

# EXPLANATORY STATEMENT

## TRANSPORT SAFETY INVESTIGATION (VOLUNTARY AND CONFIDENTIAL REPORTING SCHEME) REGULATION 2012

There are currently two separate schemes for voluntary confidential reporting: the REPCON aviation scheme under the *Air Navigation (Confidential Reporting) Regulations 2006* and the REPCON marine scheme under the *Navigation (Confidential Marine Reporting Scheme) Regulations 2008*. No scheme currently exists nationally for rail.

The proposed new *Transport Safety Investigation (Voluntary and Confidential Reporting Scheme) Regulation 2012* (the **New Regulation**) will create a new multi-modal voluntary and confidential reporting scheme to be operated by the Australian Transport Safety Bureau (ATSB). The New Regulation will be made under the *Transport Safety Investigation Act 2003* (TSI Act) and replace the existing aviation and maritime schemes while introducing one for rail.

The new scheme will be predominantly based on the existing aviation and maritime REPCON schemes and retain the REPCON name. For rail, the introduction of a national voluntary and confidential reporting scheme will be consistent with the establishment of the ATSB as the National Rail Safety Investigator as a part of the national rail safety reforms.

The New Regulation is intended to come into effect on by 1 January 2013 to coincide with the implementation of other national rail safety reforms.

The covering consultation paper explains the intent and purpose of the new multi-modal REPCON scheme. This Explanatory Statement provides an overview of each of the specific sections in the New Regulation and their operation under the TSI Act.

Under the TSI Act the REPCON scheme will use the Act's information protection provisions in Division 2 of Part 6 of the TSI Act covering restricted information. Material reported, obtained or generated in the course of assessing reports will be 'restricted information'. This means the Act as well as the regulation will provide for limitations on copying or disclosing material under REPCON.

Extending the restricted information protections to information received, obtained or generated under the scheme supports the scheme's confidential nature, encouraging persons to report without fear of reprisal. Protection of the information ensures that the scheme established is directed toward providing information to industry to address a safety issue rather than prosecuting individuals. This approach is consistent with the functions of the ATSB under section 12AA of the TSI Act.

## Attachment

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## PART 1. PRELIMINARY

The Regulation will be made under the *Transport Safety Investigation Act 2003* (TSI Act). In 2009 section 20A was inserted which allows for the creation of regulations to provide for a voluntary and confidential reporting scheme.

*Note: in the Explanatory Statement the term 'section' is used instead of 'regulation' to refer to each of the clauses in the new Regulation. Use of this terminology is consistent with new drafting practices.*

### **Section 1. Name of Regulations**

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

### **Section 2. Commencement**

This section provides for the commencement of the New Regulation.

### **Section 3. Repeal**

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

### **Section 4. Transitional**

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

### **Section 5. Definitions**

This section provides definitions of words and expressions used in the New Regulation.

To reflect the multi-modal nature of the New Regulation there is a generic description of 'transport safety authority' that means the Civil Aviation Safety Authority (CASA), the Australian Maritime Safety Authority (AMSA) and the Office of the National Rail Safety Regulator (ONRSR). The definition also includes any other authority of a State or Territory or other body that has functions relating to transport safety.

Section 8 of the new Regulation provides that one of the purposes of the scheme is to ensure the ATSB can provide transport safety authorities with information about unsafe procedures, practices and conditions in the relevant transport mode. Defining transport authority broadly will allow the ATSB to approach the most appropriate organisation for a response to the identified safety concern.

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

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

#### **Section 6. Information taken to be part of report**

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

## **PART 2. REPCON SCHEME**

Part 2 creates the REPCON voluntary and confidential reporting scheme and identifies the purpose 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.

#### **Section 7. Establishment and application of Scheme**

Subsection 7(1) provides that the scheme is for the voluntary and confidential reporting of issues that affect or might affect transport safety and is applicable to aircraft, ship and rail operations.<sup>1</sup> The name 'REPCON' stands for 'Report Confidentially'.

Subsection 7(2) addresses what types of types of transport operations REPCON applies to. These are as follows:

##### **Aviation**

The new REPCON scheme will apply to aircraft operations involving all manned aircraft and some classes of unmanned aircraft. Essentially, the New Regulation will apply to the same classes of aircraft operations as the ATSB's mandatory reporting scheme. Revisions to the aviation mandatory reporting scheme are being consulted on as part of this package and can be accessed at:

[www.atsb.gov.au/aviation\\_newregs.aspx](http://www.atsb.gov.au/aviation_newregs.aspx)

##### **Marine**

The New Regulation only applies to a ship operation to which the *Navigation Act 1912* applies. These include ships on interstate and overseas voyages. The scheme does not apply to pleasure craft, inland waterway vessels and ships on intrastate voyages.

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<sup>1</sup> 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.

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. For more information on the national maritime safety reforms go to:

[www.nationalsystem.amsa.gov.au/confluence/display/public/Home](http://www.nationalsystem.amsa.gov.au/confluence/display/public/Home)

## **Rail**

The New Regulation will apply to all rail operations over which the ATSB would otherwise have jurisdiction under s.11(2) of the TSI Act. In practice this will encompass all rail operations on the metropolitan and country networks as well as Tourism and Heritage operations.

### **Section 8. Purposes of scheme**

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

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

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

### **Section 9. Functions of ATSB**

Section 9 provides an overview of the ATSB's functions and powers that the ATSB will perform or exercise under the New Regulation. These functions and powers are essentially the same as those under the current schemes for aviation and marine.

The new section 9 also includes a broad function of identifying issues and factors from reports that affect or might affect transport safety and communicating those issues and factors to a range of transport stakeholders. These stakeholders will include operators in the industry affected by the report of a safety concern as well as the relevant transport regulator (i.e. CASA, AMSA, ONRSR). These parties will receive de-identified reports.

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

## PART 3. REPORTING

### Section 10. What may be reported

Section 20A of the TSI Act, however, provides that regulations may establish a scheme for the reporting of issues “that affect, or might affect, transport safety”. In the New Regulation anything that comes within that broad ambit will be a reportable safety concern. This general approach avoids prescription which may result in 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](http://www.atsb.gov.au)

The following are examples of what may be reported:

#### **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

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

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

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

***Serious and imminent threat to transport safety or health or life***

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

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

***Industrial relations***

Industrial relations matters are excluded as these matters should not take the ATSB's resources away from focussing on safety concerns. However, while these matters are excluded it is acknowledged that there it can sometimes be difficult to separate

safety concerns from industrial relations matters. Where it is clear that a report is about a genuine safety concern it will be accepted.

### ***Criminal offences***

In the current aviation and marine REPCON schemes reports of criminal conduct attracting penalties of at least two years in prison are not reportable. Under the new Regulation all reports of matters involving a criminal offence will be unreportable.

The proposed change, broadening the exclusion for reports of criminal conduct, has been initiated following feedback the ATSB received during consultation at the end of 2012. Concerns were raised that breaches of the law carrying a penalty of less than 2 years imprisonment can be of a serious nature. It was suggested that REPCON is not a suitable scheme for receiving reports where the law may have been broken, notwithstanding that there may be an associated issue of transport safety. It would not be appropriate for the ATSB to have information about a criminal offence of any nature that it could not adequately disclose if it was felt that the matter needed to be dealt with by an authority such as the police or a transport regulator.

### **Section 11. How report must be made**

Section 11 requires that a REPCON report made to the ATSB must be in writing. However, if a report is made to the ATSB orally the ATSB must reduce the report to writing.

Written reports are an important aid in the verification of the contents of a report. If the ATSB reduces an oral report to writing it will seek to confirm its contents with the reporter.

### **Section 12. Information to be included in report**

All reports to the ATSB must contain basic level of information. This enables the ATSB to assess and verify the report and maintain contact with the reporter for as long as may be necessary to deal with the report.

## **PART 4. ACCEPTING AND DEALING WITH REPORTS**

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

### **Section 13. Accepting report**

Section 13 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 13(a) is necessary to ensure that REPCON does not impede the effectiveness of other reporting schemes in the transport industries. For example, consistent with the principle of REPCON not being a substitute for other reporting, a person who has an obligation to make a report of a safety matter under subsections 18(1) or 19(1) of the TSI Act, 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 mandatory reporting, established by 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 this 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 13(b) and 13(c) require the ATSB to reasonably believe that the report constitutes a reportable safety concern and is true before accepting it. In practice, when the ATSB receives a report, an assessment will 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.

#### **Section 14. Dealing with report**

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

Paragraph 14(1)(a) requires the ATSB determine what information, drawn from a report, is to be included in databases maintained for the purposes of the REPCON scheme.

Paragraph 14(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 section 16.

Paragraph 14(1)(c) requires the eventual destruction of the report and, as such, 14(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 14(1)(c) requires the ATSB to deal with the report in accordance with the paragraph. The ATSB may either return the report or destroy it. This process assists with maintaining confidentiality.

The obligation on the ATSB to dispose of a report is subject to section 15, 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.

Sections 17 and 21 also affect any decision made under proposed paragraph 14(1)(b). Section 17 gives a person or organisation mentioned in a report an opportunity to comment before disclosure of a report to a transport safety authority or an emergency services organisation. Section 21 sets out how certain reports that concern criminal conduct<sup>2</sup> may be processed by the disclosure of the information without confidentiality.

Subsection 14(2) requires the ATSB ensure that personal information about a reporter, or any person referred to in the report, is only kept on any database 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. However, normally subsection 14(3) will apply to require that personal information is permanently erased when it is no longer necessary or desirable to retain it .

### **Section 15. Dealing with report containing false or misleading information**

This section obliges the ATSB to retain a report for two years 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 report may be retained for longer if a prosecution is commenced.

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. Section 14 is an important component of this deterrent. It provides that evidential material necessary for proving the offence is not destroyed prematurely. This section operates in conjunction with paragraph 16(3)(a) and subsection 19(2).

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<sup>2</sup> Unlawful interference with aviation, act of terrorism – marine and rail.

## 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.

Part 5 also provides for natural justice in the report assessment process. Where the ATSB proposes to forward a report to a transport safety authority, the ATSB will provide a person or organisation referred to in the report with an opportunity to comment.

### DIVISION 5.1 USE AND DISCLOSURE BY ATSB

#### Section 16. Disclosure of restricted information by ATSB

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

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

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

Therefore, paragraph 16(1)(a) 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.

Subsection 16(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 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 paragraphs 8(1)(b) or (c) or subsection 8(2)— an example being to facilitate safety action to remove an unsafe practice identified in a report. The second condition is that before disclosure of the information, the person to whom the information relates must provide their consent.

Subsection 16(3) will contain four exceptions to the requirement not to disclose personal information: (a) where a reporter knowingly gives false or misleading information; (b) to lessen or prevent a serious and imminent threat to transport safety

or a person's health or life; (c) disclosure of information about a terrorist act or act of unlawful interference in accordance with Part 6 of the regulations; and (d) to provide for the reporting, investigation or prosecution of criminal conduct.

Paragraph 16(3)(a) will operate in conjunction with section 15 which prevents the destruction of a report made by a reporter who knowingly provides false or misleading information (section 137.1 of the *Criminal Code* makes such acts an offence). Paragraph 16(3)(a) 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 16(3)(b) allows disclosure where the ATSB believes on reasonable grounds that disclosure is necessary to lessen or prevent a serious and imminent threat to transport safety or a person's health or life. Reports, where a person or many persons' health or lives may be in danger or there is a serious threat to transport safety are of an extremely urgent nature. The scheme could not be justified if the confidentiality regime of the scheme were applied to these reports. Further explanation on the rationale for this measure can be found under the explanation for regulation 8.

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

Paragraph 16(3)(d) allows disclosure of personal information from a report where the report relates to criminal conduct that cannot be dealt with in accordance with Part 6 of the Regulations. Information from the report of the criminal conduct, including any personal information, would be able to be disclosed for the reporting, investigation or prosecution of the possible offence. Evidence of such crimes cannot be the subject of a REPCON report. 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 New Regulation, subsection 16(3) 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 is vital to ensuring REPCON's continued use.

#### **Section 17. Named person or organisation to comment on report**

Where information is proposed to be sent to a transport safety authority or an emergency services organisation, section 17 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 in section 16, provide a person or organisation named in the report with a copy of the report (paragraph 17(2)(a)).

The person or organisation has 5 working days to comment on the report (paragraph

17(2)(b)) and the ATSB is required to consider those comments (subregulation 17(4)). This is intended to provide an assurance to the parties who may be affected by a third party's assessment of the safety concern, noting that the version that the ATSB sends out 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 transport safety authority or emergency services organisation. Section 17 also ensures that a person or organisation identified in the report receives the opportunity to respond, and so is afforded procedural fairness or natural justice.

Paragraph 17(3)(a) exempts the ATSB from compliance if the requirement to consult before passing the information to that person or organisation would reduce reporting to the scheme or reduce the ability of the ATSB to achieve a purpose of the scheme. For example, it may be impossible to provide information from a report to a person or organisation named in the report without identifying an individual. In such cases, complying with paragraph 17(2)(a) could compromise REPCON. Further it would be a breach of section 16 if information was passed on that reveals the identity of an individual without their consent. Subsection 17(3) ensures that the requirement to consult with the parties concerned does not apply in such circumstances, preserving the confidentiality of the scheme.

Further, paragraph 17(3)(b) exempts the ATSB from complying with proposed section 17 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 have expired. If the ship departs before it is possible to address the safety concerns raised in the REPCON report, then a purpose of the scheme to facilitate safety awareness and safety action, would be defeated. That would make compliance with section 17 impractical.

## **DIVISION 5.2 RESTRICTIONS ON USE AND DISCLOSURE OF INFORMATION**

### **Section 18. Disciplinary action and making administrative decisions**

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

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

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

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

## **Section 19. Information not admissible in evidence**

Section 19 prevents reports, or evidence of the content of a report, about a reportable safety concern from being admissible in evidence in a court or tribunal. The rationale for this provision is similar to the rationale for section 18. 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.

Section 19 contains two exceptions to the use limitation with respect to court proceedings. Subsection 19(2) provides an exemption for proceedings in relation to whether the making of a report constituted an offence against section 137.1 of the Criminal Code. This ensures that, 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 subsections 19(4) and (5). 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 (subsection 19(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 19(5), 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.

Under the current aviation and maritime arrangements, neither the REPCON report nor evidence about the content of the report is admissible in evidence. The new Regulation clarifies this limitation through subsection 19(3) so that information derived from a source that is not a REPCON report is admissible. This will mean that while the report itself or evidence of what is in the report will not be admissible, evidence obtained independently of the report may be used.

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

## **Section 20. Use to be for same purpose as for disclosure**

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

the scheme only use and disclose it in the manner intended.

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

## **PART 6. REPORTS RELATING TO CRIMINAL CONDUCT**

Part 6 deals with reports that relate to criminal conduct that involves acts of unlawful interference with aviation or terrorist acts with respect to marine or rail; noting that the definition of 'reportable safety concern' 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.

### **Section 21. Reports relating to terrorism or unlawful interference with aviation**

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

Subsection 21(1) provides a procedure for dealing with criminal conduct that is either an act of terrorism or an act or threatened act of unlawful interference with aviation that constitutes a criminal offence. While these matters are excluded from being reportable as a REPCON report, it is possible that the ATSB will become aware of them through REPCON because of the association between safety and security issues. Subsection 21(1) provides for a procedure to deal with security issues in these circumstances.

Subsection 21(1) provides that the ATSB is required to inform the Department of Infrastructure and Transport of the report. Subsection 21(2) provides that, if requested by the Department, the ATSB may send the report or information from the report. Subsection 21(3) authorises the ATSB to disclose to the Department personal information contained in a report that identifies a terrorist act or act of unlawful interference. Subsection 21(4) allows the ATSB to disclose restricted information that contains personal information for the reporting, investigation or prosecution of terrorist acts or acts of unlawful interference with aviation that constitute an offence.

## **PART 7. MISCELLANEOUS**

### **Section 22. Delegation of powers of the ATSB**

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