

# THE USE OF VDR INFORMATION IN AUSTRALIA

**The International Convention for the Safety of Life at Sea 1974 (SOLAS) Chapter V Regulation 20 requires ships of a certain type and size to carry onboard a Voyage Data Recorder (VDR).**

The VDR, often known as the ship's 'black box', collects and stores different information over the course of a ship's voyage, including its position, audio from the ship's bridge, its speed, depth under the keel and VHF radio communications.

In support of the SOLAS provisions relating to VDRs, the International Maritime Organisation (IMO) has issued a set of guidelines on VDR Ownership and Recovery (IMO Guidelines). The IMO Guidelines provide that in the event of an accident, a copy of the VDR information must be provided to the shipowner at an early stage in all circumstances, while the original is retained by the investigator.

The IMO Guidelines also state that the use of VDR information is to be governed by domestic legislation and the Code for Investigation of Marine Casualties and Incidents (Marine Casualties and Incidents Code). The Marine

Casualties and Incidents Code comprises mandatory and recommended standards in relation to the use of VDR information, which include having an independent investigative body as well as restrictions on the use of VDR information in legal proceedings.

Australia has gone beyond the provisions of the IMO Guidelines as well as the Marine Casualties and Incidents Code, and now has one of the strictest approaches to the use of VDR information in the world.

### **Onboard recordings**

In Australia, access to information recorded on a VDR is heavily restricted once the recording becomes an On-Board Recording (OBR) pursuant to the *Transport Safety Investigation Act 2003* (the Act).

OBR is defined in s. 48 of the Act as a recording that consists of sounds and/or images of persons in the control area of a transport vehicle. Further, the recording needs to have been made in order to comply with a law in force in any country and



any part of the recording needs to have been made at the time of the occurrence of an immediately reportable matter involving the transport vehicle and where one of the following applies:

- Any part of the recording was made while the transport vehicle was on a constitutional journey, or was made incidentally to such a journey.
- The recording was made in order to comply with a law of the Commonwealth.
- At the time when the recording was made, the transport vehicle was owned or operated by a constitutional corporation or Commonwealth entity.
- The immediately reportable matter occurred when the transport vehicle was on a route ordinarily used by transport vehicles on constitutional journeys.
- The immediately reportable matter also involved another transport vehicle that was on a constitutional journey, or was owned or operated by a constitutional corporation or Commonwealth entity.

### Constitutional journey and constitutional corporation

For the purposes of the Act, *constitutional journey* means a journey in the course of trade or commerce with other countries or among the States; or a journey within a Territory, or to or from a Territory; or a journey within a Commonwealth place, or to or from a Commonwealth place.

*Constitutional corporation* means a corporation to which s. 51(xx)<sup>1</sup> of the Constitution applies or a body corporate that is incorporated in a Territory.

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### Immediately reportable matter

Section 48 of the Act also provides that a recording becomes an OBR only upon the happening of an immediately reportable matter. An immediately reportable matter is one that involves:

- The death of or a serious injury to a person onboard a ship or in contact with the ship or anything attached to the ship or anything that has become detached from the ship.
- The ship being lost, presumed lost or abandoned.
- The ship suffering serious damage, or the existence of reasonable grounds for believing that the ship has suffered serious damage.
- A fire (even if subsequently extinguished), smoke, fumes or an explosion on or in any part of the ship.
- The loss of a person from the ship.
- The ship being stranded or disabled.
- The ship being involved in a collision.
- The ship nearly being stranded or involved in a collision.
- Contact between the ship and another object, including a wharf or buoy, resulting in the other object being seriously damaged or destroyed.

- The ship suffering a significant loss of stability to the extent that the safety of the ship is, or could be, seriously endangered.
- Any other matter in relation to the operation of the ship that a reasonable person would consider seriously endangers, or, if not corrected, would seriously endanger, the safety of the ship, its occupants or any other person.

However, once an immediately reportable matter has occurred, the entire recording becomes an OBR and its use thereafter is almost always confined to safety investigations by the Australian Transport Safety Bureau (ATSB) – Australia's national independent investigator of civil aviation, maritime accidents and other transport safety incidents.

If the ATSB does not investigate an immediately reportable matter, it must issue a declaration that the recording in question is not to be treated as an OBR, and then access to the recording will not be restricted.

Unless otherwise permitted by the Act, it is an offence punishable by two years imprisonment for any person to copy or disclose OBR information.

<sup>1</sup> Section 51(xx): foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth



## OBR information will not be admissible in civil proceedings unless the ATSB issues a certificate under s. 50, to the effect that disclosure of information is not likely to interfere with **any** investigation.

### Use of OBR information in legal proceedings

It is acknowledged that VDRs constitute an invasion of privacy for the operating crew that most other employees are not subject to, hence access to OBR information is almost always limited to safety investigations. Unless otherwise permitted by the Act, it is an offence punishable by two years imprisonment for any person to copy or disclose OBR information. Further restrictions on the use of OBR information are set out below as follows:

#### ■ Criminal proceedings

According to s. 55 of the Act, OBR information is not admissible in criminal proceedings against crew members. OBR information will, however, be made available to the police for the purposes of the investigation of any offence against a law of the Commonwealth, a State or Territory.

#### ■ Disciplinary action

OBR information cannot be used against employees for disciplinary action (s. 54).

#### ■ Civil proceedings

The use of OBR information in civil proceedings is also heavily restricted. OBR information will not be admissible in civil proceedings unless the ATSB issues a certificate under s. 50, to the effect that disclosure of information is not likely to interfere with **any** investigation. This has a very high threshold and it is, therefore, extremely unlikely that such a certificate will ever be

issued. In the unlikely event that a s. 50 certificate is issued, the court must then conduct a public interest test under s. 56(3) of the Act and be satisfied that:

- A material question of fact in the proceedings will not be able to be properly determined from the evidence available to the court.
- The OBR information, or part of it, if admitted in evidence in the proceedings, will assist in the proper determination of that material question of fact.
- Any adverse domestic and international impact that the disclosure of the information might have on any current or future investigations is outweighed by the public interest in the administration of justice.

Even when a court makes a determination under s. 56(3) to admit OBR information as evidence, it cannot be used for the purpose of determining liability in proceedings brought against a crew member (s. 58). In addition, the court may still place restrictions as to which information is published or communicated and to whom.

#### ■ Coronial inquests

If the coroner requests OBR information that is in possession of the ATSB, it must make that information available to the coroner unless the ATSB is of the opinion that to do so is likely to interfere with the investigation to which the OBR relates.

After examining the OBR information in camera, the coroner may make a determination that the information, or a part of it, should no longer be protected from disclosure. Similar to the court, the coroner may also place restrictions as to which information is published or communicated and to whom.

#### ■ Parliament and Royal Commissions

The restrictions on the use and disclosure of OBR information do not apply to the Parliament or a House of the Parliament or a Royal Commission.

### Summary

The Australian position on the use of OBR information is significantly more restrictive than the IMO Guidelines on VDR Ownership and Recovery and the Code for Investigation of Marine Casualties and Incidents. Policy reasons underpinning this approach include facilitating the free flow of safety information without fear of incrimination or retribution, as well as upholding the operational independence and objectivity of an investigative body to encourage the transport industry to be confident and willing to accept and act upon the recommendations of an investigation. Although several Australian judges have been openly critical of the current approach, the position remains that inappropriate use of OBR information may adversely affect transport safety and, therefore, the use of such recordings must be restricted. How much longer this view predominates remains to be seen, particularly when the use of VDR information can be significant in any casualty investigation.



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