

EXPLANATORY STATEMENT

Select Legislative Instrument 2012 No. 264

Issued by Authority of the Minister for Infrastructure and Transport

Transport Safety Investigation Act 2003

Transport Safety Investigation Amendment Regulation 2012 (No. 2)

Section 71 of the *Transport Safety Investigation Act 2003* (TSI 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 TSI Act.

The purpose of the *Transport Safety Investigation Regulations 2003* (Principal Regulations) is to prescribe matters required to give effect to provisions in the TSI Act, including for receiving and assessing reports of safety information that is prescribed by the regulations and disclosing restricted information that is or contains personal information.

Subsection 12AA(1) of the TSI Act provides that the function of the Australian Transport Safety Bureau (ATSB) is to improve transport safety by a number of means. These include receiving and assessing reports of transport safety matters, reportable matters, and other safety information that is prescribed by the regulations. Currently regulation 5.2A of the Principal Regulations provides that safety information received under the confidential reporting (REPCON) schemes established by the *Navigation (Confidential Marine Reporting Scheme) Regulations 2008* (REPCON Marine Regulations) and the *Air Navigation (Confidential Reporting) Regulations 2006* (REPCON Aviation Regulations) are prescribed.

The Regulation amends regulation 5.2A. The amendment is made necessary by the *Transport Safety Investigation (Confidential Reporting Scheme) Regulation 2012* (new REPCON Scheme Regulation). That Regulation establishes a consolidated REPCON scheme for aviation, marine and rail and will repeal the REPCON Marine and Aviation Regulations. The Regulation replaces the outdated reference to the REPCON Marine and Aviation regulations with a reference to the new REPCON Scheme Regulation.

The Regulation also amends regulation 5.8 of the Principal Regulations. This amendment is also made necessary by the new REPCON Scheme Regulation. Under subsections 3(a) to (h) of the TSI Act, information that the ATSB either gathers, generates or obtains in the course of an investigation is 'restricted information'. Subsections 3(i) to (j) of the TSI Act provide that information contained or obtained or generated or contained in a report under the new REPCON Scheme Regulation is also restricted information. Due to its sensitivity and subject to some limitations, the TSI Act prohibits the copying or disclosure of restricted information except in limited circumstances.

Subsection 61(1) of the TSI Act provides that the ATSB may disclose restricted information to any person if the ATSB considers that the disclosure is necessary or

desirable for the purposes of transport safety. Subsection 61(2) states that the ATSB may only disclose restricted information that is or contains personal information in the circumstances prescribed by regulations.

The Regulation amends subregulation 5.8(2) of the Principal Regulations to provide that restricted information that is or contains personal information contained in a report, obtained or generated by the ATSB or is in records of analysis of information contained in a report under the REPCON may not be disclosed under the current regulation 5.8. This is because the current regulation 5.8 was intended to apply to restricted information relevant to an investigation of a transport safety matter. Further, specific provision for the disclosure of that information has been made in the new REPCON Scheme Regulation.

The Regulation also amends subparagraph 5.8(2)(a)(ii) of the Principal Regulations to correct a minor technical anomaly with the TSI Act.

The Regulation commences on 20 January 2013 to suit the operational requirements of the ATSB and to simultaneously coincide with the commencement of the new REPCON Scheme Regulation.

A Regulatory Impact Statement (RIS) was not required for the making of the amended regulation. A RIS (Exemption), reference number 13136 has been obtained from the Office of Best Practice Regulation.

Details of the New Regulations are at **Attachment A**. A Statement of Compatibility with Human Rights for the purpose of the *Human Rights (Parliamentary Scrutiny) Act 2011* is at **Attachment B**

The Act specifies no conditions that need to be met before the power to make the Regulations may be exercised.

The Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

No consultation was undertaken in respect of the amendments. This was not considered necessary as the amendments were of a minor or machinery nature that did not substantially alter existing arrangements. The amendment to regulation 5.2A was to replace an outdated reference to repealed regulations. The amendment to regulation 5.8(2) was to draw a distinction between information obtained in the course of an investigation of a transport safety matter under the *Transport Safety Investigation Act 2003* and that obtained under the *Transport Safety Investigation (Voluntary and Confidential Reporting Scheme) Regulation 2012* (REPCON Scheme Regulation). Those arrangements did not substantially alter arrangements in place prior to the making on 22 November 2012 REPCON Scheme Regulation.

The amendment to regulation 5.8(2)(a)(ii) was merely to correct a technical anomaly in the regulations.

Authority: Section 71 of the *Transport Safety Investigation Act 2003*

ATTACHMENT A**Details of the *Transport Safety Investigation Amendment Regulation 2012 (No. 2)*****Section 1 – Name of Regulation**

This section provides that the title of the Regulation is the *Transport Safety Investigation Amendment Regulation 2012 (No. 2)*.

Section 2 – Commencement

This section provides that the Regulation commences on 20 January 2013 to suit the operational requirements of the ATSB and to simultaneously coincide with the commencement of the new REPCON Scheme Regulation.

Section 3 – Amendment of *Transport Safety Investigation Regulations 2003*

This section provides that Schedule 1 amends the *Transport Safety Investigation Regulations 2003* (Principal Regulations).

Schedule 1**Item [1] – Paragraphs 5.2A(a) and (b)**

Item 1 substitutes a new paragraph 5.2A for paragraphs 5.2(a) and (b) in the Principal Regulations. The regulation is made for the purpose of paragraph 12AA(1)(a) of the TSI Act. Paragraph 12AA(1)(a) provides for improving transport safety by receiving reports of transport safety matters, reportable matters, and other safety information that is prescribed by regulation. For the purpose of paragraph 12AA(1)(a), item 1 of regulation 5.2A prescribes the ‘other safety information’ to be information received through the aviation, marine and rail voluntary and confidential reporting scheme to be established by the *Transport Safety Investigation (Voluntary and Confidential Reporting Scheme) Regulation 2012*.

Item [2] – Paragraph 5.2A(c)

This item renumbers paragraph 5.2A(c) in the Principal Regulations as 5.2A(b). This is for the purposes of the previous item that substituted paragraphs 5.2A(b) and (b) with a new paragraph 5.2A(a).

Item [3] – Paragraph 5.8(2)(a)

This item substitutes the existing paragraph 5.8(2)(a) of the Principal Regulation. The purpose of the item is to correct a reference in sub-paragraph 5.8(2)(a)(ii) to ‘a staff member’ and to provide in the future that information mentioned in paragraph (i), (j) or (k) of the TSI Act that is or contains personal information may not be disclosed under paragraph 5.8(2).

Section 61 of the TSI Act allows the ATSB to disclose restricted information to any person if the ATSB considers that the disclosure is necessary or desirable for the purposes of transport safety. Section 61 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 is not unnecessarily compromised even where the ATSB considers that the release of restricted information is necessary or desirable for the purposes of transport safety.

Paragraph 5.8(2) of the Principal Regulations allows the ATSB to disclose a limited category of restricted information, that is or contains personal information, to Department, an agency of the Commonwealth, a State or Territory Government, an agency of a State or Territory, or a coroner. That may only be for the purpose of transport safety data sharing, reporting, investigation of a transport safety matter or conducting a coronial inquiry and assist in carrying out a statutory obligation.

The new REPCON Scheme Regulation establishes a scheme for voluntary and confidential reporting of safety concerns for aviation, marine and rail transport. Information contained in a report, or obtained or generated by the ATSB in the course of considering the report and records of the analysis of the report is restricted information per subsections 3(i) to (j) of the TSI Act. Within that scheme is a comprehensive structure for dealing with, and disclosing, where necessary, restricted information that is or contains personal information. Consequently, there is no requirement to make provision in regulation 5.8 of the Principal Regulation to address the disclosure of that material. The Regulation excludes this information from the operation of subregulation 5.8 of the Principal Regulations.

Item [4] After subregulation 5.8(2)

The note directs attention to the *Transport Safety Investigation (Voluntary and Confidential Reporting Scheme) Regulations 2012* for the disclosure of restricted information that is, or contains, personal information.

ATTACHMENT B**Statement of Compatibility with Human Rights**

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

Transport Safety Investigation Amendment Regulation 2012 (No. 2)

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

Overview of the Legislative Instrument

The purpose of the Legislative Instrument is make amendments to the Principal Regulations made necessary by the *Transport Safety Investigation (Confidential Reporting Scheme) Regulations 2012* (new REPCON Scheme Regulation). The new REPCON Scheme Regulation establishes a scheme for the voluntary and confidential reporting of issues that affect or might affect transport safety in aviation, marine or rail transport. The scheme also sets out the circumstances where information may be disclosed or retained. This Legislative Instrument makes clear that information arising from the new REPCON Scheme Regulation that relates to individuals can only be disclosed under the new REPCON Scheme Regulation and not under the Principal Regulations.

Human rights implications

This Legislative Instrument engages the right to protection from arbitrary and unlawful interferences with privacy.

Right to protection against arbitrary and unlawful interferences with privacy

The Legislative Instrument engages the right to protection against arbitrary and unlawful interferences with privacy contained in Article 17 of the International Covenant on Civil and Political Rights (ICCPR), to which Australia is a party. Article 17 provides that no one shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation, and that everyone has the right to the protection of the law against such interference or attacks.

The right to privacy may be subject to permissible limitations. In order for an interference with the right to privacy to be permissible, the interference must be authorised by law, be for a reason consistent with the ICCPR and be reasonable in the particular circumstances. Reasonableness, in this context, incorporates notions of proportionality, appropriateness and necessity.

The right to protection against arbitrary and unlawful interferences with privacy will be engaged in situations where agencies collect, use, store and share personal

information.

The current subregulation 5.8(2) of the Principal Regulations allows the ATSB to disclose a limited category of restricted information, that is or contains personal information, to a another identified body where it is for the purpose of transport safety data sharing, reporting, investigation of a transport safety matter or conducting a coronial inquiry. This is information that the ATSB acquires once an investigation into a matter is underway. It can be provided, in the interests of transport safety, to other bodies to assist with their own investigations. Information is only released under subregulation 5.8(2) to those identified bodies for the purposes stated. This recognises the importance of the privacy of individuals and is consistent with Commonwealth privacy law.

This Legislative Instrument clarifies that personal information obtained under the REPCON Regulations can only be disclosed in accordance with the new REPCON Scheme Regulation for limited and specific purposes. This is because information the ATSB obtains under that Scheme is of a different character to that dealt with in a safety investigation. The new REPCON Scheme Regulation seeks to obtain information intended to identify unsafe practices or conditions prior to an incident occurring. This is information provided voluntarily and confidentially. To encourage reporting to identify matters before they occur, protection of the identity of reporters and persons named in a report is paramount. As the new REPCON Scheme Regulation will provide a comprehensive structure for dealing with, and disclosing information that is or contains personal information, these matters are excluded from the Principal Regulations.

The effect of this regulation will be to prevent ATSB disclosing restricted information that includes personal information under subregulation 5.8 if it relates to information collected obtained or generated under a voluntary reporting scheme. In practice, the new REPCON Scheme Regulation will regulate disclosure of this information and is far more limited in scope than regulation 5.8. To that extent, the Legislative Instrument promotes the right to privacy.

Conclusion

This Legislative Instrument is compatible with human rights as it does not impose any limitations on the right to privacy and promotes the right to privacy.