute a matter that affects or might affect transport safety?

The ATSB will seek to verify the information contained in the report. This may involve contacting the reporter and other involved parties to discuss its contents. The ATSB will be mindful of the need to protect personal information in accordance with the confidentiality requirements. Therefore, it is very unlikely that the ATSB would accept an anonymous report because of the difficulties that would be associated with assessing its reliability and verifying its contents.

Subregulation 11(2) identifies the process that the ATSB must follow if a report is not accepted. Paragraph 11(2)(a) requires the ATSB to determine whether to disclose any information from the report and act accordingly. This is a broad power to deal with the report.

Regulation 15, gives a person or organisation mentioned in a report an opportunity to comment before the report is disclosed to a Regulatory Authority. Part 6, which identifies how reports that concern non-reportable criminal conduct such as unlawful interference and terrorist acts should be processed, also affect any decision made under paragraph 11(2)(a). Finally, as paragraph 11(2)(b) requires the eventual destruction of an unaccepted report in accordance with subregulation 11(3), proposed paragraph 11(2)(a) requires the ATSB consider whether any information should first be disclosed.

Subregulation 11(3) requires that the ATSB dispose of unaccepted reports. This is a measure to ensure the confidentiality of the scheme is maintained.

Subregulation 11(3) requires the ATSB to return to the reporter the report or that part that they supplied, or if a part were supplied by another person, to return that part to the other person. The ATSB will also have the option to destroy the report, or any part of the report. However, the obligation on the ATSB to dispose of an unaccepted report would be subject to regulation 13, which requires retention of a report for the purpose of possible future prosecution, where it is determined that the reporter knew that the information they supplied was false or misleading.

Regulation

12. Dealing with reports that have been accepted

Regulation 12 adopts the similar requirements in the current schemes for dealing with accepted reports.

Paragraph 12(1)(a) requires the ATSB determine what information, drawn from a report accepted under proposed subregulation 12(1), is to be included in databases maintained for the purposes of the REPCON scheme.

Subregulation 12(2) requires the ATSB ensure that personal information about a reporter, or any person referred to in the report, is only kept on any database for as long as it is necessary to keep in contact with the reporter or a person or organisation referred to in the report. Retaining personal information will also be permitted should it be impracticable to remove such information from the report. Where the restricted information that is or contains personal information has been retained on the database, subregulation 12(3) requires that the ATSB permanently erase that personal information when it is satisfied that this information is no longer necessary or desirable to be retained.

Paragraph 12(1)(b) requires the ATSB to determine whether to disclose any information from the report and act accordingly. This is a broad power to deal with the report. The ATSB may disclose information from a report as an information brief or alert bulletin to the industry so that safety issues may be addressed, or through direct contact with a person or organisation that is in the best position to immediately correct the safety matter.

However, information in the report is still subject to the confidentiality provisions under regulation 14.

Paragraph 12(1)(c) requires the eventual destruction of the report in accordance with subregulation 12(4), and, as such, 12(1)(b) requires the ATSB consider whether any information should first be disclosed prior to destruction of the report.

Once the ATSB has transferred the necessary information into any databases and determined what to disclose, paragraph 12(1)(c) requires the ATSB to deal with the report in accordance with subregulation 12(4). That subregulation requires the ATSB return to the reporter the report or that part that they supplied, or if a part were supplied by another person, to return that part to the other person. The ATSB would also have the option to destroy the report, or any part of the report.

To maintain confidentiality, these provisions require that the report, in whole or in part is not retained by the ATSB. The obligation on the ATSB to dispose of a report is subject to regulation 13, which requires retention of a report, for the purpose of

possible future prosecution, where it is determined that the reporter knew that the information they supplied was false or misleading.

Regulations 15 and 17 also affect any decision made under proposed paragraph 12(1)(b). Regulation 15 gives a person or authority mentioned in a report an opportunity to comment before disclosure of a report to a Regulatory Authority. Regulation 17 sets out how certain reports that concern non-reportable criminal conduct¹² must be processed by the disclosure of the information without confidentiality.

Regulation 13. Reports the making of which may have constituted an offence

The regulation obliges the ATSB to retain a report for a relevant period where the ATSB reasonably believes the making of the report constitutes an offence against section 137.1 of the *Criminal Code Act 1995* (CTH). The relevant period is two years after the date that the report was made, or as long as required if a prosecution is commenced within that period.

Section 137.1 of the Criminal Code makes it an offence for a person knowingly to supply false or misleading information to the Commonwealth, thereby acting as a deterrent against people who make vexatious or deliberately false or misleading reports. Regulation 13 is an important component of this deterrent. It provides that evidential material necessary for proving the offence is not destroyed prematurely. This regulation will operate in conjunction with paragraph 14(3)(a).

PART 5. DISCLOSURE AND USE OF REPORTS AND INFORMATION IN REPORTS

Part 5 contains provisions that deal with disclosure of personal information. Part 5 also deals with 'use limitations' on reports designed to protect the reporter, or other people identified within the report, from having the report used in certain administrative or disciplinary actions. This part also ensures natural justice for a person or organisation referred to in a report. Where the ATSB proposes to forward a report to a Regulatory Authority the ATSB will provide them an opportunity to comment on the report before the report is sent.

Part 5 no longer contains restrictions on the use of REPCON reports in certain court or tribunal proceedings. Those restrictions are no longer necessary in the regulations, because material from a report is restricted information (as defined by section 3 of the TSI Act). The use of restricted information in court proceedings is governed by section 60 of TSI Act. Minor amendments to the TSI Act will be necessary to accommodate the changes. Broadly, information from the reports would not be available for use in court proceedings without a certificate from the ATSB. As with information from its investigations, it is unlikely that the ATSB would issue one of these certificates in most circumstances.

¹² Unlawful interference with aviation, act of terrorism – marine and rail.

The ATSB will continue to be permitted to release information in a report for the purpose of criminal proceedings for either an offence against the TSI Act or a breach of section 137.1 of the Criminal Code. This ensures, consistent with current arrangements, a person could be prosecuted for intentionally providing false or misleading information and thereby deter vexatious reporters from abusing the scheme.

Regulation 14. Release of Restricted Information that is or contains personal information

The requirements in regulation 14 apply to all reports received by the ATSB. When the ATSB has received a report, paragraphs 11(2)(a) and 12(1)(b) require the ATSB determine whether to disclose information from that report and act accordingly. Subregulation 14(1) requires that the ATSB remove all personal information from the disclosed information, except in the specific circumstances identified in proposed subregulations 14(2), 14(3) and 14(4). Under the *Privacy Act 1988*, personal information is:

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

Therefore, subregulation 14(1) will require the removal of all information that may identify the reporter as well as anyone named in the report or able to be identified by information contained within the report. Confidentiality for the reporter is an integral element of the scheme necessary to encourage industry participation without fear of reprisal. Confidentiality for any person referred to in a report, or identifiable through the report, would guarantee that the scheme is directed towards providing information to the industry to address a safety issue rather than prosecuting individuals.

Subregulation 14(2) will allow personal information to be disclosed where the personal information could not be removed without defeating the purpose of the disclosure. However, any person identifiable by the information is protected through two conditions that, together, must be met before such disclosure is authorised under the proposed Regulations. The first condition is that disclosure of personal information would have to be for a purpose of the scheme, as described in either proposed subregulation 6(2) or 6(3) — an example being to facilitate safety action to remove an unsafe practice identified in a report. The second condition is that before disclosure of the information, the person to whom the information relates must provide their consent.

Subregulation 14(3) will contain three limited exceptions to the requirement not to disclose personal information: (a) where a reporter knowingly gives false or misleading information; (b) reports of a non-reportable criminal conduct; (c) and to lessen or prevent a serious and imminent threat to a person’s health or life.

Paragraph 14(3)(a) will operate in conjunction with proposed regulation 13, which prevents the destruction of a report made by a reporter who knowingly provides false or misleading information (section 137.1 of the *Criminal Code* makes such acts an offence). Paragraph 14(3)(a) will allow disclosure of personal information for an investigation where a person has knowingly supplied false and misleading

information. It is important for the viability of the REPCON schemes that it does not become an avenue for vexatious reporting. Subregulation 14(3) will ensure this outcome is achieved by facilitating the use of section 137.1 of the Criminal Code as a deterrent.

Paragraph 14(3)(b) allows disclosure when a report involves non-reportable criminal conduct that comprises an act of unlawful interference or a terrorist act (as addressed in regulation 18). These matters cannot be reported under the REPCON scheme. Protecting the identity of a person engaged in such activities would be inappropriate.

Paragraph 14(3)(c) allows disclosure where the ATSB believes on reasonable grounds that disclosure is necessary to lessen or prevent a serious and imminent threat to a person's health or life. Subregulation 8(2) specifically excludes such instances from being a reportable safety concern. Reports of this kind are of an extremely urgent nature where a person or many persons' health or lives may be in danger. The scheme could not be justified if it allowed such reports and applied its confidentiality regime to it. Further explanation on the rationale for this measure can be found under the explanation for regulation 8.

Subregulation 14(3)(d) allows disclosure of personal information from a report where the report relates to non-reportable criminal conduct other than that which is required to be disclosed under Part 6 of the regulations. The information, and associated personal information, would be able to be disclosed for the investigation of the possible offence. Evidence of such crimes should not be able to be reported under REPCON and cannot be the subject of a REPCON report. Subregulation 8(2) specifically excludes such instances from being reportable safety concerns.

The purpose of the scheme is to facilitate safety awareness and safety action through the dissemination of safety information that de-identifies the reporter and any person named in a report. Accepting and protecting reports about criminal conduct does not fit within this objective.

Although the ATSB would be able to disclose personal information without consent in the limited circumstances described in the proposed regulations, subregulation 14(3) the regulations does not mandate that the ATSB must make the disclosure. The ATSB would necessarily be concerned to protect the scheme when making any decision, being aware that maintaining the industry's trust in the scheme is vital to ensuring that the industry continues to use it.

Regulation 14 enhances the requirements for confidentiality that exist in the current Aviation and Marine schemes. This is to ensure the scheme is non-punitive, and directed at identifying safety concerns that the industry needs to address. It is important to emphasise that, where allegations are made against an individual, that individual is not exposed to any potential punitive processes the identity of the person who made the allegation is protected and cannot be able to be questioned further about the allegation.

Regulation**15. Opportunity to comment on reports in certain circumstances**

Where information is proposed to be sent to a Regulatory Authority, regulation 15 sets out preconditions which must be met before information is disclosed. If practicable, the ATSB must, while complying with the confidentiality requirements regarding personal information, provide a person or organisation named in the report with a copy of the report (paragraph 15(2)(a)).

The person or organisation has 5 working days to comment on the report (paragraph 15(2)(b)) and the ATSB is required to consider those comments (subregulation 15(3)). This regulation is intended to provide an assurance to the parties who may be affected by a Regulatory Authority's assessment of the safety concern, noting that the version the Regulatory Authority receives will be de-identified.

Persons who may be affected will be advised of the ATSB's decision to refer information derived from a report to a Regulatory Authority. The regulation also ensures that a person or organisation identified in the report receives the opportunity to respond, and so is afforded procedural fairness or natural justice.

Paragraph 15(4)(a) exempts the ATSB from compliance if the requirement to consult before passing the information to a Regulatory Authority would compromise the REPCON scheme. For example, it may be impossible to provide information from a report to a person or organisation named in the report without identifying an individual. In such cases, complying with regulation 15 could compromise the REPCON scheme. It would be a breach of regulation 14 if information was passed on that reveals the identity of an individual without their consent. Paragraph 15(4) ensures that the requirement to consult with the parties concerned does not apply in such circumstances, preserving the confidentiality of the scheme.

Further, paragraph 15(5)(b) exempts the ATSB from complying with proposed regulation 15 if compliance is impractical. This may be the case where a ship is in port for a short period of time, and will depart before the five working days provided by proposed regulation 15 to comment on the report has expired. If the ship departs before it is possible to address the safety concerns raised in the REPCON report, then the purpose of the scheme described in proposed regulation 5, which is to facilitate safety awareness and safety action, would be defeated, thereby making compliance with regulation 15 impractical.

Regulation**16. Report not to be ground for disciplinary action etc**

Regulation 16 is a protection that reinforces the non-punitive nature of the scheme. Subregulation 16(1) prevents information from a report about a Reportable Safety Concern being used by a person as the basis for taking disciplinary action against an employee of the person. Subregulation 16(2) would also prevent information from a report about an RSC being used as the basis for making a decision of an administrative character against someone.

The types of protections contained in proposed regulation 16 serve as a means of seeking to ensure that the REPCON scheme is ‘non-punitive’. These protections will operate consistently across aviation, marine and rail. Subregulation 16(3) identifies that the reporting of an event does not quarantine that event from disciplinary or administrative proceedings; however, such proceedings would need to gather their own evidence exclusive of REPCON reports.

Regulation 16A. Reports not to be admissible in evidence

Regulation 16A prevents reports, or evidence of the content of a report, about a reportable safety concern from being admissible in evidence in a court or tribunal. The rationale for this provision is similar to the rationale for regulation 16. Information from reports about reportable safety concerns is intended to be used for the purpose of addressing safety issues and not as a source of evidence in court or tribunal proceedings. If information from reports about reportable safety concerns was inappropriately used, as evidence in a court or tribunal, there may be a negative impact on the scheme. Parties involved in court or tribunal proceedings need to gather their own evidence separately from the REPCON scheme.

However, regulation 16A contains two exceptions to the use limitation with respect to court proceedings. Subregulation 16A(2) provides an exemption for proceedings in relation to whether the making of a report constituted an offence against section 137.1 of the Criminal Code. This ensures that, if necessary, court proceedings could be carried out to prosecute a person for intentionally providing false or misleading information.

The other exception is provided for in subregulations 16A(3) and (4). Where an administrative action or disciplinary proceeding has been instituted using information derived from a REPCON report, then that report, or evidence as to its content, should be admissible as evidence in an appeal against the outcome of the administrative or disciplinary proceeding (subregulation 16(4)). The report, or evidence as to its contents, should be available as evidence of the misuse of information from a REPCON report. Additionally, in accordance with subregulation 16A(3), for the evidence to be admitted, the ATSB has to issue a certificate stating that there is not likely to be a negative effect on REPCON or that any negative impact is outweighed by the public interest in permitting the use of the report.

Significantly, it is unlikely that an administrative decision or disciplinary action could be made, or taken, in the first place, against an individual based on a report about a reportable safety concern. The strong confidentiality requirements in the Act and regulations mean that it would be difficult to disadvantage any individual using the de-identified information released.

PART 6. NON-REPORTABLE CRIMINAL CONDUCT

Part 6 deals with reports that relate to non-reportable criminal conduct that involves acts of interference with aviation or terrorist acts with respect to marine or rail; noting that paragraph 8(2)(b) specifically excludes such matters from being reportable safety concerns. This part identifies specific acts and the required actions of the ATSB on receiving reports containing information concerning such acts.

Regulation**17. Acts of Terrorism and Acts of Unlawful Interference with Aviation**

This regulation provides a procedure for dealing with non-reportable criminal conduct that is either an act of terrorism or an act or threatened act of unlawful interference with aviation that constitutes a criminal offence. While subregulation 8(2) excludes these matters from being reportable as a REPCON report, it is the case that the ATSB does become aware of these matters through REPCON. Therefore, there must be a process to deal with those matters. The regulation provides that the ATSB is required to inform the Office of Transport Security Operations Centre in the Department of Infrastructure and Transport of the report and may send the report or information from the report, if sought by the Office. This ensures that the appropriate authority can deal with security threats, which are outside the scope of REPCON.

Regulation**18. Authorisation of disclosures of personal information for this part**

Regulation 20 provides the necessary authorisation for the ATSB to disclose personal information contained in a report that identifies unlawful interference, when the ATSB is required to forward the report, or information from the report, to the appropriate authority in accordance with proposed subregulation 18(1).

PART 7. MISCELLANEOUS**Regulation****19. Delegation by ATSB**

Regulation 21 empowers the ATSB to delegate any power, function or duty of the ATSB under REPCON (other than the power of delegation) to a person engaged to perform duties in the ATSB. A delegate will have to comply with any directions of the ATSB.

Regulation**20. Committees**

This regulation empowers the ATSB to appoint committees on such terms and with such persons as it deems fit to review the effectiveness of REPCON.