

## EXPLANATORY MEMORANDUM

Issued by authority of the Minister Infrastructure, Transport, Regional Development and Communications

### *Transport Safety Investigation Act 2003*

#### Transport Safety Investigation Regulations 2021

1. The *Transport Safety Investigation Act 2003* (the Act) provides for the investigation of transport safety matters in the aviation, marine and rail modes of transport. This includes provisions for the:
  - a. conduct of independent transport safety investigations by the Australian Transport Safety Bureau (ATSB);
  - b. reporting of transport safety matters;
  - c. making of safety action statements including safety recommendations to address safety deficiencies identified by investigations;
  - d. publication of investigation results; and
  - e. protection of sensitive safety information.
2. Section 71 of the Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act. The *Transport Safety Investigation Regulations 2003* (TSI Regulations) are made under this section.

#### **Purpose of the *Transport Safety Investigation Regulations 2021***

3. The *Transport Safety Investigation Regulations 2003* (TSI Regulations 2003) will sunset on 1 October 2021 in accordance with the requirements of the *Legislation Act 2003*. To address these sunset requirements, it is proposed that the *Transport Safety Investigation Regulations 2021* (TSI Regulations 2021) will remake the TSI Regulations 2003 with amendments informed by ongoing policy review, consultation and legislative requirements.
4. It is proposed that the TSI Regulations 2021 will:
  - a. reflect changes to current drafting practices to ensure consistency with legislation administered by the Civil Aviation Safety Authority (CASA), the Australian Maritime Safety Authority (AMSA) and the Office of the National Rail Safety Regulator (ONRSR);
  - b. clarify the scope and requirements for the reporting of aviation safety matters by:
    - i. including definitions for specific types of Remotely Piloted Aircraft (RPA) and their operation;
    - ii. requiring pilots of certain RPA to report certain safety occurrences as immediately or routine reportable matters;

- c. retain the existing jurisdiction for receiving notifications of marine safety occurrences to exclude Domestic Commercial Vessels (unless they are on an interstate voyage) while aligning terminology with Navigation Act, by:
  - i. including a list of vessel types that are required to report under the TSI Regulations 2021;
  - ii. listing the types of marine incidents that must be reported under the Navigation Act as reportable matters for the purposes of the TSI Regulations;
  - iii. excluding domestic commercial vessels that are not on an interstate voyages from the requirement to report under the TSI Regulations 2021.
- d. make further amendments proposed by the Office of Parliamentary Counsel (OPC) to comply with current drafting conventions.

#### *Aircraft Operations*

5. The current TSI Regulations 2003, do not include RPA as a specific category of operation or include specific requirements for reporting transport safety occurrences related to their operations. The inclusion of RPAs in the proposed Regulations would provide greater certainty for operators by clarifying the requirements to make reports to the ATSB, and the matters that they are required to report.

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

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

7. Operations involving smaller type 2 RPAs and those without type certification will have less reporting requirements. This is on the basis that ATSB investigations are unlikely for these operations unless there is serious risk of harm to people or significant third-party property. The proposed Regulations would limit immediate reporting requirements to death or serious injury related to this operation.

#### *Marine Operations*

8. Part 3 of the current TSI Regulations 2003 include descriptions of vessel types and their operations which are based on the repealed *Navigation Act 1912*. The regulations do not reflect current terminology in the *Navigation Act 2012*. Updating the terminology to be consistent with the current *Navigation Act 2012* will mean that the following vessel types will have reporting requirements:

- a. regulated Australian vessels (within the meaning of the Navigation Act);
- b. foreign vessels (within the meaning of the Navigation Act);

9. In addition to this, Part 3 will also impose reporting requirements on domestic commercial vessels (within the meaning of the Marine Safety (Domestic Commercial Vessel) National Law) on an interstate voyage .
10. These proposed regulations would align the reporting requirements of safety occurrences under the TSI Regulations with marine incidents under the Navigation Act. This will be achieved by adopting the types of marine incidents that must be reported to the Australian Maritime Safety Authority as reportable matters for the purpose of the TSI Regulations 2021. These marine incidents encompass the current immediately reportable matters in Part 3.
11. The approach reflects current arrangements whereby the ATSB does not receive direct reports of marine incidents, as incidents are reported to AMSA and then forwarded to the ATSB.
12. The proposed Regulations will continue to exclude domestic commercial vessels as defined in the *Marine Safety (Domestic Commercial Vessel) National Law* from making reports to the ATSB unless they are on an interstate or international voyage.
13. Details of the proposed Regulations are set out in the Attachment.
14. The Act does not specify any conditions that need to be satisfied before the power to make the proposed Regulations may be exercised.
15. The Proposed Regulations would be a legislative instrument for the purposes of the *Legislation Act 2003*.
16. The Proposed Regulations would commence on 1 July 2021.
17. The Minute recommends that the Regulations be made in the form proposed.

**Details of the proposed *Transport Safety Investigation Regulations 2021***

Section 1 - Name

This section would provide that the title of the proposed instrument is the Transport Safety Investigation Regulations 2021 (the proposed instrument).

Section 2 - Commencement

This section would provide for the whole of the proposed instrument to commence on 1 July 2021.

Section 3 - Authority

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

Section 4 – Schedules

This section makes provision for the revocation of the current TSI Regulations 2003.

Section 5 – Definitions

The section would provide definitions for terms that are used in all three modes of transport that are covered by the proposed instrument. Specific definitions for particular modes of transport are set out in the relevant Part.

**Part 2 – Aircraft Operations**

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

Section 6 – Definitions for Part 2

This section would provide definitions that are applicable to the terms used in Part 2 of these Regulations. The definitions in this section would largely replicate definitions used in the current TSI Regulations 2003 with some additional items to define types of remotely piloted aircraft. These would consist of:

- a. a type 1 RPA, which would be defined as,
  - i. a large RPA (within the meaning of the *Civil Aviation Safety Regulations 1998*) which refers to an RPA with a gross weight of more than 150kg; or
  - ii. an RPA for which a type certificate (within the meaning of the *Civil Aviation Safety Regulations 1998*), is in force, which means that the RPA meets specified airworthiness standards; and

and is not an excluded RPA (within the meaning of the *Civil Aviation Safety Regulations 1998*). An excluded RPA generally includes smaller sized RPA but can also refer to large RPA where it is being operated for the purposes of specified types of training.

- b. a type 2 RPA, which would be defined as an RPA that is not:
  - i. a large RPA; or
  - ii. an excluded RPA.

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

### Section 7 – Application of Part 2

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

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

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

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

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

Subsection 7(4) provides the circumstances when the matters under Part 2, involving manned aircraft operations, are to apply. This requirement is based upon the definition of the term ‘Accident’ set out in Annex 13 to the Convention on International Civil Aviation which refers to occurrences associated with the operation of the aircraft occurring within a specified period of operation.

For example, the operation of a manned aircraft pursuant to subregulation 7(4) requires that an immediately reportable matter under section 11, or a routine reportable matter under

section 12, need only be reported where it occurs during the period beginning when the aircraft is being prepared for take-off and ending after all the passengers and crew members have disembarked after the flight.

For an unmanned aircraft, subsection 7(5) specifies a similar period whereby matters would need only be reported where they occurs between the period, beginning when the aircraft is ready to move for the purpose of flight and ending when the aircraft comes to rest at the end of the flight and the primary propulsion system is shut down.

The only exception to this period is subsection 7(6) where a death or serious injury arises later but has occurred as a result of an occurrence during the period defined in subregulation 7(4) or 7(5).

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

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

This provision would only apply until 2 December 2021 which is when the provisions of the CAR will be repealed.

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

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

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

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

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

#### Section 11 Aircraft operations – immediately reportable matters

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

Section 3 of the Act leaves the list of immediately reportable matters to be reported under section 18 to be prescribed by regulations. Section 11 of these Regulations would provide a list of transport safety matters that are immediately reportable for aviation. These reportable matters would replicate those that are reportable under the current TSI Regulations 2003.

This extends to death, serious injury, the aircraft being missing or suffering serious damage or a breakdown of separation standards.

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

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

The more significant reporting responsibilities attached to aircraft engaged in air transport operations are consistent with the TSI Regulations 2003. Greater safety implications are foreseeable, in particular, where an aircraft is engaged in the carriage of fare paying passengers. Where the aircraft is carrying fare-paying passengers it is operating as part of a global air transport system and it is therefore possible that there may be broader systemic issues. Immediate reporting for small RPAs is limited to the few occurrences types where there is the potential for the ATSB to investigate in this category if the nature of the occurrence indicates that there may be broader systemic issues.

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

#### Section 12 Aircraft operations – routine reportable matters

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

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

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

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

#### Section 13 Aircraft operations – responsible persons

Section 3 of the Act leaves the list of 'responsible persons' who are required to report immediately and routine reportable matters to be prescribed by regulations. Consistent with the TSI Regulations 2003, this section would provide a list of persons who, by the nature of their qualifications, experience or professional association with a particular transport vehicle,

or number of transport vehicles, would be likely to have knowledge of an immediately or routine reportable matter in aviation, should one occur.

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

#### Section 14 Aircraft Operations - particulars for immediate reports

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

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

The purpose of prescribing the relevant particulars is to ensure that the ATSB receives adequate information in relation to the immediately reportable matter, rather than just a report of the specific occurrence. Reports of IRMs in accordance with subsection 18(1) are used by the ATSB to determine whether the IRM is one that is to be investigated under the Act. The ATSB needs to have sufficient information in order to make a decision about whether or not to investigate.

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

#### Section 15 Aircraft operations – particulars for written reports

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

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

For routine reportable matters, the information provided would be used to decide whether an investigation is necessary. If an investigation is considered to be necessary, the information contained in the report would be used for commencing the investigation. If an investigation is

not considered necessary, the information may be used for statistical purposes and safety research and analysis.

### Section 16 Aircraft operations – nominated officials

Section 20 of the Act requires that the regulations prescribe a list of persons who are 'nominated officials' in relation to reportable matters. This section would prescribe staff members or a member of the staff of the Australian Maritime Safety Authority (AMSA) as a nominated official.

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

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

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

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

## **Part 3 – Marine Operations**

### Section 18 Definitions for Part 3

This section would provide definitions that are applicable to the terms used in Part 3 of these Regulations. The definitions in this section would include a number of references to terms that are defined in the *Navigation Act 2012*.

### Section 19 Application of Part 3

This application provision would specify the jurisdictional requirement for vessel types that must make reports to the ATSB using descriptions and terminology consistent with the *Navigation Act 2012*. This section would differ from the application provision currently in the TSI Regulation 2003 which rely upon terminology and descriptions of vessel types that were used in the now repealed *Navigation Act 1912*.

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

- a. a regulated Australian vessel (within the meaning of the Navigation Act 2012) in the course of relevant marine navigation;

- b. a foreign vessel (within the meaning of that Act) in the course of relevant marine navigation, if the foreign vessel is:
  - i. in an Australian port; or
  - ii. entering or leaving an Australian port; or
  - iii. in the internal waters of Australia; or
  - iv. in the territorial sea of Australia;
- c. the operation of a domestic commercial vessel (within the meaning of the Marine Safety (Domestic Commercial Vessel) National Law) on an interstate voyage.

As noted in the list above, Part 3 of these Regulations would only apply to regulated Australian Vessels and foreign vessels when they are operating in the course of ‘relevant marine navigation’. This term would be defined in the Regulations as:

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

Further limitations will apply to foreign vessels in that they would have to be operated in the course of relevant marine navigation, and be within Australian waters as described in subparagraph 19(1)(b)(i) – (iv). In addition, Part 3 will only apply to domestic commercial vessels that are being operated on an interstate voyage.

The limitation of reporting requirements to certain types of ships would be done on the basis that the Commonwealth has not assumed responsibility for marine operations to the extent that it has assumed responsibility for aircraft operations.

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

Subsection 19 (2) would clarify where an occurrence involves a ship to which Part 3 applies and a ship to which Part 3 that does not, the limitation provision in subsection 19(1) would not prevent the matter being a reportable matter for the first ship. This is consistent with the current application provisions set out in the TSI Regulations 2003.

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

To provide for autonomous ships, a further period would be specified in subsection 19(4) so that matters must only be reported where they have occurred during a period beginning when

the ship is ready to move with the purpose of conducting a voyage, and ending when the ship comes to rest at the end of the voyage and the primary propulsion system is shut down

There would also be exceptions to this period in subsection 19(5) where death or serious injury would still be reportable if it arises as a later stage but has occurred as a result of an occurrence during the periods defined in subsections 19(3) or (4).

#### Section 20 Marine operations – immediately reportable matters

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

This section of the Regulations would provide a list of transport safety matters that are immediately reportable for Marine. This list would replace the list of matters in the TSI Regulations 2003 with a new list of matters that reflect marine incidents that must be reported to AMSA under the *Navigation Act 2012*.

Subsection 20(2) of these regulations would limit the requirement for foreign vessels within the territorial in the course of innocent passage to only report investible matters that:

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

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

In contrast, foreign vessels that are:

- a. in an Australian port,
- b. entering or leaving an Australian port;
- c. in internal waters, or
- d. in the territorial sea, for purposes such as proceeding to Australian waters or an Australian port,

would be required to report all of the applicable immediately reportable matters in the table in section 20 of these regulations.

#### Section 21 Marine operations – responsible persons

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

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

### Section 22 Marine operations – particulars for immediate reports

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

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

These particulars would reflect those that must be provided to the Australian Maritime Safety Authority under section 338 of the *Navigation Act 2012* for the purpose of giving a report under section 185 or 186 of that Act.

### Section 23 Marine operations – particulars for written reports

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

These particulars include:

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

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

### Section 24 Marine operations – nominated officials

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

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

Staff members of AMSA are responsible for receiving a reports of a ‘marine incident’ under the *Navigation Act 2012* and on this basis are most likely to receive reports that include immediately reportable matters. This would mean that a responsible person may provide a report to AMSA as part of their reporting obligations under the *Navigation Act 2012* which also satisfies the requirements of these Regulations.

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

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

Subsection 25(3) of the TSI Regulations would also allow a member of the staff of AMSA to pass on a report to a staff member that has been received under section 185 or 186 of the *Navigation Act 2012*. This is not required where the recipient of the report believes on reasonable grounds that that a responsible person has already given, or will give a report to a staff member that relates to the same incident.

#### **Part 4 – Rail Transport**

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

#### Section 26 – Definitions for Part 4

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

#### Section 27 – Application of Part 4

This subsection would provide that Part 4 applies to investigable matters where the ATSB has jurisdiction under subsection 11(3) of the TSI Act and where the *Rail Safety National Law 2012* of South Australia (as enabled by the States and Territories “RSNL”) applies.

#### Section 28 Rail transport – immediately reportable matters

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

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

- (i) an accident or incident that has caused death, serious injury or significant property damage;
- (ii) a running line derailment;
- (iii) a running line collision between rolling stock;

- (iv) a collision at a level crossing between rolling stock and either a road vehicle or a person;
- (v) a suspected terrorist attack;
- (vi) an accident or incident involving a significant failure of a safety management system that could have caused death, serious injury or significant property damage;
- (vii) any other accident or incident likely to generate immediate or intense public interest or concern.

#### Section 29 Rail Transport – routine reportable matters

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

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

- (i) a derailment, other than a running line derailment;
- (ii) a collision involving rolling stock, other than a collision described in paragraph (a)(iii) or (iv);
- (iii) an incident at a level crossing, other than a collision described in paragraph (a)(iv);
- (iv) an incident in which a vehicle or vessel strikes an associated railway track structure;
- (v) the passing of a stop signal, or a signal with no indication, by rolling stock without authority;
- (vi) an accident or incident where rolling stock exceeds the limits of authorised movement given in a proceed authority;
- (vii) a rolling stock run-away;
- (viii) a failure of a signalling or communications system that endangers, or that has the potential to endanger, the safe operation of trains or the safety of people, or to cause damage to adjoining property;
- (ix) any slip, trip or fall by a person on railway premises;
- (x) a person being caught in the door of any rolling stock;
- (xi) a person suffering from an electric shock directly associated with railway operations;
- (xii) any situation where a load affects, or could affect, the safe passage of trains or the safety of people, or cause damage to adjoining property;
- (xiii) an accident or incident involving dangerous goods that affects, or could affect, the safety of railway operations or the safety of people, or cause damage to property;
- (xiv) any breach of a network rule;

- (xv) any breach of the work scheduling practices and procedures set out in the rail transport operator's fatigue risk management program;
- (xvi) the detection of an irregularity in any rail infrastructure (including electrical infrastructure) that could affect the safety of railway operations or the safety of people;
- (xvii) the detection of an irregularity in any rolling stock that could affect the safety of railway operations;
- (xviii) a fire or explosion on, in, or near, rail infrastructure or rolling stock that endangers the safety of railway operations or the safety of 1 or more people, or causes service terminations or track or station closures;
- (xix) any incident on railway property where a person inflicts, or is alleged to have inflicted, an injury on another person;
- (xx) a suspected attempt to suicide;
- (xxi) the notification that a rail safety worker, when required to do so under the drug and alcohol management program of a rail transport operator, has failed to submit to a test in accordance with the testing regime set out in the operator's drug and alcohol management program;
- (xxia) the notification that a rail safety worker has returned a result to a test undergone by the worker in accordance with the testing regime set out in the drug and alcohol management program of a rail transport operator that suggests that the worker was in breach of the operator's drug and alcohol management program at a relevant time;
- (xxii) the infliction of wilful or unlawful damage to, or the defacement of, any rail infrastructure or rolling stock that could affect the safety of railway operations or the safety of people;
- (xxiii) a security incident associated with railway premises that affects the safety of railway operations, including an act of trespass, vandalism, sabotage or theft that could affect the safety of railway operations.

### Section 30 Rail Transport – responsible person

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

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

### Section 31 Rail Transport – particulars for reports of reportable matters

In accordance with section 18 and 19 of the TSI Act, this section would prescribe the particulars to be included in relation to a report. The purpose of prescribing the relevant

particulars is to ensure that the ATSB receives adequate information in relation the immediately reportable matter, rather than just a report of the specific occurrence. These particulars are:

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

#### Section 32 Rail transport – nominated officials for reportable matters

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

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

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

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

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

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

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

### **Part 5 – General**

#### Section 35 – Delegation by the ATSB or the Chief Commissioner

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

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

This section of the Regulations would specify the criteria, one of which a person must satisfy to be delegated powers by the ATSB or Chief Commissioner. This criteria would be directed

at ensuring that the person has appropriate experience or qualifications to be involved in one or more aspects of a transport safety investigation. Subsection 35 (b) would also require that where the power to be delegated is a power under Division 2 or 3 of Part 5 of the Act, a person must have received appropriate training and briefing which would ensure that they are made aware of the extent of their powers and the circumstances in which they are to be used.

#### Section 36 – Delegation by the Chief Executive Officer

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

#### Section 37 - Special Investigators

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

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

#### Section 38 – Functions of ATSB

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

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

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

This provision would follow current arrangements under the TSI Regulations 2003.

#### Section 39 – International Obligations

Section 12AD of the Act provides that the ATSB and the Chief Commissioner must ensure that their relevant powers are exercised in a manner that is consistent with Australia's obligations under international agreements that are identified in the Regulations.

Subsection 12AD(3) also provides that in exercising any powers under the Act, both the ATSB and Chief Commissioner must also have regard to any rules, recommendations,

guidelines, codes or other instruments that are promulgated by an international organisation (such as the International Maritime Organization) that are identified in the Regulations.

For this purpose, section 39 of these Regulations would amend the TSI Regulations 2003 to specify Part III of the Code of the International Standards and Recommended Practices for a Safety Investigation into a Marine Casualty or Marine Incident, adopted by resolution MSC.255(84) of the Maritime Safety Committee of the Assembly of the International Maritime Organization. Part III of the Code includes mandatory obligations for investigations involving marine casualties for ships covered by the International Convention for the Safety of Life at Sea (SOLAS), 1974. This would replace the previous version of the Code that was set out in the TSI Regulations 2003.

#### Section 40 – Immediate reports

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

#### Section 41 Written reports

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

For this purpose, this section would prescribe email, electronic lodgement or data transfer as means for providing a written report.

#### Section 42 – Identity cards

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

#### Section 43 – Fees for attending before ATSB

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

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

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

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

The definition of OBR information under section 48 of the Act is reasonably broad and could possibly capture recordings that were not intended to receive the protections associated with this type of information. Subsection 48(3) of the Act, therefore, allows the regulations to prescribe that a recording is not to be an OBR even though it may be claimed that it falls within the definition under section 48.

This section would list those recordings for each mode of transport that do not need to be protected in the same manner as an OBR under the Act as:

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

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

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

#### Section 45 - Release of OBR information

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

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

#### Section 46 – Release of restricted information

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

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

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

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

#### Section 47 – Fees for attending coronial inquiry

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

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

includes remuneration for reasonable costs incurred by the staff member for transport and accommodation for attendance at the coronial inquiry.

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

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