



Enhanced Maritime Confidential Reporting & Giving Effect to the Casualty Investigation Code

The Australian Transport Safety Bureau (ATSB) is consulting on two changes to the legislation the ATSB administers concerning confidential reporting and accident and incident investigation. These changes concern:

1. the draft Transport Safety Investigation (Voluntary and Confidential Reporting Scheme) Regulation 2012 which would replace the current REPCON confidential reporting regulations (**Attachment A**).
2. An amendment to the *Transport Safety Investigation Regulations 2003* to incorporate a reference to the new International Maritime Casualty Investigation Code (**Attachment B**);

The ATSB is seeking comments back by **Friday, 27 July 2012**. Significant parts of a submission may be published on the ATSB's website. If a person wishes to keep their name and contact details confidential they should discuss this matter with the ATSB. However, the ATSB cannot make any guarantees about confidentiality in advance. Once the consultation process is completed a final set of regulations will be drafted and finalised for Ministerial and Governor-General approval and parliamentary tabling.

An overview of the two consultation items is provided under separate headings below. Item 2 concerning the International Marine Casualty Investigation Code is a minor amendment to ensure that the *Transport Safety Investigation Act 2003* (TSI Act) makes reference to the Code for the purpose of conducting maritime investigations. The Code is annexed to the International Convention for the Safety of Life at Sea (SOLAS) 1974 and contains standards and recommended practices to provide for an internationally consistent approach to safety investigations. It is only a minor amendment because the provisions of the TSI Act already incorporate the principles of 'independence' and 'avoidance of blame' in investigations which the Code is based on.

The main focus of the consultation is on the voluntary and confidential reporting scheme regulations in **Attachment A**. The draft regulations were developed after earlier consultation on the proposal for a multi-modal (maritime, aviation and rail) confidential reporting scheme at the end of 2011. For shipping covered under *Navigation Act 1912* (i.e. overseas and interstate shipping), the new scheme will replace the existing REPCON (marine) scheme which has been in place since 2004. A summary of the issues raised during the previous consultation and the ATSB's response is on the ATSB website at www.atsb.gov.au

1. VOLUNTARY AND CONFIDENTIAL REPORTING

The Explanatory Statement accompanying the regulations at **Attachment A** goes into detail about how the scheme will operate in practice. Briefly, however, for the purpose discussion here, its operation in the multi-modal environment will not be distinctly different from the way that REPCON marine currently operates. The scheme will still provide a means for any person to report safety concerns and have their identity protected.

The protection of the reporter's identity is there to encourage reporting. Identity protection is also afforded to any person referred to in the report as REPCON's purpose is not to be a 'dobbing' scheme. REPCON's purpose is to source information about unsafe practices within an organisation or between organisations that haven't been able to be addressed through other means. To understand its purpose further, REPCON's role in the context of the broader safety system is explained below.

Confidential Reporting: Hazard and Risk Identification

REPCON has been designed to source information that usefully identifies organisational hazards and risks while also being able to communicate de-identified information it acquires to persons and organisations best placed to manage those hazards and risks. Its role is to contribute its confidentiality protections, which encourage disclosure, to a broader framework of hazard and risk identification tools within the safety system. These other tools include mandatory incident reporting, regulatory surveillance, ATSB safety investigations and safety management systems of shipping operators and port authorities. They all have unique qualities that position them to make a valuable contribution to improving safety. The industry relies on all of them to get the full picture.

The ATSB's independence maximises the potential of the new REPCON scheme to contribute to this picture and encourage others to take safety action. The ATSB is independent because it does not, for example, regulate the industry, operate ships or have a port control function. Being independent allows the ATSB to source information and objectively view the interactions between persons and organisations in the safety system.

Combined with information from its own safety investigations, and mandatory incidents reports sourced through AMSA, the ATSB can use confidential reporting to identify trends of hazards and risks that are pertinent to more than just one operator, or that involve interactions between shipping operators and the regulator.

While limiting some disclosure to protect sensitivities, the ATSB passes on safety information in electronic and hard copy forms to persons and organisations in the industry with a responsibility for managing hazards and risks. For example, a regulator or shipping operator will be able to combine information made available by the ATSB with information from its own hazard and risk identification tools to make informed safety decisions. Industry personnel are also encouraged to access the material to enhance awareness of practices compromising safety that need to be avoided and reported.

Key elements of the multi-modal REPCON scheme

Any person may report

As stated above, any person who has a concern about safety in the industry will be able to make a REPCON report. REPCON is available in the circumstances where a person has a concern about safety but is, for some legitimate reason, worried to keep their identity confidential when they make a report.

What can be reported?

Given the focus of the scheme on organisational hazards and risks, typical reports include concerns about unsafe scheduling or rostering, concerns with the unsafe application of operating procedures or by-passing safety instructions.

Because of the confidentiality requirements some matters cannot be reported. These are:

- reports of a serious and imminent risk to health, life or transport safety that requires an immediate response;
- reports of criminal conduct and transport security issues.

To adequately respond to a report of the above nature there is always the possibility that someone's identity will need to be disclosed. In these circumstances a guarantee of confidentiality should not be given.

Further, for REPCON to be effective it has to be protected from misuse. The *Commonwealth Criminal Code Act 1995* will be relied upon to deter people from making a false or misleading report. Industrial relations matters will also be unreportable to ensure REPCON is not distracted from delivering safety outcomes.

What happens with the report?

If a report indicates a safety concern involving a shipping operator, as an example, the ATSB will remove information from the report that identifies individuals and then ask the operator to comment on the issue raised.

Depending on the nature of the safety concern the operator may, in response, advise that they are seeking to do such things make changes to company practices, increase training or raise awareness amongst employees of a hazard that needs to be avoided. The operator may also review its own reporting systems to determine whether persons can be encouraged to report similar issues directly to the operator rather than through the ATSB with an identified need for confidentiality.

After the shipping operator has been contacted for their comment, the de-identified report is forwarded to relevant Commonwealth, State and Territory maritime regulators for appropriate action. The regulatory body may consider that no further action is required or it may consider that it needs to conduct an education campaign, revise guidance material, increase surveillance or take some other form or regulatory action. Importantly, the ATSB will seek to close the loop with the reporter on what happens.

Balancing confidentiality with safety action

When the ATSB consulted on confidential reporting at the end of 2011 it noted the challenge between being able to make information available for safety action while still maintaining confidentiality. One of the difficulties with confidential reporting is keeping a reporter's identity confidential where they make allegations against another individual. The person whom the allegations are made against may be unable to properly and fairly respond if the person who is making the allegations becomes anonymous.

As one of the ATSB's responsibilities under section 12AA of the TSI Act is to avoid involving itself in the casting of adverse inferences against any person, it was determined that the new REPCON scheme should continue to provide confidentiality for both the reporter and individuals referred to in the report. If there is a problem where action needs to be taken with respect to an individual then REPCON may not be the best reporting avenue. REPCON works most effectively when the reportable safety concern is used to address hazards and risks of an organisational nature.

A summary of the submissions received and the ATSB's response may be found at: www.atsb.gov.au/about_atsb/legislation/repcon-amend.aspx

Next steps

After the consultation period is over, and any significant issues are resolved, the ATSB will work with the Commonwealth Government Office of Legislative Drafting and Publishing to finalise the Regulations. Subject to the approval of the Minister for Infrastructure and Transport, and the approval of the Governor General, the regulations will be made into law and tabled in Parliament.

Further, while changes are being made now to the confidential reporting scheme, the ATSB will continue to monitor the proposal to establish a national regulatory system for domestic commercial vessels. As stated in this paper, confidential reporting exists as part of a broader safety system framework for identifying hazards and risks and managing them. As changes are made to the national regulatory system the ATSB will review the need for changes to safety system tools that it is responsible for. This includes its confidential reporting, mandatory reporting (a shared responsibility with AMSA) and its safety investigation functions. Information about the ATSB's role in the proposed new national maritime safety system is available on the ATSB's website:

- www.atsb.gov.au/about_atsb/national-jurisdiction-for-rail-and-maritime-investigations.aspx?mode=Marine

2. MARINE CASUALTY INVESTIGATION CODE

Attachment B contains a copy of the International Maritime Organisation (IMO) Code for the International Standards and Recommended Practices for a Safety Investigation into a Marine Casualty or Marine Incident (Casualty Investigation Code) which came into effect in January 2010. The Code is annexed to Chapter XI-I of the International Convention for the Safety of Life at Sea, done at London on 1 November 1974 (SOLAS).

It is proposed to amend regulation 5.3 of the [Transport Safety Investigation Regulations 2003](#) (TSI Regulations) to incorporate a reference to the Code. The amendment will provide a link between the exercise of powers under the TSI Act by the ATSB and its Chief Commissioner with the standards and recommended practices in the Code.

Clause 1.1. of the Casualty Investigation Code states that its object is:

to provide a common approach for States to adopt in the conduct of marine safety investigations into marine casualties and marine incidents. Marine safety investigations do not seek to apportion blame or determine liability. Instead a marine safety investigation, as defined in this Code, is an investigation conducted with the objective of preventing marine casualties and marine incidents in the future. The Code envisages that this aim will be achieved through States:

- 1. applying consistent methodology and approach, to enable and encourage a broad ranging investigation, where necessary, in the interests of uncovering the causal factors and other safety risks; and*
- 2. providing reports to the [International Maritime Organization] to enable a wide dissemination of information to assist the international marine industry to address safety issues.*

Effectively, the Code's approach to the conduct of safety investigations is the same as the ATSB's under the TSI Act. The ATSB already acts consistently with the Code. However, the Act provides for a formal link to be drawn between the exercise of the

ATSB and Chief Commissioner's powers under the Act and international agreements applying to transport safety investigations. Section 12AD of the TSI Act states:

- (1) *The ATSB must ensure that the ATSB's powers under this Act are exercised in a manner that is consistent with Australia's obligations under international agreements (as in force from time to time) that are identified by the regulations for the purpose of this section.*
- (2) *The Chief Commissioner must ensure that the Chief Commissioner's powers under this Act are exercised in a manner that is consistent with Australia's obligations under international agreements (as in force from time to time) that are identified by the regulations for the purpose of this section.*
- (3) *In exercising powers under this Act, the ATSB and the Chief Commissioner must also have regard to any rules, recommendations, guidelines, codes or other instruments (as in force from time to time) that are promulgated by an international organisation and that are identified by the regulations for the purposes of this section.*

To ensure the Casualty Investigation Code is properly identified, regulation 5.3 of the TSI Act will be amended to include a reference to regulation 6 of Chapter XI-I of SOLAS. The reference to the Code in the TSI Regulations will be made so that the ATSB and the Chief Commissioner will be required to exercise their powers in the TSI Act consistently with the Part II which contains the mandatory standards. Part III of the Code contains the recommended practices for the conduct of marine safety investigations. In accordance with subsection 12AD(3) of the TSI Act the ATSB will be required to have regard to the recommended practices when exercising powers under the Act.

Next steps

As with the new confidential reporting regulations, after the consultation period is finished on the proposal to amend the TSI Regulations to include a reference to the Casualty Investigation Code, the ATSB will work with the Office of Legislative Drafting and Publishing to finalise a set of Regulations. Subject to the approval of the Minister for Infrastructure and Transport, and the approval of the Governor General, the regulations will be made into law and tabled in Parliament.

The amendment will not result in any significant change to the way the ATSB does business. However, formalising the link the Casualty Investigation Code sends a message to other countries around the world about the importance that Australia attaches to conducting investigations, the purpose of which are to identify hazards and risks to safety that require safety action. The global nature of the shipping industry requires an international adoption of best practice approaches to safety investigations. The Casualty Investigation Code represents a best practice approach that is achievable across the vast majority contracting countries to the SOLAS convention.