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No. 27 2002–03

Transport Safety Investigation Bill 2002

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I N F O R M A T I O N A N D R E S E A R C H S E R V I C E S

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Transport Safety Investigation Bill 2002

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Transport Safety Investigation Bill 2002

Date Introduced: 20 June 2002

House: Representatives

Portfolio: Transport and Regional Services

Commencement: Upon proclamation or six months after Royal Assent.

Purpose

To consolidate the statutory basis for the investigation of air and shipping accidents by the Australian Transport Safety Bureau within a single Act and for the first time to provide for statutory national rail safety investigation.

Background

Australian Transport Safety Bureau

The Australian Transport Safety Bureau (ATSB) was created in July 1999 by amalgamating the former Bureau of Air Safety Investigation (BASI), the non-regulatory parts of the Federal Office of Road Safety (FORS) and the Marine Incident Investigation Unit (MIIU).¹ It is a non-statutory agency within the Commonwealth Department of Transport and Regional Services (DOTRS).

Whilst ATSB's primary role is the investigation of transport accidents, the mission statement in its 2001 annual review is:²

To maintain and improve transport safety and public confidence through excellence in:

- open and independent 'no-blame' systemic transport accident, incident and safety deficiency investigation;
- safety research and data analysis;
- safety communication and education; and

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- safety programs, including the cost-effective treatment of road safety Black Spots.

In terms of independence, the 2001 review also states that the ATSB³

is operationally independent and has a strict organisational separation from transport regulators and other bodies that may need to be investigated. ATSB undertakes investigations and analyses safety data without fear or favour and in so doing helps to improve safety and maintain public confidence that the safety of the transport system is not being compromised.

ATSB air safety investigators currently exercise statutory powers delegated by the Executive Director, who has been designated the Director of Air Safety Investigation under Part 2A of the *Air Navigation Act 1920*. The Executive Director has the power to release air safety information under section 19HA and delegated power to release final investigation reports under section 19CU. Note that disciplinary action and criminal or liability assessment do not form part of ATSB safety investigation and may be progressed by separate agencies.

ATSB's Deputy Director, Surface Safety Investigations, holds the statutory position of Inspector of Marine Accidents under Part 3 of the Navigation (Marine Casualty) Regulations (formed under the *Navigation Act 1912*) to investigate marine accidents. The Executive Director has been authorised to publish marine investigation reports and to appoint the Inspector and other marine safety investigators.

While aviation and marine accident investigation have been a large part of ATSB activities, its wider role also incorporates road and rail accident investigation. The ATSB is developing its rail investigation capability and a database of national rail safety occurrences. It provides advice and participates in investigations under State legislation on request. The ATSB's road safety activities include research and statistical analysis, a national strategy and publication of statistics, as a legacy of the former Federal Office of Road Safety.

Incorporation of rail transport within ATSB's mandate

One of the major changes that is proposed by the Bill is to provide ATSB with legislative authority in relation to rail safety investigation. Amongst other things, this will provide ATSB with the ability⁴ to collect evidence, restrict disclosure of relevant information etc in a way that overrides State safety investigations carried out under State law.

Rail transport involves both public and private operators providing the basic infrastructure and transport units. An Inter-governmental Agreement (IGA) in relation to National Rail Safety between the Commonwealth and all States and Territories came into effect in July 1996. It aims to establish a nationally consistent approach to rail safety including the accreditation of rail owners and operators, development of uniform technical and operating standards, for greater accountability and safety. Given the open access now

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available to rail infrastructure, nothing less than a national approach to rail safety is adequate to ensure seamless utilisation across States, particularly on the mainland.

In 2000, the Australian Rail Operations Unit (AROU) commenced to help progress the finalisation and implementation of Codes of Practice for use on the Defined Interstate Rail Network and include safety matters. AROU sits in the Commonwealth Department of Transport and Regional Services. Each of the state railways has tended to follow their own set of recommended practices or standards governing design and maintenance of equipment and their own safety management systems. The Australian Transport Council requested a Study of Rail Standards and Operational Requirements report in 1998. It stated that there was generally a lack of commitment to ensure that standards and procedures were appropriate for interstate (national) operations. The AROU builds upon that initiative but may itself be subject to investigation following a safety occurrence on the interstate network.

The rail industry has historically developed on a State basis but now operates on a more national basis with private companies operating trains across the country. However, the adoption of national codes of practice for rail safety and other means of standardisation will require the cooperation and agreement among the various State rail organisations. While there has been an intention of agreement among them, final action is still awaited. There are published Australian rail safety management and other relevant rail national standards. But, there is no agreed national standard on rail safety incident investigation and thus a lack of uniform approach can occur. While all States have been invited to utilise ATSB services, not all have done so, noting their respective State-based rail legislation. In view of the public interest for safe rail services, a national approach appears warranted.

Nonetheless, as noted in the Explanatory Memorandum, some accreditation authorities, while welcoming ATSB assistance, may believe that the ATSB needs to prove the effectiveness of its investigation methodology to the rail industry, prior to mandating it through an Act. Some authorities may view the proposal as resulting in more unnecessary power over the States by the Commonwealth and that any such legislation goes against the intent of the 1996 Inter-Governmental Agreement.

However, precedents exist already in the aviation and maritime sectors for Commonwealth transport mode safety investigation by the ATSB. There will be a cost to the Commonwealth, estimated at \$0.75 million per annum, to enable the ATSB to investigate rail accidents and establish the office of the Executive Director of Transport Safety Investigation.

Consultation

The explanatory memorandum comments:⁵

Individual meetings were held with some industry operators and other industry organisations. Proposals have also been discussed at accreditation authority and Rail Group, SCOT⁶ and ATC⁷ meetings.

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In September 2001, comment from the rail industry was sought on an Exposure Draft of the proposed legislation. A multi-modal industry consultation workshop was held in Canberra on 21 September 2001 to brief the aviation, marine and rail industry on the proposed provision of the new legislation. A number of comments were received from interstate operators and State and Territory regulatory authorities. The ATSB has sought to accommodate to the extent possible a number of concerns raised by those parties within a revised version of the Bill and will work with the industry and regulatory authorities to develop agreed protocols through Memoranda of Understanding. Consultation has also occurred with occupational health and safety bodies.

Relationship with Space activities

Another transport mode, space launch vehicle safety comes under the *Space Activities Act 1998* and *Regulations 2001*. That Act contains various powers that are conferred upon an investigation officer in the event of a space accident or incident. However, it is arguable that a space vehicle such as a rocket launcher also falls within the definition of an 'aircraft' under the Bill and thus the Bill may apply to activities regulated by the *Space Activities Act*. **New subsection 10(2)** of the Bill means that the Bill overrides the *Space Activities Act* to the extent of any inconsistency. Thus whilst a person may carry out any obligations they have under the *Space Activities Act* it is possible that they would also need to observe any obligations under the Bill, which may cause difficulties should any inconsistencies between the two occur. Whilst this issue may be more of a theoretical concern than a practical one, it would be helpful if it were clarified whether the Government intended to have any overlap between the two.

Main Provisions

Part 1 - Preliminary

New section 7 outlines the objects of the Act. Notably, it makes clear that attributing blame for transport accidents or incidents or providing the means to determining the liability of any person for the same is not an object of the Act. This 'no blame' approach is in line with current ATSB practice.

New section 8 provides that the Chapter 2 of the *Criminal Code Act 1995* applies to all offences in the Act. This means that standardised concepts of fault, availability of defences etc apply.

New section 10 clarifies that the Act is not intended to exclude the operation of State and Territory laws as long as they are capable of operating concurrently with the Act. In practice, while this allows the States and Territories to proceed with their own statutory transport safety investigations, ATSB will be able to collect evidence, restrict disclosure of relevant information etc in a way that overrides State safety investigations carried out

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under State law. Page 34 of the explanatory memorandum to the Bill gives an extensive commentary about the rationale for **new section 10**.

New section 11 sets out the circumstances in which the powers under the Act apply. These reflect the Commonwealth's constitutional limitations in regulating transport. The most common circumstances in which the powers of the Act will apply include those that involve interstate or overseas trade or commerce, involve a constitutional corporation, take place outside of Australia or attract the external affairs power.⁸

The investigatory powers of the ATSB under the Act are further restricted by **new section 22**. There are two main restrictions. The first is that the relevant 'transport safety matter'⁹ must have a connection with Australia, unless in the case of a foreign registered ship or aircraft the foreign country requests ATSB to investigate. The second restriction is where the transport safety matter involves an Australian military ship or aircraft or a foreign military, police or customs ship or aircraft, ATSB can only investigate if the incident *also* involves another civil vehicle or transportation facility. However, the second restriction does not prevent the ATSB from investigating in relation to an Australian military ship or aircraft if it is requested to do so by the Defence Force.

Part 2 - Administration

New section 12 requires the Secretary of the administering Department¹⁰ to create the position of the Executive Director of Transport Safety Investigation under section 77 of the *Public Service Act 1999*. The Executive Director may delegate most of his or her powers to another person. However, the powers to appoint special investigators (**new section 14**) and publish investigation reports (**new section 25**) cannot be delegated.

The Executive Director cannot be directed by either the Minister or Secretary 'in respect to the exercise of [his or her] powers under this Act' except the Minister may require the Executive Director to investigate a transport safety matter: **new sections 15** and **21**. In exercising powers under the Act, the Executive Director 'must have regard to the desirability of minimising any resulting disruption to transport by means of transport vehicles': **new section 16**. He or she must also ensure that such powers are 'exercised in a manner that is consistent with Australia's obligations under [those] international agreements' listed in regulations: **new section 17**.

Part 3 - Compulsory Reporting

New sections 18-20 provides for compulsory reporting of certain matters by 'responsible persons'. The range of matters, and meaning of responsible persons, are to be prescribed by regulations. If a responsible person has knowledge of a reportable matter and fails to report it 'as soon as practicable' they commit an offence punishable by up to six months imprisonment: **new subsection 18(1)**. No offence occurs if they believe 'on reasonable grounds' that another responsible person has duly reported the incident. The method of reporting is also to be prescribed by regulations.

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Part 4 - Investigations and reports

New section 21 provides the Executive Director with the power to investigate any transport safety matter subject to the limitations previously mentioned in **section 22**. The Executive Director may discontinue an investigation at any time, although they must make publicly available the reasons for doing so within 28 days of the discontinuation. Presumably this 'discontinuation' power also applies for investigations ordered by the Minister under **new paragraph 21(1)(b)**.

New section 24 creates the offence of hindering an investigation. Essentially, an offence occurs if a person is reckless as to any possible adverse impacts of his or her conduct on a current or possible future investigation (note the conduct must actually adversely affect such investigation) and the conduct is not authorised by the Executive Director. An offence is punishable by up to six months imprisonment. An offence does not occur if the conduct is necessary to ensure the safety of persons, animals or property, remove bodies, move the relevant transport vehicle to a safe location or protect the environment from significant damage or pollution. Refusing to let the Executive Director (including of course their delegate) enter private premises that is not an accident site does not give rise to an offence. The explanatory memorandum to the Bill comments that¹¹

This provision is intended to cover conduct such as withholding information, concealing evidence, tampering with evidence etc but no conduct will constitute an offence unless it actually has an adverse effect on an investigation. This clause not only relates to accident sites where it is very important that evidence is preserved, but also extends to include such things as the destruction/removal of evidence remote from the accident site such as minutes of meetings, training records, data recordings etc. Such information may provide crucial evidence pertinent to the investigation. Where an immediately reportable matter has occurred, the offence may apply before the matter is reported and before Executive Director decides to investigate. This is because a person would reasonably be expected to know that the Executive Director is likely to investigate in such cases.

New section 25 provides for the compulsory publication of investigation reports by the Executive Director. He or she may also publish preliminary reports, interim factual reports, safety recommendations etc, whether or not the investigation has been completed. A report may include submissions made to the Executive Director either in response to a draft report released under **new section 26** or to safety recommendations. The explanatory memorandum comments

for example, the Executive Director may wish to include, as part of the public record, comments made by directly involved parties to the investigation in relation to the accuracy of the factual information in a draft report

The Executive Director may give draft reports to persons for comment or for the purpose of 'advance notice'. Any draft reports so given are confidential and copying or disclosing the report, except in very limited circumstances such as remedying safety deficiencies

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identified by the draft report, carries a maximum penalty of 2 years imprisonment: **new subsection 26(2)**.

A published report cannot include the name of an individual unless they have consented to the inclusion. This is reflection of the 'no blame' approach to ATSB's reporting. Further, **new section 27** provides that **new section 25** and **26** reports are not admissible in evidence in civil or criminal proceedings, although **new section 25** reports (ie published reports) are admissible in a coronial inquiry.

Part 5 - Investigation Powers

New section 28 provides that any powers conferred under Part 5 can only be exercised 'for the purposes of an investigation'.

New section 32 allows the Executive Director to require a person to attend an examination and answer any questions under oath or affirmation relevant to an investigation or produce any specified evidence. 'Examination' provisions are becoming fairly common in recent Commonwealth legislation, though their content varies.

Under **new section 47** a person is *not* excused from answering questions or evidential material on the grounds of self-incrimination, or of exposure of the individual to a penalty. However, the information, evidence or documentation, or anything obtained as a direct or indirect consequence¹² of the information, evidence or documentation provided cannot be used in evidence against the individual in *criminal* proceedings except for a prosecution for failing to provide information or giving false or misleading information. Note that the information given could be used to criminally prosecute a company. There is no right for counsel to be present at an examination, nor is there any provision for a record of the examination to be given to the examinee.

Failure to attend an examination, answer lawful questions, provide requested evidence or a refusal to take an oath or affirmation is punishable by a fine of up to \$3 300.

New sections 33-39 contain a fairly standard set of search and seizure provisions, except that in the case of 'special premises' the Executive Director requires neither a warrant nor the occupier's consent to enter. Special premises encompass accident sites, the transport vehicle(s) involved, and any thoroughfares needed to get access to these. The Executive Director may use 'reasonable force' to gain entry to special premises or to any premises under warrant. Where entry is to special premises or to any premises under warrant, he or she may also require a person on the premises to answer questions or produce evidential material and seize and evidential material without the occupier's consent - a failure to answer questions attracts a fine of up to \$3 300: **new section 36**. **New section 47** applies to **new section 36**. Occupiers are entitled to be present during a search as long as they do not impede to search. Standard compensation provisions apply under **new section 46** should any electronic equipment or data be damaged or corrupted through insufficient care as the consequence of operating equipment under **new section 36** to access evidence.

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New sections 40-42 deal with the issuing of investigation warrants by magistrates. These are all standard provisions regarding the grounds for the warrant, requirement for the provision of information on oath to the magistrate etc. The making of false or misleading statements in applying for an investigation carries a maximum penalty of two years imprisonment.

New section 43 provides that the Executive Director may issue a protection order to prevent evidence that might be relevant to an investigation from 'being removed or interfered with'. The penalty for contravention of an order is imprisonment for a maximum of 12 months. As for **new section 24**, a **new section 43** offence does not occur for actions done to ensure the safety of persons, animals or property etc.

New section 45 deals with the treatment of evidential material. In particular, **new subsections 45(6) and 45(7)** allow the Executive Director to provide evidential material that is not an on-board recording or restricted information (see below) directly to other Commonwealth and State authorities or to a coroner. However, before doing so, the Executive Director must be satisfied that making the material available will not interfere with an investigation to which the material relates.

Part 6 - Protection of on board recordings and restricted information

New sections 48-63 contain complex provisions setting out limited circumstances in which 'on-board recording' (OBR) information and 'restricted information' can be disclosed or otherwise made available to various parties. OBRs are defined in **new subsection 48(1)**, but the most common example is of course the cockpit voice recording (CVRs) devices used in larger commercial aerservices. According to the explanatory memorandum, it is arguable that the release of CVR information on occasion into the courts and the public domain has in fact had a prejudicial effect on transport safety.¹³

...CVRs were originally intended only to be used to assist in the investigation of occurrences where the flight crew were fatally injured as a result of an accident and were therefore unable themselves to provide critical safety information about the events immediately preceding the accident. CVR information is now used more broadly in many non-fatal accidents and serious incidents as the information has also proven to be vital in those cases.

It is acknowledged that such recordings constitute an invasion of privacy for the operating crew of an aircraft that most other employees in workplaces are not subject to. Such recordings, therefore, must be treated with the utmost confidentiality and continue to be used for safety investigation purposes only. To ensure the ongoing availability of information from CVRs, it was considered necessary to protect the rights of individuals, in particular the operating crew of an aircraft. Inappropriate use of CVR information in the judicial system, for example, may adversely affect transport safety, both domestically and internationally, as it is unlikely that the availability and free flow of safety information will be guaranteed/continued in the future. Inappropriate use by an operator such as for disciplinary action may also result in an adverse outcome for transport safety. For example, the operating crew of an

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aircraft has the ability to deny access to CVR information simply by ‘pulling’ a circuit breaker, thus rendering a CVR inoperative.

In a recent case in New Zealand (NZ), the desire of NZ police to prosecute a DASH-8 crew for an operational error that led to an aircraft crash resulted in strong ICAO/international criticism. In this case, the police charged the crew with manslaughter and seized the cockpit voice recorder as evidence. These actions subsequently led to NZ and foreign aircrews ‘pulling’ circuit breakers on CVR devices when within NZ airspace and in doing so, rendered the CVR inoperative. This effectively denied access by investigators to vital information for future safety investigations. Aircrews were also less inclined to be cooperative and forthcoming to safety investigators in relation to their role in air safety occurrences. At the time of the events described above, NZ legislation did not provide protection regarding the disclosure and use of CVRs. Those tensions have since eased with a change to NZ law that now provides similar disclosure and use provisions for CVRs as those provided in Australian legislation.

The need to provide adequate protection to CVR information was recently reaffirmed by the International Civil Aviation Organisation (ICAO) in its Working Paper A33-WP/46 of 29 June 2001, in which it expressed a concern about inappropriate use of accident and incident records in some Contracting States. ICAO considered that accident and incident records such as CVR recordings should be protected from utilisation in disciplinary, civil, administrative and criminal proceedings, and from disclosure to the news media and the public. Therefore, it proposed a resolution urging Contracting States ‘to examine, and if necessary, adjust their laws, regulations and policies to protect certain accident and incident records in order to mitigate impediments to accident and incident investigations’.

Note that information that falls within the definition of an OBR under **new subsection 48(1)** can be excluded from the definition either by regulations (**new subsection 48(2)**) or by a decision of the Executive Director (**new subsection 49(1)**). It appears the Executive Director can only exclude an OBR on the grounds of either a decision not to investigate the relevant transport safety matter or deciding part of the OBR is not relevant to the investigation.

New section 53 creates a criminal offence for copying or disclosing OBR information except in certain cases. An offence carries a maximum penalty of 2 years imprisonment. The main exceptions (ie where disclosure or copying is permitted) are:

- in the course of the exercise of powers under this Act or in connection with the Act - for example under **new section 51**. The explanatory memorandum comments that this might occur for example 'as a normal part of the investigation process where a team approach is taken and where it may be necessary to disclose the contents of an OBR to external experts and others for the purposes of properly analysing the significance of the information'¹⁴

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- for purposes of the investigation of any offence against a law of the Commonwealth, State or a Territory
- to a court for the purposes of criminal proceedings against any person who is *not* a crew member of a relevant transport vehicle - for example the OBR could be used in prosecuting a passenger for an assault or hijacking, or
- to a court¹⁵ in civil proceedings if the Executive Director has issued a certificate under **new section 50**¹⁶ *and* the court is satisfied that the public interest outweighs any adverse impact of such disclosure on any current or future investigation.

Note that even if OBR information is disclosed to a court under one of the above, **new subsection 53(5)** allows the court to issue directions to prohibit or restrict publication and communication of the OBR information to any person. The explanatory memorandum comments that this allows a court to:

ensure that the "audience" is restricted to only those persons necessary and keeps out other parties, for example, the media, who may take the OBR information out of context or use it for purposes other than relating to the proceedings.¹⁷

Presumably relevant courts have inherent power to punish a breach of a restriction order through their legislation and rules as no offence for a breach is created by the Bill.

Even where OBR information is lawfully disclosed, a person cannot take disciplinary action against an employee 'on the *basis* of OBR information': **new section 54**. However, it is not clear whether OBR information could be *used in conjunction* with other evidence to support a disciplinary action.

OBR information is not admissible as evidence in any criminal proceedings against a crew member of a transport vehicle, other than proceedings under the Act (for example a prosecution under **new section 18** for failure to report an incident): **new section 55**

New section 51 allows the Executive Director to disclose OBR information if they consider is 'necessary or desirable for the purposes of transport safety'. If this information contains personal information,¹⁸ those elements can be only disclosed in circumstances to be prescribed in regulations.

New section 56 restricts the admissibility of OBR information in civil proceedings.¹⁹ **New subsection 56(1)** allows OBR information to be admitted in civil proceedings *only* if the Executive Director has issued a **new section 50** certificate *and* that the court has made an order under **new subsection 56(3)**.²⁰ Essentially **new subsection 56(3)** requires the court to be *both* satisfied that that the OBR information is the only source of evidence regarding a material fact *and* that the public interest outweighs any adverse impact of such disclosure on any current or future investigation. OBR information admitted under **new section 56** cannot be used as evidence in determining any liability of a crew member of the transport vehicle: **new section 58**.

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New section 59 allows a coroner to request OBR information held by the Executive Director. Access must be granted unless the Executive Director believes the coroner's access to the information is likely to interfere with any investigation to which the OBR information relates. The explanatory memorandum comments:

For example, a particular transport safety matter may still be under investigation at the time of a coronial inquiry into that same or related matter. In such cases, the Executive Director may consider it inappropriate to disclose the requested OBR information at that time as it may prejudice that investigation if that information was made public before the investigation was completed.²¹

If the OBR information is obtained by the coroner, he or she can only disclose it in the context of coronial proceedings if they consider the information is relevant to proceedings, cannot be obtained by an alternative means, and where any adverse impact on a safety investigation is outweighed by the public interest. Even if it is so disclosed, the coroner may issue directions to prohibit or restrict publication and communication of the OBR information to any person. Contravention of a direction is an offence carrying a penalty of up to 2 years imprisonment: **new subsection 59(5)**.

Subject to some exceptions, **new subsections 60(1)-(3)** prohibit a person who is or has been a staff member,²² or who has been authorised to access restricted information under **new section 62**, from making a record of restricted information, or disclosing the information to any person. Restricted information is defined in **new section 3**, but generally covers various types of sensitive information acquired or made in the course of an investigation. Disclosures or copying are permitted if they are done by persons performing functions under the Act: **new subsection 60(4)**. Disclosure is also permitted by the Executive Director in civil or criminal courts under limited circumstances: **new subsections 60(4)-(6)**. If disclosure is prohibited by **new section 60**, a court cannot order them to disclose it: **new subsection 60(8)**. Any information from a prohibited disclosure is not admissible in any civil or criminal court: **new subsection 60(8)**.

The Executive Director may disclose restricted information if they consider this is 'necessary or desirable for the purposes of transport safety': **new section 61**.²³ If this information contains personal information those elements can only be disclosed in circumstances to be prescribed in regulations.

The powers of Parliament and Royal Commissions to obtain information are not bound by Part 6: **new section 63**.

Part 7 - Miscellaneous

New section 64 provides that, in exercising powers under the Act, a person is not liable for any act or omission done in good faith. Such protections are fairly common in various types of Commonwealth regulatory legislation, eg *Quarantine Act 1908*, *Australian Sports Drug Agency Act 1990*, *Fisheries Management Act 1991*.

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New sections 65-68 deal with the issue of staff members potentially appearing before a criminal or civil court or coronial inquiry. The effect of **new sections 65-66** is that the Executive Director may prevent a court from compelling a current or past staff member to attend a court and answer questions in relation to an investigation. The explanatory memorandum comments:

It is considered important, in the interests of maintaining trust and a free flow of safety information, that any current or former *staff member* who is involved, or has been involved, in the investigation of a transport safety matter (including those having access to OBR and *restricted information*), should maintain a 'distance' from the judicial system, the focus of which is primarily on blame or liability. It was considered appropriate to include former *staff members* in this provision to ensure that the confidentiality of sensitive information, including OBR and *restricted information*, is maintained in the interests of transport safety.

Also, current staff members cannot be compelled by a court to give 'expert opinion' in civil or criminal proceedings relating to transport safety. However, the protection given to staff under **new sections 65-66** do not apply to coronial inquiries. If a staff member does provide expert opinion at a coronial inquiry or is otherwise covered by the protection of **new section 65** regarding non-compellability, they are entitled to legal representation at that inquiry: **new section 68**.

New section 70 is a standard provision regarding the payment of compensation for acquisition of property where compensation would be required under paragraph 51(xxxi) of the Commonwealth constitution.

Concluding Comments

Transport accident investigation is a highly specialised and unique process that sits within the province of international interest and applications. As such it requires strongly proscribed procedures, as provided for in the legislation, and largely tested already in practice. In general, the proposed legislation makes allowance for the quick gathering of evidence and subsequent analysis to enable resolution of safety issues in the interest of the travelling public and in accordance with international practices and agreements. The creation of the office of the Executive Director of Transport Safety Investigation may involve some changes to the administration of ATSB. Given a history of controversy within safety regulation generally, the Executive Director may well be a pivotal figure.

As mentioned in the background section of this digest, the Bill will give the ATSB extensive new powers over rail safety matters, an area that has previously largely been the province of State agencies. The explanatory memorandum quite clearly flags that this has caused concern at least amongst some States for the following reasons:²⁴

- the proposal would result in more unnecessary power over the States

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- the initiative is contrary to the intent of the 1996 IGA
- the current regime is adequate and there is a wish to maintain discretionary powers over the terms of reference and whether or not individual investigation reports are publicly released
- the States and NT are progressively improving their rail safety legislation to embrace the principles of open, independent, 'no-blame', systemic investigations, and
- the ATSB needs to prove the effectiveness of its investigation methodology to the industry, prior to mandating it through legislation.

Endnotes

- 1 The formation of an 'integrated multi-modal Commonwealth transport safety bureau' was recommended by the 1999 review of BASI conducted by Paul Mc Grath and Ms Loretta Power. See <http://www.atsb.gov.au/review/> Note that the creation of a single transport safety office to conduct investigations for all modes has been a long held policy objective: see James, ML. 1995 'Acceptable Transport Safety' *Research Paper no.30 1995-96* Department of the Parliamentary Library <http://www.aph.gov.au/library/pubs/rp/1995-96/96rp30.htm>
- 2 ATSB Annual Review, p. 3. See <http://www.atsb.gov.au/pdf/anreview2001.pdf>
- 3 *ibid.*
- 4 Subject to the various constitutional and other limitations expressed in the Bill.
- 5 Explanatory memorandum, p. 27.
- 6 Standing Committee on Transport.
- 7 Australian Transport Council.
- 8 Note however that under new subsection 11(3), that the powers of the Act cannot be exercised with respect to international matters. According to the explanatory memorandum to the Bill, this mainly reflects the lack of any relevant international agreements regarding rail safety.
- 9 This term is defined in **new section 23** but encompasses a very wide range of matters including 'something that occurred that... might affect transport safety'.
- 10 Current the Department of Transport and Regional Services.
- 11 At p. 44.
- 12 This commonly called 'derivative use immunity'.
- 13 At pp. 63-64.
- 14 At p. 67.
- 15 This includes a coroner.

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- 16 The certificate must state that disclosure 'is not likely to interfere with any investigation (carried under the Act)'.
17 At p. 68.
18 As defined in the *Privacy Act 1988*
19 **New section 56** restrictions do not apply to coronial inquiries.
20 These requirements are additional to the restrictions on the **disclosure** of OBR information for purposes of civil proceedings under new subparagraph 53(3)(d).
21 At page 70.
22 This covers all APS officers involved in the exercise of powers under the Act or any person who has been delegated any of the Executive Director's powers.
23 This would not be an offence under **new subsection 60(1)** due to the operation of **new subparagraph 60(4)(a)**.
24 At p. 28.

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