



Transport  
for NSW



# Memorandum of Understanding Agency Cooperation

**THIS MoU** is made on the date of the last party to sign

## Between

**OFFICE OF TRANSPORT SAFETY INVESTIGATIONS** (ABN 57 950 900 154) established under s.45 of the *Transport Administration Act 1988* of 201 Elizabeth St, Sydney NSW 2000 (“**OTSI**”)

**AND** **TRANSPORT FOR NSW** (ABN 18 804 239 602) constituted under s.3C of the *Transport Administration Act 1988* of 231 Elizabeth St, Sydney NSW 2000 (“**TfNSW**”)

(together, the “**Parties**”)

## Background

- A. OTSI is an independent agency, reporting directly to the Minister, sitting within the Transport Cluster. OTSI contributes to public confidence in the safety of the NSW transport system through independent safety investigation of bus, ferry and rail journeys and by sharing lessons from its investigations which may lead to safety improvements, prevention and/or changes to the regulatory framework.
- B. The intention of this Memorandum of Understanding (MoU) is to articulate OTSI’s role within the cluster and to document its relationship with TfNSW as cluster lead. The MOU outlines the roles and responsibilities of TfNSW and OTSI and sets out the terms under which both agencies will cooperate, collaborate and share information.


## Signing page

**Authority to Sign:** Each person who signs this MoU on behalf of a party warrants that he or she is duly authorised to sign this MoU.

### Execution by OTSI:

Signature of authorised Representative: 

Name/Position of authorised Representative: Natalie Pelham, CEO & Chief Investigator, OTSI

Signature of witness: 

Name of witness Michael Shedden, EA & Business Coordinator, OTSI

Date: 22/12/2022

### Execution by TfNSW:

Signature of Delegate: 

**Name/Position of Delegate:** Tara McCarthy, Deputy Secretary, Safety, Environment and Regulation, TfNSW

Signature of witness: 

**Name of witness:** Thomas Greenhalgh, Senior Manager Government Services, Safety, Environment and Regulation, TfNSW

**Date:** 21/12/2022

**DETAILS**

<b>Start Date</b>	The date of the last Party to sign.	
<b>End Date</b>	Five years from the Start Date.	
	<b>Role</b>	<b>Current incumbent</b>
<b>TfNSW Representative</b>	Head of Transport Safety, Security and Emergency Management	Peter Dunphy
<b>TfNSW Level 2 Escalation Representative</b> (clause 12)	Deputy Secretary, Safety, Environment and Regulation	Tara McCarthy
<b>OTSI Representative</b>	Director Safety Promotion	Susan Everingham
<b>OTSI Level 2 Escalation Representative</b> (clause 12)	Chief Investigator	Natalie Pelham

# The parties agree as follows:

## 1 Purpose of this Memorandum of Understanding (MoU)

1.1 The purpose of this MoU is to clarify and document:

- a) the role of OTSI within the Transport cluster;
- b) the framework for the cooperation between the Parties to assist OTSI in carrying out transport safety investigations and other functions;
- c) the framework for collaboration between the Parties to identify, investigate, and address safety issues, share safety lessons across the cluster and transport network, and to outline the process for following up recommendations or safety actions;
- d) the arrangements for OTSI to provide input into safety policy, legislation, and reform at the state and national level;
- e) the framework for the exchange of information between the Parties; and
- f) the Parties' respective obligations in these processes.

## 2 Term & Termination

### 2.1 Term

Subject to clause 2.3 (Termination for Convenience) this MoU commences on the Start Date and will remain in force until the End Date.

### 2.2 Extension

The Term may be extended by agreement in writing between the parties.

### 2.3 Termination for Convenience

Either party may terminate this MoU at any time by giving the other party at least three (3) months' written notice.

## 3 Functions of the Parties

### 3.1 Transport for NSW

TfNSW is constituted under s.3C of the *Transport Administration Act 1988*. TfNSW's statutory functions relating to passenger transport services include:

- a) providing strategic co-ordination of safety regulatory frameworks in relation to transport authorities and owners or operators of transport services;
- b) reviewing and evaluating any matter related to the safe operation of transport services and the functions of transport authorities in relation to the safe operation of transport services;
- c) advising the Minister, or making recommendations to the Minister, or both, about any matter related to the safe operation of transport services, including safety regulation by transport authorities in relation to transport services;

- d) reporting to the Minister each year on the performance of transport authorities and owners and operators of transport services in connection with the exercise of their functions relating to the safe operation of those services; and
- e) advising the Minister on the implementation of recommendations of reports of investigations and inquiries into transport accidents or incidents or the safety of transport services, including reports of the following kinds:
  - i. reports by the Chief Investigator;
  - ii. transport safety inquiry reports;
  - iii. reports by the Australian Transport Safety Bureau relating to accidents or incidents in New South Wales; and
  - iv. an inquest or inquiry under the *Coroners Act 2009*.

The statutory marine safety functions conferred on TfNSW are outlined in section 25 of the *Ports and Maritime Administration Act 1995*, and are functions delegated by the Minister to TfNSW. These functions include:

- a) responsibility generally for the safe operation of recreational and commercial vessels, safety of navigation in ports and other navigable waters, and the protection of the environment from marine pollution from vessels;
- b) arranging for the investigation of marine accidents and incidents;
- c) providing for the provision of emergency environment protection services for dealing with pollution incidents from vessels in NSW waters;
- d) providing marine safety services and infrastructure; and
- e) providing infrastructure and services for vessels such as moorings for vessels, the installation of navigations aids, and vessel traffic control within ports.

TfNSW also has functions conferred on it by the *Marine Safety Act 1988* which operates to ensure the safe operation of vessels in waterways and ports, and promotes the responsible operation of vessels to protect the safety of all waterway users and the amenity of those who occupy adjoining land (including a regime for boat driving licences and registrations for recreational vessels, and other waterway usage licences). The *Marine Safety Act 1988* provides for investigation and appropriate action following marine accidents.

More broadly, TfNSW's general functions include:

- a) Transport planning and policy - transport planning and policy, including for integrated rail network, road network, maritime operations and maritime transport and land use strategies for metropolitan and regional areas.
- b) Transport public funding - the administration of the allocation of public funding for the transport sector, including the determination of budgets and programs across that sector.
- c) Transport infrastructure - the planning, oversight and delivery of transport infrastructure in accordance with integrated transport and land use strategies

and available financial resources, including prioritising of expenditure and projects across the transport system.

- d) Capital works programs and budgets - co-ordination of capital works programs and budgets across the transport sector.
- e) Contracting for the delivery of transport services - contracting, on behalf of the State, with public transport agencies or the private sector, for the delivery of transport services, including the setting of performance targets and service standards.
- f) Transport services co-ordination - the co-ordination of transport services, including timetabling for transport services and providing for effective transport interchanges.
- g) Incident management - the management of incidents affecting the efficiency of road and public transport networks, including the co-ordination of communications with and responses by relevant agencies.
- h) Transport information - the provision of information about transport services and transport infrastructure to assist people to use those services or infrastructure.
- i) Provision and deployment of staff and services - the provision of corporate and shared services to Transport Asset Holding Entity (TAHE), Residual Transport Corporation (RTC) and public transport agencies and the deployment of staff to TAHE, RTC, public transport agencies and the Department of Transport.
- j) Ticketing for transport services - the provision of integrated ticketing arrangements for transport services, and regulating the types of tickets and other ticketing arrangements for the setting of fares for transport services.
- k) Precinct land planning - assisting the Minister for Planning and Infrastructure and other relevant agencies with the preparation of precinct plans for the development of land for, or in the vicinity of, public transport stations or wharves and transport interchanges.
- l) Procurement - co-ordinating and carrying out the procurement of transport infrastructure and transport vehicles, rolling stock and vessels.
- m) Transport innovation - developing policy and facilitating research and testing for the purposes of promoting innovative transport solutions, including the testing of automated vehicles and digital technologies on the State's roads and road related areas.

### 3.2 Office of Transport Safety Investigations

#### *Principal Functions*

The principal functions of the Chief Investigator of OTSI are to (s 45A *Transport Administration Act 1988* (TAA)):

- a) conduct investigations into rail and passenger transport accidents or incidents under the *Passenger Transport Act 1990* (PTA); and
- b) determine the causes of those accidents or incidents; and

- c) report on the outcome of any investigation to the Minister; and
- d) review investigation reports prepared by transport authorities and other transport operators; and
- e) at the Minister's request, investigate and advise the Minister about any matter related to the safe operation of transport services (includes heavy, light rail and metro services, bus and ferry services).

The Chief Investigator is not authorised to apportion blame or provide the means to determine liability for safety matters or to assist in court proceedings. Nor is it the Chief Investigator's function to allow any adverse inference to be drawn from the fact that a person was involved in a transport safety matter (although blame or liability may be inferred by someone other than the Chief Investigator).

Subject to some limitations, OTSI's scope under the PTA is:

- a) to investigate any transport accident or incident that may affect the safe provision of railway operations or bus or ferry public passenger services (s 46BA(1) PTA) – the function is expressed as “may investigate” which allows for the exercise of discretion in the selection of matters for investigation;
- b) if required by the Minister, to investigate and report to the Minister on any transport accident or incident that may affect the safe provision of railway operations or bus or ferry public passenger services (s 46BA(3) PTA).<sup>1</sup>

The Chief Investigator may also complete rail safety investigations on behalf of the ATSB in accordance with the Collaboration Agreement between ATSB and OTSI.

#### *Form of investigation*

The Chief Investigator determines the way in which the investigation will be undertaken and can extend the investigation to all relevant events and circumstances preceding the accident or incident. The Chief Investigator can compel witnesses and documents and may conduct the investigation contemporaneously with investigations by other regulators or courts.

Transport safety investigators appointed by the Chief Investigator also have powers concerning entering accident sites, premises to access accident sites and vehicles with and, in some cases, without consent. For example, power is given to enter premises without consent and without obtaining a search warrant if the investigator believes on reasonable grounds, it is necessary to do so, and the investigation is into a notifiable occurrence.

The Chief Investigator can discontinue an investigation at any time (other than one commenced at the Minister's request).

#### *Accidents, Incidents and Notifiable Occurrences*

The scope of 'accident and incidents' under the PTA is not limited in its definition. In the rail context, it also extends to 'notifiable occurrences'.

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<sup>1</sup> The scope of an investigation is expressed in similar but not identical language in s 46BA, s 46BC and s 46BD

## *Bus Services*

An operator of a bus service who becomes aware that a bus being used to provide the service has been involved in an accident or incident must notify **TfNSW** if the accident or incident:

- a) resulted in a person being injured, or
- b) prevented the bus from continuing its journey, or
- c) is, in the reasonable opinion of the operator of the service, otherwise likely to arouse serious public concern.<sup>2</sup>

The operator must notify **OTSI** if the accident or incident involved or resulted in:

- a) a person being injured,
  - b) the driver of the bus being incapacitated,
  - c) a mechanical or electrical fire or an explosion on the bus,
  - d) a failure of the steering or brakes of the bus,
  - e) a bus being in motion while not under the effective control of a driver,
  - f) the bus being unable to continue its journey,
  - g) a person being caught in the doors of the bus and being dragged by the bus,
- or is, in the reasonable opinion of the operator of the service, otherwise likely to arouse serious public concern.<sup>3</sup>

## *Rail Operations*

A rail transport operator must report to the Office of the National Rail Safety Regulator (**ONRSR**) all notifiable occurrences that happen on, or in relation to, the operator's railway premises or railway operations.<sup>4</sup> This includes a derailment, collision, and the detection of an irregularity in any rolling stock that could affect the safety of railway operations. A full schedule of notifiable occurrences relating to rail is contained in Schedule 1A of the *Rail Safety National Law National Regulations 2012*.

ONRSR will notify the Australian Transport Safety Bureau (ATSB) in accordance with the MOU between ONRSR and ATSB. ATSB will notify OTSI of reported Category A occurrences.

## *Maritime*

The master of a vessel must report marine accidents to the Minister.<sup>5</sup> The Minister may order an investigation into a reported marine accident or in other specified

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<sup>2</sup> *Passenger Transport (General) Regulation 2017*, cl. 88(1).

<sup>3</sup> *Ibid.*, cl. 88(3).

<sup>4</sup> *Rail Safety National Law (NSW)*, s. 121(1); *Rail Safety National Law National Regulations 2012*, cl.57.

<sup>5</sup> *Marine Safety Act 1998*, s.99.



circumstances.<sup>6</sup> If an investigation concerns or is related to a public passenger service provided by a ferry the Minister may appoint the Chief Investigator as the investigator.<sup>7</sup>

#### *Investigation reports*

The Chief Investigator must provide the Minister with a report on a transport safety investigation (including any discontinued investigation) and may also provide a draft report on a confidential basis to the Minister or any other person to allow for submissions, for safety purposes or for advance notice. If an investigation is discontinued, the Chief Investigator must give the Minister a report of the reasons for discontinuing within 28 days.

The Chief Investigator's report (including any draft) is not admissible in any legal proceedings.

#### *Transport Safety Inquiry*

The Chief Investigator may if they consider it appropriate in the circumstances, ask the Minister to constitute a Board of Inquiry to conduct a transport safety inquiry into any transport accident or incident or any other event, occurrence, practice or matter that may affect the safe provision of railway operations or a bus or ferry public passenger service (s 46BD PTA).

If the Minister declines the Chief Investigator's request, they must give reasons and table the reasons in Parliament.

#### *Whistleblowing*

As provided in the PTA, the Chief Investigator has established a confidential whistleblowing system for the voluntary reporting by transport safety employees or rail safety workers of matters that may affect the safe provision of a public passenger service (bus, ferry, railway operations). The system established by the Chief Investigator is the Confidential Safety Information Reporting Scheme (CSIRS). The CSIRS operates under the provisions of Section 46E of the *Passenger Transport Act 1990*.

### **3.3 OTSI's Role within the Transport Cluster**

OTSI provides an independent investigation into matters that affect the safe operation of the transport network and the modes of transport that operate on it.

The TAA and PTA define the scope of those investigations as outlined above (Cl 3.2). Independent investigation examines the root causes and contributors to safety matters with a view to identifying means of prevention or safety improvements in respect of their management.

Given that OTSI does not apportion blame, it is well-positioned to 'shine a light' on important safety matters and to share the lessons and insights with transport cluster agencies who operate on the network.

This independent investigative role provides the opportunity for TfNSW and OTSI to work together where appropriate in order to:

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<sup>6</sup> Ibid, s.103.

<sup>7</sup> Ibid, 105(1A).

- a) identify potential safety matters that would benefit from independent safety investigation; and
- b) share learnings and opportunities for safety improvement, including informing regulatory reform as required.

## **4 General Obligations**

Each party agrees to:

- a) work collaboratively and co-operate with the other party in good faith to achieve a successful outcome;
- b) perform its obligations in a timely manner and in accordance with any agreed timeframes;
- c) use suitably qualified and sufficiently experienced personnel; and
- d) provide any other related assistance, information, data, equipment, resources or materials as may be reasonably required to satisfactorily meet the objectives of the MoU.

## **5 Subcontracting & Assignment**

### **5.1 No Subcontracting**

A party must not subcontract its obligations under this MoU without the prior written consent of the other party.

### **5.2 No Assignment**

A party must not assign its obligations under this MoU without the prior written consent of the other party.

## **6 Privacy**

### **6.1 Compliance with Privacy Laws**

The parties must comply with all applicable privacy laws, including the *Privacy and Personal Information Protection Act 1998*.

### **6.2 Compliance with Government Data Security Policies**

The parties will ensure that the systems in which they store information provided under an Information Sharing Arrangement complies with all NSW Government data security policies.

### **6.3 Notification of Privacy Breaches**

A party must notify the Representative of the other party in writing immediately upon becoming aware of a breach or possible breach of any of its privacy or data security obligations under this MoU relating to information provided under an Information Sharing Arrangement or on receiving a privacy complaint relating to the party accessing or using or disclosing information provided under an Information Sharing Arrangement.

## **7 Confidentiality**

7.1 A party must not disclose to third parties, or use for any purpose (other than under this MoU) any Confidential Information of the other party or any information about this MoU unless that disclosure or use:

- (a) is specifically authorised in writing by the other party;

- (b) is required or authorised by law; or
- (c) is to the party's legal advisers for the purpose of obtaining legal advice.
- (d) is for the purpose of sharing information about an investigation, or a draft copy of the investigation, as part of the DIP process; or
- (e) is for the purpose of sharing information from a CSIRS report where the Chief Investigator approves disclosure.

7.2 In this clause "Confidential Information" is any information not in the public domain (otherwise than through a breach of an obligation of confidence).

7.3 A party must immediately notify the Representative of the other party in writing if it becomes aware of any suspected or actual unauthorised access, use or disclosure of the confidential information released to that party under this MoU or under an Information Sharing Arrangement pursuant to Schedule 2, and immediately take all steps (including those reasonably requested by the other party) at its own expense, which are necessary to prevent any suspected or actual unauthorised access, use or disclosure of the confidential information.

7.4 The Parties agree that if Confidential Information of the other party becomes subject to a Subpoena or application under the *Government Information (Public Access) Act 2009* they will use their best endeavours to advise the other party immediately to allow the opportunity to provide comment in relation to the release, disclosure, publication or production of the information.

## **8 Intellectual Property (IP)**

### **8.1 Existing IP**

All rights in Existing IP remains the property of the party that created it or owns it.

### **8.2 Licence to Use Other Party's IP**

To the extent that a party ("Licensee") requires the use of any Intellectual Property owned by the other party ("Licensor") for the purposes of carrying out its obligations under this MoU then the Licensor grants to the Licensee a non-transferable, non-exclusive, royalty-free licence to use that Intellectual Property for that purpose subject to such terms (if any) as the Licensor might reasonably impose (including the execution of a written agreement).

### **8.3 IP Warranty**

The Licensor warrants that to the best of its knowledge the IP that is the subject of the licence to the Licensee will not infringe the Intellectual Property rights of any third party if used for the Project.

## **9 Media & Public Announcements**

Neither party may make any public announcements about this MoU without first obtaining the consent of the other, unless required by law to disclose this MoU.

## **10 Enforceability**

### **10.1 MoU Not Legally Binding**

The parties do not intend that the provisions of this MoU:

- (a) will be legally binding or legally enforceable against them and a party will not have any liability for breach of provisions that are not legally binding;
- (b) waive, fetter, limit or affect the rights, powers, duties liabilities or obligations of the Parties; or
- (c) affect the due and proper performance of the Parties' statutory functions or their ability to comply with all applicable statutory requirements.

## **11 Notices**

### **11.1 Form of Notice**

A notice given in connection with this MoU:

- (a) must be in writing;
- (b) must be marked for the attention of the recipient's Representative; and
- (c) must be sent via email to the recipient's Representative with delivery receipt enabled.

### **11.2 Effective Date**

A notice takes effect from the time it is received unless a later time is specified in it.

### **11.3 Receipt**

A notice is deemed to have been received:

- (a) unless an email bounce back or out of office message is received, a notice or document shall be taken to be delivered or served in accordance with the provisions of the *Electronic Transactions Act 1999* (Cth) as if they applied to such notices.

but if receipt of a notice occurs on a day on which business is not generally carried out in the place to which the notice is sent or occurs later than 5.00 pm (local time), it will be taken to have occurred at the commencement of business on the next day when business is generally carried out.

## **12 Dispute Resolution**

12.1 If a dispute or difference arises out of, or in connection with, this MoU:

- a) the parties agree to use all reasonable endeavours to resolve the dispute speedily by good faith negotiation between the TfNSW Representative and the OTSI Representative (Level 1 Discussions);
- b) if the dispute has not been resolved within 20 Business Days after commencement of the Level 1 Discussions, the dispute is to be escalated by TfNSW to its TfNSW Level 2 Dispute Escalation Representative and the OTSI Level 2 Dispute Escalation Representative who must promptly hold good faith discussions to attempt to resolve the dispute (Level 2 Discussions); and
- c) each party must continue to perform its obligations under this MoU despite the existence of a dispute or the operation of this dispute resolution process.

12.2 Nothing in this clause prevents the Parties from exercising any termination rights under this MoU.

## **13 Schedules**

### **13.1 Additional Schedules**

- (a) Additional schedules can be annexed to this MoU by written agreement and signed by the Parties.
- (b) The annexure of an additional schedule does not require re-execution of the overall MoU.
- (c) The commencement date for each schedule is the date contained in clause 1.2 of the relevant schedule.

### **13.2 Variation of Schedules**

- (a) Individual schedules can be varied by written agreement and signed by the Parties.
- (b) The variation of an individual schedule does not require the re-execution of the overall MoU.

### **13.3 Termination of Schedules**

- (a) Individual schedules can be terminated by either party at any time by giving the other party at least 3 months' written notice.
- (b) The termination of an individual schedule does not impact the operation of the overall MoU or any other schedule.

## **14 General**

### **14.1 Costs of this MoU**

Each party will bear its own costs in respect of the negotiation and preparation and signing of this MoU.

### **14.2 Compliance with Laws**

Each party will observe all applicable laws.

### **14.3 Counterparts**

This MoU may consist of a number of copies each signed by one or more parties to the MoU. If so, the signed copies are treated as making up the one document.

### **14.4 Governing Law and Jurisdiction**

This MoU is governed by the law in force in New South Wales. Each party submits to the exclusive jurisdiction of the courts of New South Wales.

### **14.5 Variations**

Any variation to this MoU must be in writing and signed by the Parties.

## 14.6 Interpretation

The words “include”, “including”, “for example” or “such as” are not to be interpreted as words of limitation, and when such words introduce an example, they do not limit the meaning of the words to which the example relates, or to examples of a similar kind.

## 14.7 Interagency Interactions

The Parties acknowledge that timely compliance with obligations under this MoU may be impacted where input is required from third parties.

# 15 Definitions

The following meanings apply unless the contrary intention appears:

<b>Details</b>	Means the Details table at the front of this MoU.
<b>Existing IP</b>	Means Intellectual Property created prior to this MoU or which is developed independently of this MoU.
<b>Information Sharing Arrangement</b>	Means an arrangement entered into between the Parties pursuant to Schedule 2 of this MoU.
<b>Intellectual Property</b>	Means all present and future industrial and intellectual property rights conferred by statute, common law or equity and includes copyright, trademarks, patents, designs, circuit layout rights, trade secrets, inventions and other results of intellectual activity in the industrial, commercial, scientific, literary and artistic fields whether non-registrable, registered or patentable.
<b>MoU</b>	Means this Memorandum of Understanding.
<b>Public Passenger Service</b>	As defined in the <i>Passenger Transport Act 1990</i> (NSW) and (relevantly) means the carriage of passengers for a fare or other consideration by a vessel.
<b>Representatives</b>	Includes both the TfNSW Representative and the OTSI Representative.