

# **Transport Safety Investigation Regulations 2003 2003 No. 158**

## **EXPLANATORY STATEMENT**

### **STATUTORY RULES 2003 No. 158**

Issued by the Authority of the Minister for Transport and Regional Services.

#### ***Transport Safety Investigation Act 2003***

#### ***Navigation Act 1912***

#### *Transport Safety Investigation Regulations 2003*

#### *Navigation (Marine Casualty) Repeal Regulations 2003*

Section 2 of the *Transport Safety Investigation Act 2003* (the Act) provides that sections 3 to 71 commence on a single day to be fixed by proclamation, or, if no earlier date is fixed, 6 months after the Act receives the Royal Assent. The Act received the Royal Assent on 11 April 2003.

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

Subsection 425(1) of the *Navigation Act 1912* provides the regulation making power under which the *Navigation (Marine Casualty) Repeal Regulations 2003* (Repeal Regulations) are made.

The Act provides for the investigation of transport safety matters in the aviation, marine and rail modes of transport. Essentially its components cover the:

- conduct of independent transport safety investigations by the Australian Transport Safety Bureau (ATSB);
- reporting of transport safety matters;
- making of safety action statements including safety recommendations to address safety deficiencies identified by investigations;
- publication of investigation results; and
- protection of sensitive safety information.

The purpose of the TSI Regulations is to prescribe matters required to give effect to provisions in the Act, such as defining specific occurrences constituting reportable matters, listing persons responsible for reporting and nominating officials for receiving reports. Details of the TSI Regulations are attached.

The purpose of the Repeal Regulations is to provide for the repeal of, and transitional arrangements for, the *Navigation (Marine Casualty) Regulations 1990*, which are made redundant on the commencement of the Act. Details of the Repeal Regulations are also attached.

The TSI Regulations commenced on the commencement of section 3 of the Act, which was fixed by proclamation as 1 July 2003. The Repeal Regulations commenced on the commencement of Schedule 1 to the *Transport Safety Investigation (Consequential Amendments) Act 2003*, which in turn commenced immediately after section 3 of the Act (in effect 1 July 2003).

Authority: Section 71 and subsection 2(1) of the *Transport Safety Investigation Act 2003*;

Subsections 4(1) and 4(4) of the *Acts Interpretation Act 1901*; and

Subsection 425(1) of the *Navigation Act 1912*.

## **Attachment**

### ***Transport Safety Investigation Regulations 2003***

#### **Notes on Regulations**

Some of the sections in the Act which allow for the making of regulations in effect require regulations that are specific to a particular mode of transport. The lists of immediate and routine reportable matters are a good example. Transport safety matters that constitute immediate or routine reportable matters will be different for the aviation, marine and rail modes of transport. To accommodate this the Transport Safety Investigation Regulations have been broken down into separate parts for matters that are relevant for the aviation, marine and rail modes of transport and a further part that contains general matters relevant to the operation of the Act in transport safety matters for all three modes of transport.

#### **Part 1 Preliminary**

##### **Regulation 1.1 Name of Regulations**

The regulation provides that the Regulations are the *Transport Safety Investigation Regulations 2003*.

##### **Regulation 1.2 Commencement**

The regulation provides that the Regulations commence on the commencement of section 3 of the *Transport Safety Investigation Act 2003*.

##### **Regulation 1.3 Definitions**

The regulation provides definitions for terms that are used in all three modes of transport for the purposes of the Regulations.

#### **Part 2 Aviation**

##### **Regulation 2.1 Application of Part 2**

The regulation makes it clear that Part 2 only relates to matters involving aircraft operations. However, an Australian defence aircraft and an exempt foreign aircraft, which under the Act is an aircraft used in the military, customs or police services of a foreign country, are excluded, by subregulation 2.1(2), from the application of Part 2 for reporting requirements. Both types of aircraft are exempt transport vehicles under the Act. They cannot be investigated unless the occurrence involves a non-exempt transport vehicle and/or a civil transportation facility. However, an Australian defence aircraft may also 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.

Subregulation 2.9 is applicable to all aircraft within the jurisdiction of the Act. Subregulation 2.9 is not related to any reporting requirements. It should be applicable to any aircraft involved in a transport safety matter that may be investigated under the Act.

Subregulation 2.1(3) makes it clear that where a reportable matter occurs involving an aircraft excluded by subregulation 2.1(2) and an aircraft not excluded by subregulation 2.1(2) the latter aircraft is still subject to the reporting requirements of Part 2 of the Regulations

Subregulation 2.1(4) provides the circumstances when the matters under Part 2, involving aircraft operations, are to apply. For example, the operation of subregulation 2.1(4) means that an immediately reportable matter under regulation 2.3 or a routine reportable matter under regulation 2.4 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.

The only exception to this period is subregulation 2.1(5) where a death or serious injury arises later but has occurred as a result of an occurrence during the period defined in subregulation 2.1(4).

## **Regulation 2.2 Definitions for Part 2**

The regulation provides definitions that are applicable to terms used in Part 2 of the Regulations.

## **Regulation 2.3 Immediately Reportable Matters**

Section 3 of the Act leaves the list of immediately reportable matters to be reported under section 18 to be prescribed by regulations. Regulation 2.3 provides a list of transport safety matters that are immediately reportable for aviation if they meet the requirements outlined in regulation 2.1. An immediately reportable matter in aviation is similar to an *accident* or *serious incident* which were immediately reportable under Part 2A of the *Air Navigation Act 1920* (AN Act) which was repealed on the commencement of the Transport Safety Investigation Act. Part 2A of the AN Act was prescriptive of the occurrences that constituted an *accident* but only provided a broad definition of the term *serious incident*. The terms and their meanings were derived from Annex 13 to the Convention on International Civil Aviation, concluded at Chicago on 7 December 1944 (Chicago Convention). These regulations seek to avoid broad definitions of occurrences to ensure that it is clear to 'responsible persons' what they actually must report. However, while the regulation is prescriptive of the actual occurrences that need to be reported those occurrences meet the definitional requirements of Annex 13 for *accidents* and *serious incidents*.

The regulation is broken up into matters to be reported by all aircraft operations and those to be reported by aircraft engaged in *air transport operations*. Subregulation 2.3(1) sets out the matters that are immediately reportable for all aircraft operations. Subregulation 2.3(3) sets out those matters that are immediately reportable for *air transport operations* only.

Regulation 2.2 defines an *air transport operation* as a regular public transport operation or a charter operation. The distinction between these types of operations and other aircraft operations is made because of the potentially greater safety implications that might result from an occurrence involving an aircraft engaged in an *air transport operation*. 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.

Most of the occurrences covered as immediately reportable matters under subregulation 2.3(3) for aircraft involved in *air transport operation* would be reportable as routine reportable matters under subregulation 2.4(2) if the occurrence was related to an operation other than an *air transport operation*.

Subregulation 2.3(2) excludes death and serious injury occurring in certain circumstances from being an immediately reportable matter under paragraph 2.3(1)(a). The investigation of a death or serious injury in the circumstances outlined 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.

Annex 13 to the Chicago Convention provides a similar list of exceptions, highlighting that it is internationally agreed that these circumstances are not considered to be safety matters.

#### **Regulation 2.4      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. The regulation provides a list of transport safety matters that are routinely reportable if they occur during the circumstances outlined in regulation 2.1. A routine reportable matter in aviation is similar to an *incident* which was to be reported within 48 hours under the repealed Part 2A of the AN Act. Part 2A of the AN Act provided a broad definition of the term *incident*. The term and its meaning are derived from Annex 13 to the Chicago Convention. These regulations seek to avoid broad definitions of occurrences to ensure that it is clear to 'responsible persons' what they are required to report. However, while the regulation is prescriptive of the actual occurrences that need to be reported, those occurrences meet the definitional requirements of Annex 13 for an *incident*.

The regulation is broken up into two subregulations. Subregulation 2.4(1) sets out the matters that are routinely reportable for aircraft involved in an *air transport operation*. Subregulation 2.4(2) sets out all the matters that are routinely reportable for aircraft involved in an operation other than an *air transport operation*.

#### **Regulation 2.5      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. The regulation provides 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 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.

#### **Regulation 2.6      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. The regulation sets out the information required to be reported to a 'nominated official'.

The list of information to be included in the report is 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 will 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 will be used to decide whether an investigation is necessary. If an investigation is considered to be necessary the information contained in the report will 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.

Subregulation 2.6(1) does not include the information that is required to be reported for a collision with an animal or bird. Much of the information required for other reports is not needed for a collision with an animal or bird. Subregulation 2.6(2) sets out a more limited range of information that must be reported by a 'responsible person', if it is within their knowledge, for a collision with an animal or bird. Reports on collisions with animals or birds are usually only used for statistical purposes so it is not necessary for the 'responsible person' to provide comprehensive detail in the report unless the collision results in one of the other reportable occurrences.

## **Regulation 2.7      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. Under the former Part 2A of the AN Act the Australian Transport Safety Bureau (ATSB) was the prime agency for receiving aviation reports. Under paragraph 2.7(a) a staff member, other than a special investigator is listed as a 'nominated official', ensuring that the ATSB will still receive reports. Paragraph 2.7(b) lists a staff member of the Australian Maritime Safety Authority (AMSA), however, in practice, the ATSB remains the prime agency for receiving reports. Staff members of AMSA are listed as 'nominated officials' because in the past they occasionally received reports of aviation occurrences through the Australian Search and Rescue Coordination Centre. They have been made 'nominated officials' for receiving reports so that 'responsible persons' can meet statutory requirements under the Act without changing their existing reporting practices.

## **Regulation 2.8      Reports to be given to staff member**

The regulation ensures that ultimately a staff member, other than a special investigator receives a report of an immediately or routine reportable matter.

## **Regulation 2.9      OBR information**

The definition of an on-board recording (OBR) information under section 48 of the Act is reasonably broad and could possibly capture recordings that were not intended to receive the protection of OBR information. Section 48 of the Act, therefore, allows 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. The recordings listed under regulation 2.9 are not recordings that need to be protected in the same manner as an OBR under the Act. The sensitivity of the information is not the same as a Cockpit Voice Recording (CVR) in an aircraft which may be classified as an OBR under the Act.

The recordings listed in regulation 2.9 will receive protection under 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.

## **Part 3      Marine**

### **Regulation 3.1      Application of Part 3**

Subregulations 3.1(1) and 3.1(2) make it clear that Part 3 only relates to a limited category of marine operations for the reporting requirements under that Part. The reason for limiting the

reporting requirements to certain types of ships is that the Commonwealth has not assumed responsibility for marine operations to the extent that it has assumed responsibility for aircraft operations. The shipping operations which have not been excluded, such as trading ships on inter-State voyages and overseas voyages and fishing vessels on overseas voyages 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 regulation 3.3. The immediately reportable matter needs to be reported to a 'nominated official' in regulation 3.6. However, although subregulation 3.1(2) absolves the listed ships from the requirements under Part 3 of the Regulations, the Act itself will still permit the investigation of a transport safety matter involving any ship within the jurisdiction of the Act. Though an investigation of a transport safety matter involving a ship not required to report matters under Part 3 of the Regulations is only likely to occur where the accident represents very serious safety consequences or another ship is involved to which the reporting requirements of Part 3 apply.

Subregulation 3.8 is applicable to all ships within the jurisdiction of the Act. Subregulation 3.8 is not related to reporting requirements. It should be applicable to any ship involved in a transport safety matter that may be investigated under the Act.

Subregulation 3.1(3) makes it clear that where a reportable matter occurs involving a ship excluded by subregulation 3.1(2) and a ship not excluded by subregulation 3.1(2) the latter ship is still subject to the reporting requirements of Part 3 of the regulations.

Subregulation 3.1(4) provides the circumstances in which the matters under Part 3, involving marine operations, are to apply. For example, the operation of subregulation 3.1(4) means that an immediately reportable matter under regulation 3.3 need only be reported when it occurs 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.

The only exception to this period is subregulation 3.1(5) where a death or serious injury arises later but has occurred as a result of an occurrence during the period defined in subregulation 3.1(5).

## **Regulation 3.2     Definitions for Part 3**

The regulation provides definitions that are applicable to terms used in Part 3 of the Regulations.

## **Regulation 3.3     Immediately Reportable Matters**

Section 3 of the Act leaves the list of immediately reportable matters to be reported under section 18 of the Act to be prescribed by regulations. Regulation 3.3 provides a list of transport safety matters that are immediately reportable for marine if they meet the reporting requirements outlined in regulation 3.1. The list is based on the types of matters that the ATSB used to investigate under the repealed *Navigation (Marine Casualty) Regulations 1990* (Marine Casualty Regulations). Paragraph 3.3(1)(k) is an addition included to cover occurrences that are not regularly identified but which the ATSB may need to investigate for the purposes of future transport safety.

Subregulation 3.3(2) excludes death and serious injury occurring in certain circumstances from being an immediately reportable matter under paragraph 3.3(1)(a). The investigation of a death or serious injury in the circumstances outlined would be unlikely to enhance the safety of the operation of ships 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 criminal issue). However, the death of, or serious injury to, a person who has duties essential

to the safety of the ship from natural causes has not been excluded in the regulation. Therefore, a death of, or serious injury to, a person who has duties essential to the safety of the ship from natural causes is a transport safety matter.

The list of exceptions from the requirement to immediately report a death or serious injury in marine are modelled on a list provided in Annex 13 to the Chicago Convention for similar purposes in the context of aviation. The Marine Casualty Regulations excluded death and serious injury in the types of circumstances outlined by requiring the death or serious injury to be reasonably suspected of being caused by, or in connection with, the operations of a ship.

Unlike aviation, marine does not include a list of routine reportable matters. The list of routine reportable matters for aviation exists because of the extensive responsibilities that the Commonwealth Government has for aviation matters.

### **Regulation 3.4 Responsible Person**

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 the regulations. The regulation provides 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 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.

### **Regulation 3.5 Written Reports**

Section 19 of the 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'. Section 19 leaves the content of the written report to be prescribed by regulations. The regulation sets out the information required to be reported to a 'nominated official'.

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 will 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. It may also be used for statistical purposes and marine safety research and analysis.

### **Regulation 3.6 Nominated Official**

Section 20 of the Act requires that regulations prescribe a list of persons who are 'nominated officials' in relation to reportable matters. Paragraph 3.6(a) lists a staff member other than a special investigator. However, in practice, most 'responsible persons' will report to a staff member of AMSA who is listed as a 'nominated official' under paragraph 3.6(b). Under the *Navigation Act 1912* AMSA is responsible for receiving reports of marine occurrences. Prior to the commencements of the *Transport Safety Investigation Act*, by agreement, these were passed on to the ATSB. Staff members of AMSA have been made 'nominated officials' for receiving reports so that 'responsible persons' can meet statutory requirements under the Act without changing their existing reporting practices.

### **Regulation 3.7 Reports to be given to a staff member**



The regulation ensures that ultimately a staff member, other than a special investigator, receives a report of an immediately or routine reportable matter.

### **Regulation 3.8      OBR Information**

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 protection of OBR information. Section 48 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. The recordings listed under regulation 3.8 are not recordings that need to be protected in the same manner as an OBR under the Act. The sensitivity of the information is not the same as a CVR in an aircraft which may be classified as an OBR under the Act.

The recordings listed in regulation 3.8 will receive protection under 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.

## **Part 4      Rail**

### **Regulation 4.1      Application of Part 4**

The regulation sets out the circumstances in which Part 4 is to apply to matters for rail operations. For example, the operation of subregulation 4.1(1) means that an immediately reportable matter under regulation 4.3 need only be reported where it occurs as a result of a rail operation on the interstate rail network.

Unlike subregulation 2.1(2) for aviation and subregulation 3.1(2) for marine, regulation 4.1 does not prescribe a specific period during which matters are to occur for Part 4 to apply. It is only necessary that they involve rail vehicle operations and occur on the interstate rail network. For rail, the vehicle is considered to be in operation for the purposes of these regulations when it is on the interstate rail network. As reports are only required for a limited number of serious occurrences in rail it is appropriate to only confine the application of Part 4 to where the matters occur on the interstate rail network.

The only exception for this circumstance is subregulation 4.1(2) where a death or serious injury arises later but has occurred as a result of an occurrence during the circumstances defined in subregulation 4.1(1).

### **Regulation 4.2      Definitions for Part 4**

The regulation provides definitions that are applicable to terms used in Part 4 of the Regulations.

### **Regulation 4.3      Immediately Reportable Matters**

Section 3 of the Act leaves the list of immediately reportable matters to be reported under section 18 to be prescribed by regulations. Regulation 4.3 provides a list of transport safety matters that are immediately reportable for rail if they meet the requirements outlined in regulation 4.1. The immediately reportable matters for rail are derived from the list of 'Category A' incidents in Australian Standard 4292.1 - 1995 Railway Safety Management (approved on behalf of the Council of Standards Australia). The Standard contains a uniform set of safety standards that have been developed in consultation with State and Territory railway safety regulators and operators.

Subregulation 4.3(2) excludes death and serious injury occurring in certain circumstances from being an immediately reportable matter under paragraph 4.3(1)(a). The investigation of a death

or serious injury in the circumstances outlined would be unlikely to enhance the safety of the operation of rail vehicles 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 criminal issue). However, the death of, or serious injury to, a member of a locomotive crew from natural causes has not been excluded in the regulation. The locomotive crew members are directly responsible for the control and movement of the rail vehicle. Therefore, a death of, or serious injury to, a member of the locomotive crew from natural causes is a safety matter.

Unlike aviation, rail does not include a list of routine reportable matters. The list of routine reportable matters for aviation exists because of the more extensive responsibilities that the Commonwealth Government has for aviation matters. Such extensive responsibilities have not been assumed for rail.

#### **Regulation 4.4 Responsible Persons**

Section 3 of the Act leaves the list of 'responsible persons' who are required to report immediately reportable matters to be prescribed by regulations. The regulation provides 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.

#### **Regulation 4.5 Written Reports**

Section 19 of the 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'. Section 19 leaves the content of the written report to be prescribed by regulations. The regulation sets out the information that is required to be reported to a 'nominated official'.

Previously, all rail safety investigations conducted by the ATSB have been undertaken under State or Territory legislation. Those investigations were instigated on reports received by the relevant State or Territory rail safety regulator. Persons listed as 'responsible persons' have been accustomed to the reporting requirements of the rail safety regulator in the relevant State or Territory. As the rail safety regulators still receives reports as 'nominated officials' under these regulations, regulation 4.5 allows a 'responsible person' to follow the rail safety regulators reporting requirements where they exist. The result prevents duplicate reporting requirements under the TSI Act and State or Territory legislation.

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 will 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 pick up inconsistencies with other reported information. It may also be used for statistical purposes and rail safety research and analysis.

#### **Regulation 4.6 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. Paragraph 4.6(a) lists a staff member, other than a special investigator. However, in practice, most 'responsible persons' report to an employee of a State or Territory rail safety regulator who is listed as a 'nominated official' under paragraph

4.6(b). This regulation ensures that 'responsible persons' in rail can meet statutory requirements under the Act without changing their existing reporting practices.

#### **Regulation 4.7      Reports to be given to a staff member**

The regulation ensures that ultimately a staff member, other than a special investigator, receives a report of an immediately reportable matter.

#### **Regulation 4.8      OBR Information**

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 protection of OBR information. Section 48 of the Act, therefore, allows for 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. The recordings listed under regulation 4.8 are not in the category of recordings that need to be protected in the same manner as an OBR under the Act. The sensitivity of the information is not the same as a CVR in an aircraft which may be classified as an OBR under the Act.

The recordings listed in regulation 4.8 will receive protection under the Act as restricted information, including a broad range of confidentiality provisions, where they are associated with a transport vehicle that is or was the subject of an investigation.

### **Part 5      General**

#### **Regulation 5.1      Delegations**

Subsection 13(6) of the Act requires that regulations prescribe criteria that a person must satisfy to be delegated powers under subsection 13(1). The criteria a person must satisfy under paragraph 5.1(a) is directed at ensuring that the person has appropriate experience or qualifications to be involved in one or more aspects of a transport safety investigation. Paragraph 5.1(b) recognises the potential invasion of private rights through the exercise of powers under Divisions 2 and 3 of Part 5 of the Act. Ensuring that a person has appropriate training and briefing helps to ensure those rights are not unduly interfered with. Through their training and briefing, investigators delegated premises powers under Divisions 2 and 3 of Part 5 will be made aware of the extent of their powers and the circumstances in which they are to be used.

#### **Regulation 5.2      Special investigators**

Section 14 of the Act requires that regulations prescribe criteria that a person must satisfy to be appointed as a special investigator. A special investigator, generally, will be somebody who possesses specialist skills or expertise that the ATSB may need for a transport safety investigation and, as a special investigator, it is possible that the person will be delegated the TSI Act's section 32 power to require interviews. Because the special investigator will be delegated other powers under the Act that have significant responsibility attached, the same set of criteria in paragraph 5.1(a), which is applicable for the delegation of powers under the Act is also appropriate for the appointment of a special investigator. The criteria in paragraph 5.1(a) ensures that the special investigator has appropriate experience or qualifications to be involved in one or more aspects of a transport safety investigation.

#### **Regulation 5.3      International Obligations**

Subsection 17(1) of the Act states that regulations may prescribe international agreements that the Executive Director must ensure that the Executive Director's powers under the Act are exercised consistently with. Subsection 17(2) states that the regulations may prescribe rules,

recommendations, guidelines, codes or other instruments that are promulgated by an international organisation which the Executive Director must have regard to when exercising the Executive Director's powers under the Act.

Subregulation 5.3(1) sets out the international agreements to which Australia is a signatory and which contain obligations with regard to transport safety investigation. Subregulation 5.3(2) sets out the instruments, promulgated by a recognised international organisation, which Australia is not bound to follow but which the ATSB regularly has regard to when carrying out a transport safety investigation.

#### **Regulation 5.4      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'. The regulation prescribes 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.

#### **Regulation 5.5      Identity Cards**

Section 29 of the Act states that the identity card must be in a form prescribed by regulations. The regulation sets out information that appropriately identifies a person who has been delegated investigation powers under the Act when they are exercising those powers.

#### **Regulation 5.6      Fees for attending before Executive Director**

Section 32 of the Act enables the Executive Director to require the attendance of a person for the purpose of an investigation. The person attending before the Executive Director will be assisting the ATSB in ensuring that it has all the information considered relevant to a transport safety investigation. The person is eligible under regulation 5.6 for remuneration for their attendance.

The regulation takes into account that a person may be called upon to appear before the Executive Director in their professional capacity and should be eligible to be remunerated for the wages, salary or fees that the person would normally be paid. It also provides an eligibility for remuneration for a person who is called upon to appear before the Executive Director 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 the regulation makes them eligible for a fee for their attendance. The fee provided is equivalent to what a person would get in a similar circumstance for appearing before an investigator under the *Space Activities Act 1998* (see regulation 10.03 of *Space Activities Regulations 2001*).

The regulation also ensures that a person called to appear before the Executive Director has an entitlement to fair compensation for expenses such as accommodation and travel. When the Executive Director is considering what is a reasonable allowance for these expenses the regulation requires him or her to have regard to the rates (if any) determined for public service employees by the Department of Employment and Workplace Relations. Further, the entitlement for these allowances will only exist if the person seeks approval from the Executive Director before booking the accommodation and travel.

#### **Regulation 5.7      Release of OBR Information**

Section 51 of the Act allows the Executive Director to disclose OBR information to any person if the Executive Director considers that the disclosure is necessary or desirable for the purposes of transport safety. Section 51 also states that the Executive Director may only disclose OBR information that is, or that contains, personal information in the circumstances prescribed by regulations. The regulation only allows the release of OBR information that is or contains personal information when the Executive Director is required to do so by an international agreement mentioned in regulation 5.3. 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 Executive Director considers that the release of OBR information is necessary or desirable for the purposes of transport safety.

### **Regulation 5.8      Release of Restricted Information**

Section 61 of the Act allows the Executive Director 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. Section 61 also states that the Executive Director 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 Executive Director 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, subregulation 5.8(1) will 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 subregulation 5.3(1).

Subregulation 5.8(2) allows the Executive Director 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.

### **Regulation 5.9      Fees for attending a 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. The regulation takes into account a staff member being called upon to attend the coronial inquiry in their professional capacity as a transport safety investigator. The regulation, therefore, sets 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. The fee also includes remuneration for reasonable costs incurred by the staff member for transport and accommodation for attendance at the coronial inquiry.

Paragraph 5.9(1)(d) provides a discretionary mechanism for the Executive Director 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 69 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.

The fee comprising all its components is to be paid within 30 days after the day of the inquiry.

### ***Navigation (Marine Casualty) Repeal Regulations 2003***

#### **Notes on regulations**

##### **Regulation 1      Name of Regulations**

The regulation provides that the Regulations are the *Navigation (Marine Casualty) Repeal Regulations 2003*.

##### **Regulation 2      Commencement**

The regulation provides that the Regulations commence on the commencement of Schedule 1 to the *Transport Safety Investigation (Consequential Amendments) Act 2003*, which is immediately after sections 3 to 71 of the Transport Safety Investigation Act 2003 came into force.

##### **Regulation 3      Navigation (Marine Casualty) Regulations 1990 - repeal**

The regulation repeals the *Navigation (Marine Casualty) Regulations 1990* (Marine Casualty Regulations) including all subsequent amendments made to those regulations since 1990. Subject to the transitional arrangements in regulation 5 all investigations of marine safety occurrences are to be conducted under the Transport Safety Investigation Act.

##### **Regulation 4      Amendment of *Transport and Regional Services Legislation Amendment (Application of Criminal Code) Regulations 2002 (No. 1)***

The regulation omits regulation 14 and Schedule 12 of the *Transport and Regional Services Legislation Amendment (Application of Criminal Code) Regulations 2002 (No. 1)*. The combined effect of these two provisions was to amend the Marine Casualty Regulations

##### **Regulation 5      Transitional**

The regulation provides for the transitional arrangements for any marine investigation that has been completed or is under investigation at the time that the Marine Casualty Regulations are repealed. This includes investigations that have been completed or are yet to be completed, and investigations that have been discontinued before the repeal. Such investigations will continue to be covered by the provisions of the repealed regulations. All investigations that commence on or after the date that the Transport Safety Investigation Act becomes effective will be conducted in accordance with the provisions of that Act.