

**CONSULTATION DRAFT**  
**OF**  
**THE TRANSPORT SAFETY (CONFIDENTIAL REPORTING**  
**SCHEME) REGULATIONS**

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<sup>1</sup> This draft has been prepared by the ATSB for the purpose of consultation with the aviation, marine and rail transport industries. It does not reflect the actual form of the regulations as they may be drafted following consultation

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# Part 1 Preliminary

## 1 Name of Regulations

These Regulations are the Transport Safety (Confidential Reporting) Regulations

## 2 Commencement

These Regulations commence on xxxxx (NOT BEFORE January 2013).

## 3 Repeal and Transitional

- (1) The Air Navigation (Confidential Reporting) Regulations 2006 and the Navigation (Confidential Marine Reporting Scheme) Regulations 2008 are repealed.
- (2) Despite subregulation (1), the Air Navigation (Confidential Reporting) Regulations 2006 and the Navigation (Confidential Marine Reporting Scheme) Regulations 2008 continue to have effect in relation to reports made before the commencement of these Regulations

## 4 Interpretation

- (1) In these Regulations:

**Act** means the *Transport Safety Investigation Act 2003*.

**Act of unlawful interference with aviation** has the meaning given by section 10 of the *Aviation Transport Security Act 2004*

**AMSA** means the Australian Maritime Safety Authority established by the *Australian Maritime Safety Authority Act 1990*

**ATSB** means the Australian Transport Safety Bureau established by the Act

**CASA** means the Civil Aviation Safety Authority established by the *Civil Aviation Act 1988*.

**Civil Aviation Orders** has the meaning given by subsection 3 (1) of the *Civil Aviation Act 1988* as in force from time to time

**Criminal Code** means The Schedule to the *Criminal Code Act 1995*

**Department** means the Department of Infrastructure and Transport.

**Non-reportable criminal conduct** means:

- (a) an offence against a law of the Commonwealth, a State or Territory punishable by imprisonment for 2 years or more; or

*Note: this includes a terrorist act under section 100.1 of the Criminal Code*

- (b) an act of unlawful interference with aviation that constitutes a criminal offence.

**NRSR** means the National Rail Safety Regulator.

*Note: the NRSR has not been established. Model laws for consideration in the establishment of the NRSR are expected to be released on the National Transport Commission's website on 18 July 2011. See: <http://www.ntc.gov.au>*

**personal information** has the same meaning as in the Privacy Act 1988.

*Note* Section 6 of the *Privacy Act 1988* defines **personal information** as information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.

**Regulatory Authority** means either CASA, AMSA or the NRSR or a an agency of a State or Territory with safety regulation functions in relation to the aviation, maritime or rail modes of transport.

**REPCON** means the scheme established under subregulation 6 (1) for confidential reporting of reportable safety concerns.

**reportable safety concern** is an issue that affects, or might affect transport safety, other than the following matters:

- (a) matters showing a serious and imminent threat to a person's health or life;
- (b) non-reportable criminal conduct; or
- (c) industrial relations issues.

**reporter**, in relation to a report made or purportedly made under REPCON, means the person who made the report.

**Restricted information** has the same definition as in section 3 of the Act

*Note: restricted information includes all information included in an RSC Report*

**RSC report** means a report in which a reportable safety concern is described.

**Terrorist act** has the meaning given by subsection 100.1 of the *Criminal Code*.

**Transport Safety** has the same definition as in section 3 of the Act.

**Transport vehicle** has the same definition as in section 3 of the Act.

**Unmanned Aircraft Vehicle (UAV)** has the same meaning as in the Civil Aviation Safety Regulations 1998

*Note 1: Regulation 101.240 defines a UAV to mean an unmanned aircraft, other than a balloon or a kite.*

*Note 2: model aircraft are not included in the definition of UAV,*

**Large UAV** has the same meaning as in the Civil Aviation Safety Regulations 1998.

*Note: Regulation 101.240 defines a Large UAV to mean any of the following:*

- (a) an unmanned airship with an envelope capacity greater than 100 cubic metres;
- (b) an unmanned powered parachute with a launch mass greater than 150 kilograms;
- (c) an unmanned aeroplane with a launch mass greater than 150 kilograms;
- (d) an unmanned rotorcraft with a launch mass greater than 100 kilograms;
- (e) an unmanned powered lift device with a launch mass greater than 100 kilograms.

**Small UAV** has the same meaning as in the Civil Aviation Safety Regulations 1998.

*Note: Regulation 101.240 defines a small UAV to mean a UAV that is not a large UAV nor a micro UAV.*

**Micro UAV** has the same meaning as in the Civil Aviation Safety Regulations 1998.

*Note: Regulation 101.240 defines a Micro UAV to mean a UAV with a gross weight of 100 grams or less.*

**working day** in relation to a person or organisation, means a day that is not a Saturday, Sunday or public holiday in the place where that person lives, or that organisation is located.

*Note* The following terms are defined in subsection 6 (1) of the *Navigation Act 1912*:

- equipment
- port
- radio equipment
- ship.

- (2) For the purposes of these Regulations, any information obtained or generated by the ATSB in the course of clarifying and verifying information in a report is part of the report.

## **5 Application of these Regulations**

These Regulations apply to the reporting of issues that affect or might affect transport safety in respect of:

### *Aviation*

- (1) aircraft operations involving a:
  - (a) manned aircraft;
  - (b) Large UAV;
  - (c) Small UAV; or
  - (d) Micro UAV.

*Note: 'aircraft operations' includes the full range of commercial and safety matters that involve, support or are incidental to the operation of an aircraft.*

### *Marine*

- (2) marine activities associated with the operation or safety of a ship to which the *Navigation Act 1912* applies; or

### *Rail*

- (3) rail operations in respect of which the ATSB would otherwise have jurisdiction under the Act.

## Part 2 The REPCON Scheme

### 6 Establishment and purposes of scheme

- (1) There is established a scheme (**REPCON**) for the confidential reporting of issues that affect or might affect transport safety.
- (2) The primary purpose of the scheme is to enable the ATSB:
  - (a) to provide a voluntary confidential reporting scheme for reportable safety concerns; and
  - (b) to use the reports made under the scheme to identify unsafe procedures, practices or conditions; and
  - (c) to provide information to the aviation, marine and rail industries about an identified unsafe procedure, practice or condition to facilitate safety awareness and safety action and improvements by other persons and organisations.
- (3) The secondary purpose of the scheme is to enable the ATSB to provide information, arising from reports, about a transport safety security concern to an appropriate person or organisation to facilitate security awareness.

*Note: It is not intended that REPCON be a confidential reporting system for security concerns. However this subregulation applies where security issues are an unintended by-product of a reportable safety concern received under REPCON.*

### 7 Powers and functions of the ATSB under REPCON

As administrator of REPCON, the powers and functions of the ATSB include, but are not limited to:

- (a) accepting and processing reports of issues that affect or might affect transport safety;
- (b) forwarding, returning or destroying reports in accordance with these regulations;
- (c) reviewing information contained in reports;
- (d) establishing and maintaining databases for storing information contained in reports;
- (e) identifying issues and factors that affect or might affect transport safety;
- (f) communicating those issues and factors to relevant sectors of the transport industry, Regulatory Authorities and to the public;
- (g) issuing information briefs or alert bulletins that the ATSB considers are necessary or desirable in the interests of transport safety;
- (h) publishing details of reviews made under paragraph (c);
- (i) liaising with any committee established under these regulations to assess the effectiveness of REPCON.

*Note Parts 5 and 6 affect the powers and functions of the ATSB relating to information contained in reports.*

## Part 3 REPCON Reporting

### 8 What may be reported?

A report may be made to the ATSB of any reportable safety concern.

### 9 How are REPCON reports to be made?

Subject to Regulation 10, a report to the ATSB must be in writing and contain the following information

- (a) the reporter's name;
- (b) the preferred means by which the ATSB may contact the reporter (mailing or e-mail address, telephone or fax number);
- (c) a description of the matter that comprises the reportable safety concern.

*Note:* Copies of the current forms for reporting are available on the ATSB website:

*Aviation:* <http://www.atsb.gov.au/voluntary/repcon-aviation.aspx>

*Marine:* <http://www.atsb.gov.au/voluntary/repcon-marine.aspx>

### 10 Can a REPCON report be made orally?

A report that is not made in writing must be reduced to writing by the ATSB.

*Example*

*A report made over the phone to the ATSB must be reduced to writing by the ATSB.*

## Part 4 Assessment and acceptance of REPCON reports

### 11 Processing of reports

- (1) The ATSB must accept a report if:
  - (a) the ATSB is satisfied that REPCON is the most suitable avenue for making the report; and
  - (b) the ATSB reasonably believes that the matter described in the report is a reportable safety concern; and
  - (c) the ATSB reasonably believes the report to be true.
- (2) If the ATSB decides not to accept a report, the ATSB must:
  - (a) determine whether to disclose any information from the report and act accordingly; and
  - (b) deal with the report in accordance with subregulation (3) as soon as practicable.

*Note Regulations 14, 15, 17 and 18 affect the powers and functions of the ATSB relating to disclosure of information contained in reports.*
- (3) For paragraph (2) (b) and subject to regulation 12, the ATSB must:
  - (a) return to the reporter, or destroy, the part of the report supplied by the reporter; and
  - (b) if any part of the report was supplied by a person other than the reporter — return to that other person, or destroy, that part of the report.

### 12 Dealing with REPCON reports that have been accepted

- (1) If the ATSB accepts a report, the ATSB must:
  - (a) determine what information in the report is to be included in databases maintained for the purposes of REPCON and include that information in those databases; and
  - (b) determine whether to disclose any information from the report and act accordingly; and
  - (c) deal with the report in accordance with subregulation (4) as soon as practicable.

*Note Regulations 14, 15, 17 and 18 affect the powers and functions of the ATSB relating to disclosure of information contained in reports.*
- (2) The ATSB may include restricted information that is or contains personal information in a database maintained by REPCON only if:
  - (a) it is impracticable to remove the restricted information from the report; or
  - (b) the ATSB considers that it is necessary to keep in contact with the reporter or a person or organisation referred to in the report, and the restricted information is reasonably necessary for that purpose.

- (3) If restricted information that is or contains personal information is included in a database for the purpose mentioned in paragraph (2) (b), and the ATSB is satisfied that it is no longer necessary or desirable to keep the restricted information for that purpose, the ATSB must permanently remove the restricted information from the database.
- (4) For paragraph (1) (c) and subject to regulation 13, the ATSB must:
  - (a) return to the reporter, or destroy, the part of the report supplied by the reporter; and
  - (b) if any part of the report was supplied by a person other than the reporter — return to that other person, or destroy, that part of the report.

### **13 REPCON reports the making of which may have constituted an offence**

- (1) If the ATSB reasonably believes that the making of a report constituted an offence against section 137.1 of the *Criminal Code*, the ATSB must not:
  - (a) destroy the report; or
  - (b) return the report, or any part of the report, to the reporter; or
  - (c) return any part of the report supplied by a person other than the reporter to the other person;until 2 years (the *relevant period*) has elapsed from the date when the report was made.
- (2) If a prosecution for an offence against section 137.1 of the *Criminal Code* is commenced within the relevant period, the ATSB must not destroy, or return to a person, any part of the report that is required to be kept for the purpose of the prosecution until it is no longer required for that purpose.

*Note: Under section 137.1 of the Criminal Code, it is an offence for a person to knowingly supply false or misleading information to a Commonwealth officer.*

## Part 5 Disclosure and use of REPCON reports\ and information in REPCON reports

### 14 Release of restricted information

- (1) Subject to subregulations (2), (3) and (4), the ATSB may not disclose restricted information from a report unless ATSB has removed all personal information from the information to be disclosed.
- (2) If the ATSB proposes to disclose information from the report, and it is not possible to remove from the information all restricted information that is or contains personal information about a reporter or a person referred to in the report without defeating the purpose for which the ATSB proposes to disclose the information, the ATSB may disclose the information only if:
  - (a) the ATSB considers it necessary or desirable to do so for the purposes specified in subregulation 6 (2)(b), (c) or (3); and
  - (b) the ATSB has first obtained the consent of the person to whom the restricted information relates.
- (3) Nothing in this regulation prevents the ATSB from disclosing restricted information that is or contains personal information:
  - (a) necessary for the purpose of reporting or investigating a possible offence against section 137.1 of the Criminal Code;
  - (b) in accordance of Part 6;
  - (c) if the ATSB believes on reasonable grounds that disclosure is necessary to lessen or prevent a serious or imminent threat to a person's life or health; or
  - (d) reporting or investigating non-reportable criminal conduct other than that referred to in 14(3)(b).

*Note 1 The matters addressed by paragraphs (3) (b) (c) and (d) are excluded from being reportable safety concerns by the definition of a reportable safety concern in regulation 4*

*Note 2 Part 6 of these regulations prescribes the means by which such information to which paragraph 14(3)(b) relates must be disclosed*

*Note 3 For clarity, nothing prevents the ATSB providing anyone with access to restricted information that contains personal information in accordance with section 62 of the Act. A person accessing restricted information in accordance with section 62 is bound by the confidentiality requirements of section 60 of the Act.*

### 15 Opportunity to comment on REPCON reports in certain circumstances

- (1) This regulation applies if the ATSB proposes to send information from a report to a regulatory authority.
- (2) Subject to subregulation (4) before sending the information from the report to a Regulatory Authority the ATSB must:

- (a) provide any person or organisation named in the report with a version of the report in accordance with regulation 14; and
  - (b) allow the person or organisation 5 working days to comment on the report's contents.
- (3) The ATSB must take into account any comments made by the person or organisation when deciding whether to send information from the report to a person or regulatory body.
- (4) The requirements of subregulations (2) and (3) do not apply to the giving of a report to a particular person or organisation if the ATSB believes that:
- (a) giving a version of the report to the person or organisation is likely to:
    - (i) inhibit the ATSB from achieving a purpose of the scheme mentioned in subregulation 6(2) or (3); or
    - (ii) damage the ATSB's reputation for keeping restricted information, containing personal information, confidential under the REPCON scheme and, consequently, reduce reporting under REPCON; or
  - (b) it is impractical to do so.

## **16 REPCON report not to be ground for disciplinary action etc**

- (1) A person is not entitled to take disciplinary action against an employee of the person using information derived from an RSC report.
- (2) A person is not entitled to make a decision of an administrative character under an Act, or an instrument made under an Act, against a person using information derived from an RSC report.
- (3) To avoid doubt, this regulation does not prevent the use of information derived from a source that is not an RSC report.

## **16A Reports not to be admissible in evidence**

- (1) Each of the following is not admissible in evidence in a court or tribunal:
  - (a) an RSC report;
  - (b) evidence about the contents of an RSC report.
- (2) Subregulation (1) does not apply in proceedings in relation to whether the making of a report constituted an offence against section 137.1 of the *Criminal Code*.
- (3) Subregulation (1) does not apply if the ATSB issues a certificate to the effect that:
  - (a) the use of a specified RSC report, or evidence as to its contents, in specified proceedings is not likely to reduce reporting under REPCON; or
  - (b) any reduction in reporting under REPCON that the use of a specified RSC report, or evidence as to its contents, in specified proceedings might cause is

outweighed by the public interest in the use of the report, or evidence as to its contents, in specified proceedings.

- (4) The ATSB may issue a certificate mentioned in subregulation (3) in relation to an RSC report, or evidence as to its contents, only for proceedings involving an appeal against:
  - (a) a decision of an administrative character made under an Act, using information derived from the report; or
  - (b) a decision of an administrative character made under an instrument made under an Act, using information derived from the report; or
  - (c) a disciplinary action taken using information derived from the report.

## **Part 6 Non-Reportable Criminal Conduct**

### **17 Acts of Terrorism and Acts of Unlawful Interference with Aviation**

- (1) If a report relates to non-reportable criminal conduct that:
  - (a) would constitute an act of terrorism involving or relating to a transport vehicle to which these regulations apply: or
  - (b) an act of unlawful interference with aviation that would constitute a criminal offence,

the ATSB:

- (c) must inform the Office of Transport Security Operations Centre in the Department of the report; and
- (b) may, if that Office so requests, send the report, or information from the report, to that Office.

### **18 Authorisation of disclosures of personal information for this Part**

For the purpose of enabling the ATSB to act under Regulation 17 the ATSB is authorised to disclose restricted information that is or contains personal information contained in the report to the Office of Transport Security Operations Centre in the Department.

## **Part 7 Miscellaneous**

### **19 Delegation by the ATSB**

- (1) The ATSB may, in writing, delegate a power (except this power of delegation), function or duty of the ATSB under these Regulations to a person engaged to perform duties in the ATSB (whether as an APS employee, SES employee or under any other arrangement).
- (2) In exercising powers, functions and duties under a delegation, the delegate must comply with any directions of the ATSB

## **20 Establishment of Committees**

- (1) The ATSB may establish committees to assess the effectiveness of REPCON.
- (2) Any such committee may be established on such terms and conditions and with such members as the ATSB considers appropriate.

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