Rail Safety National Law
Draft Regulatory Impact Statement

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NTC AUSTRALIA

National Transport Commission

National Transport Commission

Rail Safety National Law: Draft Regulatory Impact Statement

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Report outline

Title:	Rail Safety National Law
Type of report:	Draft Regulatory Impact Statement
Purpose:	Endorsement of the Transport and Infrastructure Senior Officials Committee
Abstract:	In December 2009 the Council of Australian Governments agreed to implement a national single rail safety regulator. It was also agreed that a rail safety national law be developed, which the regulator will administer, and that the law would be based on the National Transport Commission Model Rail Safety Bill (2007) and Regulations. The national law was also to address areas where states and territories had varied from the model bill and regulations. Endorsement by Wednesday, 28 September 2011, by mail to: Chief Executive Officer National Transport Commission L15/628 Bourke Street MELBOURNE VIC 3000
Key milestones:	Submission of this draft regulatory impact statement for endorsement of the Transport and Infrastructure Senior Officials Committee from 20 to 28 September 2011. Submission of the final regulatory impact statement to the Standing Council of Transport and Infrastructure for approval in November 2011.
Key words:	Rail safety, rail safety worker, rail transport operator, rail infrastructure manager, regulatory impact statement
Contact:	Greg Deimos Project Director Telephone: (03) 9236 5038 Mobile: 0418 587 433 gdeimos@ntc.gov.au

Foreword

The National Transport Commission (NTC) is an independent organisation established under the *National Transport Commission Act 2003* (Commonwealth) and an Inter-Governmental Agreement for Regulatory and Operational Reform in Road, Rail and Intermodal Transport. The NTC is responsible for developing nationally consistent reforms in road, rail and intermodal transport and to evaluate, monitor, review and maintain those reforms.

In 2008, the Australian Transport Council (ATC) endorsed the National Transport Policy Framework, developed by the NTC, and agreed to a program of national reform to address significant national challenges across all transport modes. The National Transport Policy Framework outlined a 'new thinking' approach to transport policy which reflected changing industry and operating environments with the objective of developing a seamless, coordinated transport system.

To this end, ATC requested that regulatory impact statements be prepared for a national maritime safety regulator, a national heavy vehicle regulator, and a single, national rail regulatory and investigation framework.

In May 2009 the Australian Transport Council considered the establishment of a Single National Rail Safety Regulator, that decision being endorsed by the Council of Australian Governments in December 2009. The NTC was tasked with developing Rail Safety National Law (National Law), based on the National Transport Commission Model Rail Safety Bill (2007) and Model Regulations (Model Law).

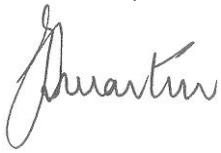
Following previous initiatives to develop more nationally uniform arrangements, this reform is an historic moment and unique opportunity to achieve a truly national system of rail safety regulation. It comes at a time when rail transport has been increasingly identified as a key means of servicing the growing nation-wide demand for safer, more productive and environmentally-friendly transport services and infrastructure.

This regulatory impact statement assesses the cost impacts and benefits of the transition from Model Law to National Law. It has been amended, following publication of a draft version for comment, receipt and consideration of those comments.

I acknowledge the efforts of NTC staff who have contributed to the regulatory impact statement, including Greg Deimos, Julian Del Beato, Kate Pearce, Monica Kishore and Vinh Trinh, and also the National Rail Safety Regulator Project Office and Advisory Committee.

The regulatory impact statement is now submitted to the Transport and Infrastructure Senior Officials Committee for endorsement, before being submitted to the Standing Council of Transport and Infrastructure for voting in November 2011.

It should be noted that policy for a risk-based model to define maximum working hours of rail safety workers (fatigue risk management) will be completed, with a regulatory impact statement, in 2012.



Greg Martin
Chairman

Executive summary

The Council of Australian Governments (COAG) and the Australian Transport Council (ATC) directed the National Transport Commission (NTC) to consolidate the seven state and territory bodies of rail safety law into a Rail Safety National Law (National Law), to support implementation of a Single National Rail Safety Regulator (Regulator).

The National Law has been developed to achieve the best outcomes in rail safety, utilising a co-regulatory approach to risk management between duty holders and the Regulator. The objective is to develop a seamless and coordinated national approach to rail safety regulation.

This is a landmark opportunity to take a significant step forward in achieving national transport objectives. The draft National Law has been estimated to have a benefit to society (net present value) of between $28 and $71 million.

A single, national system of rail regulation would have a number of benefits, both to improving levels of safety, as well as cutting costs and red tape. These include:

- Accrediting rail transport operators on a national basis, alleviating the need for interstate operators to hold multiple accreditations to different standards.
- A national system of regulating compliance with the law, cutting duplication between states and territories in the auditing, monitoring and inspecting of interstate rail transport operators.
- Making available a larger, national pool of resources and specialist knowledge for the Regulator to draw on in making technical decisions and judgments, and investigating safety incidents.
- Strengthening the capability of policy makers and the Regulator to make more evidence-based decisions, through the introduction of a national standard for the recording, sharing and management of rail safety data.
- Reduced compliance costs for rail transport operators and enhanced confidence in the regulatory regime through nationally consistent application and interpretation of rail safety laws.
- By reducing duplication in compliance tasks, freeing up resources of both rail transport operators and the Regulator to concentrate more on measures to improve safety.

The NTC had previously submitted a proposal to move from the existing state and territory-based system of rail safety law and regulation, to one under a single national law, regulator and investigation framework. The proposal and accompanying regulatory impact statement was approved by COAG in 2009, who directed the NTC to develop a National Law that would take effect under a national Regulator in January 2013.[1]

[1] Single, National Rail Safety Regulatory and Investigation Framework Regulatory impact Statement (July 2009), available at http://www.ntc.gov.au/viewpage.aspx?documentid=1927. The RIS estimates cost savings of between $36 and $67 million, resulting from establishing a single national model of rail safety regulation and law.

In approving the proposal, COAG agreed for the National Law to be based on the NTC Model Rail Safety Bill and Model Regulations (Model Law[2]).

All states and territories have implemented the Model Law; however, they have varied certain provisions in their applying law to support local policy objectives. In other cases, they have implemented their own provisions where a national position was not reached in the process of developing the Model Law, allowing instead for local variations.

In supporting the transition from Model Law to a National Law and Regulator, to resolve these variations, a number of amendments to the Model Law have been proposed. The purpose of this regulatory impact statement is to assess those amendments and therefore, the impact of the proposed National Law. This regulatory impact statement does not seek to redress governance arrangements for the Regulator, a principal element of COAG's standing direction to establish a national system of rail safety regulation.

The amendments were developed to maintain or improve rail safety management, and in many cases streamline or simplify the compliance process. Proposed requirements for the management of drug and alcohol use by, and fatigue of rail safety workers are designed to support best practice management principles being developed by rail transport operators. The requirements would help best practice being achieved at minimum necessary cost, by providing operators with the flexibility to tailor their management to the individual circumstances of their railway operations and the associated risks.

Some amendments, such as for assessing rail safety worker health and fitness, and competence, were developed to simplify or clarify compliance standards, where those standards are justifiably able to be applied in a uniform manner across the rail industry. Other amendments, representing the majority, comprise minor rewording to clarify existing requirements, or propose mechanical changes to accommodate their being administered under a national Regulator.

In the process of developing the National Law, the NTC and National Rail Safety Regulator Project Office released a number of discussion papers and convened stakeholder workshops. Stakeholders consulted during this process included state and territory government policy makers, rail safety regulators, rail industry members, rail industry associations and unions. A draft regulatory impact statement was published in July 2011, to which public feedback was sought.

Feedback was considered by the Jurisdictional Rail Safety Advisory Group, comprising policy makers from the Commonwealth, state and territory governments. Where matters were unresolved from this group, policy decisions were elevated to the Rail Safety Regulation Reform Project Board or ATC for deliberation.

A number of amendments to the Model Law, which have a measurable regulatory impact, are proposed.

- Scope and objectives, addressing objectives of the National Law, as well as clarifying its scope of applicability. Proposals are:
    - to add a number of objectives to the Act (National Law)
    - to further define railways to which the Act (National Law) will not apply

[2] Rail Safety Reform Bill - Draft Regulatory Impact Statement for Consultation (October 2005) & Model Rail Safety (Reform) Regulations: Draft Regulatory Impact Statement (July 2006), available at http://ntc.gov.au/viewpage.aspx?documentid=1667.

- to amend the accreditation exemption provisions for private sidings, to apply to registration of the siding managers rather than the infrastructure itself
- to provide a framework by which the Regulator may exempt certain railways from defined provisions of the Act (National Law)
- to authorise the Regulator to direct parties when performing works on or near rail infrastructure, when that work affects rail safety and is not otherwise subject to the National Law
- to impose specific duties on parties loading and unloading rolling stock to manage safety risks.

- Various requirements for how rail transport operators must plan and manage risks, including proposals:
  - to specify additional matters that a safety management system must address
  - requiring full compliance with the National Standard for Health Assessment of Rail Safety Workers
  - setting out requirements for how operators must managed the risks to safety associated with drug and alcohol use, including requiring that known, key elements are addressed
  - setting out requirements for how operators must manage risks to safety arising from rail safety worker fatigue, prescribing similar key elements (in a similar manner as for the management drug and alcohol use) and a framework for managing maximum hours of work[3]
  - clarifying the requirements for assessment of rail safety worker competence
  - clarifying the requirement for communication between train drivers and network control officers
  - imposing a requirement for rail infrastructure managers to consult with affected parties before making changes to network rules.
- Specific authorities and responsibilities of the Regulator, which govern elements of how the Regulator shall ensure compliance with the National Law, including proposals:
  - to authorise the Regulator to direct rail transport operators to fit safety or protective devices, in order to implement recommendations of prescribed types of safety investigations
  - requiring the Regulator to conduct a cost-benefit analysis on certain types of directions issued to rail transport operators
  - appointing the Regulator as the person required to give direction to parties who fail to agree on arrangements for coordinating prescribed types of interfaces with railways.

[3] A framework for managing rail safety worker maximum hours of work is proposed in the draft National Law and this regulatory impact statement. A supplementary proposal and regulatory impact statement, providing more policy detail under the framework, is scheduled to be submitted for voting by ATC at a later date.

- Harmonisation of the National Law with Model Work Health and Safety Legislation for provisions that may be incompatible, in order to avoid inconsistencies between the two overlapping areas of law.
    - This includes the development of a national penalty framework to align with penalties in the Model Work Health and Safety Bill.

Rail industry members have mostly, strongly supported the proposed National Law, while a number of smaller operators have expressed concerns for the potential cost impacts. State and territory governments, while mostly supporting the concept of a National Law and Regulator, have raised specific concerns with numerous provisions of the National Law.

In assessing the overall level of support for the National Law, a distinction may be drawn between the broader concept, including benefits that would result from its implementation, and support for the range of specific provisions contained within it. While in overall terms, there is relatively strong support for the former, extensive consultation has revealed a diverse range of views on the latter (i.e. specific provisions of the National Law). The NTC does not believe that it is practicable to achieve a consensus on these provisions.

Feedback provided by rail industry members, government agencies and unions during the consultation process has been taken into account account in developing the final, draft National Law. Based on feedback received from stakeholders the NTC amended a number of National Law provisions. These amendments include: lowering the maximum concentration of alcohol in a rail safety worker's blood from 0.02 per cent to 0.00 per cent; and requiring parties undertaking works on or near rail infrastructure to seek the prior approval of the rail infrastructure manager, rather than the Regulator.

The overall, incremental impact of the proposed amendments to the Model Law is estimated as having a net present value, as measured over a ten year period, of between $28 and $71 million (i.e. a net benefit). Estimates for each proposal are shown in Table 1. (figures are presented as high and low range estimates).

Table 1. Net present value of National Law proposals[4]

	Net present value ($ Million)	
	High	**Low**
Scope and objectives		
Railways to which the Act does not apply	0.42	0.17
	-0.74	-0.87
Private sidings exemption from accreditation	8.37	-0.20
Exemption framework	3.35	0.02
Powers with respect to the interface with parties whose operations may impact rail safety	2.05	0.0
Duty for loading and unloading rolling stock	7.60	3.80
Operator safety management		
Safety management system	0.20	0.28
Health and fitness management program	0.82	0.94
Drug and alcohol management program	30.46	14.96
Fatigue risk management program	4.16	2.14
Testing for drugs or alcohol	8.41	6.90

[4] Positive figures indicate a net benefit; negative figures indicate a net cost.

Specific Regulator authorities and responsibilities		
Network rules	7.80	0.28
Regulator to conduct CBA for mandatory safety decisions	-1.40	-0.70
Total	**71.48**	**27.71**

Significant benefits have been estimated for a proposal to introduce a duty under the National Law for safe loading and unloading of rolling stock, a provision that would authorise the Regulator to help prevent unsafe practices that have previously led to train derailments. More robust requirements for how rail transport operators must manage drug and alcohol use by rail safety workers are also estimated to result in significant benefits, by reducing the number of rail safety incidents caused by impaired workers.

Aggregated net present values of the proposals, as incurred by each major industry segment, are shown in Table 2. The amendments would impose some significant, potential increased costs and barriers to the ongoing viability of particularly smaller, including tourist and heritage operators. However, there is potential for those costs to be reduced by the granting of exemptions to provisions of the National Law to which they are attributed. Uncertainty over the extent of exemptions that the Regulator may grant has contributed to corresponding uncertainty in assessing the cost impact on smaller, and tourist and heritage operators.

Table 2. Net present value of National Law proposals to industry segments[5]

	Initial (implementation) ($ Million)		Ongoing ($ Million per annum)		Net present value ($ Million)	
	High	Low	High	Low	High	Low
National Regulator	(1.70)	(1.06)	(0.51)	(0.26)	(5.28)	(2.91)
Rail transport operators (freight and passenger)	(7.42)	(3.04)	(0.64)	0.11	(11.93)	(2.28)
Rail transport operators (tourist and heritage)	(3.17)	(1.75)	(1.29)	(0.76)	(12.22)	(7.12)
Society	0	0	14.37	5.70	100.91	40.02
Total	**(12.29)**	**(5.84)**	**11.93**	**4.78**	**71.48**	**27.71**

The proposed amendments are estimated to support benefits of between $28 and $71 million, measured in terms of reduced costs to society resulting from improved levels of rail safety. However, it is estimated that implementing the draft National Law would impose some costs on rail industry members and the Regulator.

COAG directed that the National Law be developed in a manner that:

- supports a seamless national rail transport system
- does not reduce existing levels of rail safety
- streamlines regulatory arrangements and reduces the compliance burden for business
- improves national productivity and reduces transport costs generally.

[5] Positive figures indicate a net benefit; negative figures indicate a net cost.

It is considered the draft National Law would serve each of these objectives. It has been assessed that implementing the proposed National Law would have substantial benefits to society, both in terms of improved levels of safety, as well as enhanced productivity resulting from a more streamlined and seamless national regulatory regime that would result in significant transport cost savings.

This reform represents an historic opportunity for broader national transport and more specifically, rail safety regulatory reform. It would more strongly position the rail industry to more effectively and efficiently meet the challenges it is likely to face in the coming decades, including demand for strong growth, downward pressure on costs resulting from more intense competition between rail and other transport modes, and an expectation of the public that safety standards would continue to improve.

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1. Introduction

1.1 Council of Australian Governments Reform Agenda

The Council of Australian Governments (COAG) has committed to regulatory and red tape reduction under the National Reform Agenda announced in February 2006.[6] COAG identified rail safety regulation as a cross-jurisdictional 'regulatory hotspot' where overlapping and inconsistent regulatory regimes were impeding economic activity.

In February 2006, COAG noted that:

> *"the dispersed nature of Australia's population and markets underlines the importance of efficient transport infrastructure to improving productivity. Transport already generates approximately five per cent of GDP and Australia's freight task is expected to almost double over the next 20 years. COAG has agreed to improve the efficiency, adequacy and safety of Australia's transport infrastructure by committing to high priority national transport market reforms."*

1.2 Australian Transport Council National Transport Policy Framework

In February 2008, the Australian Transport Council (ATC) agreed that there is a need for a national approach to transport policy and endorsed the National Transport Policy Framework.[7] The ATC's vision for Australia's transport future stated:

> *"Australia requires a safe, secure, efficient, reliable and integrated national transport system that supports and enhances our nation's economic development and social and environmental well-being."*

To achieve this vision, ATC committed to a number of policy objectives.

- **Economic**: To promote the efficient movement of people and goods in order to support sustainable economic development and prosperity.
- **Safety**: To provide a safe transport system that meets Australia's mobility, social and economic objectives with maximum safety for its users.
- **Social**: To promote social inclusion by connecting remote and disadvantaged communities and increasing accessibility to the transport network for all Australians.
- **Environmental**: Protect our environment and improve health by building and investing in transport systems that minimise emissions and consumption of resources and energy.

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[6] Council of Australian Governments' Meeting: Communiqué, 10 February 2006, http://www.coag.gov.au/coag_meeting_outcomes/2006-02-10/docs/coag100206.pdf, last checked 20 October 2010.

[7] Australian Transport Council, 2008, *Communiqué* from ATC meeting on 2 May 2008, Canberra.

- **Integration**: Promote effective and efficient integration and linkage of Australia's transport system with urban and regional planning at every level of government and with international transport systems.
- **Transparency**: Transparency in funding and charging to provide equitable access to the transport system, through clearly identified means where full cost recovery is not applied.

Following on from these objectives, ATC agreed that it would consider the options of establishing national frameworks for regulation of heavy vehicles, marine safety and rail safety to establish a genuine national market and a seamless regulatory framework.

1.3 The National Transport Commission

COAG and ATC directed the National Transport Commission (NTC) to develop a body of rail safety national law (National Law) to support implementation of a Single National Rail Safety Regulator (the Regulator).

The National Law has been developed to achieve the best outcomes in rail safety, utilising a co-regulatory approach to risk management between rail transport operators and the Regulator. The objective is to develop a seamless and coordinated national approach to rail safety regulation.

COAG directed that the National Law be developed using the NTC Model Rail Safety Bill and Model Regulations (Model Law) as the basis.[8] This regulatory impact statement has assessed the impact and benefits of proposed amendments to the Model Law, which are necessary to form a body of National Law that would be administered by the Regulator. Previous regulatory impact statements have assessed the impact of the Model Law[9] and that of establishing a National Law and Regulator.[10]

The proposed amendments are necessary to support the transition from Model Law to a National Law to be administered by the Regulator. Additionally, some amendments are proposed to resolve policy issues where states and the territories have varied from the Model Law, or where a national position was not previously formed.

[8] Available at http://ntc.gov.au/viewpage.aspx?documentid=1667.

[9] Rail Safety Reform Bill - Draft Regulatory Impact Statement for Consultation (October 2005) & Model Rail Safety (Reform) Regulations: Draft Regulatory Impact Statement (July 2006), available at http://ntc.gov.au/viewpage.aspx?documentid=1667.

[10] Single, National Rail Safety Regulatory and Investigation Framework Regulatory impact Statement (July 2009), available at http://www.ntc.gov.au/viewpage.aspx?documentid=1927.

2. Background

2.1 The current rail safety regulatory framework

Rail safety regulation is relatively new to Australia, having only been in place for 17 years. Prior to this, railways were government-owned and vertically integrated, rendering them directly accountable to governments.[11]

In 1996 the Commonwealth, states and territories signed an Inter-Governmental Agreement on Rail Safety. The agreement was to establish a cost effective, nationally consistent approach to rail safety, developed to lower barriers for entry of third party operators. In accordance with the Inter-Governmental Agreement, all parties undertook to legislate for rail safety, and more specifically, to include provisions in state and territory legislation sufficient to meet the terms and conditions of the agreement.

Australia's rail safety legislation is co-regulatory, involving a process by which rail safety operators assess the risks associated with their railway operations and then establish a safety management system to manage them. This provides flexibility that supports operators in aligning their risk management with the scope and nature of their operations and risk profile. It is neither prescriptive, nor self-regulatory. It relies on regulatory oversight, unlike other forms of regulation where rules and standards are prescribed by governments.

Australia currently has seven rail safety regulators across the eight states and territories, all with their own rail safety laws. The regulators oversee a co-regulatory rail safety regime to enable and promote safe railway operations. The overall objective is to consult, collaborate and cooperate with industry to improve safety. It is essential to develop a common understanding of the risks to safety between the regulator and regulated, and to mitigate those risks jointly.

Rail transport operators must comply with both rail safety and work health and safety laws. A number of duties under these bodies of law overlap, most notably the overarching duty to ensure the safety of rail operations (or workplaces more broadly under work health and safety law). The draft National Law imposes a number of additional requirements developed to address the management of safety risks that apply specifically to railway operations.

Similar to rail safety laws under existing arrangements, work health and safety laws are implemented at the state and territory level. They also are subject to national model law: the Workplace Relations Ministers Council endorsed the Model Work Health and Safety Act on 11 December 2009. Each state and territory and the Commonwealth will be required to enact laws that reflect the Model Work Health and Safety Act by the end of 2011, with commencement on 1 January 2012.

2.2 The Model Rail Safety Bill and Regulations (Model Law)

The Model Law was developed by the NTC with the objective of further supporting nationally uniform and best practice rail safety law.[12] It was approved by the ATC in 2006, making it available to states and territories for implementation.

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[11] The management of rail infrastructure, rolling stock operating on it and the provision of support services was undertaken by the same entity (government). This is unlike how much of the rail industry in Australia is structured today.

[12] Available at http://ntc.gov.au/viewpage.aspx?documentid=1667.

All states and territories, with the exception of the Australian Capital Territory, which does not regulate rail safety, have implemented rail safety law that is based on the Model Law, although some transitional arrangements mean that not all provisions have commenced as yet.

Approval and progressive implementation of the Model Law represents an important step towards a nationally uniform system of rail regulation. However, this arrangement has preserved some key limitations. These include variations in how states and territories have implemented the Model Law, as well as the need for rail transport operators to be separately accredited in each state or territory in which they operate.

2.3 The Single National Rail Safety Regulator

Following the release of a regulatory impact statement in July 2009, COAG agreed in December 2009 to proceed with establishing the Regulator and National Law.[13] The total incremental benefit (that is, against the current regulatory environment) of establishing a single national model of rail safety regulation and law was assessed at between $36 and $67 million.

The Regulator will be established as an independent statutory agency under legislation of the South Australian Parliament as a Commission structure managed by the Regulator/Chief Executive Officer supported by two Assistant Commissioners.

The Regulator will administer the National Law proposed in this regulatory impact statement.

2.4 Rail industry overview

In 2008, the rail industry contributed $6.47 billion to the Australia's GDP, employing approximately 10 per cent of the transport and storage workforce.[14] The national rail network services a population of almost 22.5 million and runs on approximately 39,000 kilometres of track.

At present, a third of the rail industry operates in more than one state or territory. The need to comply with varying state and territory rail safety laws increases the regulatory burden and operating costs to the rail industry, as well as the cost to policy makers and rail safety regulators. This adversely impacts on the competitive position and efficiency of interstate rail operations in particular. This inefficiency also diverts resources from achieving best practice safety outcomes.

Australia's rail industry is a mix of urban, regional and interstate or national operations, as shown in Figure 1. Railways tend to be situated in, or operate within, defined areas (metropolitan cities or regional areas such as the Hunter Valley, the Queensland coal fields or the Western Australian Pilbara mining region) or between capital cities and strategically important intermodal terminals. Australia's rail operations are largely confined to areas stretching from the east to the west coast along the south coast, vertically through the country's centre and along the east coast.

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[13] Single, National Rail Safety Regulatory and Investigation Framework Regulatory impact Statement (July 2009), available at http://www.ntc.gov.au/viewpage.aspx?documentid=1927.

[14] Bureau of Infrastructure, Transport and Regional Economics, 2009, *Australian transport statistics yearbook 2009*, BITRE, Canberra, ACT (Page 11).

Figure 1. Map of Australia's rail network[15]

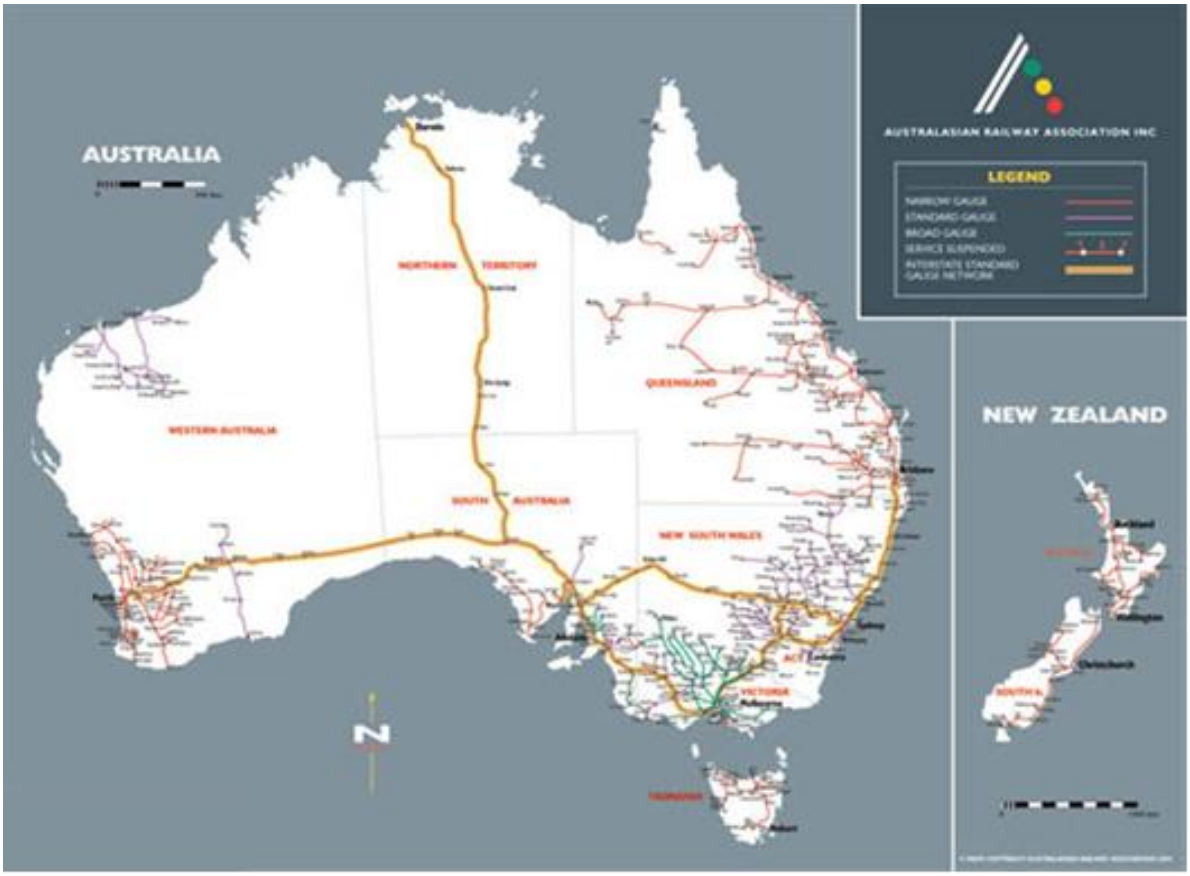
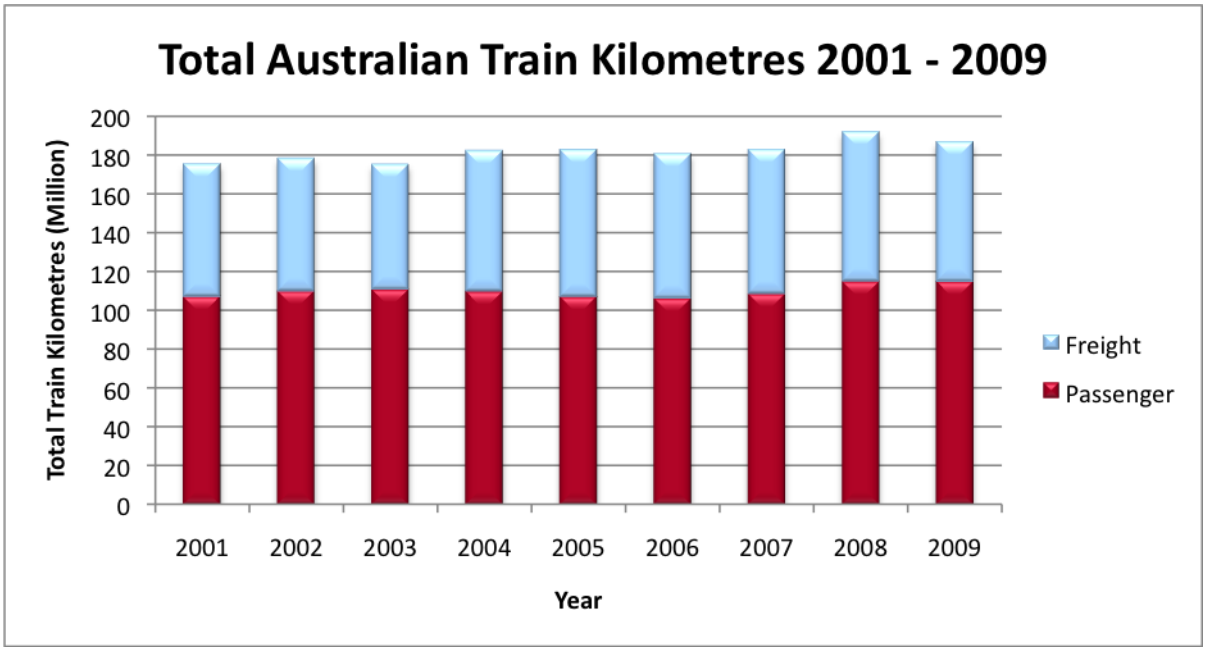


Figure 2. Total Australian train kilometres 2001 - 2009[16]



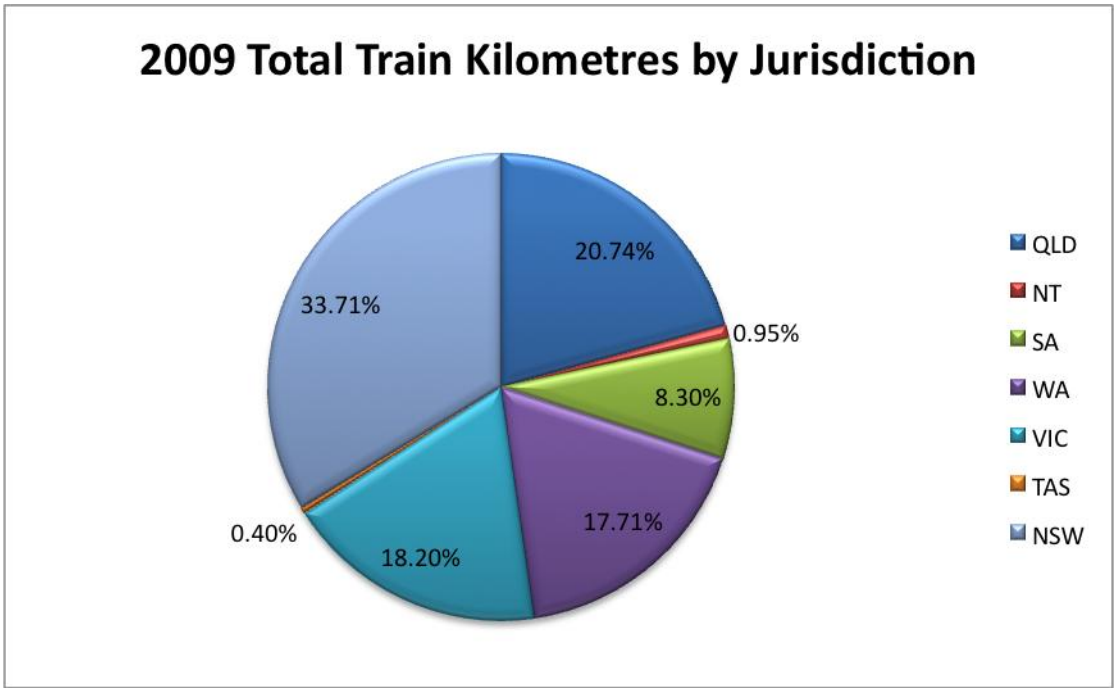
[15] Source: Australasian Railways Association

[16] Source: ATSB Transport Safety Report

Nationally, the proportion of freight and passenger train movements has remained relatively constant at approximately 40 and 60 per cent respectively of total train kilometres as shown in Figure 2.[17]

The train kilometres for each state and territory in 2009 are, in general, proportional to the population of each state and territory. New South Wales is Australia's most populated state and had the highest percentage (34 per cent) of train kilometres in 2009 whilst Tasmania and the Northern Territory had the lowest, as shown in Figure 3.

Figure 3. Total train kilometres by state and territory[18]



2.5 Rail safety trends

Rail safety is as important in cities as it is in regional areas or on railways between cities and intermodal terminals. Some of the most serious and expensive crashes in recent years have occurred in regional areas and recent multiple-fatality crashes have occurred outside metropolitan areas.

Figure 4 shows rail fatality numbers across Australian states and the Northern Territory between 2001 and 2010. Overall, the data does not yield any strong or clear trends.

There has been a gradual reduction in rail fatalities in New South Wales (which hosts the most rail movements of all states and territories and therefore represents arguably the most statistically significant data) between 2001 and 2010. However, many of these resulted from train and motor vehicle collisions at grade level crossings; the latter having been subjected to gradual improvements and closure, particularly since 2003[19]. The rate of occurrence for

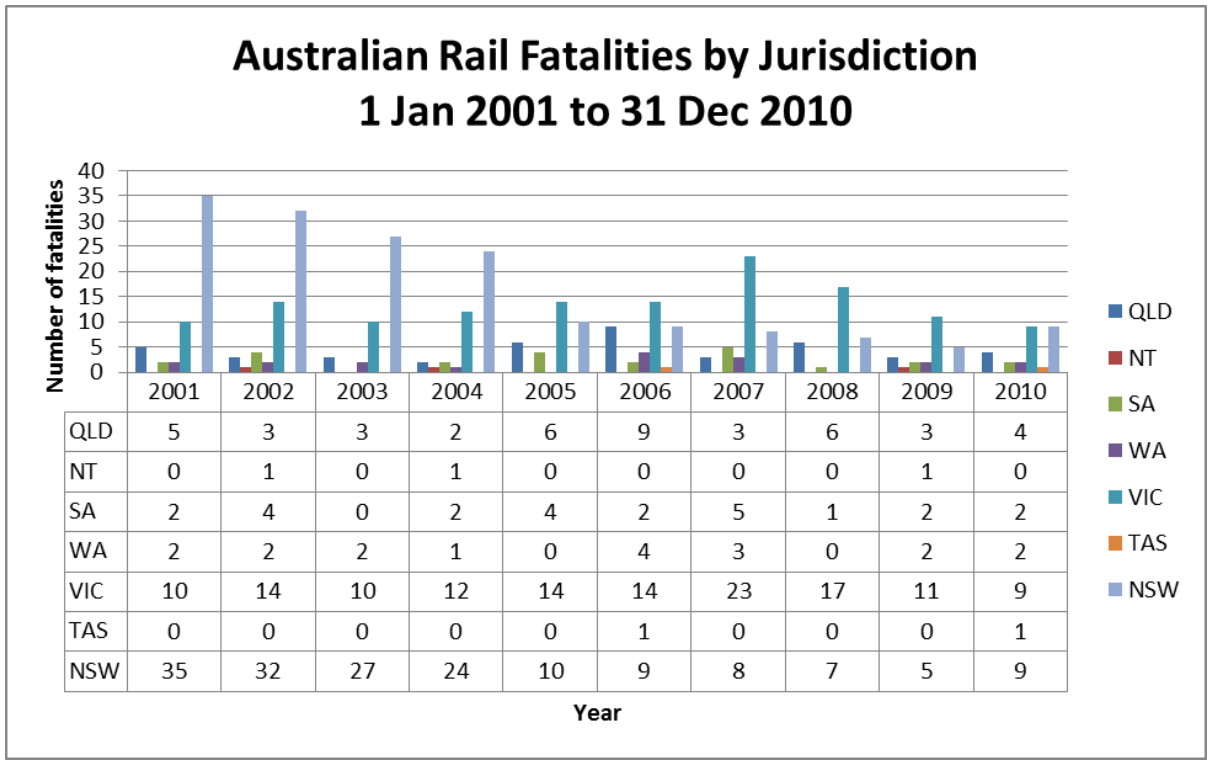
[17] Australian Transport Safety Bureau, ATSB Transport Safety Report, Australian Rail Safety Occurrence Data 1 January 2001 to 31 December 2009 (Page 15).

[18] Source: ATSB Transport Safety Report

[19] Transport New South Wales, *Improving Safety at Level Crossings*, available at http://www.transport.nsw.gov.au/levelcrossings/safety-improving.html, last checked 14 September 2011.

this type of collision is arguably less sensitive to the effectiveness of broader rail safety regulation and management systems.

Figure 4. Australian rail fatalities by jurisdiction[20]



	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
QLD	5	3	3	2	6	9	3	6	3	4
NT	0	1	0	1	0	0	0	0	1	0
SA	2	4	0	2	4	2	5	1	2	2
WA	2	2	2	1	0	4	3	0	2	2
VIC	10	14	10	12	14	14	23	17	11	9
TAS	0	0	0	0	0	1	0	0	0	1
NSW	35	32	27	24	10	9	8	7	5	9

In January 2003, seven people were killed as a result of a train being derailed near Waterfall in New South Wales. The inquiry that followed led to a number of measures for improving rail safety being implemented in New South Wales, including a significant increase in and restructure of regulatory resources.

The sudden increase in Victorian fatalities in 2007 can be attributed substantially to a single grade level crossing collision in Kerang, which resulted in 11 fatalities.

Due to the nature of rail crashes, in which multiple fatalities and injuries may result from a single crash, in combination with the overall low number of crashes and other major incidents, it is difficult to draw reliable conclusions on any trends from the casualty data alone.

With implementation of the Model Law in states and territories commencing in the past few years, it is also too early to draw reliable conclusions on the impact it has had on rail safety. Figure 5 shows a general reduction in rail industry serious personal injuries.[21]

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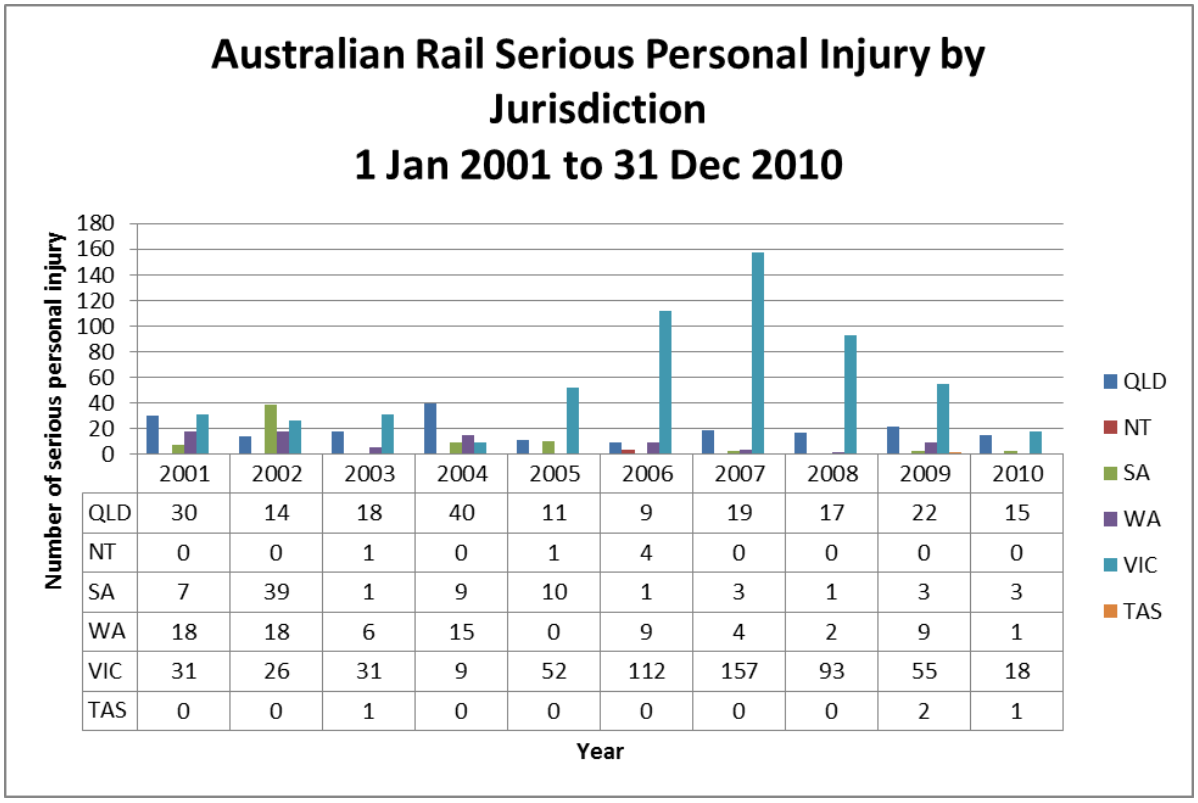
[20] Source: Australian Transport Safety Bureau, *Australian Rail Safety Occurrence Data: 1 January 2001 to 31 December 2010*, published April 2011, available at http://www.atsb.gov.au/publications/2011/rr-2011-004.aspx. These fatalities were classified according to the *Guideline for the Top Event Classification of Notifiable Occurrences (OC-G1)*, which includes deaths resulting from level crossing crashes and suicides, but exclude those resulting from health-related conditions that did not result in a defined railway occurrence.

[21] The sharp increase in Victorian reporting of serious personal injuries is attributed to the broader definition for serious personal injuries between 1 August 2006 and 29 February 2008. Effective March 1, 2008, the definition of a serious personal injury in Victoria was aligned with that included in the

Figure 5. Australian rail serious personal injuries by state and territory[22]



	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
QLD	30	14	18	40	11	9	19	17	22	15
NT	0	0	1	0	1	4	0	0	0	0
SA	7	39	1	9	10	1	3	1	3	3
WA	18	18	6	15	0	9	4	2	9	1
VIC	31	26	31	9	52	112	157	93	55	18
TAS	0	0	1	0	0	0	0	0	2	1

Guideline for the Reporting of Notifiable Occurrences (ON-S1) and as a result the number of incidents reported reduced in that state.

[22] Source: ATSB Transport Safety Report (loc. cit.) Rail transport operators in New South Wales are unable to access the information required to grade injury according to the criteria of Occurrence Notification - Standard One (ON-S1 2008). Injury statistics for NSW are based on a broader (more inclusive) definition than ON-S1 and are not comparable with other states and territories.

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3. Nature of the problem

In establishing a Regulator, it is necessary to migrate from the current circumstance in which rail safety law has been developed and implemented at the individual state and territory level, to one at the national level. Since the Model Law was approved by ATC in 2006, all states and territories have implemented it; however, they have included a number of variations to the model provisions. In agreeing on a body of National Law, these variations must be resolved.

Variations refer to matters addressed in the Model Law, but from which states and territories have varied in their implementation. While some variations are inconsequential and mere matters of drafting style or convention, others have resulted from ongoing concern or disagreement over the underpinning policy principles.

Variations also include matters that the Model Law did not address, explicitly providing for local variations (that is, where states and territories were to develop their own provisions). These include:

- the management of drug and alcohol use by rail safety workers
- the management of rail safety worker fatigue
- who an appointed person would be, for the purpose of resolving any disagreements over rail interface coordination arrangements
- penalties for breaches of rail safety law.

Additionally, even where provisions of the Model Law have been adopted by states and territories, amendments are nevertheless required where those provisions were developed specifically for the state and territory regulatory environment. For instance, the provision for granting reciprocal powers to rail safety officers of one state or territory to operate in that capacity in another state or territory would become redundant in a national regulatory environment.

At the policy level, a challenge for developing uniform National Law is to allow for adequate flexibility in accommodating genuine differences in the operating environments of states and territories. A key principle in meeting that challenge is the co-regulatory nature of rail regulation, which would provide the Regulator with sufficient latitude to account for such differences.

In resolving these matters, several amendments to the Model Law have been proposed. Each of these addresses a specific ‘problem’ relevant to that provision. A description of those problems is included in the relevant sections of this document (refer Section 6, Impact analysis).

In summary, despite substantial steps having previously been taken towards achieving uniform, rail safety national law (in the form of the Model Law), there remains a number of issues to be resolved in delivering a body of uniform National Law.

4. Scope and objectives of national reform

In July 2009, COAG agreed to establish a single national rail safety regulator, resolving that:

> "*These national arrangements will remove inefficiencies arising from inconsistent jurisdictional requirements, streamline the regulatory arrangements and thus reduce the compliance burden for business, and reduce transport costs more generally. Importantly, the efficiencies to be gained in moving to national transport safety regimes will not compromise safety. In fact, the better assessment of risk and more efficient allocation of resources through a national scheme will improve the safety of these key transport sectors.*"

The COAG determination endorsed a proposal that included the single rail safety national law being based on the existing Model Law.

In December 2009, COAG reiterated the need for "*a truly national transport system that will reduce transport costs and help lift national productivity without compromising safety"*.

Accordingly, the objectives of this reform are to develop a body of uniform rail safety national law that:

- supports a seamless national rail transport system
- does not reduce existing levels of rail safety
- streamlines regulatory arrangements and reduces the compliance burden for business
- improves national productivity and reduces transport costs generally.

Some additional matters to be resolved in establishing a Regulator include governance, institutional and funding arrangements. These are being addressed separately by the National Rail Safety Regulator Project Office and are not addressed in this regulatory impact statement.

5. Basis and structure of the regulatory impact statement

As the National Law is to be based on the existing Model Law, it is not the objective of this regulatory impact statement to assess the National Law in its entirety (as doing so would double-count costs or benefits assessed in previous regulatory impact statements), but rather focus on those elements of the National Law that vary with, or were not addressed, by the Model Law.

Neither does this regulatory impact statement seek to redress governance arrangements for the Regulator, a principal element of COAG's standing direction to establish a national system of rail safety regulation. A previous regulatory impact statement assessed the impact of establishing a Single National Rail Regulator administering uniform national law.[23]

This regulatory impact statement has assessed the proposed amendments against the corresponding provisions of the NTC Model Rail Safety Bill (Model Bill),[24] rather than rail safety law as implemented (in varied manner) by individual states and territories. Despite such variations, the Model Bill represents approved rail safety national law and is available to be applied by each state and territory.

In total, approximately 100 amendments have been proposed to the Model Law. The majority are for drafting changes only and propose no change in policy; therefore, they have no measurable impact. These have been listed in Appendix A: Amendments to the Model Bill and Regulations with no measurable impact and have not been assessed in this document.

Fewer proposals have been assessed as having a measurable impact. These proposals have been assessed individually in Section 6: Impact analysis, to a level commensurate with their degree of impact. Where amendments include more straightforward clarifications or minor amendments to existing policy, such proposals have been assessed relative to the status quo (existing Model Law provision) only. A more detailed assessment of their economic impact is included in Appendix D: Economic cost benefit analysis.

The proposals assessed in Section 6: Impact analysis have been grouped by the following themes:

- scope and objectives of the National Law
- rail transport operator safety management
- specific authorities and responsibilities of the Regulator
- alignment with the Model Work Health and Safety Bill.

The preparation of this regulatory impact statement has included significant preliminary analysis and consultation, including with a Rail Safety Advisory Committee comprising representatives of the NTC, the National Rail Safety Regulator Project Office, Commonwealth, state and territory government policy makers, rail industry members,

[23] Single, National Rail Safety Regulatory and Investigation Framework Regulatory impact Statement (July 2009), available at http://www.ntc.gov.au/viewpage.aspx?documentid=1927.

[24] Except where the Model Bill specifically allowed for local variations, in which case amendments have been assessed against existing state and territory rail safety law.

regulators and unions. The Advisory Committee participated in a number of workshops to discuss the proposals, alternative options and their impact during 2010 and 2011.

This draft regulatory impact statement was amended, following its publication and the receipt of public comments in July and August 2011. Endorsement of the Transport and Infrastructure Senior Officials Committee is now sought, prior to its submission to the Standing Council of Transport and Infrastructure for voting in November 2011.

6. Impact analysis

6.1 Overview of proposals and their impact

Included in this analysis are several proposals deemed to have a measurable regulatory impact. An overarching principle of the National Law is to require that rail transport operators manage safety risks arising from their rail operations. Additionally, it clarifies the role of the Regulator in ensuring compliance with that requirement. These would not change as a result of adopting the proposed National Law. Rather, the proposals would better clarify:

- the scope and objectives, addressing objectives of the National Law, as well as clarifying its scope of applicability to the rail industry as a whole, including some specific requirements
- various requirements for how rail transport operators must plan and manage risks, including:
    - the management of risks associated with drug and alcohol use by rail safety workers
    - the management of risks associated with rail safety worker fatigue.
- specific authorities and responsibilities of the Regulator, which govern elements of how the Regulator shall ensure compliance with the National Law
- harmonisation of the National Law with Model Work Health and Safety Legislation for provisions that may be incompatible, in order to avoid inconsistencies between the two overlapping areas of law.

A list of National Law provisions assessed as not having a measurable impact is included in Appendix A: Amendments to the Model Bill and Regulations with no measurable impact. Key assumptions made in undertaking these assessments are addressed in Appendix B: Impact assessment assumptions.

6.2 Regulatory model

As for the Model Law, the proposed National Law is based on an overarching principle of co-regulation, in which responsibility for regulation is shared between industry and the Regulator. This form of regulation requires operators to develop a safety management system that documents how safety risks arising from their operations would be (or are being) addressed. Accreditation is granted by the Regulator to an operator who has demonstrated, including through presentation of a written safety management system, that it is competent to manage such risks.

Australian rail safety law (both existing and proposed) also imposes a responsibility on the Regulator to oversee and support operators' compliance management, including by providing advice, information, education and/or training to clarify the standard to which compliance would be held. The Regulator must also review an operator's safety management system and its implementation, and work with them towards making any necessary improvements.

Due to the diverse nature of rail operations across Australia and the risks arising from them, the co-regulatory approach is broadly agreed to represent best practice and was endorsed by COAG in a recent regulatory impact statement.[25]

In theory it is possible to structure rail safety law on the basis of a single overarching requirement for operators to manage (so far as is reasonably practicable) all safety risks. However in practice, rail safety legislation across Australia has long included elements of prescription, defined as "focus[ing] on input standards and specify[ing] precisely what actions must be taken to achieve compliance".[26]

In practice, there are degrees of prescription. Rail safety law does not tend to specify requirements with a high degree of precision; rather, it prescribes parameters around the process in which an operator must develop a safety management system. In this way, while reducing the degree of flexibility for operators in determining how safety shall be managed, the co-regulatory process is predominantly maintained.

6.3 Overview of proposed risk management requirements

A number of the National Law proposals are for changes to a rail transport operator's safety management requirements. As there is a degree of consistency in the circumstances and principles under which those amendments were developed, as well as their impacts, those have been summarised in this section and further assessed individually in Section 6.5: Operator Safety Management.

The proposals that include more specific requirements than in the Model Law are:

- to prescribe additional mandatory risk management principles of a safety management system (Section 6.5.1, Safety Management System)
- to change compliance with the *National Standard for Health Assessment of Rail Safety Workers* from being only 'so far as is reasonably practicable', to mandatory (Section 6.5.2, Health and fitness management program)
- to prescribe mandatory elements of a drug and alcohol management program and of a fatigue risk management program (Section 6.5.3, Drug and alcohol and fatigue risk management)
- to prescribe a performance standard for communication between train drivers and network control officers (Section 6.5.7,

[25] National Transport Commission, *Single, National Rail Safety Regulatory and Investigation Framework: Regulatory Impact Statement (Volume 1)*, July 2009, available at http://www.ntc.gov.au/viewpage.aspx?documentid=1927.

[26] National Transport Commission/ Jaguar Consulting, Identification and Examination of Best Practice Principles for Rail Regulation: Working Paper, p.3, January 2004, available at http://www.ntc.gov.au/filemedia/Reports/IdentExamBestPractRailJan2004.pdf.

Train communication systems)

- to prescribe that rail infrastructure managers undertake consultation prior to amending rail network rules under their control (Section 6.5.8,

Network rules).

6.3.1 Overview of the impact of risk management proposals

Problem Statement

A primary objective of the National Law is to provide for safe railway operations. As it is impractical to define safety in objectively measurable terms, the co-regulatory nature of rail safety law imposes a responsibility on rail transport operators, with support and oversight of the Regulator, to develop and implement a safety management system that is adequate to account for what is understood to be best practice in risk management, as well as the operator's circumstances.

As discussed in Section 6.2 (Regulatory model), it is theoretically possible to develop rail safety law on the basis of a single, overarching requirement for operators to manage safety risks. However, in practice, capabilities and standards of risk management vary between rail transport operators. While many operators manage risks to a rigorous standard, some have access to a lesser degree of relevant skills, knowledge and resources. For this reason, overseeing and assisting rail transport operators is an important role of the Regulator.

Such assistance and oversight is an integral part of co-regulation. However, in some circumstances, rail safety regulators have reported that the process of negotiating with rail transport operators on how to achieve compliance has proven to be protracted, inefficient and even unfruitful. Additionally, with finite resources, there is the risk that the Regulator may be unable to identify and address all cases of non-compliance.

A weakness of the co-regulatory approach is also the limited authority of the Regulator to enforce undefined standards of safety management. Where an operator disagrees on certain types of decisions by the Regulator (which include those relating to safety management systems), they may apply for a review and subsequently appeal to a court. Although in practice this has proven unusual, in such circumstances the court would determine the standard to which the operator's safety management system would be held. It is conceivable that the court may arrive at a different conclusion to that of the Regulator.

The co-regulatory approach is most effective when there is a strong degree of capability and willingness amongst industry members to comply. This is predominantly, but not uniformly the case with rail safety regulation.

Co-regulation is also most appropriate for industries that undertake complex tasks, which vary between industry members in their scope and nature. This is certainly the case for rail. However, where a given requirement may be applied uniformly, without restricting best practice in safety management or continuous improvement, prescribing it may overcome some of the limitations of the co-regulatory approach, as well as clarify what constitutes 'safe railway operations' in more objective terms.

The problem lies not so much in the risk of a court contradicting the judgement of the Regulator, as it does in the protracted and resource-intensive process of resolving the dispute. Also, a disadvantage of purely performance-based regulation is that there is a greater potential for operators to exploit such a measure as *de facto* deregulation, either knowingly, being recalcitrant operators, or unwittingly, due to a lack of understanding of the risk being managed. In practice, some regulators have stated that this leads to the risk of compromise on how standards of safety management are upheld.

Objective

In addressing the identified problems, the proposal should seek to support the objectives of the national reform; that is, to streamline regulatory arrangements, improve productivity,

reduce the compliance burden for business and support a seamless national rail transport system whilst not reducing existing levels of rail safety.

Proposal

For the reasons stated above, the draft National Law has included more specific requirements in circumstances where it has been assessed that:

- the requirements do not prescribe precisely what actions a rail transport operator must take to manage a given risk,[27] but represent what are considered to be the basic elements of best practice in managing the risk, apply uniformly across the rail industry and do not restrict continuous improvement in safety management
- elements of subjectivity in more general provisions (that is, the General Safety Duties), sometimes in combination with a lack of risk management capability on the part of a rail transport operator, have led to confusion and/or disagreement with regulators over what constitutes compliant risk management
- the additional prescription contained in a given proposal contributes to clarifying best practice (compliant) risk management, is uniform across the rail industry and does not restrict continuous improvement
- such cases have required existing regulators to allocate disproportionate resources to assisting an operator(s) to comply, and/or
- it has proven impractical to successfully prosecute a rail transport operator for refusing to adopt identified best practice risk management principles (that is, due to the subjectivity in what constitutes compliance with General Safety Duties and other non-prescriptive provisions of the Model Law).

Other options

The major alternative to prescribing elements of safety management in law is the status quo, or improved variations of it. Under existing Model Law arrangements, rail transport operators are required to develop a safety management system that articulates how they address safety risks arising from their rail operations.

In fulfilling existing requirements (that is, in the absence of the proposed prescriptive requirements), some operators have developed safety management systems that may already effectively comply with all of the new, proposed requirements. Where that is not the case, under existing arrangements the Regulator is authorised to review an operator's system and assess that either:

- it is sufficient to comply with the General Safety Duties (that is, that a given operator's circumstances were such that they did not need to enhance their safety management system to address any of the matters contained in the proposed requirements), or
- it is necessary to make improvements to its safety management system to address one or more of the matters contained in the proposed requirements (that is, by assessing it against the General Safety Duties and arriving at a similar conclusion to what would be required by the proposals).

[27] A partial exception is the requirement to comply with the *National Standard for Health Assessment of Rail Safety Workers*. However, the proposed amendment is primarily a matter of clarification, rather than a new or additional, prescriptive requirement.

In the first circumstance above, this may be assessed as a desirable outcome (that is, that the operator was managing safety to a sufficient standard), or it may reflect the Regulator being resigned to the fact that requiring operators to manage safety to a standard equivalent to the proposals is impractical, in the absence of them being prescribed in law (as described in the problem statement above).

The drawbacks of the second circumstance are also discussed throughout this section.

Impact assessment

Impacts of the proposals have been assessed in terms of how they would be expected to change behaviour, processes and safety outcomes. The proposals do not amend the National Law objective to provide for safe railway operations. Rather, they were developed to better support achieving it, in a cost-effective manner.

The proposals have been assessed as supporting improvements to rail safety. In theory, rail safety may be viewed as a minimum standard to which all rail transport operations would be held by the Regulator. In other words, the Regulator may seek to ensure a similar outcome to those specified in the National Law proposals using other methods, such as (where necessary) collaboration/negotiation. However, as outlined in the problem statement, there are practical limitations to this approach.

Improved levels of rail safety are assessed as resulting from two factors.

- *Better clarifying safety management standards for rail transport operators* (simplifying the task of complying). As it is impractical to objectively define (in an absolute sense) minimum standards of safety management, operators are unavoidably required to make their own interpretations and judgments. In some circumstances, particularly those where an operator has lacked the necessary resources, this has resulted in inadequate levels of safety management. Prescribing clearer standards of safety management, where this may be done without unduly restricting operator flexibility and scope for continuous improvement, is expected to encourage operators to develop improved safety management systems.

- *Equipping the Regulator to more effectively support operators to comply with their safety management obligations and duties*. Improvements in rail safety would only be attributable to the proposed amendments, where they were not practically achievable by existing alternative means (that is, by the Regulator working with an operator to achieve a similar outcome). While in many cases, the latter remains a practical option, in some cases it has proven difficult for the Regulator to enforce a minimum standard of safety management without specified legislative precedents. In others, there is the risk of sub-standard safety management remaining undetected, at least for a period of time.

Rail safety impacts on all those who are exposed to railways. This includes rail passengers, road users and rail safety workers. A number of the proposals directly impact on rail safety workers, who are affected by fatigue risk management practices, and subjected to drug and alcohol testing as well as health and fitness assessments. By strengthening these arrangements, the proposals would improve safety for rail safety workers, and by extension, all rail patrons who rely on them for their own safety.

The process for a rail transport operator to comply with safety management requirements can be divided into three categories:

1. a rail transport operator developing amendments to its safety management system

2. a rail transport operator implementing any changes to its operations that result from such amendments

3. the Regulator working with operators to assist them in complying, as well as reviewing operator safety management systems and their implementation to ensure compliance.

To the extent that an operator is already complying with a given proposal, it is not expected that there would be any resulting regulatory impact. However, for others, the proposals would require rail transport operators to amend their safety management systems. Such amendments would incur costs, both initial and ongoing, as operators must periodically review their safety management systems to account for evolving best practice in risk management and operational changes.

The proposals would have an impact on the Regulator, in its role of working with operators to achieve compliance. To the extent that the proposals would better clarify what constitutes compliance, the Regulator would:

- benefit from the task in clarifying to operators the necessary steps towards meeting an adequate level of safety management being simplified, but
- incur higher costs where those steps represented a higher or more complex standard of safety management than the operator had previously achieved and where the Regulator needed to work with it to meet the higher standard.

The major risks of this approach are those generally associated with prescriptive regulation.[28] These include:

- imposing an unnecessary/excessive regulatory burden on rail transport operators with a relatively low degree of exposure to a restricted range of risks
- prescribing overly restrictive methods of managing safety that inhibit operators from developing more effective means
- the risk of prescriptive requirements lagging subsequent developments in best practice safety management, that is, continuing to require obsolete methods until a suitable amendment to the law is implemented and the additional resources required for that task, and
- the risk of encouraging operators to adopt a 'minimal' approach to managing safety that addresses only the prescribed matters, rather than one based on taking the initiative to account for a broader range of risks (that is, any not captured by prescriptive requirements).

By prescribing only broad elements and principles of safety management, rather than specific risk controls, these risks have been significantly reduced. However, of these, it is perhaps the risk of imposing unnecessary/excessive regulatory burden that is greatest. This risk can be categorised in two ways:

- prescribing an excessive degree of safety management, and
- increasing the administrative burden for an operator by requiring it to justify to the Regulator why it need not address a given, additional prescribed requirement.

Rail transport operators with a lower degree and/or a lesser number of risks may require a less comprehensive safety management system than others operating on a larger scale and in a more complex environment. Each proposal has been assessed to determine how it has addressed the risk of imposing excessive regulatory burden.

[28] National Transport Commission / Jaguar Consulting, *op. cit.*, p.4.

In summary, the proposals are expected to improve levels of rail safety that would result from higher standards of rail safety management. Developing and implementing such improvements would, however, impose costs on some rail transport operators. There would also be some costs for the Regulator to work with those operators, although these would be offset (to varying degrees) by savings drawn from clearer requirements and the reduced need to negotiate the same with operators.

More detailed assessments of each proposal are included in Section 6.5: Operator Safety Management and detailed economic assessments in Appendix D: Economic cost benefit analysis.

Consultation

There are diverse views on the relative merits of the proposal and the major alternative: more effective management of compliance by the Regulator. Industry members predominantly oppose greater degrees of prescription in the National Law, preferring to retain responsibility for determining which measures are necessary to manage safety. State and territory government policy makers and rail safety regulators have differing views on the matter.

Little evidence has been submitted to the NTC in support of any particular position on the matter. This is possibly due in part to the fact that specific directions on safety management maters being issued to, and prosecutions of rail transport operators by regulators are relatively rare, Rather, positions appear to predominantly represent the general experience and regulatory ‘philosophy’ of their proponents.

6.4 Scope and objectives of the National Law

Part 1 of the Model Bill outlines its purpose and objects, and contains commencement and interpretative provisions, including definitions. The objects provide context to the legislation and describe what the laws aim to achieve. Principles are also included, and explain more directly how the law should be administered and understood. The proposed additions aim to strengthen the safety requirements in the National Law and clarify the role of the Regulator. Better alignment with the Model Work Health and Safety Bill was a key objective of reviewing this part of the Model Bill. Both regulatory schemes will be applicable under a variety of circumstances, so there is a need to ensure that any overlapping duties and obligations are consistent.

Another issue for the National Law is how wide the regulatory net should be cast, and which parties should be captured, so as to optimally achieve the desired regulatory and safety outcomes without 'overreach'.

6.4.1 Objects and purpose of the Act

Current provision

Section 3 of the Model Bill prescribes the following objects:

> *Having regard to the importance of rail safety and regulatory efficiency, the objects of this Act are —*
>
> *(a) to provide for improvement of the safe carrying out of railway operations;*
>
> *(b) to provide for the management of risks associated with railway operations;*
>
> *(c) to make special provision for the control of particular risks arising from railway operations;*
>
> *(d) to promote public confidence in the safety of transport of persons or freight by rail.*

The objects govern how the law will be developed and influence how it will be interpreted and applied; they describe what the laws aim to achieve. The objects are included particularly to assist the courts in considering the purposes of statutes when interpreting them, and to guide officials in exercising their powers and performing their functions.

Problem statement

While the model provisions accurately reflect the broad objectives of the National Law, the current objects do not explicitly address some principles of rail safety law, and as a result, may not fully recognise the role of the Regulator. Notably, the principle of ensuring safety of the general public and those parties who interface with rail operations is not clearly articulated. The Regulator's role in compliance, enforcement and provision of advice and training is also not recognised.

Objective

To more clearly define the objectives of the National Law, including to provide additional guidance on how occasionally competing priorities should be accounted for.

Options

Option 1

Status quo; the existing objects in the Model Bill to be retained, unamended.

Option 2

Include additional objects in the National Law:

- to establish the Office of the National Rail Safety Regulator (ONRSR)
- to make provision for the appointment, functions and powers of the Regulator
- to provide for a national system of rail safety, including a scheme for national accreditation of rail transport operators in relation to railway operations
- to provide for continuous improvement of the safe carrying out of railway operations
- to promote the provision of advice, information, education and training for safe railway operations
- to provide through consultation and cooperation, for the effective involvement of relevant stakeholders in improving rail safety.

Include guiding principles for the provision of a national rail safety scheme:

- to assist rail transport operators to achieve productivity by the provision of a national rail safety scheme
- to operate the national rail safety scheme in a timely, transparent, accountable, efficient, effective, consistent and fair way
- that fees paid for the national rail safety scheme are reasonable, having regard to the efficient and effective operation of the scheme.

These additional objects and guiding principles would provide greater detail for the role of the Regulator and other relevant stakeholders in supporting the overarching National Law objective of ensuring the carrying out of safe railway operations. They were developed by reviewing the objects of state and territory rail safety laws, as well as the Model Work Health and Safety Bill.

Impact assessment

Option 1 – Status quo

There would be no impact of maintaining the status quo. The model provisions accurately reflect the broad objectives of the National Law.

Option 2 – Include additional objects and guiding principles

The proposed changes seek to better clarify the operation of the National Law and functions of the Regulator.

Some stakeholders expressed concerns for including guiding principles in the National Law, referencing the need for assisting operators in achieving productivity. They stated that a responsibility to promote productivity would risk compromising the major objective of improving safety. Despite such concerns, the inclusion of a guiding principle for productivity has been assessed as imposing no measurable impact. While safety remains the primary

objective of the National Law, the qualification that it be managed "*so far as is reasonably practicable*" already implicitly acknowledges productivity as a criterion in determining appropriate safety measures.

The additional objects have been assessed as, in practice, maintaining the status quo and not materially impacting on the role of the Regulator or other stakeholders, beyond better clarifying them.

Proposal

Option 2 is proposed, in order to better clarify the objects of the National Law.

Clear articulation of the Regulator's role is important for improved understanding of it across the broader rail industry, as well as assisting in developing policy for other matters that are affected by scope of the Regulator's role. Such clarity also assists with the interpretation and application of the National Law and to strengthen the safety requirements.

The proposal changes are addressed in section 3 (Purpose, objects and guiding principles of law) of the draft National Law.

6.4.2 Railways to which the Act does not apply

Current provision

Section 6 of the Model Bill excludes application of the Bill to certain types (classes) of railways. Such exclusions are granted to railway types that typically operate on a very small scale and in an unsophisticated environment that present a significantly lower degree of risk than other larger scale railways. Amongst others, they include "*a railway that is operated solely within an amusement or theme park, is required to be registered as an amusement device under occupational health and safety legislation and does not operate on or across a road*", as well as any railways prescribed in the Model Regulations.

The exclusions were developed on the basis that for the prescribed railway types, the costs of complying with and enforcing the Model Bill exceeded the benefits, measured in terms of reduced risk to safety. Most of the railways granted exclusions to the Model Bill must still comply with relevant work, health and safety law.

Problem statement

There are several classes of railways of a very small scale, and presenting a low degree of risk to safety, to which the Model Law applies. These include hobby railways, horse-drawn trams and static railway displays. For these types of railways, the compliance burden posed by the Model Law (and draft National Law) is excessive.

The Model Law does not apply to (excludes) prescribed amusement railways. However, a definition of what constitutes a railway operating in an amusement park, or an amusement device, is not addressed in the Model Law. This has led to a degree of subjectivity and confusion in determining whether a railway should be classified as an amusement railway under the Model Law.

Introducing a similar definition presents a risk of its own. In certain circumstances, a degree of subjectivity or discretion in determining which railways the National Law should apply to is desirable. This is because, while the risks to safety posed by certain types of railways may be predominantly low, there may be some railways in a given category that pose a higher risk.

Therefore, there is a balance to be struck between the need to define the scope of the National Law in objective terms (that is, provide certainty to railway operators and the Regulator) and to ensure that all railways posing a risk to safety above a certain threshold are properly regulated.

Objective

In reviewing the railways to which the act does not apply, an opportunity exists to further meet the objectives of the national reform insofar as streamlining regulatory arrangements and reducing unnecessary compliance burden for business. As such, the intention of amendments to section 6 of the Model Bill should be to clearly define the scope of the National Law and to exclude those railways with risk profiles below that which is considered necessary to be subjected to a high degree of regulatory oversight. Options

The options for this section of the National Law have been addressed in two parts, to address two distinct problems with the Model Law.

Part 1: Additional classes to be excluded from the National Law

Option 1.1

Retain the status quo. This would mean that there would be no additions to or omissions from the classes of railways excluded under the Model Law.

Option 1.2

To exclude from the National Law, in addition to those classes of railways already exempted in the Model Bill:

- railways used only by a horse-drawn tram
- railways used only for a static display
- hobby railways that do not operate on or cross, a road or road-related area (within the meaning of the Australian Road Rules).

Include a definition of hobby railways: “railway intended or used as a hobby, is operated on private property and is not operated for hire or reward, commercial operations or public participation by invitation or otherwise.”

Part 2: Amusement railways

Option 2.1

Retain the status quo. Amusement railways are excluded from the Model Law.

Option 2.2

Require amusement railways to comply with the National Law (that is, delete section 6(e) of the Model Bill), but authorise the Regulator to exclude railways or classes of railways (for example, by notice). This authority would permit the Regulator to exclude all types of railways (beyond just amusement railways) and substitute for the existing arrangement under which such exclusions may be granted by prescription in the Model Regulations (that is, by deleting section 6(f) of the Model Bill).

Option 2.3

As for Option 2.2, require amusement railways to comply with the National Law (that is, delete section 6(e) of the Model Bill). In contrast to Option 2.2, exclusions for amusement railways may be granted by the existing process of prescribing them in the National Law (Regulations).

Option 2.4

Retain the exclusion for amusement railways, but:

- amend the scope of the exclusion to railways that are amusement devices, but only those that do not operate on or cross a public road or are connected to another railway that falls within the scope of the National Law;
- define amusement devices as those used solely in an amusement park for hire or reward or in the course of a commercial operation; and
- define amusement parks as commercially-run enclosed grounds where amusements are situated.

The provision for excluding railways by the making of regulations would be retained. Additionally, a corollary provision for including, by the making of regulations, railways that were otherwise excluded under section 6 of the Model Bill would be introduced.

Impact assessment

Part 1: Additional railways to be excluded from the National Law

Option 1.1 – Status quo

There would be no impact from retaining the status quo.

Option 1.2 – Exclude additional classes of railways from the National Law

Economic assessment

The net benefit of this option is estimated to be between $0.17 and $0.42 million. Refer Appendix D: Economic cost benefit analysis (section 3.2) for detailed analysis.

Impacts

The impact of excluding the additional, prescribed railways would be minimal and has no measurable economic impact. Due to local variations around this matter, it is understood that no horse-drawn trams, static display railways or hobby railways, as defined in the draft National Law, in any state or territory are currently subject to rail safety laws. These types of railways pose a minimal risk to public safety.

Under the Model Bill, however, lacking a class exclusion for such operators, these railways would need to be excluded individually via regulation, a potentially costly process.

Part 2: Amusement railways

Option 2.1 – Status quo

There would be no impact from retaining the status quo.

Option 2.2 – Amusement railways to be included in the National Law unless excluded by notice

Deleting the provision for railways to be excluded from the National Law by the making of regulations (which requires approval of Ministerial Council) and replacing it with a mechanism by which the Regulator could grant exclusions (such as by the publication of a notice on its website) would have implications for exclusions granted to all types of railways.

A concern with this option is the reduced degree of oversight for decisions about excluding railways from the National Law. A general principle of regulation is that the degree of oversight for regulatory decisions be in proportion to the importance (impact) of the decision. As excluding a railway from the National Law in its entirety is a decision that has a greater impact than many of the other more administrative decisions of the Regulator, it arguably merits a greater degree of oversight than would be provided by this option. As such this option has not been subject to an economic assessment.

Option 2.3 – Amusement railways to be included in the National Law unless excluded by regulation

Economic assessment

The net cost of this option is estimated to be between $1.38 and $1.76 million. Refer Appendix D: Economic cost benefit analysis (section 3.2) for detailed analysis.

Impacts

Granting such exclusions by the making of regulations would require undertaking broad consultation and approval by Ministerial Council. This option would overcome the shortfall identified with Option 2.2, namely the lack of oversight for decisions to exclude (amusement) railways.

However, this would introduce a separate problem. As the definition of a railway would encompass, depending on their track gauge, roller coasters and other similar fairground amusement rides, it is likely that the vast majority of amusement railways would be included in the National Law. As a result, the process of individually proposing all such exclusions in regulations would impose a significant (and unnecessary) regulatory burden.

A benefit of this option would be greater assurance of more rigorous analysis of whether excluding a given railway (or railways) was justified.

Option 2.4 – Amusement railways to be excluded with an amendment to the scope and definition of amusement railways

Economic assessment

The net cost of this option is estimated to be between $0.74 and $0.87 million. Refer Appendix D: Economic cost benefit analysis (section 3.2) for detailed analysis.

Impacts

This option is similar to the existing provision (status quo), but would provide a more precise definition of what constitutes an amusement railway. This would remove ambiguity and confusion around whether a given railway should be classified as an amusement railway. It would also impose a reduced administrative burden on the Regulator and/or policy makers in comparison to Options 2.2 and 2.3, that is, to individually assess whether a given railway should qualify for an exclusion and (under Option 2.3) propose a regulation to that effect.

A risk with this option is for amusement railways that, despite qualifying for exclusion under the proposed definition, are of a scale and nature that represent a risk to safety, justifying them being subject to the National Law. In order to alleviate this concern, this option also provides a mechanism by which they may be 're-included'. This newly proposed provision for including otherwise excluded (individual) railways would provide a means by which they, if assessed as posing a sufficient risk to safety, may be included within the scope of the National Law. This provision is a corollary of the existing provision by which railways may be excluded (by exception), despite otherwise being included in the National Law.

Rail safety regulators advise that there would be extremely low numbers of such railways that would need to be re-included in this way (perhaps only three across Australia). The process of identifying new railways that are excluded by the definition, but may need to be 're-included' is an issue; this may be addressed via arrangement with the local state or territory Occupational Health and Safety Regulator (although rail safety regulators have also indicated that such railways are reasonably obvious and they would most likely be aware of their existence as higher risk operations). The risk of inadvertently overlooking such a railway is considered minimal.

Proposal

For Part 1, Option 1.2 is proposed. This would exclude, from the scope of the National Law, some additional types of railways assessed as having a risk profile below that considered necessary to be subjected to the degree of regulatory oversight provided by the National Law.

For Part 2, Option 2.4 is proposed. This would provide greater clarity for what constitutes an amusement railway.

By reducing the need for the Regulator to conduct individual assessments of railways to determine appropriate scope of applicability for the National Law, these proposals would support the stated principle of the National Law to "*operate the national rail safety scheme in a[n]...efficient...way*". By reducing the degree of regulation for some lower risk types of railways, the proposals would also "*assist rail transport operators to achieve productivity*".

A core objective of the National Law, to "provide for the effective management of safety risks associated with railway operations", would not be compromised.

This proposal is addressed in section 7 (Railways to which this law does not apply) and definitions in section 4 (Interpretation) of the draft National Law.

6.4.3 Private sidings exemption from accreditation

Current provision

Accreditation of rail transport operators is a prerequisite for undertaking railway operations, as prescribed in Part 4 (Rail Safety), Division 2 (Accreditation) of the Model Bill. It requires operators to demonstrate to the rail safety regulator that they have the competence and capacity to manage risks arising from their proposed operations, prior to commencing them. A major implication of accreditation is the requirement to develop and implement a safety management system, the prescribed duties under which comprise a substantial proportion of an operator's total costs of compliance.

Section 56 of the Model Bill provides for rail infrastructure managers of private sidings to be exempted from having to be accredited.

Problem statement

Private sidings are sections of rail track connected and separately managed to a main running line.[29] Typically short sections of track branching off a main line, private sidings are used for purposes such as the loading and unloading of rolling stock. Private sidings are often, but not necessarily, operated as independent concerns (that is, private siding managers may or may not operate any other railways).

As such, a private siding manager who is not managing any mainline railways nor operating any rolling stock would face a substantially reduced degree of risk. Exemptions from accreditation are granted to such private siding managers on that basis. Such private siding managers are therefore subjected to a significantly reduced degree of regulatory scrutiny, duties and compliance costs under the Model Bill.

States and territories have varied in how they have addressed providing exemptions from the accreditation requirements for operators of private sidings. This has necessitated revisiting the Model Bill provision to consider whether it may be amended to better reflect relevant practices and stakeholder views.

A number of specific problems were identified with the Model Bill provision.

- The exemption was intended to extend only to the management of rail infrastructure on private sidings. Concern was expressed that the provision risks being interpreted as extending to infrastructure managers also managing rolling stock on the private siding. This was not the original policy intent.
- It was unclear whether and in what circumstances the Regulator had the authority to refuse an application for, or cancel, a private siding registration. This may be necessary when a private siding operator has submitted an unsatisfactory application or has breached National Law in the course of operating a registered private siding.
- Section 56(2)(c) of the Model Bill refers to "*management of the interface with the railway of the accredited person*". This section was considered unnecessarily restrictive in its application, which would appropriately extend to types of interfaces other than just accredited railways (such as roads and road infrastructure, the interfaces with which may present significant risks to safety).
- The provision is insufficiently clear about requiring that the infrastructure manager of a private siding must be registered, rather than the private siding itself. This is an important distinction, as a given infrastructure manager may need to be accredited for other purposes (that is, for management of other railways). In such cases, the infrastructure manager cannot be exempted from accreditation and the accreditation must therefore cover management of the private siding (that is, no exemption applies).
- Model regulation 11 (Maintenance and operational conditions) prescribes the conditions under which an exemption from accreditation may be granted. Some of the risk management principles have been superseded by those proposed for inclusion in section 57 of the Model Bill (safety management system).

[29] Definitions of *sidings* and *private sidings* are included in the Model Bill.

Objective

To provide for a more effective system of managing/regulating private sidings, that is in better proportion to the nature and degree of safety risks incurred in the operation of individual sidings.

Options

Option 1

Status quo, which would preserve the Model Bill requirements and not address the identified problems.

Option 2

Amend this section:

- to clarify that exemptions from accreditation apply to the operation of rail infrastructure (on private sidings) only, not rolling stock
- to give the Regulator power to refuse to register a private siding manager if an assessment finds that its operations are of a sufficient complexity to warrant requiring it to be accredited, or to suspend or cancel a registration if the manager is assessed as unwilling or unable to comply with safety duties
- to require that private siding managers comply with section 61 of the Model Bill in relation to the management of all interfaces, generally, rather than just those with accredited railways, as is required by the Model Bill
- to clarify that it is the siding manager who is to be registered, not the physical siding.

Amend Model regulation 11 (Maintenance and operational conditions) to better align with the risk management principles proposed to be included in Model Bill section 57 (Safety management system). Those principles are proposed to be drawn from Schedule 3 (Matters and information to be contained in a SMS of a non-accredited rail operator) of the *Rail Safety Regulations 2006* (Victoria).

Impact assessment

Option 1 – Status quo

There would be no impact from maintaining the status quo.

Option 2 – Clarify provisions relating to exemption from accreditation for private sidings

Economic assessment

The economic assessment of this option is estimated to be between a cost of $0.20 million and a benefit of $7.60 million. Refer Appendix D: Economic cost benefit analysis (section 3.3) for detailed analysis.

Safety

For the most part, the proposals are clarifications of existing policy and would serve National Law objectives by improving compliance levels through improved clarity.

However, the requirement to extend the scope for forming interface coordination agreements would represent a safety improvement. Regulators have advised that interfaces with roads at level crossings, particularly major roads, present risks to safety. Parties have also indicated that, due to increased infrastructure development in remote areas, the number of such interfaces is expected to increase.

Regulator

This option would impose no major impacts on the Regulator. Due to the large number of private sidings on Australian railways, any substantial change to the number requiring accreditation would represent a saving (or impost) on the administrative resources of the Regulator. However, the option represents clarification of existing policy and is not expected to cause a significant change to the accreditation ‘threshold’.

Whilst some initial costs would be incurred to transition the private siding registrations currently in place to a new system for registration of rail infrastructure managers, the ongoing costs would be offset by the reduction in registration applications.

Rail infrastructure managers often own more than one private siding, and the proposal to register the manager as opposed to the physical siding may significantly reduce the number of registration applications submitted to the Regulator for processing. In New South Wales it is estimated that the number of registration applications would be reduced by 75 per cent; and in Queensland by 50 per cent.

There has been some conjecture over the scope for administrative savings that would result from the Regulator assessing only a single application by a rail infrastructure manager of multiple private sidings, instead of individual applications for each siding. One regulator stated that the savings would be minimal, as under each option there would be a continuing need for the Regulator to assess each private siding.

However, there would likely be a degree of consistency in the safety management measures proposed by a rail infrastructure manager of multiple private sidings. Accordingly, there may be some reduction in administrative burden on the Regulator resulting from only having to assess such measures once (in a consolidated application for registration), rather than individually for each private siding under the control of the infrastructure manager. The option to extend interface agreement requirements for private sidings to include road interfaces may impose an additional burden on the Regulator to audit any additional interface agreements entered into by the rail infrastructure manager. The Regulator may also be required to support and facilitate this process from time to time.

The Model Bill, under section 56(5), provides scope for the Regulator to place additional requirements on the rail infrastructure manager for their application for registration of a private siding. It is understood that this provision is, on occasion, utilised to require rail infrastructure managers and road managers to establish interface agreements. It is therefore considered to be a minor change and cost burden for the Regulator to explicitly extend the interface agreement requirements to road interfaces in the National Law.

Rolling stock operators

There should be minimal, if any, impact on rolling stock operators. Any rolling stock operators on private sidings currently registered for accreditation exemptions would need to be accredited; however, there are not expected to be many.

Rail infrastructure managers

Rail infrastructure managers already accredited for other purposes would need to include in their accreditation matters relating to the operation of any private sidings they also operate (and currently receive an exemption from); however, there are not expected to be many in this category.

The option for rail infrastructure managers to be registered, instead of the physical private siding, is likely to reduce the in administrative burden. The Model Bill requires that rail infrastructure managers individually register their private sidings with the Regulator; this option would require only one registration application for each rail infrastructure manager.

Extending interface agreement requirements of section 61 to interfaces other than just railways (roads, bridges, etc.) may impose some additional burden on rail infrastructure managers, to the extent that they have complied only with the strict requirements of the Model Bill. For instance, where a railway on a private siding formed part of a grade level crossing of a road managed by an independent entity, an interface agreement would need to be formed. Regulators have indicated that infrastructure managers with private sidings

crossing roads of significant size are most likely already entering into informal arrangements for the management of level crossings. The impact of this provision would therefore be minor.

Changing the operational conditions in Model regulation 11 (Maintenance and operational conditions) would be expected to have a minor impact on how rail infrastructure managers of private sidings manage risks. A review and amendment of risk management procedures would be necessary, although under scalable provisions, given the low risk environment of private sidings, this impact is considered minimal.

Rail safety workers

The impact on rail safety workers would broadly align with that for safety and is assessed as low.

Other parties

Any impact on rail infrastructure managers to form an interface agreement with another party would incur a corresponding impact on that party.

Proposal

Option 2 is proposed.

This option would better clarify and otherwise support the original policy intent of the provision and provide a more efficient means of registration, without imposing any substantial, additional regulatory burden. In addition, the proposal may deliver safety benefits in requiring more comprehensive treatment of interface agreements.

The proposal is addressed in Part 3, Division 5 (Registration of rail infrastructure managers of private sidings) of the draft National Law.

6.4.4 Exemption framework

Current provision

There are no provisions for regulators to exempt rail transport operators from any provisions of the Model Bill.[30] Rather, the broad scope of the General (Rail) Safety Duties to manage risks to safety "so far as is reasonably practicable" provides a degree of latitude to operators in how they may develop their safety management systems. It provides the same for regulators in determining whether such systems are compliant and the management of risks is so far as is reasonably practicable.

Problem statement

While the general co-regulatory approach of the Model Law provides latitude in determining what measures are required for an operator to comply, some of the more prescriptive provisions of the Model Bill provide a lesser degree of flexibility. These include the requirements for managing rail safety worker health and fitness (section 64 of the Model Bill), as well as requirements to develop a security management and emergency plan.

[30] Other than section 56 of the Model Bill, which exempts private siding operators from being required to be accredited.

Such prescriptive requirements may impose an excessive regulatory burden, while having only minor or negligible benefits to safety. This may be the case for smaller scale railways operating in a low risk environment.

This problem risks being exacerbated by adopting into the National Law a number of additional, proposed prescriptive provisions; in particular, the prescribed elements of drug and alcohol and fatigue risk management programs.[31]

Another problem lies with the scope of accreditation. Rail transport operators, including infrastructure managers and rolling stock operators, must be accredited. Both are defined as parties who are "in effective management and control" of railway operations. This requirement in the definition of those parties that must be accredited is intended to exclude parties who have a non-operational interest, such as owners of rail track and rolling stock that is leased to third party operators.

However, the distinction between parties who are or are not in effective management and control is sometimes unclear. An example is the Victorian Director of Public Transport, who oversees a public transport system, the operational responsibility for which is mostly contracted out to a consortium of private companies (such as Metro Trains Melbourne). However, the Victorian Director retains some limited responsibilities, such as involvement in developing train timetables and planning for rail network upgrades.

A provision of Victorian rail safety law (not included in the Model Law or draft National Law) clarifies that despite any interpretation of accreditation requirements, the Victorian Director need not be accredited. There is a risk that, should the existing Model Law provisions be retained, the Victorian Director may need to be accredited to continue operating in his current capacity. Due to the very limited impact of his role on rail safety, the costs of accreditation would significantly outweigh the minimal benefits.

Objective

In reviewing the railways to which the act does not apply, an opportunity exists to further meet the objectives of the national reform insofar as streamlining regulatory arrangements and reducing unnecessary compliance burden for business. As such, the intention of amendments to section 6 of the Model Bill should be to clearly define the scope of the National Law and to exclude those railways with risk profiles below that which is considered necessary to be subjected to a high degree of regulatory oversight. Options

Option 1

Retain the status quo, which would require rail transport operators to comply in full with all applicable provisions of the National Law.

Option 2

Adopt a framework for granting exemptions to rail transport operators from provisions of the National Law. An option is for the exemption framework to provide for both ministerially-granted short-term exemptions and Regulator-granted longer term exemptions.

To account for circumstances in which an exemption is sought under pressing or urgent circumstances, ministerial exemptions may be granted for a maximum applicable period of

[31] A discussion of the broad impact of the proposed, additional prescriptive requirements is included in Section 6.3 (Overview of proposed risk management requirements) of this regulatory impact statement.

three months. Other exemptions, that is, those of a less urgent nature and being sought for a longer period of time, would be subjected to an assessment process administered by the Regulator.

Ministerial exemptions would be granted by the relevant minister (as nominated by individual states and territories in their applying law) to a rail transport operator, for operations undertaken in the home state or territory of the minister. For exemptions sought to operations in multiple states or territories, individual submissions to each relevant minister would be required.

Exemptions considered by the Regulator for longer term situations would be subjected to a more formal process. Such exemptions would be restricted to all or part of the following areas of the draft National Law:

- Accreditation (Part 3, Division 4 of the National Law)
- Registration of rail infrastructure managers of private sidings (Part 3, Division 5 of the National Law)
- Part 3, Division 6, Sub-division 3 of the National Law, i.e. the following elements of a Safety Management System:
    - security management plan (section 112 of the draft National Law)
    - emergency management program (section 113 of the draft National Law)
    - health and fitness management program (section 114 of the draft National Law)
    - drug and alcohol management program and testing (sections 115 of the draft National Law)
    - fatigue risk management program (section 112 of the draft National Law).

Both types of exemptions would be assessed only on application by (and granted to) individual rail transport operators. In both cases, the granting of an exemption may be subject to conditions or restrictions and would include authority for the grantor (Regulator or minister) to vary, revoke or suspend it.

While decisions on exemption applications made by the Regulator would be potentially subject to review (under Part 7 of the draft National Law – Review of Decisions), those made by a Minister would not.

Impact assessment

Option 1 – Status quo

There would be no impact of retaining the status quo.

Option 2 – Include a framework for granting rail transport operators exemptions from certain provisions of the National Law

Economic assessment

The net benefit of this option is estimated to be between $0.02 and $3.35 million. Refer Appendix D: Economic cost benefit analysis (section 3.4) for detailed analysis.

The major impact of introducing an exemption process would be to reduce the regulatory compliance burden on railways being operated in low risk environments. This reduction

would be achieved by the granting of exemptions from provisions of the National Law to operators for whom compliance with those provisions is assessed as not reducing risks to safety by any substantial degree.

The proposed exemption provisions may be viewed as a partial countermeasure to the increased compliance costs for some of the more prescriptive requirements being proposed in the draft National Law, for example drug and alcohol and fatigue risk management. Where compliance with such provisions is assessed as having no or minimal benefits for an operator, it is anticipated that the Regulator would be able to exempt them.

Safety

The provision of an exemption process would not of itself impact on safety. By potentially allowing for a reduced degree of safety management, there is a risk that safety may be reduced. It would be the responsibility of rail transport operators and the Regulator to ensure that exemptions, in conjunction with alternative arrangements (conditions of an exemption), are only approved/enacted in circumstances where it is demonstrated that safety would not be compromised.

Regulator

While the Regulator already has a role in accrediting and periodically auditing operators' safety management systems, assessing exemptions would add to its role. Under the co-regulatory principles of the National Law, it is anticipated that the burden of such assessments would be shared between the Regulator and operators, including:

- operators to conduct risk analyses to support applications for exemptions
- the Regulator to assess such applications, including associated and complementary tasks such as undertaking research on relevant rail safety matters.

Under existing arrangements, primary responsibility for developing a compliant safety management system lies with rail transport operators. The adoption of exemption provisions, including the need for the Regulator to approve alternative arrangements, would represent a transfer of some responsibility from the operator to the Regulator.

However, under the co-regulatory framework of Australian rail safety law, regulators currently invest significant resources in assisting operators with complying; particularly smaller operators. This means that there is no clear dividing line between compliance costs of the Regulator and those of rail transport operators.

State and territory regulators were mixed in their assessments of how an exemption framework would impact on resources of the Regulator. Some feedback indicated that the process of assessing suitable alternative arrangements may require resources comparable or exceeding those necessary to oversee compliance with the exempted provision(s).

An example is the requirement to comply with the National Standard for Health Assessment of Rail Safety Workers, which required significant resources and expertise to develop. If (under Option 2) alternative compliance arrangements were proposed by an operator, requiring (application for) an exemption, the Regulator may need some additional resources to assess them.

Under Option 1, the Regulator would have no latitude to consider such a proposal. This would arguably increase the need for developing more flexible requirements (e.g. amending the National Law to permit deviation from the National Standard for Health Assessment of Rail Safety Workers). Such an arrangement could result in a similar process and yield a similar result to that under an exemption framework (Option 2).

Rail transport operators

The provision of exemptions to rail transport operators from elements of their safety management duties has the potential to reduce their compliance costs. Experience with similar types of provisions, particularly those in New South Wales rail safety law, is that exemptions would most likely be granted to smaller operators, particularly those in the tourist and heritage sector.

Any reduction in cost to an operator that resulted from an exemption being granted would be mitigated by the need for the operator to develop appropriate alternative arrangements. While it is conceivable that some exemptions may be granted in an 'outright' manner (that is, where the risk to safety was demonstrated to be negligible), in most cases it is likely that only a reduced degree of risk would be demonstrated, which would still need to be managed in some form.

Additionally, this option would allow for greater clarity in determining whether a party was considered to have 'effective management and control' of a railway and needed to be accredited.

It is important to note that the scope of exemptions granted to tourist and heritage rail operators would have a major impact on broader costs incurred by this industry segment, as a result of the National Law amendments. In particular, the cost of their complying with the proposed fatigue management amendments ($6.9M-$13.9M) is of a similar magnitude to the net cost they would incur in implementing the broader National Law amendments ($7.1M-$12.2M).

Other parties

Applications for exemptions may also be made to state or territory ministers. This would impose some burden on ministers and their staff. As referenced in the draft National Law, it is expected that in deciding on an exemption application, a minister would seek advice from the Regulator. In this way, the major burden would be shouldered by the Regulator, similar to that for an application made directly to the Regulator.

Proposal

Option 2, to introduce an exemption process, is proposed for the National Law.

The need for such a process has increased with the number of prescriptive requirements in the National Law, such as for drug, alcohol and fatigue risk management. Assessments of these proposals have identified a risk that the costs of uniform compliance would exceed the safety benefits for a limited number of operators. This risk would be reduced by granting exemptions, particularly from the more prescriptive provisions that are assessed as imposing greater costs than safety benefits for a given operator.

By reducing the degree of regulation for some railways commensurate to their level of risk, the proposal would support the key objectives of the reform by not reducing existing levels of rail safety, but still streamlining regulatory arrangements and reducing the compliance burden for business.

This proposal is addressed in Part 6 (Exemptions) of the draft National Law.

6.4.5 Powers with respect to interfaces with parties whose operations may impact rail safety

Current provision

The Model Law does not provide any explicit requirements for the regulation of third parties, for example utility companies,[32] or require rail transport operators and third parties to collaborate on the safety of their works in the vicinity of rail infrastructure.

The overarching requirements in the General Safety Duties provisions of Part 4, Division 1 and the Safety Management provisions of Part 4, Division 4 of the Model Bill require rail transport operators to manage such risks and to ensure the safety of railway operations. These requirements do not apply to utility managers or road managers.

Persons who are not subject to rail safety law would still be required to comply with applicable work health and safety law. Such law imposes responsibilities on parties to manage risks to safety, while undertaking any work in the vicinity of rail infrastructure.

Some states and territories have implemented in their rail safety law requirements for third parties to consult with rail transport operators, and vice versa, before undertaking works that may affect the operations of the other party. These include Victoria, South Australia and the Northern Territory.

Problem statement

The Regulator is not authorised to regulate works occurring around or in the vicinity of rail infrastructure, where those works impact on rail safety but do not fall under the definition of rail safety work.

For example, the Model Law currently does not contain provisions to address the interface issues with the activities of utility companies, some of which have been conferred rights of entry under current Commonwealth legislation.

These provisions are required due to the observed practice of entities, often utility companies, undertaking works on or in the vicinity of rail operations, without sufficient consideration of how their actions may impact on the safety of rail operations. This has resulted in a number of rail safety incidents in Victoria, for example:

- a contractor laying fibre optic communications cables without the approval of the rail operator resulting in a near miss
- a gas leak occurring at Southern Cross Station
- a train colliding with a utility company's van which was parked on rail tracks
- utilities which have dug trenches or holes and undermined nearby rail track.

While accredited rail infrastructure managers are accountable for the safety of their networks under the General Safety Duties, it is difficult for them to manage safety when third parties are legally able to undertake activities without the operator's or regulator's permission (or even knowledge), and without regard to its safety management system. Smaller rail transport operators, particularly those in the tourist and heritage sector, have also indicated

[32] Where reference is made in this clause to 'utilities' this is a reference to any entity that provides services and/or infrastructure relating to telecommunications, water, gas, electricity or similar.

that they are often unable to influence large utility companies to consult with them before undertaking such works.

Similarly, rail regulators are also unauthorised to direct rail infrastructure managers where any works they are undertaking may threaten the safety or integrity of utility operations, including the provision of services such as gas, water and electricity. The Model Bill only authorises rail regulators to regulate matters relating to rail safety. Although work, health and safety regulators are authorised to intervene where safety (in all work places, rather than just for rail operations) is a concern, rail regulators are typically better placed to be aware of and to address such matters arising from rail operations.

Objective

To support the enhanced safety of railway operations, by providing for more effective management of safety risks arising from works on or near railway premises.

Options

Option 1

Status quo. This would provide no specific powers or requirements for the management of utility works on or near rail infrastructure premises, beyond the general rail safety duties obligations on rail infrastructure managers and Work Health and Safety obligations on utility companies.

Option 2

An option is to require that a person may not carry out works near a railway that are likely to threaten the safety or integrity of the railway operations, without prior consent of the relevant rail infrastructure manager or the Regulator.

The Regulator may also:

- direct persons, who are undertaking, or have proposed to undertake, works that the Regulator believes is likely to threaten the safety or integrity of railway operations, to cease or alter that work
- direct a rail transport operator who is undertaking, or has proposed to undertake, operations that are likely to threaten the safety of utility infrastructure or works, or safe provision of utility services, to cease or alter the operations.

Impact assessment

Option 1 – Status quo

Although there would be no impact of maintaining the status quo when measured against the Model Bill, some states and the Northern Territory have varied from the Model Bill by implementing duties for parties undertaking works on or near rail infrastructure. In practice, adopting this option would likely be viewed by some as diminishing safety and authority of the Regulator.

Option 2 – Include a power in the National Law for the Regulator to cease or alter works that could potentially threaten the safety or the integrity of the railway operations

Economic assessment

The net benefit of this option is estimated at between $0.00 and $2.05 million. Refer Appendix D: Economic cost benefit analysis (section 3.5) for detailed analysis.

Safety

The requirement to consult before undertaking works is expected to reduce the risk of rail incidents resulting from damaged, or unauthorised access to, rail infrastructure. As indicated in the problem statement, this option could possibly avoid incidents or accidents and has the potential to provide considerable safety benefits.

Regulator

There may be some initial costs associated with the establishment of policies, administrative procedures, training for regulatory staff and education of affected parties, such as utility companies, of their obligations.

It is likely that the Regulator would be required to give directions infrequently; the corollary legislative obligations on the rail transport operator and third party would ensure that the Regulator would only need to become involved when a rail transport operator and third party could not successfully negotiate a suitable arrangement. It is not anticipated that this would impose any substantial burden on resources of the Regulator.

By providing this 'regulatory reach', this option provides the Regulator with a more efficient method to address these risks to safety as, under the Model Bill, such risks could only be addressed by the Regulator via the operator's safety management system.

Rail infrastructure managers

The requirement to collaborate with utility companies may impose some burden, but would be balanced by reduced scope for adverse outcomes from unilateral works on rail corridors. It is understood that many rail infrastructure managers already have systems in place to manage these risks and liaise effectively with utilities and other parties; there may be a greater impact on smaller and medium-sized operators.

The proposed penalty for non-compliance with the proposed provision is assessed as having a minor impact, as it is not envisioned that penalties would be applied frequently.

Other parties

The requirement to collaborate with rail operators may impose some burden on third parties, such as utility companies and road managers. This impact is considered minor given that most third parties are understood to already be adopting this approach as good practice under occupational health and safety legislation. Again, while there is the scope for penalties, their application is foreseen on an infrequent basis only.

Conversely, corollary obligations on rail transport operators to have regard to the safety of utilities' infrastructure and works may provide benefits to the utilities.

In order for the Regulator to issue directions and impart the corollary legislative obligations, it is also noted that amendments may be required to other legislation, for instance addressing the safe management of gas and electricity services, as well as road management Acts in all

states and territories. Such amendments would be the responsibility of individual states and territories if this was deemed necessary.

Proposal

Option 2 is proposed for the National Law.

The proposal would provide a clearer duty for both rail infrastructure managers and third parties to manage risks posed to the other party associated with the interfacing works. It would also authorise the Regulator to intervene when that duty is breached. The impact on the Regulator, rail infrastructure managers and other parties is assessed as only minor.

Given that a number of states and territories have included this provision in their applying legislation, this proposal supports the national reform objective in not reducing existing levels of rail safety. In addition, the extended regulatory reach should streamline regulatory arrangements.

This proposal is addressed in section 199 (Power to require works to stop) of the draft National Law.

6.4.6 Duty for loading and unloading rolling stock

Current provision

General Safety Duties provisions of Part 4, Division 1 and the Safety Management provisions of Part 4, Division 4 of the Model Bill apply to rail transport operators with respect to the safety of their operations. These impart a general duty on operators to ensure the safety of rail operations, which would include the loading and unloading of rolling stock.

However, as the loading and unloading of rolling stock does not fall within the Model Bill's definition of rail safety work, there is no corresponding duty on rail safety workers.

The loading and unloading of rolling stock is subject to relevant work health and safety laws, which require them to manage general safety risks arising from their operations in a similar manner to the General Safety Duties provisions of the Model Bill. However, rail safety regulators are not authorised to regulate compliance with work health and safety law, and work health and safety regulators are not authorised to regulate compliance with rail safety law.

Problem statement

The loading or unloading of goods from rolling stock is an activity that impacts on the safety of railway operations. Poorly loaded or unstable goods may injure rail workers or lead to de-stabilised freight carriages (potentially resulting in them being derailed).

A general principle of the Model Bill is for safety management duties to apply to both rail transport operators and rail safety workers. This principle recognises that workers share a responsibility to ensure the safety of railway operations. It also recognises that in practice, the ability of rail transport operators to directly manage the safety performance of rail safety workers can vary with circumstances, such as whether the worker is under the operator's direct employment.

The lack of any safety duty on workers engaged in the loading or unloading of rolling stock does not support that principle. It has made rail transport operators disproportionately responsible for the safety of these activities. Additionally, it has inhibited rail safety regulators in regulating the safe loading and unloading of rolling stock, beyond any matters that may be addressed with rolling stock operators alone.

Objective

To support enhanced rail safety, by providing for more effective management of risks arising from the loading and unloading of goods from rolling stock.

Options

Option 1

Status quo. Under this option, a duty on the safe loading and unloading of rolling stock (to the extent these activities were assessed as impacting on safe railway operations) would remain on rail transport operators alone.

Option 2

Extend the definition of rail safety work to cover loading and unloading of rolling stock. This option would provide for the safety of loading and unloading to be managed in a similar manner to the range of other types of rail safety work.

Option 3

Introduce a duty for persons who load or unload goods on or off rolling stock to ensure, so far as is reasonably practicable, that such operations are carried out safely.

Impact assessment

Option 1 – Status quo

There would be no impact from maintaining the status quo.

Option 2 – Extend the definition of rail safety work in the National Law

Economic assessment

The net cost of this option is estimated to be between $92.89 and $185.79 million. Refer Appendix D: Economic cost benefit analysis (section 3.6) for detailed analysis.

Safety

Principally, safety would be improved by empowering the Regulator to more effectively oversee how the safety of loading and unloading rolling stock is being managed. Under existing arrangements, (other than rail transport operators) only the work health and safety regulator is able to intervene in addressing any matters arising from the loading and unloading of rolling stock (by parties not directly controlled by rail transport operators).

In this way, some degree of safety improvement may result from a more specific duty on the loading and unloading of rolling stock in the National Law. However, similar duties effectively already exist under work health and safety law.

Some improvement in safety may also result from expanded coverage of duties on rail transport operators to manage rail safety worker health and fitness, drug and alcohol use, fatigue and competence. However, the magnitude of such a safety benefit is questionable; the degree of risk associated with those matters is reduced for those involved only in loading and unloading rolling stock, compared with other more safety critical roles such as train driving or signal control.

Regulator

The Regulator would have a role in overseeing and if necessary, intervening in matters relating to the safe loading and unloading rolling stock (that is, beyond the current scope, where such oversight is restricted to engaging only with rail transport operators). This option would necessitate an increased allocation of regulatory resources to undertake audits, inspections and investigations of how rolling stock loaders and unloaders are complying with the proposed duties.

However, it would not increase the number of accredited operators, nor impose any additional administrative tasks (for example, to review additional safety management plans). Safety incidents arising from loading and unloading rolling stock are not believed to occur frequently. Therefore, it is not expected that this option would place any substantial additional pressure on resources of the Regulator.

Overall, the Regulator would be better positioned to address concerns with the management of safety risks associated with the loading and unloading of rolling stock. This would alleviate the current circumstances in which only the relevant work health and safety regulator could directly intervene with the activities of parties other than rail transport operators (i.e. rail workers and contractors). This is expected to improve the effectiveness and efficiency of such regulatory activities.

Rolling stock operators

Rolling stock operators would be required to address, as part of their safety management plan, parties involved in the loading and unloading of rolling stock. This would include being required to manage their health and fitness, drug and alcohol use, fatigue and competence. This would impose additional costs, initially from the need to revise their plans, and ongoing from the expanded scope of their management (for example, the need to assess health and fitness, competency and conduct drug and alcohol testing for a greater number of rail safety workers).

Operators have reported that it is often difficult to effectively manage the safety of parties not directly employed by them. However, this applies to all parties, not just those loading and unloading rolling stock.

Rail infrastructure managers

There would be no impact, assuming rail infrastructure managers would not be involved in the loading or unloading of rolling stock.

Rail safety workers

To the extent that the proposed duty would improve safety associated with the loading and unloading of rolling stock, this would reduce the risk of harm to rail safety workers either involved in any unsafe practices or who may be injured by goods loaded in an unsafe manner by a third party.

There would also be some social benefits to parties engaged in the loading and unloading of rolling stock from requiring rail transport operators to manage their health and fitness, drug and alcohol use and fatigue.

Option 3 – Include a safety duty for persons loading and unloading rolling stock in the National Law

Economic assessment

The net benefit of this option is estimated at between $3.80 and $7.60 million. Refer Appendix D: Economic cost benefit analysis (section 3.6) for detailed analysis.

Safety

Safety would be impacted in a broadly similar manner to Option 2; namely, the proposal would empower the Regulator to better ensure that all relevant parties were conducting their work safely.

However, any additional safety benefits under Option 2, resulting from the expanded coverage of duties on rail transport operators to manage rail safety worker health and fitness, drug and alcohol use, fatigue and competence, would not be realised under this option.

Regulator

The Regulator would be impacted in a manner broadly corresponding to that for Option 2. However, for this option the impact would be less, as the Regulator would not be required to monitor compliance with the range of other duties associated with parties being categorised as rail safety workers (that is, for rail transport operators to manage their health and fitness, drug and alcohol use, fatigue and competence).

As with Option 2, this option increases the regulatory reach and provides the Regulator with a more efficient method to address these risks to safety. Under the Model Bill provisions, such risks could only be addressed via the operator's safety management system.

Rolling stock operators

Rolling stock operators would continue to be bound by their obligations under the General (Rail) Safety Duties, that is, to manage safety risks arising from the loading and unloading of rolling stock. However, by imposing a similar and more direct requirement on parties engaged in the loading and unloading of rolling stock, the responsibility for ensuring safety is more evenly distributed. This may make achieving compliance more practical for rolling stock operators.

Rail infrastructure managers

Nil.

Rail safety workers

To the extent that the proposed duty would improve safety associated with the loading and unloading of rolling stock, this would reduce the risk of harm to rail safety workers either involved in any such unsafe practices or who may be injured by goods loaded in an unsafe manner by a third party.

Other parties

This option would impose a safety duty on persons engaged in the loading or unloading of rolling stock. The impact is assessed as low, due to the fact that a similar duty already exists under work health and safety law. The duty would be imposed only on persons directly engaged in the loading or unloading of rolling stock and would not apply to others more indirectly involved, such as consignors, consignees and packers.

Proposal

Option 3 is proposed for the National Law.

Introducing a specific duty into the National Law for the loading and unloading of rolling stock to be undertaken in a safe manner would resolve the major limitations of existing arrangements, namely the lack of any duty for loaders/unloaders (who are not rail transport operators) under rail safety law and the Regulator not being authorised to regulate such activities.

Option 2 would impose excessive obligations and requirements on rail transport operators, for little apparent benefit beyond that able to be realised under Option 3.

The proposal is seen to support the objectives of the national reform, streamlining regulatory arrangements in providing an appropriate level of regulatory reach, and reducing the unnecessary burden for operators to be disproportionately responsible for the actions of loaders and unloaders.

This proposal is addressed in section 54 (Duties of persons loading or unloading freight) of the draft National Law.

6.5 Operator Safety Management

Rail transport operators are required to be accredited by the Regulator. The purpose of accreditation is to attest that an operator has the competence and capacity to manage the safety risks of their railway operations.

Accreditation is a method by which the Regulator can be assured that a rail transport operator has systematically considered the risks from its operations and has in place a system to eliminate or reduce those risks.

A key consideration in assessing an application for accreditation is the rail transport operator's demonstrated ability to develop and maintain a compliant safety management system. It provides a systematic way to identify hazards and control risks while maintaining assurance that these risk controls are effective. The safety management system, like many other management systems, is founded on a cyclical process of planning, implementation, monitoring and review, and taking action to improve performance in the light of results. This process results in continuous improvement of the system and increasing achievement of the system objectives of safety of railway operations.

6.5.1 Safety Management System

Current provision

Section 57 of the Model Bill and Model regulation 10 require that rail transport operators develop a safety management system for their accredited railway operations. The safety management system must be developed in consultation with various groups including health and safety representatives, persons affected by the safety management system and/or their representing union, other operators where there is an interface agreement and the public, as appropriate.

The safety management system must be evidenced in writing in a form approved by the Regulator and must identify each of the persons responsible for its preparation and implementation.

Section 57 requires rail transport operators to comply with relevant prescribed requirements and the prescribed risk management principles, methods and procedures to identify, assess and control the risks to safety. The operators must also implement procedures for monitoring, reviewing and revising their safety management system.

A safety management system, in accordance with the Model Bill includes:

- identification and assessment of risks to safety that have arisen or may arise from the carrying out of railway operations
- specification of the controls used to manage the risks to safety
- procedures for monitoring, reviewing and revising the adequacy of those controls.

Problem statement

While the Model Regulations prescribe a range of content that must be included in a safety management system, they do not extend to addressing risk management principles (that is, the guiding principles or steps that outline the decision making process or mechanics of how safety risks are to be addressed). Model Regulation 10 is silent on this matter, with a drafting note having reserved this provision for future development.

Under the National Law, all operators must have robust, documented and auditable risk management processes and procedures to substantiate that they are managing risks to safety, so far as is reasonably practicable. These should be in a form that can be used to manage safety risks to a suitable standard and to increase the transparency of risk management decisions.

With no prescribed risk management principles in the National Law, rail transport operators must determine how to identify, assess and manage risks to safety. However, established principles of risk management are widely available, including through the national guideline,[33] which references the Australian Standard (AS/NZS 4360:2004 Risk Management). Therefore, their absence from the National Law does not materially restrict their availability, although consistency of approach is not guaranteed if operators choose a different standard or methodology.

Regulators have reported that standards of risk management vary across the rail industry. Many operators (particularly those better resourced) have adopted best practice principles. However, there is some concern that some operators have adopted sub-standard approaches. Some regulators have reported that their inability to assess a risk management system against prescribed principles set out in legislation has inhibited efforts to convince operators to raise their risk management standards (that is, there is disagreement between a regulator and operator on whether a safety management system is compliant or not). A disadvantage of the performance-based provision is that there is a greater potential for operators to exploit such a measure as *de facto* deregulation, either knowingly, being recalcitrant operators, or unwittingly, due to a lack of understanding of the risk management process or of the risk being managed.

The lack of prescribed principles has also been identified by some regulators as making prosecutions more difficult for matters arising from sub-standard risk management by an operator; some regulators consider a more transparent requirement would help to demonstrate where a breach of rail safety duties has occurred.

Objective

In addressing the issues identified, the proposal should seek to support the national reform objectives in supporting a nationally consistent and seamless rail transport system, setting a clear standard for safety management without reducing existing levels of safety already established by states and territories.

Options

Option 1

Status quo. This option would continue the Model Bill arrangement under which rail transport operators would develop a safety management system using self-determined principles.

Option 2

To include risk management principles in the National Law based on three steps:

1. risk identification
2. risk assessment

[33] National Transport Commission, *National Rail Safety Guideline: Preparation of a Rail Safety Management System*, June 2008 http://ntc.gov.au/filemedia/Reports/NRSG_SafetyManagementSystemSMS_J.pdf, last accessed 21 February 2011.

3. risk control.

It is proposed to base the risk management principles for risk identification and assessment on sections 50 and 51 of the *Rail Safety Act 2006* (Victoria) in the National Law, for example:

> *A rail transport operator must, as far as is reasonably practicable, identify safety risks that have arisen or may arise from the carrying out of railway operations on or in relation to the rail transport operator's rail infrastructure or rolling stock.*
>
> *A rail transport operator must conduct a comprehensive and systematic assessment in relation to those risks identified. An assessment must involve an examination and analysis of the hazards and incidents identified including –*
>
> - *the nature of each hazard and incident*
> - *the likelihood of each hazard causing an incident*
> - *in the event of an incident occurring –*
>   - *its magnitude*
>   - *the severity of its consequences*
> - *the range of control measures considered.*
>
> *In conducting an assessment, the rail operator must consider hazards cumulatively as well as individually and use assessment methodologies that are appropriate to the hazards being considered. The risk assessment must be documented showing a consideration of the hazards and incidents, their likelihood and severity of consequences.*

The appropriate risk control method depends on the risk identification and assessment process. The assessment of risk magnitude, according to the likelihood of an incident and the severity of consequences, would determine the level of control required.

It is also proposed to elevate the risk management principles from the regulations to the National Law Act due to risk management being an integral part of the National Law and an important legislative requirement.

Impact assessment

Option 1 – Status quo

There would be no impact from maintaining the status quo. The Regulator may still move to hold operators to the standards as proposed in Option 2. However, without them being prescribed in law, that task is potentially more difficult, as discussed in Section 6.3 (Overview of proposed risk management requirements).

Option 2 – Include risk management principles in the National Law

Economic assessment

The economic benefit of this option is estimated at between $0.20 and $0.28 million. Refer Appendix D: Economic cost benefit analysis (section 3.7) for detailed analysis.

Safety

By prescribing risk management principles for a safety management system, it is anticipated that this would contribute to improving the quality of some safety management systems. In particular, some smaller rail transport operators may lack the in-house knowledge and resources to develop a compliant safety management system (that is, based on best practice principles of risk management). In some cases, the Regulator is able to support such operators in making suitable improvements. In other cases disagreements over the need for, and the cost of, developing and implementing such improvements have led to resistance on the part of the operator.

The safety benefit derived from prescribing principles of risk management would therefore arise from empowering the Regulator to more effectively (or authoritatively) influence operators to make changes to their safety management system.

Regulator

For the Regulator, the burden should be reduced when reviewing a rail transport operator's safety management system. This stems from greater clarity of minimum standards, which regulators expect would simplify the task of working with operators to develop a compliant safety management system. Due to the fundamental role of risk management principles in developing a safety management system, some regulators stated that this option potentially would have a significant impact on streamlining their role in assisting operators to comply.

Rail transport operators

The introduction of prescribed risk management principles will provide greater clarity for rail transport operators of their compliance requirements. It is expected to simplify their compliance obligations, by providing clearer guidance on how to may demonstrate that they have assessed risks and identified appropriate countermeasures according to what is reasonably practicable.

Some rail transport operators, particularly those in the tourist and heritage sector, have reported that they may need to review and update their safety management systems to comply with the proposed risk management principles. This would impose an initial cost.

However, the Model Bill, in section 59 (Review of a Safety Management System), places an obligation on operators to review their safety management system at least once each year (unless otherwise directed by the Regulator). Therefore, the cost of a safety management system review in accordance with the proposal under Option 2 would likely be partially absorbed within the operator's annual review.

Review of safety management systems may result in the identification of additional risks that require control. Additionally, the review may increase the level of severity of previously identified risks which would subsequently require additional controls to be implemented. A rail transport operator may incur costs to implement these higher levels of controls. The impact of these reviews is likely to be greater for smaller operators, as some larger operators have indicated that they already comply with this option.

Rail safety workers

It is anticipated that rail safety workers would benefit from improved levels of safety resulting from this proposal being adopted.

Proposal

Option 2 is proposed. It would prescribe best practice principles of safety management, which are already applied implicitly through the General Safety Duties. The greater clarity achieved by their prescription is expected to improve regulatory efficiency and simplify the compliance process, with associated cost savings.

This proposal is addressed in section 100 (Conduct of assessments for identified risks) and section 46 (Management of risks) of the draft National Law.

6.5.2 Health and fitness management program

Current provision

Section 64 of the Model Bill and Model regulation 22 require rail transport operators to have and implement a health and fitness program for rail safety workers. The program must comply, so far as is reasonably practicable, with Volumes 1 and 2 of the National Standard for Health Assessment of Rail Safety Workers (the Standard), published by the NTC.[34]

The Standard was developed by the NTC to help rail operators meet their obligations for the health and fitness of rail safety workers. Those obligations include the monitoring of the health of rail safety workers, to prevent or minimise work-related deaths and injury caused by medical conditions particularly where a worker's incapacitation may present a risk to others.

The health and fitness management program is an essential component of the overall rail transport operator's safety management system. It is aimed at minimising risks to all members of the public whose safety may be at risk from a rail safety worker becoming incapacitated, as well as to the health and safety of rail safety workers themselves.

The Standard comprises two volumes.

- Volume 1: Management Systems – provides accredited rail organisations with practical guidance for implementing systems, based on a risk management approach, to monitor rail safety worker health and fitness.
- Volume 2: Assessment Procedures and Medical Criteria – provides authorised health professionals with information outlining the procedures for conducting health assessments and the medical criteria for judging fitness for rail safety duty.

Problem statement

Interpreting the requirement to comply with the Standard, so far as is reasonably practicable, has resulted in some confusion. While the Standard includes some scope for flexibility in its application and interpretation, the objective of the model provision is for rail transport operators to substantially adhere to it. However, some rail transport operators have reportedly interpreted the practicability qualification as latitude to materially deviate from the Standard, or to assess a reduced number or classes of rail safety workers than it requires.

As well as potentially causing confusion amongst rail transport operators in its interpretation, rail safety regulators have stated that the 'so far as is reasonably practicable' qualification also makes enforcement of the policy objective (substantial compliance with the Standard) difficult.

[34] Available at http://www.ntc.gov.au/viewpage.aspx?documentid=1669.

Rail safety regulators indicated that, to assess proposed deviations from the Standard, the Regulator would need the services of medical experts. For this reason, allowing such deviations may cause the Regulator to incur significant costs.

Objective

To better clarify the existing requirement for rail transport operators to manage the health and fitness of rail safety workers.

Options

Option 1

Status quo. Under this option, compliance with the Standard would continue to be required so far as is reasonably practicable.

Option 2

An option is to remove the so far as is reasonably practicable qualification from Model regulation 22, requiring strict compliance with the Standard.

Impact assessment

Option 1 – Status quo

As this is the existing Model Bill requirement, there is no impact of maintaining the status quo. However, with the implementation of the Regulator, one regulator reported that it may be necessary to implement a medical panel to assess health and fitness programs of rail transport operators that deviated from the Standard. This was due to the need to consult with medical experts on whether such deviations would support a similar outcome to the Standard.

Assessing the impact of these options hinges on the extent to which the 'so far as is reasonably practicable' qualification permits an operator to deviate from the Standard. In the absence of prescribed requirements, ultimately this may only be authoritatively determined by a court. However, for the purposes of this regulatory impact statement, the advice of regulators has been adopted: that this option would allow operators to deviate from the Standard.

Option 2 – Remove the so far as is reasonably practicable qualification from Model Regulation 22

Economic assessment

The net benefit of this option is estimated at between $0.82 and $0.94 million. Refer Appendix D: Economic cost benefit analysis (section 3.8) for detailed analysis.

Safety

It is expected that requiring strict compliance with the Standard would improve safety, encouraging more stringent management of rail safety worker health and fitness. This would reduce the risk of harm being caused to rail safety workers themselves, as well as others.

An example of a significant rail safety incident, caused in part by inadequate management of rail safety worker health and fitness, is discussed in the McInerney Inquiry into the Waterfall rail accident in New South Wales.[35]

Regulator

This option would alleviate a need for the Regulator to procure medical expertise to assess health and fitness programs that deviate from the Standard. An associated saving of between $0 and $2.6 million per annum to the Regulator is estimated.

Rail transport operators

Some rail transport operators stated that strict compliance with the Standard would require them to assess the health and fitness of a higher number of rail safety workers. It would also prohibit the current practice of some operators managing rail safety worker health and fitness by alternative means. Both of these impacts would impose costs.

Rail safety workers

It is anticipated that rail safety workers would benefit from improved levels of rail safety resulting from this proposal being adopted, as well as from any more rigorous assessment of their health and fitness.

Other parties

Nil. Rail transport operators are responsible for ensuring parties contracted by them comply with the National Law. Therefore, it has been assumed that any costs to contractors are accounted for in the estimates provided by rail transport operators.

Proposal

Option 2 is proposed. While it would impose some costs on rail transport operators, these appear to stem at least partly from misinterpretations of the 'so far as is reasonably practicable' qualification (i.e. the extent to which it permits relaxed compliance with the Standard). Specifically, in developing the Model Bill provision, policy makers did not intend that operators would be permitted to materially deviate from the Standard, unless there were pressing matters of practicability. While this is arguably more a question of managing compliance with the existing provision than one of policy, better clarifying the requirement is nevertheless assessed as beneficial.

The proposal is addressed in section 114 (Health and fitness management program) of the draft National Law.

[35] The investigation report is available online at http://www.transport.nsw.gov.au/inquiries/waterfall.html.

6.5.3 Drug and alcohol and fatigue risk management

This section assesses the following items:

- drug and alcohol management program
- fatigue risk management program

Options for the drug and alcohol management program and fatigue risk management program are described individually; however, due to similarities in their regulatory effects, the impacts for the options have been assessed together.

In addition, as the Model Law allowed for local variations (intended as an interim arrangement until national agreement was reached) in these two areas, there are potential benefits to be gained from adoption of nationally consistent provisions. These benefits are assessed in the section titled Benefits of national consistency below.

Drug and alcohol use in the rail industry

Drug and alcohol use has the potential to impact on performance at work by increasing the risk of an incident resulting in the loss of productivity, asset damage, injury or death. The consequences of an accident or incident in the rail industry resulting from a rail safety worker being affected by drug and alcohols may be severe.

The general public commuting on passenger rail services and interacting with rolling stock at level crossings has an expectation that railway operations are carried out safely. In recent years, there has been a focus on managing the drug and alcohol-related risks in the road environment, and the public expects that this would be translated and applied to the rail industry.

Given the above and evidence to suggest that drug and alcohol use impacts on workplace productivity and incident risk, drug and alcohol management has been a focus of recent policy development. States and territories have varied in their approaches to this risk and, following COAG's directive, resolution of this issue is important for the National Law.

Fatigue in the rail industry

The Australian rail industry is undergoing fundamental changes to its structure, ownership and competitive position in the provision of land transport services. Operators are extending services beyond historical boundaries and integrating them with road and shipping operations. Many of these changes have impacted on traditional work practices including shift lengths and rostering of workers, focusing attention on fatigue as a workplace safety issue.

Fatigue has been linked to degraded operational performance and has been identified as a contributing factor in accidents and incidents in railway systems and in other industries. In addition, simulator studies have indicated that train drivers may unwittingly undertake practices (speed or brake applications) that increase risks, or modify driving behaviour to offset the effects of fatigue by driving less efficiently. However, based on the information available, the number of fatigue-related railway safety incidents in Australia appears to be relatively low. [36] [37] [38]

[36] Dorrian, J., Roach, G.D., Fletcher A. and Dawson, D (2006). 'The effects of fatigue on train handling during speed restrictions'. Transportation Research Part F: Traffic Psychology and Behaviour, Volume 9, Issue 4, pp.243-257.

A significant amount of research has been undertaken on the effects and management of fatigue in the transport sector. A well-formed platform of knowledge and practical experience in managing fatigue-related risks has developed in the rail industry over the past decade or more. In keeping with research and operational trends in safety regulation, there has been a general (if not universal) shift from purely prescribed approaches focused on working hours to a more systematic approach to managing fatigue-related risk.

The nature of the rail industry and its working requirements is such that fatigue is a complex risk and its management is important.

Benefits of national consistency

The Model Law allows for local variations in key areas of the management of drug and alcohol use and rail safety worker fatigue risk management. Any option other than maintaining local variations (the status quo) represents nationally consistent arrangements.

A proportion of the rail industry has operations in multiple states and must contend with differing requirements and interpretations in each state for these two areas of the safety management system. Managing these local variations adds to the compliance costs of rail transport operators, duplicating efforts or reworking proposals to suit the differing demands in each state or territory. This creates inefficiency, potentially diverting resources away from business efficiency and operational safety activities.

Regulatory consistency would provide certainty of the regulatory environment, allowing operators to focus on having a single safety management system, rather than either a core safety management system with additional materials for each state and territory of operation, or complying with the most onerous requirements across all operations.

As such, the options proposed present potential benefits, addressing areas where overlapping and inconsistent regulation may impede economic activity.

Drug and alcohol management program

Current provision

The overarching requirements for the management of drug and alcohol-related safety risks are explicitly provided for in the General Safety Duties of rail transport operators contained in the Model Bill (section 28). Under section 28, a duty is placed on rail transport operators to "ensure, so far as is reasonably practicable, that rail safety workers do not carry out rail safety work in relation to the rail transport operator's railway operations, and are not on duty, while more than the relevant concentration of alcohol is present in their blood or breath or while impaired by a drug."

Additionally, under section 57 (Safety Management System) of the Model Bill, rail transport operators are required to include in their safety management system a drug and alcohol management program in accordance with section 65.

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[37] Mitler, M.M., Carskadon, M.A., Czeisler, C.A., Dement, W.C., Dinges, D.F. and Graeber, R.C. (1988). 'Catastrophes, sleep, and public policy: Consensus report'. *Sleep*, *11:1*, pp. 100-109.

[38] Mitler, M.M., Dinges, D.F. and Dement, W.C. (1994). 'Sleep, medicine, public policy, and public health'. in Kryger, M.H., Roth, T. and Dement, W.C. (eds.), *Principles and practice of sleep medicine (2nd ed.)*. Philadelphia: W.B. Saunders, pp. 453-462.

Section 65 of the Model Bill requires rail transport operators to prepare and implement a drug and alcohol management program for rail safety workers in accordance with the prescribed requirements specified in the regulations.

However, the Model Regulations are silent on the specific requirements for such a program and allow for local variations (intended as an interim arrangement until national agreement was reached).

With regard to the duties imposed on rail safety workers, section 70(1)(c) requires that a rail safety worker must "co-operate with the rail transport operator with respect to any action taken by the rail transport operator to comply with a requirement imposed by or under this Act or the regulations." This duty on rail safety workers ensures their conformance with the operator's drug and alcohol management program.

All states and territories have adopted a provision in their applying laws in accordance with the Model Bill specifying a mandatory requirement on rail transport operators to prepare and implement a drug and alcohol management program.

States and territories have differing approaches to the prescribed requirements of a drug and alcohol management program in their regulations. Some have retained the principle of pure performance-based co-regulation placing the onus on the rail transport operator to identify what should be included in the drug and alcohol management program, whilst others have prescribed detailed elements for inclusion in the drug and alcohol management program.

Problem statement

This is an area where the Model Bill allowed for local variations until national agreement was reached. COAG directed that the issues surrounding drug and alcohol management in the rail sector are resolved and included in the National Law.

Objective

To support enhanced rail safety, by prescribing a clearer, more robust and nationally uniform standard for rail transport operators to manage risks arising from rail safety workers' drug and alcohol use.

Options

Option 1

Status quo. This option would retain the existing requirement for operators to develop a drug and alcohol management program, but allow individual states and territories to determine details of what the program must address and include.

Option 2

The drug and alcohol management program would be required as part of a safety management system, but no elements are prescribed in Model Regulations.

This means that the regulations are silent on the requirements for a drug and alcohol management program and the local variations currently provided for in the Model Regulations would no longer apply. Guidance material could be generated to assist rail transport operators with compliance.

Option 3

The drug and alcohol management program would be required as part of a safety management system, with prescribed elements (mandatory inclusions and other matters to be considered) included in Model Regulations.

Under this option, a rail transport operator must mandatorily establish an internal drug and alcohol policy, provide information and education to rail safety workers, address confidentiality measures relating to rail safety workers' personal information and include a drug and alcohol testing regime.

Matters for consideration when developing a drug and alcohol management program include the incorporation of rules relating to alcohol and other drugs for those undertaking rail safety work (including prohibition or restriction), the provision of treatment and rehabilitation for rail safety workers, the provision of information to rail safety workers relating to their obligations under the Act and the possibility of disciplinary action, fair internal procedures for the management of drug and alcohols and self-reporting obligations for rail safety workers.

The complete list of these factors is included in regulation 28 of the draft National Regulations.

The intent of this option is not to prescribe an exhaustive list of requirements or to detail particular behaviours that must be undertaken by the regulated entity to ensure compliance (that is, prescriptive regulation), but rather specify high-level considerations and inclusions as minimum requirements to assure good practice. This maintains a performance-based and co-regulatory approach by allowing for flexibility in the application of this option to account for the scope and nature of the railway operations.

Option 4

The matters to be mandatorily included in a drug and alcohol management program, as described above, are prescribed in National Regulations. The matters for consideration are not prescribed in National Regulations under this option.

Fatigue Risk Management Program

Current provision

A fatigue risk management program is part of an overall framework for fitness for duty and a safe working environment for rail safety workers, their organisations and the general public. The fatigue risk management program is an integral part of a rail transport operator's safety management system that provides a means of ensuring that employees' (including contractors and subcontractors) alertness and performance is not degraded to an unacceptable level as a result of fatigue.

The overarching requirements for the fatigue risk management program are provided in section 28(2)(d) of the Model Bill (General Safety Duties of the Operator), which imposes a duty on rail transport operators to "*ensure, so far as is reasonably practicable, that rail safety workers who perform rail safety work in relation to the operator's railway operations comply with the operator's fatigue risk management program.*"

Section 57(1)(f)(vi) of the Model Bill (Safety Management System) explicitly requires that a fatigue risk management program be included in a rail transport operator's safety management system in accordance with section 67.

Section 67 of the Model Bill requires rail transport operators to prepare and implement a fatigue risk management program for rail safety workers, as a mandatory element of their safety management system, in accordance with any requirements prescribed in the Model Regulations.

However, the Model Regulations are silent on the specific requirements for such a program and allowed for local variations (intended as an interim arrangement until national agreement was reached).

With regard to the duties imposed on rail safety workers, section 70(1)(c) of the Model Bill requires that a rail safety worker must "co-operate with the rail transport operator with respect to any action taken by the rail transport operator to comply with a requirement imposed by or under this Act or the regulations." This duty on rail safety workers ensures their conformance with the operator's fatigue risk management program.

Problem statement

This is an area where the Model Bill allowed for local variations until national agreement was reached. COAG directed that the issues surrounding fatigue risk management are resolved and included in the National Law.

A comparative analysis of the current regulatory approaches to fatigue risk management programs by the states and territories revealed that, while all states and territories have implemented a provision similar to section 67 of the Model Bill in their respective legislation, each has adopted differing approaches to the prescribed requirements of a fatigue risk management program, with little consistency found.

Objective

To prescribe provisions in the National Law that help clarify the minimum standard for fatigue risk management to which the broader rail industry would most appropriately be held, without unduly restricting flexibility, innovation and improvement in fatigue risk management practices by rail transport operators.

Options

Option 1

Status quo. This option would retain the existing requirement for operators to develop a fatigue risk management program, but allow individual states and territories to determine details of what the program must address and include.

Option 2

A fatigue risk management program to be required as part of a safety management system, but with no elements prescribed in National Regulations.

This option would exclude any specific requirements for a fatigue risk management program. It would differ from Option 1 in that the provision for local variations in the Model Regulations would be removed. Instead, rail transport operators would be required to develop a fatigue risk management program that adequately addressed the types of risks applying to its operations. Guidance material could be developed by the Regulator to assist operators with compliance.

Option 3

A fatigue risk management program to be required as part of a safety management system, with elements (mandatory inclusions and matters to be considered) based on available scientific evidence of contributors to fatigue risks in occupational settings. Operators would be required to assess whether these factors are applicable and assess their impact.

Under this option, rail transport operators must mandatorily establish documented procedures for education of rail safety workers, as well as scheduling and monitoring of rosters to enable an operator and the Regulator to monitor the effectiveness of the fatigue risk management program.

Matters for consideration include scheduling and rostering practices, work and rest environments and other related considerations with respect to their effect on safety, performance and well-being of rail safety workers. Operators would also be required to account for ongoing developments in research and technology for the management of fatigue risks.

The complete list of these factors is included in regulation 29 of the draft National Regulations.

The intent of this option is not to prescribe an exhaustive list of requirements or to detail particular measures that must be taken by the regulated entity (that is, prescriptive regulation), but rather specify high-level considerations and inclusions as minimum requirements to assure good practice. This maintains a performance-based and co-regulatory approach by allowing for flexibility in the application of this option to account for the scope and nature of the railway operations.

Option 4

The matters to be mandatorily included in a fatigue risk management program, as described above, are prescribed in National Regulations. The matters for consideration are not prescribed in National Regulations under this option.

Impact assessment – drug and alcohol and fatigue risk management programs

The impacts for the drug and alcohol management program and fatigue risk management program have been assessed together due to similarities in their regulatory effects.

Option 1 – Status quo

As the status quo, this option would impose no regulatory impact.

However, by providing for local variations in what is required for the management of drug and alcohol use, as well as fatigue, it would not support the key objective of the reform: to support a national system of rail regulation.

Option 2 – No elements of a fatigue or drug and alcohol management program prescribed in the National Regulations

Economic assessment

The economic benefit for this option for the drug and alcohol management program is estimated at between $0.00 and $27.84 million. Refer Appendix D: Economic cost benefit analysis (section 3.9) for detailed analysis.

The economic benefit of this option for the fatigue risk management program is estimated at between $0.00 and $29.63 million. Refer Appendix D: Economic cost benefit analysis (section 3.10) for detailed analysis.

Rail transport operators have assumed that the cost incurred for Option 2 is zero. However, it should be noted that the impact of the National Regulations being silent on the requirements for a drug and alcohol and fatigue risk management programs will be dependent on how the Regulator interprets the absence of any provisions in the regulations.

The Regulator may take a relatively passive role and only require that a management program be developed and implemented for fatigue and drug and alcohols as set out in the National Law. This would result in no impact, as assumed by rail transport operators. Conversely, the Regulator may impose any requirements on rail transport operators, including those contained in guidelines, in the absence of requirements stipulated in

regulations. In this case, the costs could potentially be similar to those estimated under Option 3.

Safety

Compared with the current Model Law provisions, which allow for local variations, Option 2 represents a true performance-based arrangement. This would see a reduction in the level of prescription in most, if not all, states and territories. Remaining silent in the National Law about the requirements for managing the safety risks associated with fatigue and drug and alcohols ensures that regulated parties have the utmost flexibility in determining how they achieve compliance in these key areas of rail safety.

The benefit of performance-based regulation is its ability to emphasise the underlying objective of the regulatory requirement, in this case to manage drug and alcohol and fatigue risks as far as is reasonably practicable, and to require those regulated to address that objective directly. This means that responses can be better tailored to individual circumstances, improving operator efficiency. This may be particularly important over the longer term as, in the absence of prescriptive regulation, future innovations for risk management can be introduced by operators more promptly than by amending legislation. This would extend to advancements and new technologies in the science of fatigue and drug and alcohol management, maximising continuous improvement in the management of risks.

However, a disadvantage of purely performance-based regulation is that there is a greater potential for operators to exploit such a measure as *de facto* deregulation, either knowingly, being recalcitrant operators or unwittingly, due to a lack of understanding of the risk being managed. Some regulators have expressed a potential concern that enforcing the general duty requirements (to manage risk so far as is reasonably practicable) is sometimes difficult in the areas of human factors, and potentially time consuming. There is a potential that this option could introduce a negative safety outcome for a number of operators.

It would be assumed that guidance material (guidelines or codes of practice) would be required to assist operators with compliance if Option 2 was implemented.

Regulator

The Regulator's function is one of compliance oversight in terms of the appropriateness and effectiveness of the drug and alcohol management program and fatigue risk management program, in the context of the operator's risk profile and scope of operations.

This option places a greater requirement on the Regulator to conduct its own research into identifying a suitable reference base against which it will make decisions as to the appropriateness of an operator's drug and alcohol management program and fatigue risk management program, as there would be no legislative precedents in the National Law. This may place the Regulator in a weakened position when challenging an operator's risk management strategies.

Performance-based regulation may also increase the burden on the regulator of monitoring and enforcing compliance. It would require a robust and well-resourced regulator to be able to monitor and assess the varied and possibly innovative risk management programs put in place by operators. Some state and territory regulators have indicated that this option would increase the number of investigations required and necessitate the employment of additional fatigue risk specialists. As a result of the increased number of investigations, it is likely that there would be an increase in prosecutions. With this option, it could be likely that prosecution attempts would be less successful, due to the lack of any specific provisions in the National Law.

As rail transport operators do not have requirements for the drug and alcohol management program and fatigue risk management program established in law, there may be greater reliance on the Regulator to assist, educate and inform operators as to acceptable means of compliance. This is also likely to require additional resources at the Regulator. There may also be increased interaction between the Regulator and operator during the assessment process, increasing costs.

Rail transport operators

Given the many different types and sizes of rail operations in Australia, flexibility and scalability in the National Law are two important considerations.

This option allows utmost flexibility for rail transport operators to manage the safety risks related to fatigue and drug and alcohols in accordance with the size, scope and risk profile of their organisation. The performance-based approach, emphasising only the underlying objective to manage these risks so far as is reasonably practicable, should mean that actions taken in response are better directed and, therefore, more productive. Being able to tailor the programs to individual circumstances may reduce overall compliance costs and improve operator efficiency, competitiveness and profitability.

Conversely, performance-based regulation may result in uncertainty amongst rail transport operators regarding acceptable means of compliance with the National Law and determining what is reasonably practicable. Accordingly, this may increase costs to the rail transport operator. The outcome could be a varied and inconsistent approach to managing fatigue and drug and alcohol safety risks within the rail industry. Without direction in regulations, some operators may need additional resources, in the form of expert consultancy, in order to produce a drug and alcohol management program or a fatigue risk management program. While larger organisations would most likely already employ such resources, this could potentially be an additional cost for some small or medium operators.

Rail safety workers

Rail safety workers are likely to have less certainty around their obligations under this option. Under Option 2, there would be no explicit requirements for rail transport operators to develop internal policies and procedures detailing their approach to managing the safety risks associated with fatigue and drug and alcohols. This is likely to result in a lack of awareness for rail safety workers regarding an operator's safety culture and their obligations to their employer and under the National Law. Consequently, unintended and inadvertent contravention of the requirements placed upon rail safety workers may ensue.

Dissemination of information and the provision of education and training to rail safety workers is imperative to managing the safety risks related to alcohol, drugs and fatigue. A lack of knowledge and understanding on the part of a rail safety worker is likely to be detrimental to the overall objective of managing the fatigue and drug and alcohol related safety risks.

A rail safety worker has a specific responsibility to ensure they are fit for duty, however this term is subjective in the context of alcohol, drugs and fatigue. The absence of explicit alcohol, drug and fatigue requirements in the National Law and potentially within the workplace may result in uncertainty for rail safety workers as to whether or not they are fit for duty.

Rail safety workers would most likely face differing standards of work between operators. Such inconsistencies, when moving between rail transport operators, may result in uncertainty and unintended breaches of their obligations.

Option 3 – Include mandatory requirements and matters for consideration for fatigue and drug and alcohol management programs in the National Regulations

Economic assessment

The economic benefit for this option for the drug and alcohol management program is estimated at between $14.96 and $30.46 million. Refer Appendix D: Economic cost benefit analysis (section 3.9) for detailed analysis.

The economic benefit of this option for the fatigue risk management program is estimated at between $2.14 and $4.16 million. Refer Appendix D: Economic cost benefit analysis (section 3.10) for detailed analysis.

As with Option 2, the actual cost incurred will be dependent on how the Regulator interprets and enforces the provisions set out in regulations; that is, the extent to which flexibility and scalability is allowed for relevant to the scope and nature of the railway operations.

If the Regulator chooses to administer the law flexibly, in a way that is commensurate with the level of risk of the particular rail transport operator, then the costs of this option would most likely be closer to those stated in Option 2. However, if the Regulator interprets and enforces the provisions rigidly and to a level not necessarily commensurate with the risk, it is plausible that operators may apply for an exemption (as described in Section 6.4.4, Exemption framework). The exemption could mitigate the high cost based on the less favourable interpretation of this option.

Safety

As compared with Option 2, Option 3 represents a performance-based standard supplemented by more prescriptive considerations designed to ensure integrated management of a range of risks whilst remaining scalable and relevant to an operators particular risk assessment. Whilst a more detailed arrangement than may currently be employed in most states and territories, the provisions are drafted to remain in the spirit of co-regulation, allowing an operator the opportunity to consider the appropriate application of the provisions to their particular operations.

In the case of fatigue risk management, the detailed list of considerations embodies the latest in human factors research, included to prompt operators to take into account the variety of risks when developing a fatigue risk management program. Such clauses are not drafted to indicate an exhaustive list, but rather to recognise that such factors would need to be at least considered when considering fatigue risks. The mandatory requirements are few, relating to safe scheduling practices, education for rail safety workers and monitoring of management systems.

Inclusion of mandatory high-level elements for the development of a fatigue risk management program and drug and alcohol management program, without being overly detailed, would support the overall improvement of managing the risks to safety in the rail industry, without being unnecessarily onerous for smaller operators. The elements will also facilitate a more consistent approach towards risk management.

The advantages of including some high-level requirements in regulations are that it provides clear, unambiguous boundaries in which to work and that it is easy for the Regulator, rail transport operators and rail safety workers to understand. There may also be advantages with respect to public perception as it may be viewed that there is an active attempt to address these high-profile risks. This regulatory approach may also have the benefit of reducing, or at least being perceived to place limits on, the potential of regulatory capture (a distortion or softening of a regulator's influence attributable to an undesirably close relationship with the regulated party).

In as far as this option provides for more comprehensive management of risks, it also provides benefits for rail safety workers in the protection of their health and wellbeing in these matters. Clear obligations as required under the drug and alcohol management program and the mandatory provision of education in terms of self-assessment with respect to drug and alcohol and fatigue risks provide improved awareness and safety culture around these risks.

A disadvantage is that the elements as stated may not remain current with the latest innovations in safety, science or technology. The prescriptive approach may only require those regulated to achieve minimum standards and may not encourage continuous improvement or innovation.

Regulator

Benefits to the Regulator are in improving the efficiency of administering and auditing fatigue and drug and alcohol management programs. Provisions in the regulations for mandatory inclusions and considerations would offer greater direction for the Regulator to assess and ensure compliance.

Providing key inclusions and considerations in regulations delivers a solid and readily available reference base by which the Regulator can challenge a fatigue risk management program or drug and alcohol management program if it considers that a rail transport operator is not managing the risks as far as is reasonably practicable.

Moreover, the Regulator would have a higher level of certainty that operators are identifying and addressing risks to a minimum standard, taking into account and assessing the relevance of the 'considerations' as stated. There is also less need for interaction between the regulator and operator during assessment, reducing costs.

In addition, it is likely that fewer investigations would be required and that prosecution attempts would be more successful, having the legislative requirements clearly stated.

Rail transport operators

The major advantage for rail transport operators of more detailed regulation is the certainty of acceptable means of compliance.

This may initially result in an increase to administrative costs whereby rail transport operators will need to justify to the Regulator that they have considered all the requirements listed in regulations, even when assessing the risk factor as not applicable to their operations. Conversely, cost savings may be realised as operators are provided with guidance about some of the factors that the Regulator would expect to form part of the risk assessment when developing the management programs for drug and alcohol and fatigue, potentially minimising the number of iterative loops required for compliance.

It is important to note that the level of knowledge in the rail industry about the safety risks of fatigue and drug and alcohols varies. Generally, larger rail transport operators have comprehensive fatigue and drug and alcohol management programs with resources available to support the ongoing review and implementation for such programs. However, some medium and smaller operations, including some tourist and heritage operators, may not have the same level of risk knowledge or expertise available within their organisations. Providing detail in regulations could produce improved risk management outcomes for operators where safety maturity is low and where there are limited resources to support the development of fatigue and drug and alcohol management programs. Some stakeholders have indicated that the level of maturity and understanding with respect to fatigue risk management is lower than that for drug and alcohol management due to the focus of the latter in road campaigns.

However, some rail transport operators have indicated that they may require specialist consultancy to interpret the new requirements (particularly the 'considerations' for fatigue risk management). It is envisioned that these costs would be minimal as guidance material will be produced through the implementation process to aid in interpretation.

The potential disadvantages of Option 3 are that the elements may be seen as a maximum and not a minimum standard for compliance. It may result in operators considering only the requirements in the National Regulations and prevent innovation and continuous improvement.

High level elements in the National Regulations may also be unnecessarily restrictive and inflexible for industry use, and potentially discouraging to business involvement. They may also place an unnecessary burden on smaller rail transport operators or those with low risk profiles. Appropriate drafting of the provisions will be required to mitigate such risks.

Rail safety workers

Rail safety workers would most likely realise benefits under this option, with rail transport operators required to address a number of aspects, such as rehabilitation, fair reporting practices, the effects of scheduling and other matters, that may prove beneficial to rail safety workers. Rail safety workers, when moving between employers, will have more certainty about the content and consistency of the drug and alcohol and fatigue risk management programs with which they must comply.

More comprehensive management of risks will result in better safety for rail safety workers.

Option 3 clearly sets out the requirements for an operator to prepare and implement a drug and alcohol management program and a fatigue risk management program and provides a more solid foundation for rail safety workers to be informed and educated about their obligations to safety management. This option would reduce the risk of inadvertent and unintended breaches by rail safety workers of an operator's policies and procedures. A rail safety worker would have a clear understanding of what constitutes being 'fit for duty' under this option as the policies would be explicitly communicated through the management programs.

Assistance could also be provided for rail safety workers who have drug and alcohol related health concerns. A rail safety worker may be more likely to seek help under this option knowing if their employer has policies in place to support and rehabilitate their workforce.

Option 4 – Include only mandatory requirements for fatigue and drug and alcohol management programs in the National Law

Economic assessment

Operators and regulators have indicated that the costs associated with this option would be equivalent to those incurred under Option 3.

The economic benefit for this option for the drug and alcohol management program is between $14.96 and $30.46 million. Refer Appendix D: Economic cost benefit analysis (section 3.9) for detailed analysis.

The economic benefit of this option for the fatigue risk management program is between $2.14 and $4.16 million. Refer Appendix D: Economic cost benefit analysis (section 3.10) for detailed analysis.

Safety

As compared with Option 2, Option 4 represents a performance-based standard supplemented by mandatory high-level elements requirements.

Again, inclusion of mandatory high-level elements for the development of a fatigue risk management program and drug and alcohol management program, without being overly detailed, is considered to support the overall improvement of managing the risks to safety, without being unnecessarily onerous for smaller operators. The elements may provide benefits, particularly consistent monitoring of safety management systems, but produce less consistency in the overall approach to these risks than under Option 3.

This option carries with it both the benefits and shortfalls of performance-based regulation (refer to Option 2 impact analysis) and would see a reduction in the level of prescription in most, if not all, states and territories with respect to the matters that must be considered in developing these management programs.

It would be assumed that guidance material (guidelines or codes of practice) would be required to assist operators with compliance if Option 4 was implemented.

Regulator

The Regulator's function is one of compliance oversight in terms of the appropriateness and effectiveness of the drug and alcohol management program and fatigue risk management program in the context of the operator's risk profile and scope of operations.

This option, with both the advantages and disadvantages as detailed in Option 2, provides the Regulator with greater information by which to monitor the effectiveness of an operator's management programs.

Regulators have indicated that there would be minimal cost differences in enforcing Option 4, as opposed to Option 3, due to the flexible and scalable nature of the 'considerations' as included under that option.

Rail transport operators

Again, this option carries with it the same benefits and shortfalls as Option 2; however requires operators to undertake some mandatory actions, which may assist with monitoring and effectiveness of the developed management programs.

Operators have also indicated that there would be minimal cost differences in enforcing Option 4, as opposed to Option 3, due to the flexible and scalable nature of the 'considerations' as included under that option.

Rail safety workers

Rail safety workers would most likely realise some benefits under this option, although not as fully as for Option 3, particularly with respect to fatigue (as the 'consideration' elements address a number of rail safety workers' concerns). To the extent that safety outcomes may be less favourable under this option, rail safety workers may be negatively impacted.

Proposal

Option 3 is proposed for the National Law.

The outcome of all options is that a rail transport operator must develop a risk-based drug and alcohol management program and fatigue risk management program; however, Option 3 is considered to provide overarching legislative requirements requiring considerations of

critical risk factors, but is broad enough to enable rail transport operators flexibility in its application.

A disadvantage of both Options 2 and 4 is that there is a greater potential for operators to exploit such a performance measure as *de facto* deregulation, either knowingly, being recalcitrant operators, or unwittingly, due to a lack of understanding of the risk being managed.

With respect to the economic benefits of the proposals, there is no material difference between Option 3 and Option 4. Since Option 4 is more aligned to Option 2 and has the potential to negatively impact on safety, Option 3 is the preferred approach as it provides greater guidance for operators.

For the Regulator, Option 3 should represent some minor cost savings given that the overarching inclusions and considerations contained in the National Law will assist the task of auditing and reviewing a safety management system. Option 3 provides a solid and readily available resource for the Regulator to assess against, which may improve efficiency and present some minor cost savings. In terms of prosecution attempts, Option 3 is considered to be superior.

Rail transport operators should find the task of compliance more straightforward under Option 3. With clear direction as to the legislative requirements, it is expected that there will be less iteration loops required before compliance is achieved for the fatigue and drug and alcohol management programs. It is recognised that, even with the provisions applied in a flexible and scalable manner, there will be an increased administrative cost due to the need for rail transport operators to justify their considerations, even when discounted as a risk factor.

Flexibility and scalability with respect to a safety management system is currently provided for in regulation 10 of the Model Regulations. It states that:

> *"A safety management system must provide for all of the matters listed in schedule 1 that are relevant to the railway operations for which the rail transport operator is accredited, or seeking to be accredited, and must* ***provide a level of detail with respect to each of those matters that is appropriate having regard to the scope, nature and risks to safety of those operations****, and to the operator's duties under s28 [General Duties] of the Act."*

Given that a drug and alcohol management program and a fatigue risk management program are just two elements of an overall safety management system, regulation 10 allows for a flexible application of the elements detailed under Option 3.

The broad guidance provided for in Option 3 should allow small or medium operators, with limited resources available to devote to the development of such programs or with low safety maturity, to improve management of the risks to safety under this option.

The National Law will also retain regulations 16 and 18 of the Model Regulations which detail the matters that must be included in a security management plan and an emergency management plan respectively. Correspondingly, with the implementation of Option 3, the same broad list of inclusions will apply to the management programs for fatigue and drug and alcohols, aligning the approach adopted for each element required for a safety management system in the National Law.

The overall cost associated with either Options 2, 3 or 4 will be largely dependent on how the National Regulator interprets the National Law. With respect to Option 3, if the National Regulator does not allow for flexibility and scalability in accordance with the scope and nature of the railway operations, then the cost to industry to comply could be high. Similarly,

under Options 2 and 4, the cost of compliance could also be high if the Regulator does not allow flexibility and enforces a set of guidelines or other material in the same way. It is recognised from some stakeholder experience that the probability of this occurring may be more likely under Option 3 and hence the cost of this less favourable interpretation has been included. It should be noted that under this interpretation, if the Regulator chooses to administer the law rigidly and to a level not necessarily commensurate with the risk, it is plausible that operators may apply for an exemption (as described in Section 6.4.4, Exemption framework). Therefore, exemption could mitigate the high cost, based on the less favourable interpretation of Option 3.

Assuming a reasonable approach by the Regulator, recognising the 'considerations' and allowing for scalability, Option 3 is considered to produce the most favourable result in terms of risk management.

This proposal is addressed in regulation 28 (Drug and alcohol management program) and regulation 29 (Fatigue risk management program) of the draft National Regulations.

6.5.4 Testing for drugs and alcohol

Policy for the testing for drugs and alcohol has been addressed individually, for the following categories:

- Roles of the Regulator and rail transport operator in testing
- Establishing a standard for drug and alcohol testing by the Regulator
- Definition of a drug for the purposes of drug testing by the Regulator
- Requirements for a 'testing officer' or other 'authorised person' to compel and coordinate testing of rail safety workers
- Drug and alcohol offences
- Economic assessment of drug and alcohol testing
- Summary of drug and alcohol testing and offence proposals

Roles and duties of the Regulator and rail transport operators in testing

Current provision

Under the General Duty provisions of the Model Bill, rail transport operators must ensure (so far as is reasonably practicable) that rail safety workers are not on duty while the relevant concentration of alcohol is present in their blood or while impaired by alcohol or a drug (section 28(2)(c)). Section 65 of the Model Bill requires a rail safety operator to develop and implement a drug and alcohol management program; such programs are subject to regular audits by the regulators. In addition, section 66 of the Model Bill provides for the testing for drugs or alcohol.

Broadly, there are two types of testing, i.e. that done for:

- compliance and enforcement purposes, typically by or on behalf of the rail safety regulator; and
- to support compliance with a rail transport operator's safety management duties, typically by a rail transport operator.

These two types of testing reflect differences in the respective roles and duties of rail transport operators and the Regulator. Associated testing procedures and requirements under rail safety laws necessarily also vary.

Agreement was not reached for testing arrangements when the Model Bill was developed. The Regulations allowed for local variations (intended as an interim arrangement until national agreement was reached); states and territories have developed independent arrangements.

All states and territories have implemented broadly similar provisions to the Model Bill requirement for rail transport operators to prepare and implement a drug and alcohol management program. They have consistently included a power for the Regulator to undertake drug and alcohol testing. Regulator testing is undertaken for the purposes of measuring the effectiveness of an operator's drug and alcohol management program and for prosecution of individual rail safety workers.

Rail safety laws in some states and territories explicitly require that a drug and alcohol testing regime be included in a rail transport operator's drug and alcohol management program, whilst those of others do not.

New South Wales rail safety law imposes a requirement on operators to undertake testing to a prescribed standard and make evidence of non-compliance available to the regulator, for the purpose of supporting (potential) prosecutions. This is intended to alleviate pressure on resources of the rail safety regulator, by requiring operators to undertake the type of testing done exclusively by or on behalf of the regulator in other states and territories.

Problem statement

In directing that a National Law be developed, COAG required that the policy issues for drug and alcohol management be resolved. This requires that the varying provisions in the rail safety laws of each state and territory be, as far as practicable, consolidated into a single, nationally uniform policy and included in the National Law.

This presents some challenges, arising from the divergent approaches taken by states and territory governments; in particular, the respective roles of rail transport operators and regulators in drug and alcohol use management and testing. A fundamental consideration is therefore to establish these roles under the National Law, which may then be used to guide how the more detailed testing provisions are developed.

Objective

To develop policy for the respective roles of the Regulator and rail transport operators in rail safety worker drug and alcohol use management, and more specifically testing, that best supports:

- the safety management duties and obligations on rail transport operators;
- providing, as far as practicable, for nationally uniform arrangements;
- promoting a culture, first and foremost, of managing rail safety worker drug and alcohol use as an occupational health and safety issue; and
- the enforcement of drug and alcohol offences by the Regulator.

Options

Option 1 – Status quo

Status quo; allow states and territories to maintain their individual testing arrangements as per existing local variations.

Option 2 – Do not prescribe operator testing requirements in the National Law

Impose no obligation on rail transport operators in the National Law to conduct evidentiary-level testing for the purpose of supporting prosecutions of rail safety workers.

Option 3 – Prescribe operator testing requirements in the National Law

Impose obligations on rail transport operators in the National Law to conduct testing, including evidentiary-level testing for the purpose of supporting prosecutions of rail safety workers.

Impact assessment

Option 1 – Status quo

As the status quo, this option would impose no regulatory impact.

However, it should be noted that maintaining local variations presents potential inefficiency for compliance and enforcement activities of the Regulator, requiring knowledge of the various testing adopted by states and territories, and for any cross-border operations, which will either comply with the most stringent requirements across all operations or maintain separate systems.

This option would not support the key objective of the reform, to support a national system of rail regulation.

Option 2 – Do not prescribe operator testing requirements in the National Law

Safety

The objective of a rail transport operator's testing regime is to manage the risks to safety so far as is reasonably practicable, to create a safety culture within the workplace and to deter rail safety workers from being unfit for duty. This is in keeping with the objectives of the National Law.

Therefore, it is considered that there will be no diminished safety if a rail transport operator does not conduct drug and alcohol testing to an evidentiary standard. The testing conducted by operators contributes to the operators' commitment to safety and provides deterrence for rail safety workers to be on duty when unfit to perform their rail safety work.

There may be the perception that removing the prescribed testing regime is a lessening of the safety standard in states where prescribed testing currently exists. It is acknowledged that this is a risk as there may be greater potential for operators to exploit such a measure as *de facto* deregulation, either knowingly, being recalcitrant operators, or unwittingly, due to a lack of understanding of the risk being managed. The inadvertent consequences may result in lower levels of testing and therefore detection, a higher level of usage with the resultant impact on incidents or accidents. However, this is considered a minor risk as it is not proposed to remove drug and alcohol testing by operators, but rather to create a stronger link between an operator's risk profile and the testing regime that they undertake.

A rail transport operator must determine the most appropriate way to manage the risks to safety that drug and alcohols present for its railway operations. A flexible approach to how

this will be achieved by each operator presents the most appropriate methodology to ensure that an operator develops a testing regime that is appropriate to the scope and nature of its railway operations and to achieve the maximum safety benefit.

Safety could be compromised if the role of the operator was broadened from one of risk management to include a more direct role in supporting prosecutions, as the focus of its testing regime would be altered.

Regulator

There may be an additional burden imposed on the Regulator, particularly in New South Wales, as it is likely that the Regulator would increase the amount of drug and alcohol testing it undertakes of rail safety workers.

The level of testing for evidentiary purposes will be determined by the Regulator on a case by case basis. Whilst any increase in testing by the Regulator would impose a significant cost, it could be minimised through an effective auditing process to ensure rail transport operators are adequately managing their risks.

The Regulator will still be required to conduct audits of a rail transport operator's drug and alcohol testing regime required as a component of their drug and alcohol management program.

Rail transport operator

There would be no undesirable impacts on operators. This option:

- meets the principles of a co-regulatory and risk management framework
- is in keeping with the intent that rail transport operators have obligations to manage risks so far as is reasonably practicable
- allows the flexibility to manage the drug and alcohol related risks
- provides a scalable solution by not imposing an unreasonable burden on rail transport operators to comply with drug and alcohol testing requirements that are beyond the scope and nature of their railway operations
- distances operators from enforcement activities thereby enhancing employer–employee relationships.

It is also envisaged a cost saving would be afforded to operators in New South Wales relating to confirmatory testing and reporting processes.

Rail safety workers

It is not envisaged that there would be any change in the status quo for rail safety workers as they would still be required to submit to a test whether it is offered by the Regulator or operator. However, a benefit could well be the improvement of the relationship between the worker and employer, which has a flow-on effect of better productivity.

Option 3 – Prescribe operator testing requirements in the National Law

Safety

The inclusion of a prescriptive testing regime for all rail transport operators would not be in keeping with the objectives of the National Law. Rail transport operators are not required to undertake an enforcement role, and placing this responsibility on them is likely to detract

from their primary objective of risk management and ensuring safe railway operations so far as is reasonably practicable.

A 'one size fits all' approach to drug and alcohol testing will serve to introduce costs to the industry where corresponding safety benefits may not be realised. This would specifically include requiring an operator with a relatively low risk profile to undertake a testing regime considered too onerous and costly to achieve improved safety outcomes.

Regulator

This would assist the Regulator in its role of enforcement by increasing its resource pool allowing additional evidentiary tests that otherwise would not have occurred. Although this may be a more cost effective option for the Regulator, it does not lend itself to the principles of risk management upon which the National Law is based.

Rail transport operator

This would impose additional costs on operators in undertaking a prescribed number of tests and some, or all, to an evidentiary standard. Additionally, it would remove the flexibility (and possibly the responsibility) from operators to manage risks as the option presents a 'one-size-fits-all' approach.

Furthermore, smaller operators will be unable to adjust to the risk and size of their operations (scalability) by undertaking only sufficient tests to ensure their drug and alcohol management programs are effective.

It is also likely to negatively impact on the relationship between the employer and the employee and undermine the effectiveness of the drug and alcohol management program in promoting the health and safety of rail safety workers.

Rail safety workers

It is not envisaged there will be any adverse impact on workers, as they are required to undertake a test when requested, whether it is required for evidentiary purposes or not, no matter whether it is requested by the Regulator or operator. However, consideration should also be given to employer and employee relationships that may become stressed when the operator conducts tests for evidentiary purposes which may also impact on productivity.

Proposal

Option 2 is proposed for the National Law.

Under this proposal, the National Law does not prescribe the testing requirements for rail transport operators and does not require operators to provide evidentiary test results to the Regulator.

For the majority of rail transport operators Option 2 does not present any additional compliance or administrative burden. Operators would continue with their current drug and alcohol testing regime as described in their drug and alcohol management program, subject to auditing by the Regulator.

Option 2 also presents considerable savings to those rail transport operators currently operating in New South Wales, who are required to undertake tests to an evidentiary standard currently.

This option also provides flexibility and scalability for rail transport operators to assess the cost of conducting drug and alcohol tests against the potential safety benefits that could be realised, and to manage their risks in accordance with the risk profile of their operations.

Establishing a standard for drug and alcohol testing by the Regulator

Current provision

The Model Bill is silent on a standard for drug and alcohol testing undertaken by rail safety regulators.

A standard may prescribe matters such as allowable test types, equipment that may be used to obtain a test sample and determine a result, the circumstances under which a sample may be taken, sample handling and analysis procedures.

The testing standard includes procedural matters for how evidence of drug and alcohol use is collected, but excludes matters of pertinence for rail transport operators and safety workers, in undertaking their duty to comply with rail safety law. The latter includes particularly what constitutes an offence.

Permitting local variations in the Model Bill has resulted in various test types and test methods being utilised by the different states and territories. The rail safety law of most states and territories references their respective road traffic laws, for the purposes of prescribing drugs and alcohol testing standards. An exception is the rail safety law of New South Wales, which prescribes urine testing instead of oral fluid (saliva) testing in its road traffic law.

Problem statement

In undertaking drug and alcohol tests to support potential prosecutions of rail safety workers, it is important that tests performed under the authority of the Regulator adhere to a robust standard, suitable to demonstrate their accuracy and integrity in a court.

Under a single national rail safety regulator, the National Law would ideally prescribe a single standard for testing. However, a limitation arises from the common practice of appointing police officers as authorised persons under rail safety law.

Police already undertake drug and alcohol testing of motor vehicle drivers under the varying testing standards, as prescribed in the road traffic laws of individual states and territories. At least some police services have stated that it would be impractical for their officers to undertake such testing to multiple standards (i.e. rail safety workers under the National Law and motor vehicle drivers under state or territory road traffic law).

As police are already trained and experienced in testing arrangements under their respective road traffic laws, they have expressed reluctance to support testing to any separate and additional standard under the National Law.

Objective

To establish a drug and alcohol testing standard(s) that supports the broader objectives of the National Law, particularly to ensure safety of railway operations, while balancing the competing priorities of national uniformity and the need to accommodate the existing (road traffic) testing arrangements of individual states and territories.

Options

Option 1

Status quo; do not prescribe drug and alcohol tests and procedures undertaken by the Regulator in the National Law, thus retaining local variations.

Option 2

Prescribe uniform national drug and alcohol tests and procedures to be undertaken by the Regulator in the National Law.

Impact assessment

Option 1 – Status quo

As the status quo, this option would impose no regulatory impact.

Under this option, the national Regulator would potentially be required to undertake different types of tests and employ different methods of analysis and reporting in each state and territory. This would also require different training for authorised officers and the development and maintenance of different enforcement guidelines and forms.

However, it is intended that the national Regulator would operate with offices in each state and territory. As a result, it is unlikely that it would be necessary for the same officers to conduct testing in more than one state, meaning there would be little or no impact on the authorised officers themselves.

While standards for drug and alcohol testing undertaken on behalf of the Regulator vary between states and territories, the differences are almost exclusively of a technical or procedural nature, with negligible impact on rail transport operators and safety workers.

Option 2 – Prescribe national drug and alcohol tests and procedures to be undertaken by the Regulator in the National Law

Safety

Whilst Option 2 represents a nationally consistent approach and would meet the objectives of the National Law, it is expected that there would be little or no safety benefit in altering current evidentiary test methodology in each state and territory.

The National Regulator conducts drug and alcohol tests to ensure compliance with the National Law and to prosecute, where applicable, for any breach of the National Law. The primary purpose of Regulator testing to an evidentiary level is to deter rail safety workers from being unfit for duty and unable to perform rail safety work and is usually the last resort in securing compliance.

There would be no measurable improvement in safety to justify the costs that would be incurred to establish a national drug and alcohol testing regime for the rail industry (when it has not yet been achieved in road) and the infrastructure that would be required to support the new scheme. Furthermore, a new testing regime would need to be proven through the court process in each state and territory and may have a detrimental impact on safety if the chain of evidence could not be protected and court proceedings undertaken for breaches of the National Law were ultimately dismissed.

Regulator

This is likely to result in a change in current test practices in all states and territories. This presents a cost burden on the Regulator to accredit additional laboratories and a risk that there may be an insufficient number of laboratories capable of meeting the required standards (the same standard) for analysis of test samples across Australia.

Though most states and territories reference road legislation in their rail safety legislation, there may be subtle differences in the manner in which samples are taken, controlled and analysed. There may also be different evidentiary reporting requirements in each state and

territory. Harmonising the different roadside testing methodologies and procedures in order to achieve a national testing regime for rail may be difficult. Furthermore, given that police may conduct drug and alcohol testing of rail safety workers in some circumstances (particularly after an incident or accident) it is unreasonable to expect that they would test in a different manner to that which is currently in place for the road environment.

Whilst a national uniform testing regime would be desirable, altering the current testing regime in each state and territory would impose a significant cost for little or no safety benefit.

Rail transport operators

There would be no impact on operators.

Rail safety workers

There would be no impact on workers as the test practices must have the same veracity whether conducted for rail or road.

Proposal

Option 1 is proposed for the National Law.

Drug and alcohol tests and procedures undertaken by the Regulator should not be prescribed in the National Law. It is proposed that states and territories maintain their existing arrangements for drug and alcohol testing.

Whilst national consistency is the objective of the rail safety reform, it is not possible to have application of a single national testing regime in rail when it has not been established in the road environment. The process in the road environment has been tested and proven through the court process over many years. It is a widely accepted methodology and can adequately support prosecutions under rail safety law.

Given that police may conduct testing under the National Law in certain circumstances, it is unreasonable to expect that they would test in a different manner than their current road procedures.

A change to a nationally uniform testing regime for the national Regulator would impose a significant cost burden. Costs would be incurred to ensure that new procedures could be applied in each state and territory, to require police officers to undertake alternate testing from roadside methodologies; in addition to the potential requirement for investment in the infrastructure (laboratories) and appropriately trained resources. It is likely that the safety benefits realised from undertaking this considerable investment would be minimal.

It is intended that any prosecution under the National Law would be conducted by the relevant state or territory in accordance with its local legislation. In this instance, it therefore seems sensible to have local variations.

Definition of a drug for the purposes of drug testing by the Regulator

Current provision

Responsibility for prescribing substances as a drug under the Model Law is delegated to responsible ministers of each state and territory. Additionally, the Model Law defines a drug to be any substance, other than alcohol, that "*deprives [a] person.. of his or her normal mental or physical faculties*".

In their rail safety laws, some states and territories have defined "drug" by reference to a prescribed list in regulations (usually cannabis, speed and ecstasy) whilst others have made reference to other laws such as their local road transport laws, the *Drugs Misuse and Trafficking Act (1985)* or the *Drugs Poisons and Controlled Substances Act (1981)* that contain lists of substances that are deemed to be drugs.

Problem statement

Analysis of all the drugs referenced in current state and territory legislation showed that there were over 700 different drugs listed. Additionally, there was duplication of certain drugs due to different laws being referenced by states and territories in their applying law. There is little or no consistency in how drugs are referenced and for the purposes of defining offences in the National Law.

For the purpose of setting clear requirements for rail safety workers operating under a national scheme, it is preferable that a national, consolidated definition of a drug is prescribed.

Objective

To prescribe a definition of drug in the National Law, that supports the broader compliance and enforcement activities for drug use by rail safety workers, and sets a clear requirement for what constitutes a proscribed drug.

Options

Option 1

Status quo; allow individual states and territories to maintain their current references to drugs.

Option 2

Include a schedule of drugs in the National Law, making reference to the Commonwealth Government's *Poisons Standard 2010*[39] (as amended) for a nationally consistent schedule of drugs.

Impact assessment

Option 1 – Status quo

As the status quo, this option would impose no regulatory impact.

However, it should be noted that maintaining local variations presents potential inefficiency for compliance and enforcement activities of the Regulator, particularly in terms of

[39] Available from http://www.comlaw.gov.au/Details/F2010L02386.

prosecutions for drug-related breaches. The Regulator would also be required to prove that a substance found in the system of a rail safety worker is a drug for all court proceedings unless the minister has utilised the power to declare the substance in question to be a drug. This would necessitate the attendance of experts at each court hearing at significant cost.

This option would also not support the key objective of the reform: to support a national system of rail regulation.

Option 2 – Include a national drug schedule in the National Law

Safety

Option 2 would provide clarity to the Regulator, duty holders and rail safety workers about what substances are considered drugs under the National Law. A nationally consistent schedule of drugs is likely to improve safety so far as inadvertent breaches could be avoided, particularly in relation to prescription drugs.

Regulator

This would eliminate the requirement for the Regulator to call an expert to prove that a substance is a drug in court proceedings. A certificate of analysis from an approved laboratory naming the substance would be sufficient to satisfy a prosecution if the substance was on the declared list.

The inclusion of the reference to the Commonwealth *Poisons Standard 2010* in the National Law would automatically define all substances in that standard to be a drug. This would present a significant cost saving in the event of a prosecution, as experts would not be required to give evidence that a substance identified in a positive drug test analysis is in fact a drug.

Rail transport operators

There is a negligible impact on the rail transport operator as, based on the previous proposals that operators do not undertake evidentiary testing, operators are not involved in enforcement activities.

Rail safety workers

Rail safety workers will benefit from the provision of clarity about which substances are drugs for the purposes of the National Law, including prescription and over the counter medications that may impact on their capacity to perform rail safety work.

The inclusion of a declared list of drugs would also inform and educate rail safety workers about what is and is not considered to be a drug in the context of the National Law. There are a number of prescription and over the counter medications that have the ability to impair a person. A reference to a standard list of drugs in the National Law would provide a reasonable level of certainty for a rail safety worker to determine what effect, if any, a drug they are prescribed or purchase over the counter may have on their ability to perform rail safety work.

Proposal

Option 2 is proposed for the National Law.

A nationally consistent definition of a drug is required to ensure uniformity in the event of prosecutions of drug related offences. Option 2 would also remove the possibility of inconsistencies and duplication of substances deemed to be drugs.

It is considered that the overall cost impact of all options is low given the infrequency of prosecutions for drug-related breaches of rail safety legislation However, where a drug-related prosecution was to be undertaken by the Regulator, reference to a national schedule of drugs in the National Law would yield a benefit, by alleviating a need for the prosecution to prove a substance to be a drug.

Requirements for an authorised person to compel and coordinate testing of rail safety workers

Current provision

As it allowed for local variations in implementing drug and alcohol testing arrangements, the Model Bill does not define a person who is authorised to compel and coordinate drug and alcohol testing of rail safety workers.

Problem statement

It may be necessary to define an 'authorised person' with the power to compel a rail safety worker to undergo a drug and alcohol test, and to coordinate and control the chain of evidence in order to support the provisions in the National Law for drug and alcohol testing to be undertaken by or on behalf of the Regulator, and the associated offences and penalties.

If the Regulator does not have persons authorised to compel and coordinate drug and alcohol testing, he or she would be unable to prosecute any persons for a breach of the associated offences. While authorised persons could be specified in the law with local variations, such variations would risk reducing clarity for rail safety workers, in understanding who was authorised to compel them to submit to drug and alcohol tests.

Objective

To establish who may be authorised to compel a rail safety worker to undergo a drug and alcohol test, in a manner that supports the Regulator in undertaking a program of drug and alcohol testing with maximum effectiveness, efficiency and transparency.

Options

Option 1

Status quo; allow local variations (i.e. delegate the responsibility to states and territories for specifying in their applying law who an appointed person may be and/or how they may be appointed), by not defining a 'testing officer' or other 'authorised person' in the National Law.

Option 2

Include a definition of a 'authorised person' in the National Law that identifies the categories of persons who may be appointed by the Regulator to compel rail safety workers to undergo a drug and alcohol tests.

Impact assessment

Option 1 – Status quo

As the status quo, this option would impose no regulatory impact.

However, it should be noted that maintaining local variations for this matter may be incongruous with other proposals around testing for drugs or alcohol. Without defining an

'authorised person', the Regulator may be unable to prosecute for breach of drug and alcohol offences contained in the draft National Law.

Option 2 – Include a definition of a 'authorised person' in the National Law

Safety

Defining an authorised person in the National Law would offer some safety benefits and clarity, particularly in relation to who is lawfully able to conduct drug and alcohol testing of rail safety workers.

The defined person would be adequately trained to follow procedures established by the National Regulator that would protect the health and wellbeing of all rail safety workers who undergo testing. The testing officer or other authorised person would also be responsible to protect the chain of evidence for all test samples taken and ensure that court proceedings are not jeopardised by insufficient evidence.

Defining an authorised person in the National Law ensures a robust process for prosecution of breaches of the National Law and maximises the effects of the deterrence objective of the Regulator drug and alcohol testing regime.

Regulator

It is envisaged there would be significant cost associated with the requirement for the Regulator to have specific and adequately trained resources to enable them to successfully prosecute for breaches of the drug and alcohol offences in the National Law. It would require up skilling existing staff to undertake the duties of an authorised person or additional staff to meet the testing requirements for the Regulator.

Appropriately trained resources to protect the chain of evidence, from the time the test sample is taken to the analysis of results, are imperative to avoid disputes over the validity and accuracy of the evidence presented in court proceedings.

Rail transport operators

The impact on operators is low. As a result of a previous proposal in this section, rail transport operators would not require the Regulator to authorise resources employed to give effect to the testing regime specified in their drug and alcohol management program.

Rail safety workers

This option may serve to assure rail safety workers that the testing process and sample analysis has been controlled, and that the results are accurate and reliable.

Proposal

Option 2 is proposed for the National Law.

It is necessary to define an authorised person with the power to compel a rail safety worker to undergo a drug and alcohol test, and to coordinate and control the chain of evidence, in order to give effect to the offences and penalties contained in the National Law. It is considered to be the responsibility of the Regulator to have appropriate resources to ensure a rail safety worker is not erroneously charged with a breach of the National Law, or charged with an offence without sufficient evidence to substantiate such charges.

Drug and alcohol offences

Current provision

The Model Bill contains an offence if a rail transport operator fails to prepare and implement a drug and alcohol management program.

The Model Bill includes General Safety Duty provisions, requiring a rail safety worker to take reasonable care not to place themselves or others at risk. Workers are also prohibited from wilfully or recklessly place the safety of others at risk.

As a result of the local variations provided for in the Model Law in relation to drug and alcohol testing, no offences were included for rail safety workers in relation to the use of drugs and alcohol. However, offences are included in the rail safety laws of all states and territories .

All states and territories include an offence for exceeding a prescribed concentration of alcohol (PCA), with the limit ranging from 0.00 and 0.02 grams of alcohol in 100ml of breath or blood. New South Wales, South Australia and Queensland also have in their existing rail safety legislation an offence for being under the influence of (or impaired by) alcohol. All states and territories have an offence relating to impairment by a drug, albeit with some subtle differences.

There are various other offences used to support the primary offences of exceeding a PCA or impairment and those relate to refusals, interference, tampering, etc.

Problem statement

Continuation of the current circumstance in which offences for drug and alcohol use vary between states and territories would, under a National Law and Regulator, contribute to inconsistency and a lack of clarity for precisely what constituted an offence. It would also perpetuate the existing circumstance in which rail transport operators must develop and implement drug and alcohol use management programs that comply with varying laws.

Objective

To establish uniform offences for drug and alcohol use in the National Law, that support the broader objective of ensuring safe railway operations.

Options

Option 1

Status quo; remain silent in the National Law and allow local variations for drug and alcohol offences.

Option 2

Include the following offences in the National Law, for a rail safety worker to carry out, or attempt to carry out, rail safety work:

- alcohol:
    - with any alcohol detected above the prescribed concentration of alcohol (PCA) > 0.00 grams/100ml of blood.

- drugs:
    - an ‘offence of presence of drug’ where any individual would be deemed impaired if a specific nominated substance is identified in their sample via appropriate evidentiary forensic analysis. These nominated substances are:
        - Cannabis THC (delta-9-tetrahydrocannabinol)
        - ‘speed’ (methyl amphetamine)
        - Ecstasy (3,4-Methylenedioxy-N-Methylamphetamine (MDMA)).
    - an “offence by indicia of being impaired by a drug” where observations would have to be collected as to the state of the individual, and with consideration of their ability to work safely. In addition, an appropriate evidentiary forensic analysis of their supplied sample and interpretation of this result (for example, considering therapeutic ranges of specific drugs) would be needed to support the indicia and enable a conclusion to be drawn that they were impaired by a defined drug.
- other:
    - an offence for a rail safety worker, without reasonable excuse, to refuse to undergo a drug and alcohol test
    - an offence for a person to interfere or tamper with test samples
    - an offence for a person to destroy test samples
    - an offence for failure to comply with a ‘reasonable direction’ from the authorised person described previously.

The above offences mirror those currently existing locally in each state and territory, albeit removing variations due to differing testing regimes.

Impact assessment

Option 1 – Status quo

As the status quo, this option would impose no regulatory impact.

However, it should be noted that maintaining local variations presents potential inefficiency for compliance and enforcement activities of the Regulator. Given the varied nature of offences in each state and territory, needing to determine whether an offence has been committed in a given state or territory results in productivity costs.

This option would also not support the key objective of the reform: to support a national system of rail regulation.

Option 2 – Include drug and alcohol offences in the National Law

Safety

Safety benefits could be realised with a national approach to drug and alcohol offences in the National Law. Prescribing consistent offences across borders will eliminate confusion for rail safety workers and minimise the potential for inadvertent breaches of the National Law. It is likely that alignment of state and territory offences in relation to drug and alcohol use would provide clarity to rail safety workers and ensure that they are treated equally under the National Law regardless of their geographic location.

The shift to a limit of 0.00 grams/100ml of blood PCA would represent a reduction in some states and one territory. However, in practice it would have a negligible impact, as rail transport operators predominantly already maintain an organisational policy of limiting rail safety workers' PCA to 0.00.

Regulator

It is envisaged that benefits would be realised from having a nationally consistent approach to offences, with the inefficiencies presented under Option 1 eliminated. Aside from administering a test program, these would include costs arising from training and developing guidelines.

Rail transport operators

There would be some savings to rail transport operators from only having to develop and implement a drugs and alcohol management program that complied with a single set of national offences. However, these would be absorbed within those assessed in section 6.5.3 (

Drug and alcohol and fatigue risk management).

Rail safety workers

Rail safety workers would benefit from nationally consistent drug and alcohol offences, particularly through the provision of enhanced clarity for what constitutes an offence.

Occasional concerns have been expressed that the shift from a limit of 0.02 grams/100ml of blood PCA (as currently exists in some states and territories) to 0.00 in the National Law may lead to rail safety workers more frequently and inadvertently breaching the law. However, it is understood that testing procedures utilised by states and territories effectively mitigate the risk of non-negative tests arising from the inadvertent consumption of alcohol, e.g. through some mouthwash products. The adoption of a 0.00 grams/100ml of blood PCA is therefore assessed as having a negligible impact on the risk of rail safety workers inadvertently committing an offence.

Proposal

Option 2 is proposed for the National Law.

The cost to prosecute is assumed to be unchanged regardless of the specific offences contained in the National Law. Whilst testing methodology and procedures may be subject to local variations, as previously proposed, it is desirable to have the same overarching offences applicable to all rail safety workers nationally.

National consistency for drug and alcohol offences will ensure efficiency for the Regulator and consistent application of obligations and requirements of all rail safety workers.

Offences in the National Law have the objective of deterring unsafe acts in the course of undertaking rail safety work; together with an appropriate safety management plan, this should reduce of the impacts of drug and alcohol use in the workplace.

Economic assessment of drug and alcohol testing

The cost impact of creating a national schedule for the definition of a drug and the inclusion of drug and alcohol offences in the National Law is negligible. The total number of successful prosecutions for a drug or alcohol breach since the implementation of the Model Bill is 21. This equates to approximately 3 to 4 prosecutions per year. It is expected that prosecutions will remain infrequent when the National Law is applied.

Additionally, retaining the current regulator test methods and procedures in each state and territory presents no change and therefore no cost impact.

The major cost impact associated with the proposals outlined in this section are related to the prescription of a testing regime for rail transport operators in the National Law and mandating a requirement for operators to conduct drug and alcohol tests to an evidentiary standard.

The cost stems from the need for operators to undertake confirmatory drug and alcohol tests, reporting requirements for evidentiary testing to support potential prosecutions for breaches of the National Law and the need to employ an authorised person to secure the chain of evidence.

To determine the economic impacts of the proposals, given the areas that are most likely to impose costs, three aggregated options may be considered:

Option 1: Status quo (local variations)

There would be no economic impact of retaining the status quo, that is, local variations with respect to drug and alcohol testing.

Option 2: Do not prescribe a rail transport operator testing regime in the National Law and do not mandate evidentiary drug and alcohol testing by operators

The net benefit of this option is between $6.90 and $8.41 million. Refer Appendix D: Economic cost benefit analysis (section 3.11) for detailed analysis.

It should be noted that tourist and heritage operators are currently exempt from complying with drug and alcohol testing requirements in a number of states and territories, resulting in a relatively minor cost to comply with this option. It is expected however, that tourist and heritage operators would continue to be provided with exemptions, reducing the cost impact of drug and alcohol testing on the sector.

Option 3: Prescribe a rail transport operator testing regime in the National Law and mandate evidentiary drug and alcohol testing by operators

The net cost of this option is between $12.79 and $20.72 million. Refer Appendix D: Economic cost benefit analysis (section 3.11) for detailed analysis.

Summary of drug and alcohol testing and offence proposals

Option 2 is proposed for the National Law.

It is therefore proposed that the National Law:

- does not prescribe rail transport operator testing requirements and places no obligation on rail transport operators to conduct evidentiary level testing;
- does not prescribe drug and alcohol test types and procedures to be undertaken by the Regulator in the National Law, i.e. by retaining the provision for local variations ;
- references the Commonwealth Government's *Poisons Standard 2010* for a nationally consistent schedule of drugs;
- includes a definition for an 'authorised person', for the purposes of co-ordinating the Regulator drug and alcohol testing regime to an evidentiary standard;

- includes the following drug and alcohol offences in the National Law:
    - prescribed concentration of alcohol (PCA) > 0.00 grams / 100ml
    - an “offence of presence of drug” where any individual would be deemed as being impaired if a specific nominated substance is identified in their sample via appropriate evidentiary forensic analysis. These nominated substances are:
        - Cannabis THC (delta-9-tetrahydrocannabinol)
        - ‘speed’ (methyl amphetamine)
        - Ecstasy (3,4-Methylenedioxy-N-Methylamphetamine (MDMA)).
    - an ‘offence by indicia of being impaired by a drug’ where observations would have to be collected as to the state of the individual, and with consideration of their ability to work safely
        - In addition, an appropriate evidentiary forensic analysis of their supplied sample and interpretation of this result (for example, considering therapeutic ranges of specific drugs) would be needed to support the indicia and enable a conclusion to be drawn that they were impaired by a defined drug
    - an offence for a rail safety worker, without reasonable excuse, to refuse to undergo a drug and alcohol test
    - an offence for a person to interfere or tamper with test samples
    - an offence for a person to destroy test samples
    - an offence for failure to comply with a ‘reasonable direction’ from the authorised person.

The above proposals are in accordance with the objectives of the National Reform, supporting national consistency, streamlining regulatory arrangements and reducing the compliance burden for business.

The National Law is based on the principles of risk management by rail transport operators, the proposals outlined in this section are in keeping with the risk management obligations of operators, in addition to the Regulator assuming a role of ensuring compliance with the National Law. Option 3, however, imposes significant costs on the rail industry and is not aligned with the underlying principles of the National Law.

6.5.5 Fatigue risk management – hours of work and rest

Current provision

Section 67 of the Model Bill requires rail transport operators to prepare and implement a fatigue risk management program for rail safety workers as a mandatory element of the safety management system.

The Model Law imposes no specific limit on the maximum hours of work or minimum periods of rest for rail safety workers (often referred to as a ‘safety net’ for broader fatigue management measures).

Rather, it is intended that any such limits would be included, as necessary, within a rail transport operator’s fatigue risk management program.

The New South Wales approach

In New South Wales, a different approach has been adopted: overlaying general fatigue risk management provisions with maximum working hours and minimum rest periods, for train drivers only. These provisions were implemented following some major incidents and privatisation of the rail industry, and concern that these were associated with some rail safety workers undertaking excessive work/shift periods.

The provisions impose maximum working hours and minimum rest periods that vary with factors including the type of train being driven (passenger or freight) and the number of drivers available.

An operator can apply for an exemption to all or part of those requirements, based on satisfying certain conditions necessary to demonstrate that they have identified fatigue-related risks and implemented measures sufficient to substitute for the default requirements.

The provisions for maximum working hours and minimum rest periods are prescribed in Schedule 2 of the *Rail Safety Act 2008* (New South Wales), with those for exemptions in Regulation 14 of the *Rail Safety (General) Regulations 2008* (New South Wales).

A similar approach is being considered by the Queensland Government.

Problem statement

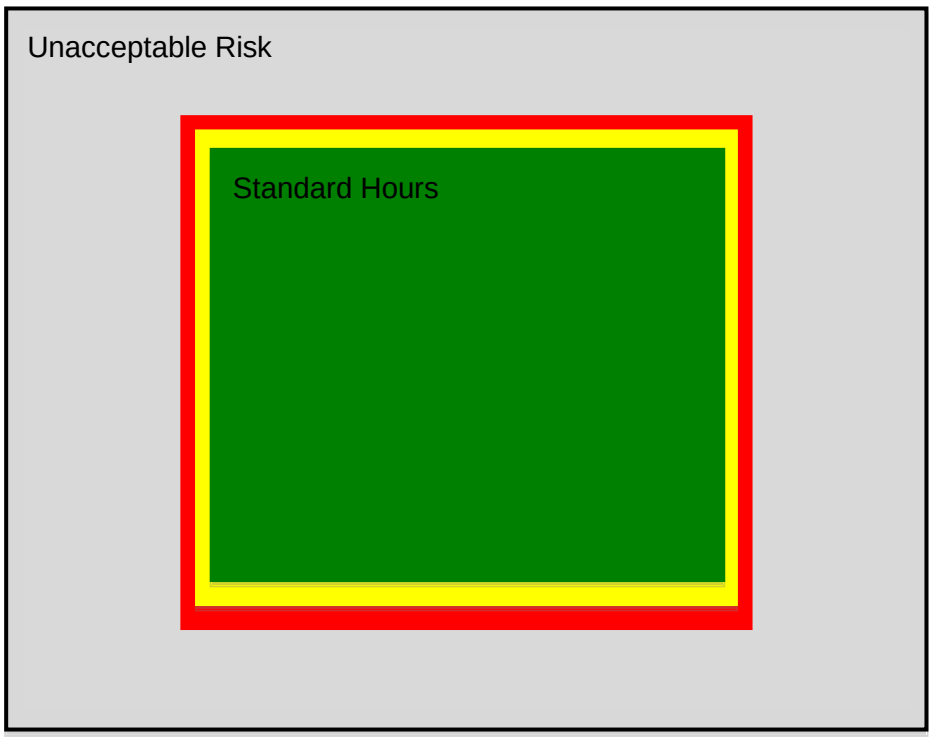
COAG required that, amongst other things, policy for fatigue risk management in the rail sector be established and included in the National Law. This requires that specific policy be resolved for what part, if any, prescribed maximum working hours and minimum rest periods should have in the National Law.

Progress to date

In 2010, the NTC convened an Expert Panel to develop policy for matters including rail safety fatigue risk management. The Expert Panel was specifically asked to consider and draw recommendations on the need for regulating maximum working hours and minimum rest periods, and if such a need was established, how it should be regulated in the National Law.

In May 2011, ATC approved recommendations by the (majority of the) Expert Panel for the National Law to make provision for "*a broad 'safety net' framework [which] should not involve a single, legislated limit on work hours for all [rail safety workers].. but sets of guidance materials for use in both developing and monitoring fatigue management plans*". The recommendations included for adopting a multi-tiered approach, that would match degrees of risk with maximum working hours and minimum rest periods. This approach is depicted in Figure 6, below.

Figure 6. Visual representation of a risk-based framework for determining maximum working hours and minimum rest periods.



A second panel, the Rail Safety Fatigue Management Group, was convened in August 2011 to finalise some of the details of the guidance framework, including more specific advice on how degrees of operational risk/measures taken to manage it may impact on maximum working hours and minimum rest periods.

Further steps

The Expert Panel recommendations included that the advice be implemented as guidance material, rather than prescriptive limitations in the National Law. To reflect this, the guidance material will be developed in the form of a code of practice. A draft code is scheduled to be submitted, accompanied by a regulatory impact statement (separate to this one), to SCOTI for voting in mid-2012.

It should be noted that as the Expert Panel recommendations (i.e. excluding the additional guidance material currently being developed) were approved by Ministerial Council (then operating as ATC, now SCOTI), there is no plan to reconsider them or policy relating to them in the immediate future. The outcomes are described here for information only.

6.5.6 Assessment of competence

Current provision

The Model Bill imposes a responsibility on rail transport operators to ensure that rail safety workers are competent to carry out work done in the course of their operations. It requires that operators must assess competence by reference to:

- any applicable qualifications and units of competence recognised under the Australian Quality Training Framework (AQTF), or if none apply
- any applicable prescribed provisions of the Model Regulations, and
- the knowledge and skills of the rail safety worker.

Problem statement

The Australian Quality Training Framework is the nationally recognised quality assurance framework for the delivery of training. Reference to the framework was intended to encourage operators to develop rail safety workers' skills to a transportable and nationally recognised standard. In practice, this would mean training rail safety workers to a formal curriculum delivered by (Australian Quality Training Framework accredited) registered training organisations, rather than 'in-house' training developed by unaccredited persons.

A review of the Model Bill provision revealed a lack of clarity in precisely what standard it held rail transport operators to, in assessing rail safety worker competence. This was due to ambiguity in the term "by reference to…the [Australian Quality Training Framework]", which could be interpreted as a requirement merely to use the framework as a benchmark against which to assess competence, or more strictly as requiring formal assessment under it (that is, to enrol rail safety workers in Australian Quality Training Framework sanctioned courses).

Additionally, the Australian Quality Training Framework refers to the framework under which training is delivered, rather than the competency units/standards themselves, which fall under the Australian Qualifications Framework (AQF). Although the two frameworks work hand-in-hand, reference in the Model Bill exclusively to the Australian Quality Training Framework also caused a degree of confusion.

A broader issue with the Model Bill provision is concern by some stakeholders about whether rail transport operators should be required to assess rail safety worker competence under the Australian Qualifications Framework/Australian Quality Training Framework, or whether they should be permitted to develop a competency assessment strategy free of any prescriptive constraints. As this would constitute revisiting a policy agreed in the process of developing the Model Bill, this issue was considered to be beyond the scope of developing a draft National Law.

Operators, particularly small or remote operators, have raised concerns with the explicit requirements to assess competence against the Australian Qualifications Framework/Australian Quality Training Framework, due to cost and access to registered training organisations (which must deliver training modules for recognition under the Australian Qualifications Framework).

Objective

To develop provisions in the National Law that help ensure rail safety workers are suitably assessed as competent to perform, in a manner that supports the broader undertaking of safe railway operations, any specific tasks and duties. Also to develop such provisions in a

manner that supports the National Law guiding principles of assisting rail transport operators in achieving productivity and efficient operation of the regulatory scheme.

Options

Option 1

Retain the status quo, adopting the Model Bill provision into the National Law unchanged.

Option 2

Amend the Model Bill provision to clarify that rail safety worker competence must be assessed in accordance with applicable qualifications or units of competence under the Australian Qualifications Framework. Include a provision to allow, if it is not reasonably practicable for a rail transport operator to assess competence in accordance with the Australian Qualifications Framework, that they may assess competence by other means (i.e. other applicable qualifications and sufficient knowledge and skills).

Other requirements of the Model Bill provision would remain unchanged.

Impact assessment

Option 1 – Status quo

There would be no impact of retaining the status quo, although uncertainty over how the existing provision should be interpreted would continue.

Option 2 – Amend provision for clarity in the use of the AQF framework

This option would remove the uncertainty over how the Model Bill provision is interpreted and better ensure that the policy intent was supported by the provision in law. Referencing the Australian Qualifications Framework instead of the Australian Quality Training Framework, would better support the existing policy objective of requiring rail transport operators to assess competence in accordance with Australian Qualifications Framework sanctioned qualifications and units of competence.

Other than clarifying the policy intent of assessing rail safety worker competence, there would be no measurable impact of this option. In practice, rail transport operators and most safety regulators have interpreted it this way.

Proposal

Option 2 is proposed, as it better supports the policy objective of assessing rail safety worker competence and does not impose any additional burden on any parties.

The proposal is addressed in section 117 (Assessment of competence) of the draft National Law.

6.5.7 Train communication systems

Current provision

There is no explicit requirement in the Model Law for rail transport operators to fit and utilise train communication systems. However, it is necessary to satisfy the General Safety Duties provisions of Part 4, Division 1 and the Safety Management provisions of Part 4, Division 4 of the Model Bill.

Problem statement

Effective communication between train drivers and relevant network control officers is an important element of coordinating the safe movement of rolling stock on a rail network. Although arguably implicit in general requirements of the Model Bill for rail transport operators to manage risks to safety, rail regulators have reported instances where insufficient means of communication have been identified.

By definition, properly functioning communication systems must be interoperable. While rolling stock operators are primarily responsible for communication equipment fitted to trains and rail infrastructure managers for the communication equipment of network controllers, they are jointly responsible for their interoperability.

Effective means of communication is imperative during emergencies, when information must be able to be clearly communicated and relayed across a rail network without any undue delay.

Objective

To establish a standard for train communications systems in the National Law, that better clarifies the duty on rolling stock operators and rail infrastructure managers to ensure that such systems support the undertaking of safe operations.

Options

Option 1

Status quo. The matter of train communications would continue to be managed through compliance with the General Safety Duties, that is, without being addressed by any specific provisions in law.

Option 2

To prescribe general safety duties for both rail infrastructure managers and rolling stock operators establish and maintain communications systems and procedures necessary to support the undertaking of safe railway operations.

Option 3

To develop a standard that specifies what is necessary for train communication systems to support the undertaking of safe railway operations, and include it in the National Law.

Such a standard has not yet been developed.

Impact assessment

Option 1 – Status quo

There would be no impact of maintaining the status quo. In practice, rail transport operators and the Regulator would interpret what standard of train communications is necessary to support compliance with the Rail Safety Duties.

Option 2 – Prescribe a general requirement for train communications systems

Economic assessment

On the understanding that existing communication systems would comply with the proposal, there is no measurable cost impact.

Safety

If the proposal would better clarify the requirement for effective and interoperable train communication systems, a safety improvement may be expected. Rail transport operators advise that there is already broad compliance with the proposal. Therefore, for most operators, there may be no impact on safety.

Regulators

If the proposal would better clarify the requirement for effective and interoperable train communication systems, it may reduce the need for the Regulator to allocate resources to achieving that objective. Under existing arrangements, resources may be needed to review operators' communication systems, issue advice for how they may need to be improved and take other associated measures, for example issuing improvement notices. However, due to reported broad compliance with the proposal, the impact on the Regulator is assessed as minor.

Rail transport operators

Different views were expressed by rail transport operators in assessing the impact of this proposal. It is likely that those differences could be attributed mostly to variations in how the proposal was interpreted; in particular the qualification of so far as is reasonably practicable.

Rail transport operators reported that the cost of implementing train communication systems (in general, rather than specifically as a result of the proposal) varies widely, depending on factors such as the size of an operator and the technology utilised. Costs are understood to vary from a few thousand dollars for a very small operator in a relatively low risk environment, up to hundreds of millions for a major rail infrastructure manager of a complex network utilised by numerous rolling stock operators.

Accordingly, some rail transport operators stated that changes to train communication system requirements had the potential to impose high costs on them as they may require operators to implement new communication systems.

The Association of Tourist and Heritage Rail Australia stated that some tourist and heritage operators not on a main line may need to install upgraded or new communication systems. In one example the quoted cost was $100,000.

Some large rail transport operators also stated that upgrades to their systems would be required. This contrasted with the predominant view of rail safety regulators, who stated that the proposal imposed only a negligible or minimal impact.

Some specific issues highlighted by rail transport operators included communication 'black spots' on a rail network (for example, incomplete radio or general packet radio service

(GPRS) network coverage), as well as the implications of a train communication device failing whilst the train was in service. Such circumstances and events may result in a lack of communication capability at a given location and/or point in time.

The proposal includes a qualification of 'so far as is reasonably practicable'. For the purpose of assessing its impact, it has been assumed that this would have a similar meaning to the equivalent qualification in the General Safety Duties provisions. In other words, the extent to which a rail transport operator must address risks arising from matters such as incomplete communications network coverage under the (existing) General Safety Duties provisions would similarly apply to the proposal.

Therefore, it is likely that any rail transport operator not complying with the proposal may be judged to be also not complying with the existing General Safety Duties provisions. For that reason, the impact of the proposal is assessed as minor and there is insufficient evidence that this option would impose any additional costs on rail transport operators.

As there is a mutual responsibility for rolling stock operators and rail infrastructure managers to comply with the proposal, the impact on them has been assessed in a combined manner. It is understood that the distribution of costs between them for any train communication system upgrade is a contractual, rather than a regulatory matter.

Rail safety workers

It is anticipated that rail safety workers would benefit from improved levels of rail safety resulting from this proposal being adopted.

Option 3 – Develop and mandate a standard for train communication systems

As a performance standard for train communications has not yet been developed, it is impractical to assess its impact. However, a higher standard has the potential to contribute to higher levels of safety than under Option 2, while also imposing higher costs on rail transport operators.

Proposal

Option 2 is proposed. It would better clarify the requirement for train communications, without impose any additional costs on rail transport operators.

However, it is intended that a proposal for Option 3, to develop a standard for train communications systems, would be developed post-approval and pre-implementation of the National Law (i.e. in 2012).

The proposal (Option 2) is included in section 52 (Safety duties of rail transport operators) of the National Law.

6.5.8 Network rules

Current provision

Rail infrastructure managers specify network rules for how rolling stock operators, maintainers and rail safety workers may operate on their rail network. Although no explicit provision for network rules exists in the Model Law, in practice they are utilised to comply with the general safety duties and form part of the operator's safety management system.[40]

Section 57(2) of the Model Bill (Safety Management System) requires that rail transport operators to consult with affected parties, prior to establishing or varying their safety management system.

Problem statement

There have been some reported cases of network rules being changed by rail infrastructure managers, without engaging in adequate prior consultation.

This creates two problems for rolling stock operators: firstly, they do not have the opportunity to raise any concerns with the changes and secondly, they may not even be aware of the changes. Such circumstances increase the risk of occurrence of incidents involving network breaches, with implications for safety. Although the Model Law imposes requirements that may be interpreted as requiring consultation, policy makers have supported a more explicit requirement.

Objective

In order to address the identified problem, the proposal should remain true to the national reform objectives in providing safety improvements without imposing an unnecessary compliance burden upon business.

Options

Option 1

Status quo. The matter of network rules would continue to be managed through compliance with the General Safety Duties and the safety management system, that is, without being addressed by any specific provisions in law.

Option 2

To strengthen consultation provisions in the National Law for network rules (rail safety rules), to clarify the requirement to consult with affected parties including rail infrastructure managers, rolling stock operators, maintainers and rail safety workers.

Impact assessment

Option 1 – Status quo

There would be no impact of maintaining the status quo. However, this may contribute to perpetuating the current situation of some rail infrastructure managers neglecting to engage in adequate consultation regarding changes to network rules.

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[40] Section P, Schedule 1 of the Model Regulations – Content of the Safety Management System, specifies General Engineering and Operational Systems Safety Requirements.

Option 2 – Strengthen consultation provisions in the National Law

Economic assessment

The economic benefit of this proposal is estimated to be between $0.28 and $7.80 million. This is primarily based on the assumption that strengthening the consultation provisions for network rules and making the requirements explicit in the National Law, one rail safety accident may be avoided per annum. Refer Appendix D: Economic cost benefit analysis (section 3.12) for detailed analysis.

Safety

It is expected that there will be a reduced risk of incidents and an improved level of safety by stipulating that parties affected by the introduction of, or changes to, network rules are consulted and informed.

Regulator

The requirement to consult is expected to improve the management of risks to safety, by ensuring that all parties affected are consulted about network rule changes. As any changes to network rules are required to be reported to the Regulator, it is expected to reduce the need for the Regulator to have resources available to intervene when adequate consultation has not been undertaken. This provision also enables the Regulator to prosecute, where penalties apply.

Rolling stock operators

Under the proposal, rolling stock operators will have greater certainty about the current state of network rules which affect their operations. There will also be the opportunity to consult on and provide input to appropriate changes to network rules in the future. In many instances there will be the opportunity for reduced costs given the more efficient use of network rules.

Rail infrastructure managers

Rail infrastructure managers are required to consult on network rules under the safety management system provisions in the Model Bill. This proposal merely clarifies this requirement. Whilst there may be a cost incurred by rail infrastructure managers to specifically require them to consult, provide 28 days for affected parties to make submissions and then to consider all submissions, it is thought that this cost impact would be low.

Rail safety workers

It is anticipated that rail safety workers would benefit from improved levels of rail safety resulting from the introduction of Option 2.

Rail safety workers are required to utilise and adhere to network rules; their safety while operating on railway premises substantially depends on network rules being developed in a manner that accounts for their needs, as well as being made aware of current rules. Proper consultation with rail safety workers on network rule changes would support these objectives.

Proposal

Option 2 is proposed. It would better clarify the need for proper consultation and the dissemination of information to all affected parties regarding the introduction of, and changes to, network rules, while not imposing a significant burden on the Regulator or operators.

The proposal would improve safety by minimising the risk of incidents, and supports the National Law objectives by improving compliance through better clarity.

The proposal is addressed in Part 4, Division 4 (Railway safety rules) of the draft National Regulations.

6.6 Specific Regulator authorities and responsibilities

While the overarching methodology behind rail safety is co-regulatory, imparting the primary obligation on rail transport operators to identify and manage their risks to safety, it is important that the Regulator is appropriately empowered to make safety decisions and issue directions where necessary. The Regulator's role in compliance and enforcement must also be clearly reflected in the National Law.

Under the Model Bill, regulators have the power to direct amendments of an operator's safety management system within a specified period, and the direction provided by the Regulator must indicate the reasons. Currently regulators are able to issue specific requirements to rail transport operators where they believe the level of safety standards in the Model Bill have not been met.

There exist a number of circumstances in which specific directions can be issued.

- Under section 51 of the Model Bill, the Regulator may direct amendment of a safety management system.
- Under section 61F of the Model Bill, the appointed person may give directions where parties required to enter into an interface agreement have failed to do so in a timely and effective manner, to take specific corrective actions.
- Under sections 44(2)(b) and (c) of the Model Bill (Revocation or suspension of accreditation).

In addition to the existing Model Bill provisions listed above, proposed provisions in the National Law allow the Regulator to direct:

- the installation of a safety or protective device in response to a report (such as a coronial report)
- the amendment of a rail infrastructure manager's railway safety rules, in the case where the manager has failed to agree, under the prescribed process, on establishing or amending a rule with a stakeholder whom the manager is required to consult.

6.6.1 Installation of safety or protective devices

Current provision

The Model Bill requires that rail transport operators comply with the General Safety Duties provisions of Part 4, Division 1. In instances where an operator is not compliant, the Regulator may:

- under Part 5 (Enforcement), Division 1 (Improvement notices), issue an improvement notice, requiring an operator to make suitable improvements to their safety management system (with the improvements to be proposed by the operator)
- under Part 5 (Enforcement), Division 2 (Prohibition notices), issue a prohibition notice, prohibiting the carrying out of specified activities
- under section 104 (Rail Safety Regulator may direct amendment of a safety management system), direct an amendment to the operator's safety management system, in order to improve safety.

Problem statement

In certain circumstances, decisions by rail transport operators on how to manage a given type of risk may have especially high cost and safety impacts. An example is whether to fit safety or protective devices to a fleet of rolling stock, or across rail infrastructure. The operator may face a dilemma in determining whether the high cost would outweigh the projected safety benefit, or whether a lower cost/lower benefit option would be sufficient to comply with the requirement to manage risks so far as is reasonably practicable.

Risk management principles under the Model Bill (and draft National Law) afford a degree of flexibility to an operator in determining the appropriate countermeasure. Where the Regulator is dissatisfied with the proposed approach of an operator, one option is to issue an improvement notice.

However, there may continue to be disagreement over what measures are necessary to achieve a sufficient degree of safety improvement. Regulators are typically reluctant to escalate such disputes by issuing prohibition notices, which may have broader economic and social ramifications. While the Regulator has the authority also to direct an amendment to an operator's safety management system, it is unclear whether that authority extends to directing a specific outcome.

While the available suite of enforcement options are adequate for resolving most compliance issues, some regulators have stated that they are inadequate for those that may have major cost implications for operators, potentially measured in the tens or hundreds of millions of dollars. The installation of safety or protective devices may have such a high cost impact.

Objective

In addressing the identified problems, the proposal should strike an appropriate balance between providing the Regulator with powers to address shortcomings in rail safety management and preserving the co-regulatory principles of the National Law.

Options

Option 1

Status quo. This would retain the enforcement measures available to the Regulator in the Model Bill.

Option 2

Provide the Regulator with the authority to direct rail transport operators to fit specific safety or protective devices, as deemed necessary to comply with the safety management duties and obligations. Such a provision may replace or amend Model Bill section 51 (Rail Safety Regulator may direct amendment of a safety management system).

Any such directions may be subjected to a cost benefit analysis, as discussed in Section 6.6.2 (Regulator to conduct cost benefit analysis for mandatory safety decisions).

Option 3

Introduce a provision empowering the Regulator to require the installation of safety or protective devices. The Regulator could only require the installation of the device upon the suggestion or recommendation made in a coronial inquest or an investigation by the Australian Transport Safety Bureau of a rail incident under *the Transport Safety Investigation Act 2003* (Cth).

Any requirements imposed by the Regulator (as a result of the report) would be subject to a cost benefit analysis, as discussed in Section 6.6.2 (Regulator to conduct cost benefit analysis for mandatory safety decisions).

Impact assessment

Option 1 – Status quo

There would be no impact of maintaining the status quo. Under this option, the Regulator would continue to rely on the existing enforcement provisions as prescribed in the Model Bill.

Option 2 – Provide the Regulator with the authority to direct rail transport operators to fit specific safety or protective devices

Economic assessment

At this time, there is no measurable cost impact associated with this proposal. Instead, any cost impact of directions for an operator to fit safety or protective devices would be assessed by the Regulator.

Safety

Where specified safety or protective devices represent unique value in reducing safety risks, and their fitment is not practicably achievable under existing enforcement provisions of the Model Bill, this option would result in improved safety.

Regulator

The provision to install safety or protective devices will give the Regulator the authority to specify the means by which a rail transport operator must mitigate certain types of risk. This has the potential to reduce the necessary resources required of the regulator to negotiate an equivalent outcome with operators, using only the existing enforcement provisions of the Model Bill.

Rail transport operators

The introduction of a power for the Regulator to require the installation of safety or protective devices has the potential to impose substantial costs on rail transport operators. The proposal to require a cost benefit analysis would enhance accountability of the Regulator in making such a direction.

However, some operators felt that it may reduce the scope for them to determine the most cost effective option for mitigating a given safety risk.

Rail safety workers

There is no measurable impact on rail safety workers of this proposal. However, rail safety workers would benefit from any resulting, general improvements to rail safety.

Option 3 – Provide the Regulator with the authority to direct rail transport operators to fit specific safety or protective devices in response to a coronial inquest report or an Australian Transport Safety Bureau investigation report

The impact of this option is broadly similar to that for Option 2.

However, it would permit the Regulator to direct an operator only as the result of a report by an applicable coroner or investigation held under the *Transport Safety Investigation Act 2003* (Cth). This, in conjunction with retaining the requirement to conduct a cost benefit analysis (in prescribed circumstances), would apply greater scrutiny before any direction was able to

be made. Such additional analysis and scrutiny would reduce the risk of cost-inefficient outcomes. However, it is impractical to measure the degree to which this would be the case.

Proposal

Option 3 is proposed. It is assessed as best balancing the need for the Regulator to specify an outcome in certain circumstances, while preserving the co-regulatory principle of delegating primary responsibility for determining the appropriate means of managing safety to rail transport operators in the majority of circumstances.

The proposal is addressed in section 198 (Response to certain reports) of the draft National Law.

6.6.2 Regulator to conduct cost benefit analysis for mandatory safety decisions

Current provision

As outlined in this section, the Model Bill provides the Regulator authority to make decisions that impact on how rail transport operators manage safety risks.[41] Part 6 of the Model Bill includes provisions by which such decisions may be subject to review.

Problem statement

Although certain decisions of the Regulator are subject to review, a shortcoming of the decision making power of the Regulator, as well as the review process, is the lack of any requirement to subject a decision to rigorous analysis. There is a risk that such decisions may have significant cost impacts on rail transport operators, and may not represent a cost-effective outcome that delivers the desired safety objective.

Victoria is the only state that currently incorporates a provision for a cost benefit analysis to be undertaken in the event that a mandatory safety decision by the Regulator presents a significant cost burden on rail transport operators.[42] The intent of this provision is to introduce rigour into the decision making process and reduce the likelihood of the Regulator imposing equipment or system requirements on rail transport operators that may require a high cost of compliance with little or no resulting safety benefit. The provision was viewed as part of good governance when the independent regulator was established, and was enacted in 2006.

Objective

To better ensure that any decision by the Regulator, comprising a specific direction being issued to a rail transport operator on how a risk to safety shall be managed and that would result in the latter incurring a significant cost, was supported by a robust assessment of its cost-effectiveness.

[41] Additionally, Section 6.6.1 (Installation of safety or protective devices) of this regulatory impact statement includes a proposal for the Regulator to be able to direct rail transport operators to fit specific safety and protective equipment in certain circumstances.

[42] Section 175 of the *Transport Integration Act 2010* (Victoria).

Options

Option 1

Status quo. This would maintain the arrangement under which the Regulator would be authorised to make certain directions, including the proposed authority to require specified safety or protective equipment to be fitted, without undertaking a cost-benefit analysis.

Option 2

The Regulator be required to undertake a cost benefit analysis for mandatory decisions made on behalf of a rail transport operator. The proposal may safeguard against certain decisions of the Regulator resulting in costs being incurred (typically by rail transport operators) that are disproportionate to the safety benefits achieved.

Applicable decisions would include those made under the following provisions of the draft National Law:

- conditions or restrictions placed on a rail transport operator's accreditation (refer section 67 (Determination of application) of the draft National Law)
- directed amendments to a safety management system (refer section 104 (Regulator may direct amendment of safety management system) of the draft National Law)
- the issuing of improvement notices (refer section 175 (Issue of improvement notices) of the draft National Law)
- requiring specified safety or protective equipment to be fitted (refer section 198 (Response to certain reports) of the draft National Law)
- directed amendments to a rail infrastructure manager's railway safety rules (refer Part 4, Division 4 of the draft National Regulations).

It is envisaged that guidelines, policies and procedures would need to be developed in order to support this provision and to provide clarity particularly with regard to what constitutes significant cost.

A requirement to conduct a cost benefit analysis would not directly impact on the decision making power of the Regulator; it would still be possible for a decision to be taken, even if it was not supported by the analysis if there were significant benefits.

A rail transport operator may waive the requirement on the Regulator to undertake a cost benefit analysis if it accepts the Regulator decision.

Impact assessment

Option 1 – Status quo

There would be no impact of maintaining the status quo. However, this option would impact on the proposal for the Regulator to direct specified safety or protective equipment to be fitted. That proposal and its relationship to this one is discussed in Section 6.6.1 (Installation of safety or protective devices) of this regulatory impact statement.

Option 2 – The Regulator be required to undertake a cost benefit analysis for mandatory decisions made on behalf of a rail transport operator

Economic assessment

The net cost of this option is estimated between $0.70 and $1.40 million. Refer Appendix D: Economic cost benefit analysis (section 3.13) for detailed analysis.

Nominally, a cost benefit analysis may be expected to cost between $10,000 and $50,000, depending on its scope. However, regulators have stated that the types of decisions that would cause such an analysis to be undertaken have historically been taken infrequently. There is no reason to believe that would change in the foreseeable future. Therefore, the cost of undertaking cost benefit analyses is assessed as marginal.

A more significant cost impact is likely to be the effect this option would have on the quality (cost-effectiveness) of applicable decisions by the Regulator. With the cost impact of decisions potentially reaching hundreds of millions of dollars (note that such costs are not an impact of this option), any means of supporting more cost-effective outcomes would have a significant benefit (cost saving). Again, it is impractical to measure this benefit.

Safety

Improved safety is not the major objective of this option. Rather, by requiring more rigorous analysis of applicable decisions by the Regulator, a cost-effective outcome for the rail transport operator is more likely. Cost-effectiveness does not directly equate to maximising safety; in some cases it may justify an option with a lesser degree of safety.

For decisions with a major cost impact, cost-effectiveness may have a significant impact on the economic viability of a rail transport operator. This may affect broader safety management performance by allowing the reallocation of resources to manage other risks.

The impact on safety of this option is assessed as neutral. It is possible that a cost benefit analysis may help support a decision by the Regulator that would enhance or reduce safety. The conclusion of a cost benefit analysis would not determine a decision, but would merely serve as a tool for developing evidence to be taken into account.

Regulator

The Regulator would incur additional costs, resulting from being required to undertake a cost benefit analysis for applicable decisions.

However, it is not envisaged that this provision would be utilised frequently, as evidenced by the Victorian experience. The cost benefit provision has been in Victorian legislation since 2006; however, the provision has not yet been utilised as no mandatory rail safety decisions have met the definition of ‘significant cost’.

Due to the expected infrequency of the requirement for the Regulator to undertake a cost benefit analysis, the cost impact is minor.

Rail transport operators

Operators would benefit from any process that would better assure the cost-effectiveness of any applicable decisions by the Regulator. This would reduce the risk of operators having to allocate resources in an inefficient manner; resulting in a cost saving.

A cost benefit analysis may also increase transparency of decision-making and would provide operators with an enhanced framework to review any proposals and where necessary, work with the Regulator to improve the outcome.

Rail safety workers

Rail safety workers would not be significantly impacted by this option. However, a cost benefit analysis would also provide them with an enhanced opportunity to participate in developing the final decision.

Proposal

Option 2 is proposed for the National Law.

Where the Regulator is to make a decision on how a rail transport operator must manage a given aspect of safety, the decision would potentially have a significant cost impact on the operator. It is appropriate that the decision is subject to rigorous analysis to ensure that it represents a cost-effective outcome that delivers the desired safety objective. This proposal supports national reform objectives in safeguarding against excessive compliance costs for operators.

6.6.3 Appointed person may give directions

Current provision

Sections 61, 61A, 61B and 61C of the Model Bill require that agreements be formed between rail infrastructure managers and other rail or road managers where there is an interface between infrastructure under their respective management and control. Interface agreements must address how safety risks arising from those interfaces shall be managed. These sections also authorise an appointed person, where parties required to enter into an interface agreement have unreasonably failed to do so, to take specific corrective actions.

The Model Bill did not specify who the appointed person was to be, allowing local variations. Most states and territories have specified the rail regulator as the appointed person, however, some states have allowed the appointed person to be whom the relevant minister chooses to appoint.

Problem statement

Under a National Law, it is desirable to provide a uniform definition for appointed person. This is complicated by the fact that states and territories have varied in who is nominated, with some enabling an appointment by the relevant minister and others directly nominating the rail safety regulator.

There is broad consensus that the degree of independence of the 'appointed' person from the parties subject to the agreement (or direction) should be a criterion for their selection (or appointment).

Objective

To define *appointed person* in the National Law, such that the appointment is made in a nationally uniform manner (whether or not there may be provision for more than one person to be appointed).

Options

Option 1

Status quo. This would retain the provision for individual states and territories to determine who the appointed person is, for interface agreements in a given state or territory.

Option 2

The Regulator is prescribed as the appointed person. The Regulator is considered to have sufficient expertise in determining appropriate arrangements for managing risks arising from railway interfaces, as well as being sufficiently independent of all relevant parties.

Option 3

The relevant minister in a given state or territory is provided with the power to appoint the appointed person.

Impact assessment

Option 1 – Status quo

There would be no impact of maintaining the status quo. However, retaining the provision for local variations in specifying who the appointed person is, would not support the reform objective of nationally uniform rail safety law.

Option 2 – The Regulator is prescribed as the appointed person

Economic assessment

The overall cost impact of this proposal in monetary terms is considered to be negligible due to the low frequency for the need for intervention by a third party to resolve disputes around interface agreements.

Safety

It is unlikely that safety benefits will be realised under this option. A minor improvement, from dispute resolution, may be achieved where improvements to managing the interface risks to safety could be applied nationally by the Regulator. This effect is considered minor.

Regulator

For the Regulator to counsel and direct parties in disagreement over how to manage interface coordination, there may be some impact. Such a process may be protracted and require the allocation of significant resources. The impact depends primarily on the frequency of disagreements that would require the appointed person (Regulator) to intervene, and these are extremely rare.

States and territories that provide for the Regulator to be the appointed person have indicated that the power to direct parties, if they have not made reasonable efforts to enter into interface agreements, has either not been utilised (due to lack of implementation of this particular provision) or envisage that this power would be exercised infrequently.

In addition, in those states and territories which specify that the minister may select the appointed person, it is envisioned that the minister will appoint the rail regulator in the majority of instances.

Whilst the Regulator may, in certain circumstances, have less influence in directing non-rail organisations to enter into an interface agreement, it is considered by some stakeholders to be a necessary provision in the National Law to promote good faith negotiations between the parties.

Rail transport operators

Due to the infrequent occurrence of such disagreements to date, rail transport operators have reported that the cost impact of this proposal would be negligible. Under any option, rail

transport operators will be required to take direction from a person, whether the Regulator, minister or other; as such, there should be minor impact.

Rail transport operators have indicated that benefits would be realised for national consistency in decision making for rail infrastructure managers who operate interstate. A single national point of contact for dispute resolution would benefit interstate operators saving to compliance and administration costs, in addition to efficiency within their organisations.

Rail safety workers

There is no measurable impact of this proposal on rail safety workers.

Other parties

The proposal has the potential to result in the Regulator giving directions to non-rail entities, in particular, road managers. Some concerns have been expressed by road managers over the implications of being directed by the Regulator (without specific responsibility for or knowledge of road management). However, the impact is nevertheless assessed as minimal, due to the infrequency of such disagreements and a reasonable expectation that in such circumstances, the Regulator would consult with an affected road manager prior to issuing any directions.

Option 3 – The relevant minister in a given state or territory is provided with the power to appoint the appointed person

Economic assessment

The overall cost impact of this proposal in monetary terms is considered to be negligible due to the low frequency for the need for intervention by a third party to resolve disputes around interface agreements.

Regulator

In practice, it is likely that a minister would consult of the Regulator and other relevant parties (for example, road manager), or delegate the task to one these parties. If delegated to the Regulator, the cost impact is the same as Option 2.

An additional administrative cost burden may be imposed on the Regulator to elevate disputes surrounding interface agreements to the state or territory minister. Regulator resources would be required to brief the minister; and resolution of the issue may be prolonged unnecessarily if the dispute between the parties could have been resolved by the Regulator itself.

Rail transport operators

This option would not result in national consistency for rail transport operators operating across borders. A potential for inconsistent decisions in each state and territory would be carried forward from the Model Bill into the National Law reducing the likelihood of administrative and compliance benefits being realised.

Rail safety workers

There is no measurable impact of this proposal on rail safety workers.

Other parties

Elevating the power to direct parties to the state and territory minister may assist in relieving any sensitivities arising from having the Regulator direct non-rail organisations.

In practice, it is likely that a minister would consult with the Regulator and other relevant parties (for example, road manager), or delegate the task to one these parties. This process would require that resources are available for consultation and dispute resolution.

Proposal

Option 2 is proposed for the National Law.

While Option 3 would also be feasible, a common understanding of who the appointed person is under Option 2 is likely to support a more timely resolution of any disagreements over interface management. Furthermore, the Regulator is an independent party with safety as the primary consideration, rather than a minister or person appointed by a minister who may be subject to political and commercial pressures. As it is likely a minister would often delegate the role to the Regulator, Option 2 would also reduce unnecessary administrative burden for the Regulator and the rail transport operator.

A nationally consistent approach towards the resolution of disputes around interface agreements is viewed as preferable. Consistency and predictability in decision-making should assist efficiency and timeliness of issue resolution.

Option 3 is considered to be in contradiction with the national reform objectives to remove inefficiencies arising from inconsistent jurisdictional requirements, streamline the regulatory arrangements and thus reduce the compliance burden for business.

This proposal is addressed in section 110 (Regulator may give directions) of the draft National Law.

6.7 Alignment with the Model Work Health and Safety Bill

6.7.1 General alignment

Current provision

Section 13 of the Model Bill states that work health and safety legislation prevails where it is inconsistent with a provision of the Model Bill. Therefore, model rail safety provisions have no effect in states and territories that have implemented conflicting work health and safety law provisions.

Additionally, Section 15 of the Model Bill states that evidence of a contravention of the Model Bill is admissible in any proceedings for an offence against the work health and safety legislation.

Problem statement

The Model Bill contains provisions which overlap wholly or partially with work health and safety legislation.

Work health and safety legislation aims to ensure the health and safety of workers and workplaces, including rail workers and others exposed to railway operations (for example, rail patrons and road users). The National Law has a broadly similar objective to work health and safety legislation, but focuses on matters of safety management more specific to railway operations. The National Law complements work health and safety legislation.

The Model Work Health and Safety Bill (first approved in 2009) includes a number of provisions that are inconsistent with corresponding provisions of the Model Bill, which was approved in 2006. These inconsistencies render the relevant Model Bill provisions ineffective. They also risk causing confusion for rail industry members, who may falsely interpret the Model Bill provisions as the applicable legal duties and obligations. This increases the risk of work health and safety (and rail safety) law being inadvertently broken.

Objective

To develop provisions of the National Law, recognising and supporting the primacy of work health and safety laws over any corresponding provisions in the National Law.

Options

Option 1

Status quo. Under this option, inconsistencies between the Model Bill and Model Work Health and Safety Bill would be retained.

Option 2

Amend the Model Bill so that it is consistent with the Model Work Health and Safety Bill. This does not require duplicating the latter in its entirety; it only applies to provisions that are necessary to support a functioning body of rail safety legislation and which correspond to a provision of the Model Work Health and Safety Bill. A list of the draft National Law provisions that have been harmonised with the Model Work Health and Safety Bill is included in Appendix C: Alignment with Model Work Health and Safety Bill.

Impact assessment

Option 1 – Status quo

While there is no impact of maintaining the status quo, this would retain the situation in which a range of Model Bill provisions may have no legal effect and potential mislead rail industry members.

Option 2 – Amend the Model Bill so that it is consistent with the Model Work Health and Safety Bill

Economic assessment

Amendments to the Model Bill to align with the Model Work Health and Safety Bill have been assessed as having no measurable cost impact.

Despite the Workplace Relations Ministers' Council agreement that the Model Work Health and Safety Bill will be uniformly implemented on 1 January 2012, it is nevertheless possible that may not occur. Inconsistencies between the National Law and Model Work Health and Safety Bill would impose cost impacts attributed to a more complex compliance task for rail transport operators (variations in law between states and territories) and any resulting impacts on rail safety.

However, those impacts would be attributed to variations from the Model Work Health and Safety Bill and would need to be assessed by the relevant states and territories in proposing the amendments. They have not been assessed in this regulatory impact statement.

Safety

A safety benefit would result from clearer rail safety law, which would be expected to improve compliance levels. However, such a benefit is unable to be measured.

Regulator

Efficiencies would be realised by the Regulator from a uniform and consistent body of National Law and Model Work Health and Safety Bill. Non-compliance may result from confusion on the part of rail transport operators, attributed to inconsistencies in the two bodies of law (that is, if the status quo was maintained under Option 1). Non-compliance would require the Regulator to allocate resources to work with operators in rectifying their operations. Such an allocation would be unnecessary under this option. However, it is impractical to measure this benefit.

Rail transport operators

Efficiencies would be realised by rail transport operators through better clarifying the compliance task, and by developing a consistent National Law and Model Work Health and Safety Bill. However, it is impractical to measure this benefit.

Efficiencies resulting from uniform bodies of law, through uniform implementation of the Model Work Health and Safety Bill would be a separate and additional benefit. That benefit is beyond the scope of this regulatory impact statement.

Rail safety workers

Rail safety workers would benefit from improved levels of rail safety, as well as clearer duties and obligations under the National Law that would result from it being made consistent with the Model Work Health and Safety Bill. It is impractical to measure these benefits.

Proposal

Option 2 is proposed. It is not the role of this process to review or amend policy determined in the process of developing the Model Work Health and Safety Bill. Rather, the Model Bill (and draft National Law) is structured as a 'taker' of work health and safety policy and law. Harmonising with the Model Work Health and Safety Bill would achieve that objective.

6.7.2 Penalties in the National Law

Current provision

There are 65 offences in the Model Bill that have a provision for a penalty. Maximum penalty amounts have not been specified in the Model Bill, allowing for local variations. States and territories have determined maximum penalty levels to be consistent with their own monetary penalty policy, resulting in significant inconsistency across similar offences.

States and territories also adopted differing approaches towards a corporate multiplier for body corporate offences, the provision for loading for repeat offenders (for example, enabling a 50 per cent higher penalty amount for recidivism) and the inclusion of custodial sentences (jail terms).

Problem statement

Local variations have resulted in a lack of consistency in the maximum penalty amounts applied in rail safety legislation nationally, even when considering comparable offences. Furthermore, states and territories have created additional offences where local variations were provided for in the Model Bill; particularly in the areas of fatigue and drug and alcohol management.

The Parliamentary Counsels Committee's *Protocol on Drafting National Uniform Legislation* states:

> *"Because of differences in current levels of the value of penalty units among jurisdictions and the potential for further variations to occur, national uniform legislation will use dollar amounts to express the amount of monetary fines for offences."*[43]

Policy work was undertaken to create a national penalty framework and remove the disparity in maximum penalty amounts in order to establish a consistent national approach.

Additionally, when considering model work health and safety legislation, as the same breach may give rise to causes of action under both regulatory schemes, it was deemed necessary to align the penalty framework where similar offences were involved. If alignment is not achieved between model work health and safety and the National Law, an unfavourable situation of 'penalty shopping' between Regulators may develop; that is, where a maximum penalty in rail safety legislation is lower than that of the equivalent offence in model work health and safety law, the rail Regulator may provide evidence to the health and safety Regulator to enable prosecution under the Model Work Health and Safety Bill.

Objective

In addressing the identified problems, the proposal should seek to support the objectives of the national reform; that is, to streamline regulatory arrangements, improve productivity,

[43] Parliamentary Counsel's Committee, Protocol on Drafting National Uniform Legislation, Third Edition: July 2008 (s6.9 – Penalty Units).

reduce the compliance burden for business and support a seamless national rail transport system whilst not reducing existing levels of rail safety.

Development of a National Penalty Framework

Comparative analysis of maximum penalty amounts

In order to ascertain whether alignment for maximum penalty amounts existed amongst the states and territories for a given offence, a comparison of state and territory penalties in rail safety legislation was undertaken. Penalty information according to the applied dollar amounts was mapped against the corresponding provisions carrying penalties in the Model Bill.

The comparative analysis did not reveal consistency in how states and territories assigned a dollar amount to penalties, either for bodies corporate or individuals. It was found that whilst the highest penalties in each state and territory could be attributed to the same provisions of the Model Bill, the maximum penalty amount imposed was, in some cases, significantly different. For example, a breach of section 28(1) of the Model Bill (general duty on rail transport operators) attracted a penalty of $100,000 in South Australia and $215,000 in Victoria.

Consistency in ranking

Consistency was established for the level of severity of the penalties applied across the states and territories; that is, how each state and territory 'ranked' the offences. For example, even though the penalty amount differed, all states and territories applied the highest possible penalty in their particular state for a breach of a general safety duty (section 28 of the Model Bill) and their lowest possible penalty for applying a brake or emergency device (section 136 of the Model Bill).

Based on this consistency, an approach which ranked the penalties according to their relative severity in each state and territory, and removed the impact of the different dollar amounts was applied.

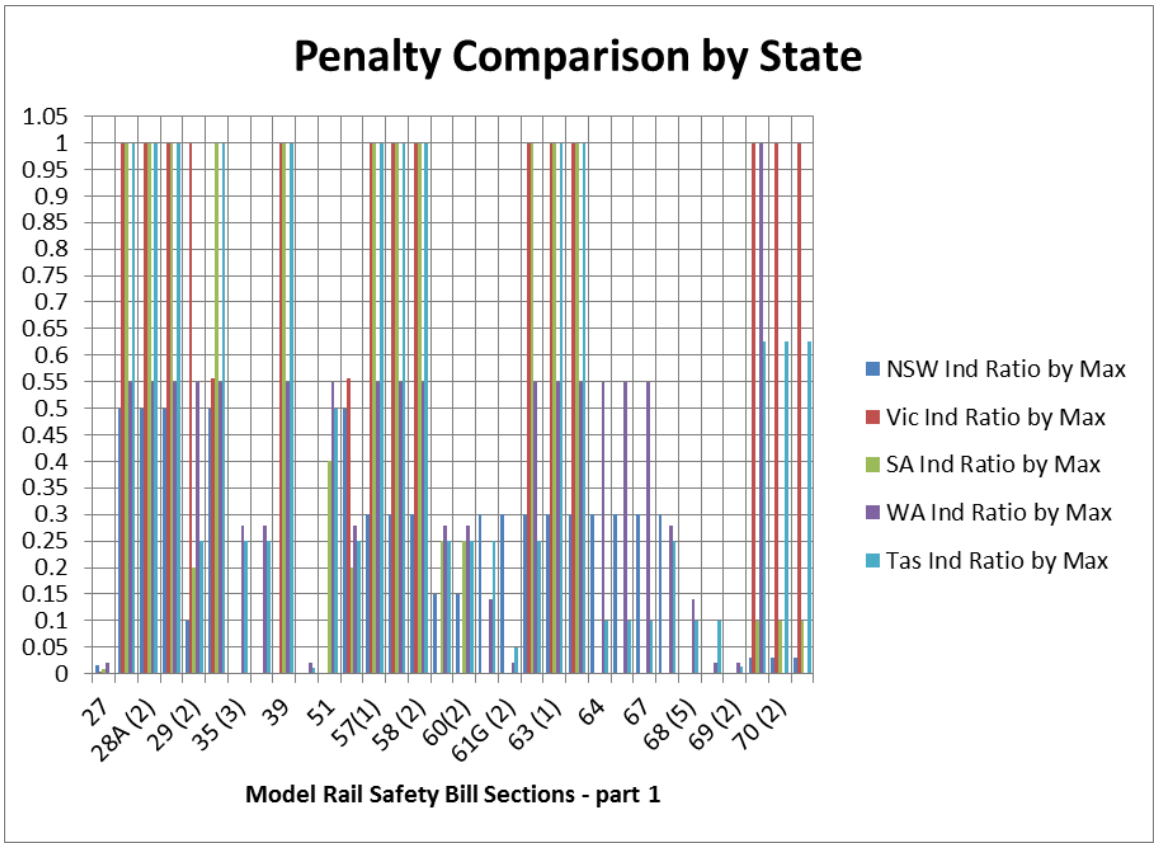
Penalties for each state and territory were calculated according to an ordinal scale, as follows:

> *Example: South Australia*
>
> *The maximum penalty amount applied in South Australia under the Rail Safety Act is $100,000 (for an individual).*
>
> *All penalties in the SA were then converted to be expressed as a proportion of the maximum possible penalty applicable in SA. For example:*
>
> - *s28(1): Breach of general safety duty: SA Penalty (individual) = $100,000*
>
> *Ordinal ranking = $100,000/$100,000 = 1*
>
> - *s101(1): Contravention of an improvement notice: SA Penalty (individual) = $40,000*
>
> *Ordinal ranking = $40,000/$100,000 = 0.4*
>
> - *s97: Failure to give name and address: SA Penalty (individual) = $0*
>
> *Ordinal ranking = $0/$100,000 = 0*

This process resulted in a ranking of the severity of each penalty in SA between 0 and 1, where 1 is the highest severity (maximum penalty) and 0 is the lowest (no penalty applied).

This process was repeated for each state and territory, resulting in a data set that enabled a national comparison of penalties according to the same metric. The result from utilising an ordinal scale to rank the level of severity of each penalty showed a high level of consistency between the states and territories. This consistency is depicted visually in Figure 7.

Figure 7. Sample penalty comparison by ordinal ranking[44]



Categorisation

Analysis of the graph in Figure 6 indicated approximately four groups of penalties, as depicted in Table 3.

Table 3. Penalty groups based on offence severity

Penalty Group	Ordinal Ranking	Meaning of Category
1	>0.75	Severe penalty
2	0.50-0.75	High penalty
3	0.25-0.50	Medium penalty
4	<0.25	Low penalty

[44] Note: Queensland and Northern Territory rail safety legislation does not differentiate between individual and body corporate penalties, as a result the data has not been included in the comparison of individual penalties.

Each offence in the Model Bill was allocated to a penalty group based on the rankings specified in Table 3.

As previously indicated, it was preferable for penalties in the National Law to align with penalties in the model Work Health and Safety Bill for similar offences.

The Model Work Health and Safety Bill includes three categories of penalty for offences relating to breaches of general safety duties. As the Model Bill includes equivalent general safety duties, the same categories were included in the National Law. In addition, the requirement for a rail transport operator to develop and implement a safety management system, a fundamental requirement of the Model Bill, was deemed to require similar categorisation.

Finally, by considering both the penalty groups determined through the analysis of the severity of each offence in the Model Bill, together with the policy objective to align the penalties in the National Law with the Model Work Health and Safety Bill, the penalty types as shown in Table 4 were developed.

Table 4. Penalty framework for the National Law

Penalty type	Offence	Sub-type	Definition	Penalty amount (individual)
1	**Breach of a safety duty or safety management system requirement**	**A**	Serious breach for risk of death or serious injury – reckless behaviour	$300,000 and/or 5 years imprisonment
		B	Serious breach for risk of death or serious injury	$150,000
		C	Breach with no risk of death or serious injury	$50,000
2	**Serious Breach of the Rail Safety Act**	-	Breach of significant obligation required by the National Law	$20,000
3	**Enforcement**	-	Breach of important operational or procedural requirement which may adversely affect the enforcement of the National Law	$10,000
4	**Operational**	-	Breach of other operational or procedural requirement	$5,000

The penalty amounts for type 1 offences are equivalent to the comparable offences in the Model Work Health and Safety Bill. Penalty amounts for type 2, 3 and 4 offences were determined based on a common practice approach; as the severity of the offence decreased, the penalty amount was decreased by a factor of approximately one half.

Other considerations

Body corporate multiplier

The penalty amounts in Table 4 reflect the maximum penalty amounts for an individual. In aligning the penalty structure to that contained in the Model Work Health and Safety Bill, these penalty amounts are proposed to be subject to a corporate multiplier for offences committed by a body corporate, as follows:

- type 1 offence: a maximum of 10 times the individual penalty amount will be applied
- type 2, 3 or 4 offence: a maximum of 5 times the individual penalty amount will be applied.

Loading for repeat offenders

States and territories have adopted differing approaches towards the provision for 'loading' for repeat offenders, some, for example, enabling a 50 per cent higher maximum penalty amount for recidivism.

In aligning with the Model Work Health and Safety Bill, the maximum penalty amounts for many offences are proposed to be increased for the majority of states and territories. Higher penalties for repeat offenders were therefore not included in this proposal.

Options

Option 1

Status quo; retain local variations.

Option 2

Implement the penalty framework, described in this section.

Impact assessment

Option 1 – Status quo

Although there would be no impact of maintaining the status quo, it would be undesirable to preserve inconsistent penalties under a national scheme. One of the primary objectives of the transport reform project is to resolve policy issues where states and territories have varied and to develop a uniform National Law. Retention of different penalties in each state and territory for the same offence is contrary to this objective.

Option 2 – Implement the national penalty framework as described

Most states and territories will be affected by a change in maximum penalty amounts. In some cases the penalty amount will increase significantly; however, a number of penalty amounts will be reduced in accordance with the severity ranking framework.

It should be noted that penalties quoted are the maximum penalty amounts that could be applied; courts will ultimately have the discretion to determine an appropriate penalty amount and will likely take into consideration the offender's history and other relevant matters when passing sentence.

Prosecutions, since state and territory implementation of the Model Bill have been made infrequently, with most states and territories reporting that they have not prosecuted for any offences under their rail safety legislation. Since 2005, there have been 21 successful prosecutions for drug and alcohol related offences in NSW, whose rail safety officers actively test rail safety workers. The costs of mounting a prosecution for a breach of the National Law will remain unchanged regardless of the applied penalty amount. The impact of any change to maximum penalty amounts in the National Law is therefore considered to be low.

It is not expected that the trend of infrequent prosecutions will change under the National Law; in accordance with widely accepted deterrence theory, prosecutions are often a last resort in supporting compliance.

The inclusion of a corporate multiplier for offences committed by a body corporate represents a change for the Northern Territory, where such a provision is not a feature of rail safety or other applicable penalties legislation. Considering the low number of prosecutions, this is again considered to be of negligible impact.

Excluding loading for repeat offenders represents a removal of this provision for Western Australia and New South Wales. The increase in maximum penalty amounts for repeat offences is considered to offset any impact that this removal may have.

Proposal

Option 2 is proposed as it meets the reform objective of a uniform National Law and resolves an area where states and territories have varied.

Due to the nature of interaction between the model work health and safety legislation and the National Law, harmonisation with model work health and safety legislation is viewed as preferable. Given the infrequency with which prosecutions are currently undertaken by state regulators the impact of implementing the proposed national penalty framework is considered to be negligible.

This proposal is addressed throughout the draft National Law under offence provisions.

6.8 Impact assessment summary

COAG directed that the National Law be developed in a manner that:

- supports a seamless national rail transport system
- does not reduce existing levels of rail safety
- streamlines regulatory arrangements and reduces the compliance burden for business
- improves national productivity and reduces transport costs generally.

It is considered the draft National Law would serve each of these objectives. It has been assessed that implementing the proposed National Law would have substantial benefits to society, both in terms of improved levels of safety, as well as enhanced productivity resulting from a more streamlined and seamless national regulatory regime that would result in significant transport cost savings.

These benefits would be delivered by implementing a National Law, comprising a number of proposed amendments to the Model Law. This regulatory impact statement has focussed on assessing the impact of those amendments. Most have been assessed as imposing only a negligible impact, but with several assessed as requiring rail transport operators to review and revise significant elements of their safety management systems, some operational changes would be required.

Where requirements for how rail safety risks must be managed have been amended, some rail transport operators have stated that the amendments are in line with industry best practice and are already being complied with. Generally, larger operators stated that they were better positioned to absorb any costs of amending their safety management systems and had greater access to in-house resources. While a number of smaller operators, particularly those in the tourist and heritage sector stated that such amendments represented a cost imposition, others concluded that any necessary changes may be absorbed within existing maintenance processes.

Proposals governing authorities and responsibilities of the Regulator would impose some changes. However, in administrative terms, these were assessed as having a minor impact, due to the infrequent nature with which they have been and would expect to be deployed in the future. The more routine roles and responsibilities of the Regulator, that is, those having the greatest impact on its role and resources, remain substantially unchanged. Again, this excludes the savings resulting from the transition to a single national Regulator.

Consultation has revealed that in general, the largest impacts would result from any requirements to impose substantial changes to how rail transport operators conduct their businesses, or require them to fit new equipment on a large scale (for example, across the rail infrastructure or to all rolling stock under their management).

The majority of proposed amendments in developing the National Law were assessed as having no or an inconsequential impact and were not assessed in this regulatory impact statement. In addition, only some of the proposals addressed in the regulatory impact statement were able to be assessed in a quantitative manner.

A summary of the estimated costs and benefits for each proposal is included Table 5. The overall impact of the proposed National Law amendments has an estimated net present value of between $28 and $71 million (that is, a net benefit). Refer Appendix D: Economic cost benefit analysis for detailed analysis.

Table 5. Net present value of National Law proposals[45]

	Net present value ($ million)	
	High	**Low**
Scope and objectives		
Railways to which the Act does not apply	0.42	0.17
	-0.74	-0.87
Private sidings exemption from accreditation	8.37	-0.20
Exemption framework	3.35	0.02
Powers with respect to the interface with parties whose operations may impact rail safety	2.05	0.0
Duty for loading and unloading rolling stock	7.60	3.80
Operator safety management		
Safety management system	0.20	0.28
Health and fitness management program	0.82	0.94
Drug and alcohol management program	30.46	14.96
Fatigue risk management program	4.16	2.14
Testing for drugs or alcohol	8.41	6.90
Specific Regulator authorities and responsibilities		
Network rules	7.80	0.28
Regulator to conduct CBA for mandatory safety decisions	-1.40	-0.70
Total	**71.48**	**27.71**

There is a reduced degree of certainty for both the operator safety management and exemption framework cost estimates (as shown in Table 5 above). This stems particularly from uncertainty over how the Regulator would administer applications for exemptions to operator safety management provisions, and the cost sensitivity of such decisions.

The impacts of the National Law amendments on each major industry segment are shown in Table 6 below. There is a risk that the amendments would result in significant costs being incurred by smaller operators, particularly those in the tourist and heritage sector (i.e. $7.1M-$12.2M). However, this risk (and associated costs) may be mitigated by the effective administration of the proposed National Law exemption scheme.

In practice, the Regulator would be responsible for assessing the costs and benefits of exempting operators from the relevant National Law provisions, on a case-by-case basis. In principle, where the net cost of complying with a provision was assessed as greater than the safety benefit, an exemption should be granted. This mechanism provides an effective means for the Regulator to manage the efficient operation of the National Law, and affordability for operators.

In some cases and despite the potential for granting exemptions, the cost to a rail transport operator of ensuring safety may nevertheless be unaffordable. In some such cases, state and territory governments have in the past subsidised their compliance costs. However, this broader practice is not specifically attributable to the proposed National Law amendments and is beyond the scope of this regulatory impact statement.

[45] Positive figures indicate a net benefit; negative figures indicate a net cost.

Table 6. Net present value of National Law proposals to industry segments[45]

	Initial (implementation) ($ million)		Ongoing ($ million per annum)		Net present value ($ million)	
	High	Low	High	Low	High	Low
National Regulator	(1.70)	(1.06)	(0.51)	(0.26)	(5.28)	(2.91)
Rail transport operators (freight and passenger)	(7.42)	(3.04)	(0.64)	0.11	(11.93)	(2.28)
Rail transport operators (tourist and heritage)	(3.17)	(1.75)	(1.29)	(0.76)	(12.22)	(7.12)
Society	0	0	14.37	5.70	100.91	40.02
Total	**(12.29)**	**(5.84)**	**11.93**	**4.78**	**71.48**	**27.71**

The costs and benefits estimated in this regulatory impact statement, which reflect a number of amended requirements for how rail transport operators must manage safety risks, effectively form an addendum to those estimated in the previous regulatory impact statement of 2009,[46] which assessed the impact of establishing a Regulator and National Law. In that case, the net benefits were assessed at between $36 and $67 million.

These requirements have been proposed by policy makers as representing best practice in rail safety management. While certain proposals may incur additional costs, it has been assessed that these would be fully offset by the savings that would result from substantially improved levels of rail safety, as well as other substantial savings from establishing a National Regulator assessed in a previous regulatory impact statement.

[46] Single, National Rail Safety Regulatory and Investigation Framework Regulatory impact Statement (July 2009), available at http://www.ntc.gov.au/viewpage.aspx?documentid=1927.

7. Consultation

7.1 Policy development

In developing the National Law, the NTC and National Rail Safety Regulator Project Office released a number of discussion papers and convened stakeholder workshops. Stakeholders consulted during this process included state and territory government policy makers, rail safety regulators, rail industry members, rail industry associations and unions. A draft regulatory impact statement was published in July 2011, to which public feedback was sought.

Feedback was considered by the Jurisdictional Rail Safety Advisory Group, comprising policy makers from the Commonwealth, state and territory governments. Where matters were unresolved from this group, policy decisions were elevated to the Rail Safety Regulation Reform Project Board.

The proposals put forward in this regulatory impact statement reflect the majority agreement of these groups.

Additionally, a Rail Safety Expert Panel was formed in 2010 specifically to develop policy proposals for drug and alcohol testing of rail safety workers and consideration of legislated hours of work for rail safety workers, areas where the aforementioned groups were unable to form policy positions. The proposals of the Expert Panel were endorsed by ATC; those for drug and alcohol testing are included in this regulatory impact statement, while those for legislated hours of work will be addressed separately in 2012.

7.2 Preparation of the regulatory impact statement

In preparing this regulatory impact statement, the NTC has engaged widely with stakeholders. Members of the public, state and territory rail safety policy departments and regulators have provided ongoing advice and feedback.

A number of workshops were held during 2010 and 2011 with the participation of rail industry members including representatives of the Australasian Railway Association, the Association of Tourist and Heritage Rail Australia, as well as the Rail, Tram and Bus Union. A number of industry members, state and territory policy makers and regulators, and the Rail, Tram and Bus Union have provided written submissions on impacts of the regulatory proposals. In addition, industry and regulators responded to surveys, designed to obtain cost data to inform the economic cost benefit analysis. Feedback from these bodies was accounted for in developing a draft regulatory impact statement.

7.3 Public Consultation

The draft regulatory impact statement and associated legislation was released for public comment in July 2011. To facilitate public input, the NTC conducted twelve information forums at the following locations around Australia, including Melbourne (two forums), Launceston, Adelaide, Darwin, Perth (two forums), Sydney (two forums), Townsville, Brisbane and Newcastle.

The NTC received 66 written submissions from stakeholders providing feedback on the draft regulatory impact statement and associated legislation (see Appendix E: List of submissions received). In general, larger operators and the Australasian Railway Association have indicated strong support for the move to a single national regulator, while providing feedback

on specific aspects of the draft legislation they believe could be improved. A number of smaller operators, particularly those in the tourist and heritage sector, have expressed strong concerns for the potential increases in costs and regulatory burden that they have assessed would result from implementing the proposed National Law.

Current state and territory governments and the unions have not indicated their specific level of support for the National Law. An exception is the Department of Transport (Victoria), which has expressed strong concerns for the strength of the case made for establishing a single national rail safety regulator and law. However, as this case was approved by COAG in 2009, the NTC considers that concern to fall outside the scope of this regulatory impact statement and COAG's standing direction to develop a National Law and Regulator.

State and territory governments, rail industry members and unions have provided detailed, specific feedback on the draft National Law. This feedback has been accounted for in developing the final regulatory impact statement and National Law. The following sections summarise the major comments made by stakeholders during the consultation process, and the NTC's responses.

7.3.1 Cost impact for tourist and heritage operators

Feedback was received from a number of stakeholders that changes proposed in the National Law, particularly additional prescribed requirements for safety management systems, would result in a significant regulatory burden and cost increase for smaller operators such as those in the tourist and heritage sector.

NTC Response

To address the diverse range of operators across the rail industry and to minimise the impacts on small operators, the National Law would provide an exemption framework where operators with lower risk profiles may apply to the Regulator, to be exempted from certain requirements.

7.3.2 Drug and Alcohol Testing

Stakeholders commented that there was a lack of clarity and consistency in how drug and alcohol testing would be conducted under the National Law. Additionally, concerns were raised over the proposed limit of four hours for testing to be undertaken.

NTC Response

It is intended that drug and alcohol testing procedures will be addressed in the application laws of each state and territory. It is anticipated that states and territories would predominantly adopt provisions in their respective road traffic law.

For this reason, the National Law has been amended to remove all references to testing procedures, providing only a power for the Regulator to conduct tests, including the four hour limit on undertaking testing. It should be noted that offences for drugs and alcohol use have been retained in the National Law.

7.3.3 Fatigue Management Plans

Some industry stakeholders queried the need for prescribing requirements for fatigue management plans, as they believed fatigue was already being managed effectively by industry members. Conversely, some government stakeholders commented that more

requirements should be included, particularly in relation to training and education, and that too many of the prescribed elements need only be considered, rather than assessed.

Comments were also received regarding the flexibility of working hours. It should be noted that the framework for regulating hours of work and rest will be the subject of a separate policy develop process and regulatory impact statement.

NTC Response

Regulators have indicated that the level of maturity, knowledge and capability for fatigue risk management varies across the rail industry. The National Law has been drafted to better clarify what must be addressed in a fatigue management plan, while preserving flexibility for operators to tailor their plans to the nature and extent of risks arising from their individual operations.

7.3.4 Power to require works to be stopped

A number of stakeholders queried whether approval of the Regulator should be required, prior to commencing work which threatens or is likely to threaten the safety of a railway. Stakeholders stated that such issues may more effectively be managed between the party seeking to undertake works and the relevant rail infrastructure manager.

Additionally, there was concern that requiring a person to seek approval, rather than requiring consultation or notification between the parties, would create an unnecessary administrative burden for no safety benefit.

NTC Response

The National Law has been amended to require a person to notify the rail infrastructure manager when carrying out works that threaten or are likely to threaten the safety or operational integrity of a railway.

The Regulator will still retain the power to direct a person to stop, alter or not commence work if they believe it will threaten the safety or operational integrity of a railway. Any such decision can now be reviewed under Part 7 of the National Law.

7.3.5 Requirement for the Regulator to undertake a cost benefit analysis for certain decisions

Some stakeholders questioned the need for provisions requiring the Regulator to undertake a cost benefit analysis where their decision is likely to have a significant cost for the rail transport operator. Particular areas of concern were the lack of clarity regarding what triggered the need for a cost benefit analysis, the definition of 'significant cost' and the potential impact on the resources of the Regulator.

NTC Response

Although certain decisions of the Regulator are subject to review, a shortcoming of the decision making power of the Regulator, as well as the review process, is the lack of any requirement to subject a decision to rigorous analysis. There is a risk that such decisions may have significant cost impacts on rail transport operators, but not represent a cost-effective means of delivering the desired safety outcome. The cost benefit analysis provisions have been included in the National Law to address that risk.

Most 'day-to-day' functions of the Regulator would be unaffected by the cost-benefit analysis provisions. For example, issuing an improvement notice would not necessarily include specifying a course of action, but would instead require the duty holder to determine that themselves. This would not require the Regulator to undertake a cost-benefit analysis.

On the other hand, a cost-benefit analysis would be required where an improvement notice included a specific course of action that was likely to impose a significant cost on the duty holder.

The National Law was amended to further clarify that the obligation on the Regulator to conduct a cost-benefit analysis is restricted to circumstances in which significant costs are likely to be incurred as a result of a specific direction being issued by the Regulator.

As the instances in which a Regulator will be required to undertake a cost benefit analysis are likely to be low, it is anticipated that the impact on the resources of the Regulator will be minimal.

It was considered a definition of 'significant cost' and other criteria determining the need for a cost benefit analysis would best be addressed a guideline. The National Rail Safety Regulator Project Office will develop guidelines prior to the National Regulator commencing in 2013.

7.3.6 Penalties

Stakeholders sought clarity on how penalty levels in the National Law had been set, particularly where penalties had increased or decreased, relative to existing state and territory legislation.

Concerns were also raised with inconsistencies between custodial penalties in the National Law and Model Work Health and Safety Bill; specifically who would bear the burden of proof for offences that provide a defence of reasonable excuse.

NTC Response

In attempting to arrive at a national scheme for penalties in the law, a comparative analysis was conducted of maximum penalty amounts amongst the states and territories for any given offence. The analysis revealed inconsistency in how states and territories assigned dollar amounts to penalties and a national penalty framework was developed, using methodology detailed in section 6.7.2 (Penalties in the National Law).

To address inconsistencies with the Model Work Health and Safety Bill, a custodial penalty has been included in the National Law for breach of a safety duty with reckless conduct. Offences that allow a defence of reasonable excuse have also been amended to expressly provide that the evidential burden of proof with respect to reasonable excuse lies with the accused.

7.3.7 Safety Recordings

Stakeholders expressed concern that the definition of train safety recordings and the circumstances in which they may be disclosed would restrict the ability for industry to utilise recordings as required for their operations and impede the sharing of information for investigative purposes outside of the National Law. Additionally, some concern was expressed regarding the potential impact on law and order schemes relating to train vandalism that are currently being operated in some jurisdictions.

NTC Response

The definition of a train safety recording has been amended so that it is restricted to the recording of activities carried out by rail safety workers in relation to the operation of a train, and excludes recordings of all other activities.

Additionally, the circumstances in which a train safety recording may be disclosed have been expanded to those permitted under another law, in addition to the National Law (for example the *Transport Safety Investigation Act 2003*).

7.3.8 Network Rules

Stakeholders queried why explicit requirements for developing and amending network rules had been included in the National Law, when they may be no more important than a range of other rail safety matters. Concern was also expressed regarding the terminology used in the regulations.

NTC Response

Network rules have been specifically included in the draft regulations to address an identified problem of network rules being changed by rail infrastructure managers without prior consultation (see section 6.5.8). Introducing an explicit requirement to consult would better ensure that other affected rail transport operators were made aware of the changes and had an opportunity to provide input to them.

However, to address the issues raised by stakeholders the requirement to obtain agreement from other rail infrastructure managers before proceeding and the power for the Regulator to intervene have been removed. There is now simply a requirement to consult with affected stakeholder.

7.3.9 Summary of amendments made

Responding to comments received, the NTC amended a number of National Law provisions. These included amending:

- Section 7 (Railways to which this law does not apply), to remove exclusion from the National Law of amusement railways that connect to an accredited railway.
- Section 40 (National rail safety register), to restrict the types of information the Regulator may publish in the register, and to add the ability to publish updates on the status of notices issued to operators.
- Section 50 (Safety duties of rail transport operators), to further align the provisions with the Model Work Health and Safety Bill, by better emphasising the requirement for operators to ensure safe railway operations (generally) and removing prescriptive requirements, including those more applicable to individual rail safety workers.
- Section 52 (Duties of persons loading or unloading freight), to better clarify the duty to load and unload freight in a manner that helps ensure rail safety in the broader sense, rather than only safely undertaking the process of loading and unloading.
- Section 62 (Application for accreditation), to require that a description of an operator's safety management system must extend to describing specific measures taken to manage identified risks, rather than just a broad description.
- Section 120 (Investigation of notifiable occurrences), to preclude the use of a report prepared by an operator, as directed by the Regulator under the authority of this section, as evidence in any prosecution of the operator.
- Section 126 (Drug and Alcohol – Offences), to set the prescribed concentration of alcohol in a rail safety worker's blood to a maximum of 0.00 per cent; previously set at 0.02 per cent.

- Section 199 (Power to require works to stop), to require parties undertaking works on or near rail infrastructure to seek the approval of the rail infrastructure manager, rather than the Regulator.
- Section 224 (Offences by body corporate & employees), to better align with the Model Work Health and Safety Bill by removing vicarious liability for officers of bodies corporate.

Appendix F: Responses to public comments provides further detail on the feedback received from stakeholders and NTC's responses to these comments. The NTC acknowledges the input and participation of all stakeholders.

The regulatory impact statement is now submitted to the Transport and Infrastructure Senior Officials Committee, for their endorsement. Feedback will be considered in developing a final regulatory impact statement and National Law, which will be submitted to the Standing Council of Transport and Infrastructure for voting in November 2011.

8. Implementation and Review

8.1 Implementation

Subject to approval by the Ministerial Council, the National Law will be enacted in the South Australian Parliament. The remaining states and territories will then implement applying legislation that will reference the South Australian rail safety legislation (National Law) as their own legislation. Commencement is expected to take place in January 2013.

The National Regulations may be made by the Governor of South Australia, on the unanimous recommendation of the Ministerial Council (as prescribed in section 264 of the draft National Law).

The National Law does not include consequential amendments arising out of the Law. Each state and territory adopting the Law is to enact an Act incorporating the consequential amendments, which may be the Act that adopts the Law. Nor does this version of the National Law include transitional provisions providing for the change from the operation of a state or territory's current law to the operation of the National Law. The transitional arrangements are to be developed in tandem with the consequential amendments. It is expected that the National Law that is introduced into the South Australia Parliament will include transitional provisions that can generally apply to all states and territories, and that each state or territory's Act adopting the Law will include the transitional provisions that are specific to that state or territory.

8.2 Transition and funding arrangements

In line with COAG's decision on 7 December 2009 to implement a national regulator, the National Rail Safety Regulator Project Office has been developing and implementing a change management plan to support the transition from individual state and territory rail safety regulators, to a National Regulator. The objective is to ensure implementation is achieved in a professional and inclusive manner, risks and problems are identified and communication and consultation are undertaken to the highest of standards.

A change management strategy is being developed so that all affected staff currently working in state and territory regulators' offices and their unions are informed of and engaged in transitional arrangements to the National Regulator.

A Cost and Capability Review, being arranged through the Project Office, has identified the outputs and activities of state and territory regulators and the resources, costs and funding required fulfilling their roles.

An Intergovernmental Agreement on Rail Safety Regulation and Investigation Reform[47] was signed by all Transport Ministers at the COAG meeting of 19 August 2011. The agreement included matters for the objectives, scope, functions, structure, governance arrangements, roles and responsibilities of the Regulator.

[47] Available at http://www.coag.gov.au/coag_meeting_outcomes/2011-08-19/docs/Rail_IGA-19August2011.pdf.

8.3 Evaluation

Following implementation by states and territories, the NTC will conduct an Evaluation Review. This review will focus on identifying areas in which states and territories may have differed from the National Law (as enacted by South Australian Parliament) in their applying law.

8.4 Maintenance Program

The NTC's general process would include a maintenance program for ongoing review of the National Law and is scheduled to commence in 2011.

Current items to be reviewed in the maintenance program include:

- definitions of rail safety work, rail safety worker, railway operations and rolling stock operator
- train communication systems (review of proposed standard)
- data loggers
- network rules
- train safety systems
- review of Schedule 1 of the National Regulations
- safety duties to extend to contractors
- train safety systems
- annual report
- other persons to comply with safety management system
- offences by body corporate and employees
- safety management system
- specific duties for rail transport operators extend to contractors
- whistle blower protections

Any subsequent amendments to the National Law following implementation will be developed for consideration by the Ministerial Council in accordance with the provisions of the COAG *Best Practice Regulation – A Guide for Ministerial Councils and National Standard Setting Bodies*.

In addition to the above, there will be ongoing development of guidance material to accompany the law prior to implementation.

8.5 Review

Formal review of the National Law will occur every five years following implementation. The reviews will be conducted to ensure that the legislation is meeting the objectives as outlined by COAG and as stated in the National Partnership Agreement.

9. Appendix A: Amendments to the Model Bill and Regulations with no measurable impact

This document has assessed the impact of a number of amendments to the Model Bill and Regulations. A number of additional amendments, to sections listed below, have been assessed as having no measurable impact.

9.1 Model Bill Amendments with no measurable impact

Sec.	Short Title	Amendment	Draft National Law	Short title
1	Purpose	This provision has been moved into section 3 of the Draft Bill	3	Purpose, objects and guiding principles of Law
2	Commencement	This provision has been amended to account for the enactment of the National Law	2	Commencement
4	Definitions	Various amendments	4	Interpretation
9	Examples	This provision has been omitted for national consistency	N/A	
10	Notes	This provision has been omitted for national consistency	N/A	
11	Crown to be bound	This provision has been amended for clarity and does not change the policy intent	11	Crown to be bound
23	Reciprocal powers of rail safety officers	This provision has been omitted as it is redundant for the National Law	N/A	
25	Rail safety officer must not exercise functions without identification card	No change	136	Identity cards
26	Display and production of identification card	No change	136	Identity cards
27	Return of identification cards	No change	136	Identity cards
29	Duties of designers, manufacturers, suppliers etc.	This provision has been amended for clarity and does not change the policy intent	53	Duties of designers, manufacturers, suppliers, etc.

Sec.	Short Title	Amendment	Draft National Law	Short title
31	Accreditation required for railway operations	This provision has been amended for clarity and does not change the policy intent	62	Accreditation required for railway operations
32	Purpose for which accreditation may be granted	This provision has been amended to further explain the purpose of accreditation	61	Purpose of accreditation
33	Application for accreditation	This provision has been amended for clarity and does not change the policy intent	64	Application of accreditation
36	Coordination between Rail Safety Regulators	This provision has been omitted as it is redundant for the National Law	N/A	
37	Determination of application	This provision has been amended with the inclusion of Model Regulation 6	67	Determination of application
38	Prescribed conditions and restrictions	This provision has been amended for clarity and does not change the policy intent	70	Prescribed conditions and restrictions
39	Penalty for breach of condition or restriction	No change from Model Bill	78	Penalty for breach of condition or restriction
43	Surrender of accreditation	This provision has been amended with the inclusion of Model Regulation 8	75	Surrender of accreditation
45	Immediate suspension of accreditation	This provision has been amended for clarity and does not change the policy intent	74	Immediate suspension of accreditation
46	Keeping and making available documents for public inspection	No change	81	Keeping and making available records for public inspection
New	Regulator to publish register of documents	This provision has been added	42	National Rail Safety Register
48	Where application relates to cooperative railway operations or operations in another jurisdiction	This provision has been omitted as it is redundant for the National Law	N/A	
53	Rail Safety Regulator may make changes to conditions or restrictions	This provision has been amended with a drafting change and does not change the policy intent	72	Commission may make changes to conditions or restrictions

Sec.	Short Title	Amendment	Draft National Law	Short title
58	Compliance with safety management system	This provision has been amended with a drafting change and does not change the policy intent	101	Compliance with a safety management system
61	Interface coordination - rail transport operators	No change	106	Interface coordination – rail transport operators
61A	Interface coordination - rail infrastructure manager - public roads	This provision has been amended for clarity and does not change the policy intent	105	Interface coordination – rail infrastructure and public roads
61B	Interface coordination - rail infrastructure manager - roads other than public roads	This provision has been amended to include the NT Protocols under section 21 of the *AustralAsia Railway Act of NT*	106	Interface coordination – rail infrastructure and private roads
61G	Register of interface agreements	This provision has been amended to account for national consistency	111	Register of interface agreements
71	Contractors to comply with safety management system	This provision has been amended to be consistent the framework of the Draft National Law	119	Other persons to comply with safety management system
120	Proceedings for offences	This provision has been omitted as it is redundant for the National Law	N/A	
New	Infringement notices	New provision	233	Meaning of infringement penalty provisions
139	Infringement penalty	No change	233	Meaning of infringement penalty provisions
144	Commercial benefits order	No change	230	Commercial benefits order
145	Supervisory intervention order	No change	231	Supervisory intervention order
146	Contravention of supervisory intervention order	No change	235	Supervisory intervention order
147	Exclusion orders	No change	232	Exclusion orders
148	Contravention of exclusion order	No change	232	Exclusion orders
152	Immunity for reporting unfit rail safety worker	This provision has been amended for clarity and does not change the policy intent	248	Immunity for reporting unfit rail safety worker

Sec.	Short Title	Amendment	Draft National Law	Short title
160	Prescribed persons	This provision has been omitted as it is redundant for the National Law	N/A	
New	Extra-territorial operation	This provision has been added for the purposes of national consistency	10	Extra-territorial operation of law

9.2 Governance provisions – Establishment of the National Regulator

Sec.	Short Title	Amendment	Draft National Law	Short title
New		This provision has been added for the National Regulator	12	Establishment
New		This provision has been added for the National Regulator	13	Functions and objectives
New		This provision has been added for the National Regulator	14	Independence of Office of the National Rail Safety Regulator
New		This provision has been added for the National Regulator	15	Powers
New		This provision has been added for the National Regulator	16	Constitution of the Office of the National Rail Safety Regulator
New		This provision has been added for the National Regulator	17	Appointment of Regulator
New		This provision has been added for the National Regulator	18	Acting National Rail Safety Regulator
18	Functions	This provision has been amended for clarity and does not change the policy intent	19	Functions of the Regulator
New		This provision has been added for the National Regulator	20	Power of Regulator to obtain information
New		This provision has been added for the National Regulator	21	Appointment of non-executive members
New		This provision has been added for the National Regulator	22	Vacancy in or removal from office

Sec.	Short Title	Amendment	Draft National Law	Short title
New		This provision has been added for the National Regulator	23	Member to give responsible Ministers notice of certain events
New		This provision has been added for the National Regulator	24	Extension of term of office during vacancy in membership
New		This provision has been added for the National Regulator	25	Members to act in public interest
New		This provision has been added for the National Regulator	26	Disclosure of interests
New		This provision has been added for the National Regulator	27	Times and places of meetings
New		This provision has been added for the National Regulator	28	Conduct of meetings
New		This provision has been added for the National Regulator	29	Defects in appointment of members
New		This provision has been added for the National Regulator	30	Decisions without meetings
New		This provision has been added for the National Regulator	31	Common seal and execution of documents
New		This provision has been added for the National Regulator	32	Establishment of Fund
New		This provision has been added for the National Regulator	33	Payments into Fund
New		This provision has been added for the National Regulator	34	Payments out of Fund
New		This provision has been added for the National Regulator	35	Investment of money in Fund
New		This provision has been added for the National Regulator	36	Financial management duties of Office of the National Rail Safety Regulator
New		This provision has been added for the National Regulator	37	Chief executive

Sec.	Short Title	Amendment	Draft National Law	Short title
New		This provision has been added for the National Regulator	38	Staff
New		This provision has been added for the National Regulator	39	Secondments to Office of the National Rail Safety Regulator
New		This provision has been added for the National Regulator	40	Consultants and contractors
New		This provision has been added for the National Regulator	41	Regulator may be directed to investigate rail safety matter
New		This provision has been added for the National Regulator	42	National Rail Safety Register
19	Information to be included in annual reports	This provision has been amended for clarity and does not change the policy intent	43	Annual report
New		This provision has been added for the National Regulator	44	Other reporting requirements
20	Delegation	This provision has been amended for clarity and does not change the policy intent	45	Delegation

9.3 Model Regulation amendments with no measurable impact

Model Reg.	Short Title	Comment	National Reg.	Short Title
4	Application for accreditation	This Regulation has been amended to include the ability to provide an Australian Business Number in an application	8	Application for accreditation
5	What the applicant must demonstrate	This Regulation has been omitted	N/A	N/A
6	Prescribed details of accredited person	Regulation has been elevated into the National Law under section 69 Determination of application	N/A	N/A

7	Prescribed conditions of, or restrictions on, accreditation	This regulation has been amended to include more information required by the operator	9	Prescribed conditions of, or restriction on, accreditation
Model Reg.	**Short Title**	**Comment**	**National Reg.**	**Short Title**
8	Surrender of accreditation	Regulation has been elevated into the National Law under section 76 Surrender of accreditation	N/A	N/A
11	Maintenance and operational conditions	This Regulation has been omitted	N/A	N/A
12	Meaning of interface agreement	Regulation has been elevated into the National Law under section 105 Requirements for interface agreements	N/A	N/A
13	Obligations on rail transport operators	Regulation has been elevated into the National Law under Section106 Interface coordination – rail transport operators	N/A	N/A
14	Obligations on rail infrastructure managers	Regulation has been elevated into the National Law under section 107 Interface coordination – rail infrastructure and public roads and Section 108 Interface coordination – rail infrastructure and private roads	N/A	N/A
15	Obligations on road authorities	Regulation has been elevated into the National Law under section 107 Interface coordination – rail infrastructure and public roads and Section 108 Interface coordination – rail infrastructure and private roads	N/A	N/A
17	Preparation of an emergency management plan	This Regulation has been amended to include the requirement of consultation	19	Emergency management plan

19	Keeping, maintaining and testing an emergency management plan	This Regulation has been amended for clarity and does not change the policy intent	20	Keeping, maintaining and testing emergency management plan
Model Reg.	**Short Title**	**Comment**	**National Reg.**	**Short Title**
21	Rail safety work	Regulation has been elevated into the National Law under section 9 Meaning of rail safety work, however this section is still subject to the maintenance process	N/A	N/A
26	Records of competence	Regulation has been elevated into the National Law under section 118 Assessment of Competence	N/A	N/A
27	Periodic information to be supplied	This Regulation has been amended for clarity and does not change the policy intent	39	Periodic information to be supplied
28	Reporting of notifiable occurrences	This Regulation has been amended with drafting changes	40	Reporting of notifiable occurrences
29	Documents to be made available for public inspection	Regulation has been elevated into the National Law under section 82 Keeping and making available records for public inspection	N/A	N/A
30	Annual report of Rail Safety Regulator	Regulation has been elevated into the National Law under section 42 Annual report	N/A	N/A
31	Audits of railway operations	Regulation has been elevated into the National Law under section 135 Audit of railway operations by Commission	N/A	N/A
32	Embargo notices	This Regulation is redundant and has been deleted	N/A	N/A

34	Prescribed persons	This regulation has been deleted to align with the Draft National Bill	N/A	N/A
35	Exemptions from the Act by regulation	This regulation has been taken from the Model Bill	N/A	N/A
Model Reg.	**Short Title**	**Comment**	**National Reg.**	**Short Title**
New	Application of Commonwealth Privacy Act		38	Application of Privacy Act
New	Application of Commonwealth Freedom of Information Act		36	Application of Freedom of Information Act
New	Application of Commonwealth Ombudsman Act		37	Application of Ombudsman Act

10. Appendix B: Impact assessment assumptions

10.1 Interpretation of the National Law by the Regulator

A key assumption revolves around how the Single National Rail Safety Regulator would regulate compliance with the National Law. The majority of provisions contained in the National Law do not prescribe precise outcomes, requiring instead that rail transport operators "ensure, so far as is reasonably practicable, the safety of the operator's railway operations". Where there are questions, confusion or disagreement over what constitutes minimum compliance standards, it is the Regulator who plays the major role in resolving them. Although Part 7 (Review of decisions) of the National Law provides operators with the ability to challenge decisions of the Regulator, in practice this option has tended to be utilised infrequently.

A significant factor in assessing the impact of establishing the Regulator and National Law is how the Regulator would uphold standards of compliance (that is, interpret the National Law). This type of impact has been divided into two categories.

1. Where no amendment has been proposed to a provision of the Model Bill, no assessment of how the Regulator may interpret it has been made. Such matters are beyond the scope of this regulatory impact statement, which has addressed only proposed amendments to the Model Bill.

2. Where an amendment has been proposed, the impact, where it was assessed as measurable, has been assessed with high and low range values. These values reflect uncertainties in the impact of the amendment, including how the Regulator may interpret the provision.

10.2 Overlap with Work Health and Safety Law

Rail transport operators are required to comply with rail safety, as well as work health and safety law. Due to the significant overlap between these two bodies of law, it may be argued that the regulatory impact of rail safety law (and the National Law specifically, as is being assessed here) is reduced to the extent that any duties are duplicated in work health and safety law.

There is an inherent difficulty in proportionately attributing the impact of rail operations between both bodies of law. Therefore, proposals in this regulatory impact statement have been assessed, as far as possible, by assessing the extent to which they would cause changes to rail operations and its regulation, and measuring the resulting costs and benefits.

10.3 Other assumptions

Other assumptions made in assessing the impact of individual proposals have been addressed within the relevant sections.

11. Appendix C: Alignment with Model Work Health and Safety Bill

Model Bill	National Law	Provision Short Title
7	47	Meaning of reasonably practicable
13	48	Relationship between the Law and occupational health and safety legislation
24	136	Identity cards
New	137	Accountability of rail safety officers
New	138	Suspension and ending of appointment of rail safety officers
New	140	Function and powers
28	52	Safety duties of rail transport operators
49	55	Duty of officers to exercise due diligence
70	56	Duties of rail safety workers
New	143	Powers of entry
117	215	Reviewable decisions
121	218	Period within which proceedings for offences may be commenced
122	220	Authority to take proceedings
124	222	Records and evidence from records
125	223	Certificate evidence
126	224	Proof of appointments and signatures unnecessary
127	219	Multiple contraventions of rail safety duty provision
Part 7 Division 2	Part 8 Division 2	Discrimination against employees
132	226	Offence to give false or misleading information
133	172	Offence to hinder or obstruct rail safety officer
New	251	Enforceable voluntary undertaking
140	251	Compliance with rail safety undertaking
141	253	When a rail safety undertaking is enforceable
149	244	Confidentiality of information
150	246	Civil liability not affected by Part 3 Division 3 or Division 6
Part 8 Division 3	Part 10 Division 5	Codes of Practice
161	262	Contracting out prohibited

12. Appendix D: Economic cost benefit analysis

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This cost benefit analysis has been prepared by Halcrow for the National Transport Commission.

Note: This study uses data provided by third parties. This third party information was used in good faith.

1. Background

The cost benefit analysis has been undertaken in accordance with the Office of Best Practice Regulation (OBPR) *Best Practice Regulation Handbook Appendix E Cost Benefit Analysis* (2010) and Council of Australian Governments (COAG) *Best Practice Regulation Guide* (2007). It documents the methodology and findings of the cost benefit analysis undertaken to evaluate the material impacts of the proposed amendments and additions to the existing Model Bill as part of the introduction of the proposed National Rail Safety National Law. The incremental costs or benefits have been the primary focus of the assessment of these changes. The base case, or status quo, is thus the Model Bill and Regulations.

This appendix contains the following subsections:

- Background – discusses the matters required to be covered in this cost benefit analysis appendix
- Railway industry and survey response statistics – sets out the industry statistics used in the preparation of this appendix and the statistics about the activities submitted by the respondents
- Items with measurable impact – sets out those items for which a cost benefit analysis has been undertaken
- Measurable impact items option summary – provides a summary of the costs and benefits of each of the options assessed.

1.1 Approach

The following section provides an overview of the cost benefit analysis approach, including the survey implemented to determine costs and benefits of the change, and the parameters adopted in the appraisal.

1.1.1 Cost benefit analysis

Cost benefit analysis (CBA) is a tool for estimating the economic value of projects. It measures the change in welfare after allowing for economic costs. This should not be confused with a discounted cash flow, which uses financial costs and benefits to evaluate a proposal from the point of view of the project proponent.

CBA takes into account non-market goods, externalities, opportunity costs and benefits and, if the market is distorted, shadow prices. A non-market good is one which does not have an observed monetary value, such as improvements in safety; externalities are third party effects which are not usually accounted for by private costs but do represent a cost (or benefit) to society; the opportunity cost (or benefit) is the cost of pursuing an alternative course of action; and, shadow prices represent the social value of goods or services. CBA does not take into account to whom the costs or benefits accrue as the analysis is undertaken at the societal level, and it ignores taxes and subsidies as they are monetary transfers.

Any CBA is essentially a comparison between the base case and the proposal. The base case is often the status quo or the 'do minimum' case and is important as it forms the basis of comparison in determining the likely impact of the preferred option or options. In this case,

the base case is the assumed rail safety arrangements under the provisions of the Model Bill.

That is, the incremental costs and benefits of implementing the National Law have been estimated assuming the Model Bill as the base case and assuming that all elements of the Model Bill have been implemented in full. However, it is noted that in a number of areas the Model Bill has not been fully implemented and so this is considered a 'virtual' base case.

For those items on which the Model Bill is silent but that are captured by the National Law, for example drug and alcohol and fatigue management, the comparison has been made on the basis of the existing arrangements in each state or territory.

Business compliance costs

A key issue in regulation is the compliance burden imposed on businesses. While many of the changes to the legislation would have no compliance burden, there are some items which would incur potentially significant compliance costs to rail transport operators.[48] Such costs are likely to include items such as education, expert advisory services, documentation, and approval and enforcement expenses for both the Regulator and the regulated.

These costs, or cost savings, have been estimated for each proposed amendment or addition based on information provided by regulators and rail transport operators and verified through consultation with industry practitioners who are considered to be experts in their field.

Risk analysis

Risk analysis in a regulatory impact statement concerns the "quantitative assessment of the risk magnitudes affected by the proposal".[49] In this case, the proposal is the regulatory solution to an identified problem. OBPR sets out four issues to be addressed by the risk assessment:

1. appraisal of the current level of risk to the exposed population from an identifiable source
2. the reduction in risk that would result from the introduction of the proposed measures
3. consideration of whether the proposed measures are the most effective available to deal with the risk
4. whether there is an alternative use of available resources that would generate greater overall benefit to the community.

Outputs from the risk analysis inform the CBA and identify the costs and benefits to be measured. Safety related benefits have been measured where possible and appropriate, noting that a number of measures are being proposed for reasons other than safety, that is, to improve efficiency and to ensure consistency of approach.

[48] Reference to 'rail transport operators' includes both rolling stock operators and rail infrastructure managers.

[49] COAG Best Practice Regulation, A guide for ministerial councils and national standard setting bodies, October 2007

Competitive effects

Regulation can often curtail the competitive environment in an industry. Regulation could deter entry or exit from the industry or effectively grant rights to certain parties or only enable certain parties to compete.

It is considered that moving from the Model Bill to the draft National Law should not have any significant impact on the competitive environment and would not deter entry or exit of rail transport operators to the industry.

1.1.2 Cost benefit analysis parameters

The CBA has been undertaken in line with standard industry practice and is consistent with guidelines provided in the *Best Practice Regulation Handbook* (OBPR, 2010).

The following parameter values have been adopted for this appraisal:

- 10 year period of operation, implementation takes place in year 0
- Real discount rate of 7 per cent, including high and low variations at 3per cent and 10 respectively
- 10 year evaluation period[50]
- Price year – 2010.

1.1.3 The survey

Information about the costs and benefits associated with specific items has been gathered from a number of sources including from existing regulators and rail transport operators. This report is predominantly based on the responses to a survey issued to regulators and rail transport operators covered by the proposed National Law and Regulations. The approach involved a postal survey issued to all regulators and a representative group of operators. Industry statistics have been used to scale up the survey responses to reflect the impact on the sector as a whole.

Rail transport operator responses have been categorised into the following three groups: large companies, small to medium companies and tourist and heritage organisations. These groups are defined as follows:

- Large operators are those operators with over 1000 staff.
- Small to medium operators (SME) are all other operators, generally with significantly fewer than 1000 staff.
- Tourist and heritage operators have typically up to 200 staff.

The survey responses have been analysed and critiqued and form the basis of the following assessment of costs and benefits accruing to regulators and operators. A summary of the survey response rates and indicative representation is provided in Section 2.2 of this appendix.

[50] A ten year evaluation period has been adopted to align with the appraisal timeframe used in the assessment of the single, national rail safety regulatory framework. It may seem that this relatively short timeframe unduly limits the period over which the costs and benefits accrue. However at the real discount rate assumed, costs and benefits beyond a ten year timeframe provide diminishing changes in present value terms.

2. Railway industry and survey response statistics

This section contains rail industry statistics that have informed the CBA. The statistics serve to illustrate the scale and scope of the sector.

The total number of accredited rail transport operators in October 2010 was 164. The number principally accredited in each state or territory is set out in Table 1 below.

All rail transport operators must be accredited in every state or territory in which they operate. The place of principal accreditation is the place of their principal regulator, which in turn is the regulator of the jurisdiction in which the rail transport operator is principally based. This is typically taken to be the jurisdiction in which the corporate management of the safety management system is undertaken and/or administered.[51]

Table 1. Accredited rail transport operators by state or territory

	NSW	NT	QLD	SA	TAS	VIC	WA	Total
Principally accredited	49	2	25	31	12	27	18	164
Accredited	14	8	17	18	5	15	7	84

Source: Register of Accredited Railways in Australia. Principal accreditation is in their home state or territory; rail transport operators can also be accredited in other states and territories.

Table 2 shows that most rail transport operators (127 out of 164 or 77 per cent) are accredited in only one state.

Table 2. Accreditation by state or territory

No. of states/territories in which accredited	No. Of accredited railways
accredited in 1 state or territory	127
accredited in 2 states or territories	16
accredited in 3 states or territories	9
accredited in 4 states or territories	2
accredited in 5 states or territories	6
accredited in 6 states or territories	4
Accredited in 7 states or territories	0
Total accredited railways	**164**

Source: Register of Accredited Railways in Australia

Table 3 shows the total train kilometres travelled over the years from 2001 to 2009. The numbers are stable with no demonstrable trend increase or decline, with the exception in Northern Territory and Western Australia. The trend for increasing train kilometres observed in Western Australia is associated with the continued growth of the mining sector. Statistics

[51] For further information see: http://www.rsrp.asn.au/principalregulator_role.cfm

for the Northern Territory reflect the commencement of the operation of the Darwin to Alice Springs railway line, which opened in 2004.

In Tasmania an initial increase in train kilometres travelled was experienced between 2001 and 2005 whilst under private ownership (Australian Transport Network and, from 2004 Pacific National). The decline in train kilometres travelled since 2005 can be largely attributed to a reduction in intermodal and coal traffic and cessation of timber traffic.

Table 3. Total Million Train Kilometres (MTK)

Year	QLD	NT	SA	WA	VIC	TAS	NSW	Total
2001	39.39	0.16	16.42	16.50	36.83	0.92	64.89	175.11
2002	39.10	0.18	17.28	19.47	37.90	0.92	63.13	177.99
2003	38.62	0.18	16.12	20.34	37.79	0.98	60.89	174.93
2004	39.34	1.19	17.14	22.80	37.79	1.10	62.57	181.92
2005	39.78	1.12	17.50	24.22	38.17	1.16	60.47	182.42
2006	38.62	1.26	17.52	24.63	38.17	1.03	59.13	180.37
2007	39.93	1.50	17.05	25.68	37.51	0.92	59.91	182.50
2008	41.68	1.67	17.52	32.94	36.21	0.85	60.79	191.66
2009	38.67	1.77	15.47	33.02	33.93	0.75	62.84	186.45

Source: Australian Transport Safety Bureau, Australian Rail Safety Occurrence Data. Figures are in millions

2.1 Rail safety accident data

To assist in the assessment of potential rail safety benefits generated by the implementation of the National Law, it is necessary to establish and understand the cost of rail safety accidents.

A rail safety accident, as discussed in the analysis, is defined as “a transport accident involving a railway train or other railway vehicle operated on rails, whether in motion or not”.[52] This definition of rail accidents excludes level crossing accidents involving motor vehicles as well as rail related suicides.

Level crossing accidents involving motor vehicles are excluded from the standard definition of rail safety accidents. They have been identified separately in the following analysis since the vast majority of level crossing accidents involving motor vehicles involve factors beyond the control of rail safety regulation and are therefore not impacted by most of the proposed amendments and additions under consideration. Unless clearly stated in the text, this type of accident has been excluded from the assessment of safety benefits.

[52] BTRE, Rail Accident Costs in Australia, 2003.

Rail related suicides have been excluded as it is assumed that changes in rail safety regulation would not change the frequency, causes or results of this type of accident and therefore would not impact on the associated costs.

In the assessment of potential safety benefits this CBA has used an estimate of rail safety accident costs as published in the 2003 Bureau of Transport and Regional Economics[53] (BTRE) *Rail Accident Costs in Australia Report 108* (2003). The report presents the findings of a comprehensive socio-economic assessment of Australian rail accident costs. Whilst the study relies upon 1999 reported rail safety data, it is considered to be the only reliable source of rail safety cost information and is the latest available cost data.

Table 4 below provides a summary of the average rail accident cost data as reported by BTRE (2003) and Table 5 presents the equivalent information for level crossing accidents involving motor vehicles.

Table 4. 1999 rail safety accident data ($million)

Type of Cost	Total Cost	No. of Accidents	Cost per Accident
Human costs	73.00		0.21
Property costs	56.00		0.16
Other costs	4.00		0.01
Total	133.00	351	0.38

Source: *Rail Accident Costs in Australia*; BTRE© Commonwealth of Australia 2002; ISSN 1446-9790; ISBN 1-877081-13-2

Table 5. 1999 level crossing accidents involving motor vehicles ($million)

Type of Cost	Total Cost	No. of Accidents	Cost per Accident
Human costs	9.00		0.101
Property costs	1.00		0.011
Other costs	0		0.000
Total	10.00	89	0.112

Source: *Rail Accident Costs in Australia*; BTRE© Commonwealth of Australia 2002; ISSN 1446-9790; ISBN 1-877081-13-2

Table 4 indicates a total rail accident cost of $133M and an average cost per accident of $0.38M in 1999.

To derive an equivalent 2010 cost estimate, the total cost of all accidents combined ($133M) has been adjusted by CPI[54]. In order to determine an estimate of the total number of accidents in 2010, reference has been made to rail safety *occurrence* time series data in the absence of equivalent historical data for rail safety accidents.

A rail safety occurrence is defined as any reportable safety breach, whether or not that resulted in an economic cost or 'loss'.

[53] Bureau of Transport and Regional Economics (BTRE) is now known as the Bureau of Infrastructure, Transport and Economics (BITRE).

[54] Consumer Price Index as published by the Australian Bureau of Statistics

Table 6 sets out rail safety occurrence volumes and occurrence rates per million train kilometres (MTK).

Table 6. Rail safety occurrence data

Year	Actual Occurrences	Total Million Train Km	Occurrence rate per MTK
2001	468	175.1	2.68
2002	522	178.0	2.94
2003	424	174.9	2.42
2004	442	181.9	2.43
2005	418	182.4	2.29
2006	403	180.4	2.24
2007	382	182.5	2.09
2008	434	191.7	2.26
2009	413	186.4	2.22

Source: Australian Transport Safety Bureau, *Australian Rail Safety Occurrence Data*, from 1 January 2001 to 31 December 2009.

The declining trend in reported rail safety occurrences reflects increasing awareness and emphasis on improving safety, particularly in light of high profile accidents such as the 2003 Waterfall accident in New South Wales. Increased education, sharing of knowledge and engineering solutions, such as Australian Rail Track Corporation's (ARTC) concrete sleepering and track upgrade program, have combined to affect an overall decline in the number of reported occurrences since 2001.

Countering that decline is the anticipated growth in train kilometres travelled as the land freight task is forecast increase significantly in a relatively short time period[55] (doubling of the freight task by 2020, from 2000 levels, has been cited by some and passenger numbers are forecast to increase significantly according to state and federal transport authorities. Assuming that the observed incident trend continues into the future and that anticipated growth in train kilometres is realised, then it is expected that incident numbers would decline slightly initially followed by a slow increase as rail traffic continues to grow.

The average rate of decline in rail safety occurrences per million train kilometres (MTK), as presented in Table 6, is 1.55 per cent per annum.

For the purpose of this analysis it has been assumed that rail safety accidents have displayed a similar trend to occurrences over the last decade. In forming this assumption it is noted that regulators and operators alike are arguably more inclined to target a reduced accident rate than occurrence rate given the relative cost implications. Thus the assumption of a similar declining trend may be slightly conservative, however, it is considered appropriate for the purpose of this assessment.

The rail safety accident cost data shown in Tables 4 and 5 have been further adjusted to reflect the currently preferred approach to the value of statistical life (VOSL). The Willingness To Pay approach to estimating value of statistical life now supersedes the Human Capital approach adopted in estimating the 1999 rail accident costs. The value of statistical life is a measure often used to estimate the benefits of reducing the risk of death and is an estimate of the financial value society places on reducing the number of deaths by one (OBPR, 2008). It is currently considered by industry leaders, including the Office of Best Practice

[55] NTC Twice the Task report 2008.

Regulation, that value of statistical life is most appropriately measured by estimating how much society is willing to pay to reduce the risk of death, which may be determined in a number of ways including through surveys.

Accordingly, the human cost component of the 1999 rail accident cost estimate ($0.21M) has been scaled up with reference to relevant Willingness To Pay values.[56]

Table 7 presents the derived 2010 rail safety accident cost data and Table 8 presents the derived 2010 cost data for level crossing accidents involving motor vehicles.

Table 7. 2010 Rail safety accidents cost estimate ($million)

Type of Cost	Total Cost	No. of Accidents	Cost per Accident
Human costs	227.28		0.76
Property costs	78.80		0.26
Other costs	5.63		0.02
Total	311.71	300	1.04

Table 8. 2010 rail safety accidents cost estimate – level crossings ($million)

Type of Cost	Total Cost	No. of Accidents	Cost per Accident
Human costs	12.66		0.37
Property costs	1.41		0.02
Other costs	0.00		0.00
Total	14.07	76	0.39

As shown in Table 7, the estimated number of accidents in 2010 is 300, which is expected to remain constant over the 10 year CBA evaluation period. This is considered appropriate given the declining trend in rail safety occurrences, which is likely to be offset by the forecast growth in train kilometres.

Table 9 shows the total train kilometres travelled, passenger train kilometres travelled and freight train kilometres travelled in 2009.

Table 9. Total passenger and freight Million Train Kilometres (MTK)

Year	QLD	NT	SA	WA	VIC	TAS	NSW	Total
Freight	25	1	7	18	4	1	17	72
% of total	64	50	47	55	12	100	27	39
Passenger	14	0	9	15	30	0	46	114
% of total	36	0	60	45	88	0	73	61
Total	39	2	15	33	34	1	63	186

Source: Australian Transport Safety Bureau, *Australian Rail Safety Occurrence Data* Figures are in millions of train kilometres in 2009.

[56] RISSB Costing Model (2010) has been used to determine the ratio of Human Capital to Willingness To Pay values and a factor of 2.21 has been used to update the accident cost estimate used in this analysis.

2.2 Survey response statistics

The NTC, in conjunction with Halcrow, undertook a survey to gather economic, operational and financial information that forms the basis of this CBA. Respondents surveyed include both regulators and rail transport operators across all states and territories. The statistics from the survey are as follows:

- 33,000 kilometres of track length were managed by the rail infrastructure managers that responded
- 88 million train kilometres were covered by respondents (including maintenance companies who covered more train kilometres than most small rolling stock operators)
- $7.6 billion was the combined turnover of the companies that responded (noting that many organisations declined to answer this question)
- 27,000 people were employed by the respondents
- 4,200 contractors, in addition, were employed by the respondents
- Employee numbers varied from 26 to 12,000 per respondent
- 2,300 was the average number of employees
- 900 was the median number of employees.

2.2.1 Number of rail transport operators

For the purpose of this CBA rail transport operators have been identified and categorised as follows:

- 82 commercial rail transport operators (excluding tourist and heritage operators), comprising:
    - 12 large commercial operators
    - 70 small to medium commercial operators
- 82 tourist and heritage operators.

The term *commercial operator* is in reference to those rail transport operators whose principal purpose is the transport of people and/or goods and a *tourist or heritage operator* is an operator whose principal purpose is the provision of a rail tourist or heritage value service.

2.2.2 Association of Tourist and Heritage Rail Australia response statistics

The key statistics provided by the Association of Tourist and Heritage Rail Australia (ATHRA) are:

- 82 tourist and heritage rail transport operators
- 76 ATHRA members (15 large, 23 medium and 38 small operators)
- 11 use shared track provided by a rail infrastructure manager

- 65 use their own track
- Track length varies from 0.3 km to 77 km
- Annual train kilometres travelled vary from 10 km to 46,000 km.

2.2.3 Survey response rate and consultation summary

The survey response rates are summarised as follows:

Regulators

Five out of six state regulators responded in writing to the survey and verbal comments were received from the remaining state regulator. Discussions were also held with regulators both as a group and individually. Coverage was judged to be 100 per cent.

Commercial rail transport operators

The Australian Railway Association provided advice regarding the most appropriate operators to target as part of the survey. The resulting mix of operators is considered representative of small and medium operators as well as the large operators, and included one large contractor with operations in multiple states. In addition, the operators surveyed adequately mixed rail infrastructure managers and rolling stock operators across the states and territories. Operators associated with sizable truck fleets and intermodal hubs, and operators moving commodities, including coal and iron ore, are also represented. Across all commercial operators, the survey is estimated to include companies whose rolling stock operations comprise around 85 per cent of the reported train kilometres travelled in 2009.

The commercial rail transport operator category also includes those operators servicing the mining industry. These may be subsidiaries of the relevant mining companies or independent freight operators contracted to carry the freight from the mine to its destination. It is estimated that there are approximately 15 operators servicing the mining industry.

Interstate operators are also a distinct group of commercial rail transport operators. These operators run services across greater distances and with longer travel times than other operators. It is estimated that there are approximately 37 operators with interstate services.

Five out of the twelve large commercial operators responded to the survey.

Seven small to medium commercial operators responded to the survey.

Rail safety workers

A rail safety worker is defined in the Model Bill as “a natural person who has carried out, is carrying out or is about to carry out, rail safety work”.

There are estimated to be approximately 24,000 rail safety workers working for accredited rail transport operators in Australia, of which approximately 8,000 rail safety workers are in New South Wales.

This number has been estimated using survey response data. Approximately 21,000 rail safety workers were identified as being employed in companies that responded to the survey, which in turn represents around 85 per cent of the industry.

At just over 85 per cent coverage the total number of rail safety workers is thus approximately 24,000. This is a speculative calculation and the amount is an assumption.

Tourist and heritage rail transport operators

The Association of Tourist and Heritage Rail Australia (ATHRA) responded on behalf of its 76 members. There are estimated to be six tourist and heritage operators without ATHRA membership. Several discussions were held with ATHRA and its response was comprehensive.

2.3 Railway regulator and operator cost estimates

A series of standard cost estimates have been derived in consultation with regulators, operators and other industry professionals and applied within this CBA. They are summarised as follows:

- Amusement and hobby railways costs:
    - $2,000 to $5,000 per annum is the incremental cost to regulate an additional amusement or hobby railway
    - $25,000 to $70,000 is the one-off cost for an amusement or hobby railway to undertake accreditation, with $10,000 per annum in maintenance costs.
- Private siding registration costs:
    - 1350 is the estimated number of private sidings in Australia
    - $1,000 is the cost for a regulator to assess a private siding registration application
    - $10,000 to $20,000 is the cost to the operator to develop a private siding interface agreement.
- Exemption from accreditation costs (small, low risk and tourist and heritage operators):
    - $75,000 is the cost to apply for exemption from accreditation
    - $45,000 is the cost to apply for exemption from the safety management system
    - $20,000 is the cost to apply for exemption from components of the safety management system
    - $10,000 to $25,000 is the cost to the regulator to process an accreditation exemption application at the time of accreditation
    - $6,000 to $12,000 is the cost to the regulator to process an accreditation exemption application after accreditation.
- Safety management system costs:
    - $5,000 to undertake an internal review of the safety management system
    - $15,000 to employ an external consultant to undertake the review.
- Drug and alcohol management program costs:
    - $10,000 is the cost for small to medium operators to prepare a compliant drug and alcohol management program.
- Testing for drugs and alcohol costs:

- $30 is the cost to the operator of a non-evidentiary standard test
- $250 is the cost to the operator of an evidentiary standard test.

2.4 Additional references and data

Information concerning accredited rail transport operators has been taken from the Register of Accredited Railways in Australia (RARA) as at 1 July 2010.[57] There are 164 accredited rail transport operators listed on the RARA list at 1 July 2010.

Of the 164 accredited rail transport operators in Australia, 49 are principally accredited in New South Wales (see Table 1 of this appendix). This leaves 115 principally accredited outside New South Wales. Half of these are assumed to be tourist and heritage operators and five are assumed to be large operators. This leaves 53 small to medium sized rail transport operators. It is estimated that of the small to medium sized rail transport operators approximately 53 reside outside of New South Wales. This is significant in examining the impact of particular options where the current practice in New South Wales differs from that of other states and territories.

The Australian Bureau of Transport Statistics (ABS) data show 12 rail transport operators have over 200 staff.[58] This has been assumed as the number of large rail organisations. The remaining 152 rail organisations, from the same ABS data, are small to medium enterprises based on ABS classifications.

In addition, from the ABS data referred to above, which details entry and exit of organisations in the sector, 11 per cent of the total number of organisations were new entrants to the sector during the year. Those new entrants were all small to medium operators.

ATHRA reports that it has 76 members (2010). Of those, 65 were both rolling stock operators and rail infrastructure managers.

[57] RARA is available from the National Rail Safety Regulators' Panel[57] website http://www.rsrp.asn.au/.

[58] ABS 8165.0 Jun 2003 to Jun 2006 Counts of Australian Businesses, including Entries and Exits

3. Items with measurable impacts

3.1 Introductory comments

This section contains the evaluation of the measurable impact items. In total, approximately one hundred amendments have been proposed to the Model Bill. The majority are for drafting changes only and propose no change in policy; therefore, they are deemed to have no measurable impact.

The items with measurable impacts are:

- Railways to which the Act does not apply
- Private sidings exemption from accreditation
- Exemption framework
- Powers with respect to interfaces with parties whose operations may impact rail safety
- Duty for loading and unloading rolling stock
- Safety management system
- Health and fitness management program
- Drug and alcohol management
- Fatigue risk management
- Network rules
- Regulator to conduct cost-benefit analysis for mandatory safety decisions.

In the following sections each measurable item is discussed in turn and analysed with respect to economic costs and benefits as they accrue to regulators and rail transport operators, including rolling stock operators and rail infrastructure managers. The summary tables that follow the discussion of each measurable item set out the high and low set up costs and the high and low ongoing costs adopted in the analysis.

The CBA has relied largely upon survey responses and additional information provided by regulators and rail transport operators, which have been reviewed by independent rail safety and operations experts.

Throughout the document, and in line with standard industry practice, costs are presented as negative values, indicated by parentheses, and benefits and cost savings are shown as positive values.

3.2 Railways to which the Act does not apply

This item is addressed in Section 6.4.2 of the regulatory impact statement.

Section 6 of the Model Bill excludes application of the Bill to certain classes of railways.

The costs and benefits of the following options are assessed:

Part 1: Additional railways to be excluded from the National Law

Option 1.1

Status quo (no impact).

Option 1.2

To exclude from the National Law, in addition to those types of railways already prescribed in the Model Bill, railways used only by a horse-drawn tram, railways used only for a static display and hobby railways that do not operate on or cross, a road or road-related area within the meaning of the Australian Road Rules. A definition to be included for *hobby railways*, referring to a "*railway intended or used as a hobby, is operated on private property and is not operated for hire or reward, commercial operations or public participation by invitation or otherwise*".

Part 2: Amusement railways

Option 2.1

Status quo (no impact).

Option 2.2

Require amusement railways to comply with the National Law (i.e. delete section 6(e) of the Model Bill), but authorise the Regulator to exclude railways or classes of railways (e.g. by notice). This latter authority would permit the Regulator to exclude any and all types of railways (i.e. beyond just amusement railways) and substitute for the existing arrangement under which such exclusions may be granted by prescription in the Model Regulations (i.e. by deleting section 6(f) of the Model Bill). This option has not been assessed.

Option 2.3

As for Option 2.2, require amusement railways to comply with the National Law (i.e. delete section 6(e) of the Model Bill). However, exclusions for amusement railways may be granted by the existing process of prescribing them in the Model (now National) Regulations.

Option 2.4

Retain the exclusion for amusement railways, but to:

- amend the scope of the exclusion to railways that are amusement devices, but only those that do not operate on or cross a road or road-related area (within the meaning of the Australian Road Rules)
- define amusement devices as those used solely in an amusement park for hire or reward, or in the course of a commercial operation, and
- define amusement parks as commercially run enclosed grounds where amusements are situated.

The provision for excluding railways by the making of regulations would be retained. Additionally, a corollary provision for including, by the making of regulations, railways that were otherwise excluded under section 6 of the Model Bill would be introduced.

Proposal

Options 1.2 and 2.4 are proposed.

3.2.1 Economic costs

Regulator

Regulator survey responses have described a range of existing approaches to the management of amusement devices and hobby railways. This has had a significant impact on the perceived costs of the proposed options and the assessment of those railways to be included or excluded.

Option 1.2, which proposes to exclude additional types of railway (those used only by a horse-drawn tram, railways used only for a static display and hobby railways that do not operate on, or cross, a road), has minimal cost implications since a majority of such railways are already excluded from regulation. However, one survey respondent, currently regulating six operators that would be excluded under Option 1.2, estimated a cost saving of approximately $10,000 per operator per annum. Discussions with industry professionals have determined that the incremental cost saving of having one less operator to regulate is more likely to be in the range of $2,000 to $5,000 per operator per annum. The cost saving varies depending on the relative size and complexity of the operations and includes reduced administrative duties and a reduction in the requirement to undertake site visits. This represents an annual cost saving of between $0.01 and $0.03 million.

For Option 2.3, which requires amusement railways to comply unless an exclusion is prescribed in the regulations, it is estimated that it would cost a state-based regulator between $0.1 million and $0.2 million to assess the operators captured by the amended section and to identify appropriate exclusions. The cost includes hiring and training the additional staff required to undertake the assessments and exclude railways from coverage as appropriate. Ongoing maintenance costs have been assumed to be 10 per cent of the initial set up cost for each state or territory.

For Option 2.4, which proposes to further clarify and define those railways which are currently excluded, it is estimated that an additional cost of between $0.05 million and $0.1 million would be incurred by regulators to assess operators currently excluded and to identify additional inclusions. This cost estimate is lower than that for Option 2.3 since the rail transport operators to be reviewed would be more apparent and less in number.

Rail transport operators

Each of the options would impact only on tourist and heritage railways as detailed below. The proposal would not impact on any commercial operators, as has been confirmed by survey respondents.

Tourist and heritage rail transport operators

For Option 1.2 ATHRA consider that a small number of hobby railways would now be excluded. Moreover, if the hobby railway is currently accredited then the compliance cost of running a small, low risk, accredited railway is estimated at approximately $10,000 per annum (ATHRA). It is noted that this would in all likelihood be a material amount for the small hobby railway concerned.

ATHRA has identified that six tourist and heritage rail transport operators currently operating as amusement devices would be included as per the requirements of Option 2.3. All six operators would be required to undertake the full accreditation process at a high cost of $70,000 per accreditation and a low cost of $25,000. This estimate has been confirmed through consultation with industry experts. The ongoing maintenance cost of accreditation is assumed to be approximately $10,000 per annum, per operator as indicated by ATHRA. This is the time spent in ensuring the railway stays within the Act, including completing and maintaining proper documentation and records that would otherwise not be undertaken.

For Option 2.4, it is estimated that all of the six tourist and heritage rail transport operators mentioned above would need to be included. The total high cost estimate is therefore $0.42 million and the low cost estimate is $0.15 million. The associated high and low ongoing costs have been estimated at $0.06 million and $0.03 million respectively.

It is considered that these tourist and heritage operators could qualify for an exemption from some of the accreditation requirements under the new exemption section, and it has been estimated that the accreditation and ongoing costs would be lowered by roughly two thirds if exemptions were granted.

An application for exemption has been estimated to cost an operator $10,000. A requirement of the application would be the development of a business case detailing the reasons for the exemption. The Regulator would be required to review the business case and make a site visit for inspection and review. The low cost is assumed to be the same as the high cost. It has also been estimated to cost the Regulator a similar amount to assess the application.

3.2.2 Economic benefits

The intent of this amendment is to refine the existing classification of railways excluded by the regulations and to ensure that railways and operators are regulated by the most appropriate body according to the perceived riskiness of the operation.

Workplace Health and Safety Laws currently apply to all railways, including those not currently regulated by the Rail Safety Regulator. The inference is that the impact on safety of any changes such as those proposed above would be largely incremental in nature and it has therefore been estimated that any benefits, given their incremental nature of the proposals and the target group, would be small. Discussions with industry experts have indicated that, whilst factors impacting on the causes of minor incidents are likely to be equally well regulated by both Workplace Health and Safety and the Rail Safety Regulator, factors influencing more serious accidents would be better addressed by the Rail Safety Regulator.

Assuming that the additional six operators to be encompassed by the regulations, as per Options 2.3 and 2.4, each experience one serious accident every twenty years (or 0.5 accidents per operator during the course of the CBA ten year evaluation period), there is a potential saving of three accidents during the CBA evaluation period. The frequency of serious accidents, that is one every twenty years, has been adopted following advice from industry professionals and reflects the rarity of such events. However, it has not been possible to obtain data to support this assumption. It has been arbitrarily assumed for the purpose of this calculation that the revised regulations may prevent half of these accidents, since the proposed regulatory changes are unlikely to avoid all such accidents, at an average rail safety accident cost of $1.04 million the potential (high) safety benefit is $1.56 million or $0.16 million per annum, with a low benefit of zero.

3.2.3 Summary

The tables below provide a summary of the costs and benefits of Options 1.1, 1.2, 2.3 and 2.4. Option 2.2 has not been assessed.

Table 10. Railways to which the Act does not apply, Regulator consolidated cost, $million ($2010)

	Initial Cost		Ongoing Cost Per Annum		Present Value Cost	
	high	low	high	low	high	low
Option 1.1	0	0	0	0	0	0
Option 1.2	0	0	0.03	0.01	0.21	0.08
Option 2.3	(1.20)	(0.60)	(0.12)	(0.06)	(2.04)	(1.02)
Option 2.4	(0.60)	(0.30)	(0.06)	(0.03)	(1.02)	(0.51)

Table 11. Railways to which the Act does not apply, tourist and heritage, consolidated cost, $million ($2010)

	Initial Cost		Ongoing Cost Per Annum		Present Value Cost	
	high	low	high	low	high	low
Option 1.1	0	0	0	0	0	0
Option1.2	0	0	0.03	0.01	0.21	0.08
Option2.3	(0.42)	(0.15)	(0.06)	(0.03)	(0.84)	(0.36)
Option2.4	(0.42)	(0.15)	(0.06)	(0.03)	(0.84)	(0.36)

Table 12. Railways to which the Act does not apply, economic benefits, $million ($2010)

	Benefit Per Annum		Present Value Cost	
	high	low	high	low
Option 1.1	0	0	0	0
Option 1.2	0	0	0	0
Option 2.3	0.16	0	1.12	0
Option 2.4	0.16	0	1.12	0

3.3 Private sidings exemption from accreditation

This item is addressed in Section 6.4.3 of the regulatory impact statement.

Section 56 of the Model Bill provides for rail infrastructure managers of private sidings to be exempted from having to be accredited.

The costs and benefits of the following options are assessed:

Option 1

Status quo (no impact).

Option 2

Amend section 56 of the Model Bill, as follows:

- Clarify that exemptions from accreditation apply to the operation of rail infrastructure (on private sidings) only, not rolling stock.

- Give the Regulator power to refuse to register a siding, or to suspend or cancel a registration, linked to an assessment that the operator will/does not adequately comply with safety duties.

- Require that private siding managers comply with Section 61 in relation to the management of all interfaces, generally, rather than just those with accredited railways, as is required by the Model Bill.

- Clarify that it is the siding manager who is to be registered, not the physical siding.

Also, amend Model Regulation 11 (Maintenance and operational conditions) to better align with the risk management principles proposed to be included in Section 57 - Safety Management System (SMS). Those principles are proposed to be drawn from Schedule 3 (*Matters and Information to be Contained in a SMS of a Non-Accredited Rail Operator*) of the Victorian Rail Safety Regulations.

Proposal

Option 2 is proposed.

3.3.1 Economic costs

Regulator

Regulator survey responses have indicated that the average cost to assess and review a private siding registration application is approximately $1,000. This setup cost encompasses the initial assessment, documentation, internal training, peer review and time spent on coordination. Furthermore, there is an ongoing cost to the Regulator associated with each registration. The ongoing cost generally comprises items such as, random (desktop) audits, regular reviews and changes of ownership amendments and has been estimated at approximately $500 per registration.

Most regulators indicated that under Option 2, the administrative burden would be vastly reduced. In most states and territories rail infrastructure managers own more than one private siding and this would significantly reduce the number of registration applications submitted to the Regulator for processing. It is estimated that if rail infrastructure managers were required to register the physical infrastructure then the cost burden to assess and review all applications would be approximately $1.35 million. This figure was based on a combination of two factors, being 1) the total estimated number of private sidings across all states and territories, and, 2) the average estimated cost to assess and review a private siding application.

The total number of private sidings is estimated to be approximately 1,350.[59]

Total initial implementation cost under Option 2 was estimated to be approximately $0.46 million. This cost estimate has been based on a combination of two factors, being 1) the estimated number of private siding infrastructure managers across all states and territories, and 2) the average estimated cost to assess and review a private siding application. The difference between the total cost of Option 2 ($0.46 million) and Option 1 ($1.35 million) translates to a cost saving of $0.89 million. A more conservative low estimate of $0.45 million has been assumed.

[59] It has not been possible to obtain full information about the number of private sidings in each state. Missing data have therefore been estimated using statistics for comparable states.

These estimates have been derived largely from regulator survey responses and verified through consultation with industry professionals.

Several regulators noted that there would be an additional ongoing cost saving since they would not be required to process as many activity statements, as fewer activity statements would be lodged each year. Conversely, it is recognised that there would be additional costs associated with ongoing monitoring and auditing as a result of the extension of requirements for interface agreements. The net effect of the two opposing cost streams has been estimated to be an annual cost saving of low $0.17 million and high of $0.33 million. The additional ongoing costs associated with the extension of requirements for interface agreements are substantially lower than the potential savings from not having to register each physical private siding.

Rail transport operators

Under Option 2, and for the purpose of this cost and benefit analysis, it is assumed that every private siding road interface would require the preparation of an interface agreement.

Operator survey responses have indicated that additional costs would be incurred with the implementation of Option 2. Several rail infrastructure managers with private sidings indicated that the cost to enter into an interface agreement with a road manager is between approximately $10,000 and $20,000 depending on the complexity of the site. These costs include site visits, stakeholder correspondence and meetings, and preparation of documentation. For more complex sites the agreement process is likely to involve a greater number of stakeholders and more protracted process to form the agreement. To enable the estimation of the implementation costs for rail infrastructure managers, the following assumptions have been made:

- total number of interface agreements required (226) equals to the total number of cross roads; and
- cost per interface agreement is in the vicinity of $10,000 and $20,000[60]

Taking into account both the cost of an interface agreement and the number of interface agreements required, it has been estimated that the total cost would be in the range of $2.26 million and $4.52 million for all rail infrastructure managers across all states and territories.

Furthermore, for the rail infrastructure managers who own multiple private sidings, it has been estimated that a total saving (in not having to prepare multiple registration applications) would be in the range of $0.45 million and $0.89 million. Given a lack of information to the contrary, the costs of registration for a rail infrastructure manager have been assumed to be the same as for the Regulator. The evidence presented in the surveys and through industry consultation suggests the most likely costs would fall within this range.

Tourist and heritage rail transport operators

ATHRA noted that there is only one heritage rail transport operator known to be currently operating a private siding with a roadway crossing. Variable estimates of the costs to prepare and finalise an interface agreement have been provided including an estimate from ATHRA, which suggested the cost could be in the range of $50,000 to $30,000.For the purpose of the CBA a uniform cost of between $10,000 and $20,000 has been estimated for commercial and tourist and heritage operators.

[60] Amount estimated through industry consultation.

3.3.2 Economic benefits

The intent of the proposed amendment is to provide greater clarity around the management of private siding infrastructure with the principal anticipated benefits being in the extension of the requirement for interface coordination agreements which would represent an improvement in safety.

In particular it was indicated that there are many private sidings involved in mining operations that have more complex road and bridge crossings, which present additional risks. In such situations, having an interface agreement in place would reduce the risk of an accident occurring and it is considered that the requirement for formal interface agreements would necessarily improve safety by reducing the risk of accidents.

Generally, the extension of the scope for forming interface coordination agreements is likely to improve safety conditions. Whilst survey respondents suggested there would be no or minimal material difference in safety benefits between the options, experience indicates that the existence of such agreements necessitates a more systematic and considered approach to safety.

Although there are no accident data specifically pertaining to private sidings and associated interfaces, rail safety expert advice has indicated that the proposed change could reduce the number of accidents involving private siding interfaces.

Assuming the proposed amendment avoids just one accident per annum, given the average rail safety accident cost including level crossing accidents involving motor vehicles (see Table 8 of this appendix); this is a benefit of $1.25 million per year. The average accident cost applied in this benefit assessment is a simplification but is considered representative of the possible accident savings.

The pessimistic assessment assumes there are no accident savings.

3.3.3 Summary

The tables below provide a summary of the costs and benefits of Option 1 and Option 2.

Table 13. Private sidings exemption from accreditation, Regulator consolidated cost, $million ($2010)

	Initial Cost		Ongoing Cost Per Annum		Present Value Cost	
	high	low	high	low	high	low
Option 1	0	0	0	0	0	0
Option 2	0.89	0.45	0.33	0.17	4.03	1.62

Table 14. Private sidings exemption from accreditation, operator consolidated cost, $million ($2010)

	Initial Cost		Ongoing Cost Per Annum		Present Value Cost	
	high	low	high	low	high	low
Option 1	0	0	0	0	0	0
Option 2	(3.63)	(1.81)	0	0	(3.63)	(1.81)

Table 15. Private sidings exemption from accreditation, tourist and heritage consolidated cost, $million ($2010)

	Initial Cost		Ongoing Cost Per Annum		Present Value Cost	
	high	low	high	low	high	low
Option 1	0	0	0	0	0	0
Option 2	(0.02)	(0.01)	0	0	(0.02)	(0.01)

Table 16. Private sidings exemption from accreditation, economic benefit, $million ($2010)

	Benefit Per Annum		Present Value Benefit	
	high	low	high	low
Option 1	0	0	0	0
Option 2	1.25	0	8.78	0

3.4 Exemption framework

*This item is addressed in Section **6.4.4** of the regulatory impact statement.*

There are no provisions for regulators to exempt rail transport operators from any provisions of the Model Bill.

The costs and benefits of the following options are assessed:

Option 1

Status quo; rail transport operators would be required to comply in full with all applicable provisions of the draft National Law (no impact).

Option 2

Adopt a framework for granting rail transport operators exemption to provisions of the National Law, including short-term ministerial exemptions from all or part of the draft National Law and Regulator-granted exemptions from all or part of the following provisions upon application:

- Accreditation (Part 3 Division 4)
- Registration of rail infrastructure managers of private sidings (Part 3 Division 5)
- The following elements of a safety management system: fatigue risk management program, drug and alcohol management program, security management plan, health and fitness management program or an emergency management program.

Proposal

Option 2 is proposed.

3.4.1 Economic costs

Option 2 is focussed largely on low risk rail transport operators and in particular tourist and heritage operators.

Regulator

The intention of Option 2 is to reduce the regulatory compliance burden on railways being operated in low risk environments. There are three key factors to be considered:

- the likely number of exemption applicants
- the types of exemption that would be the subject of the applications (i.e. exemption from accreditation, full safety management system exemption, or partial safety management system exemption), and
- the proportion of applicants that are already accredited and are seeking exemption from ongoing compliance, and the proportion of applicants that require accreditation and are seeking exemption from both accreditation (or specific components of accreditation) and the associated ongoing compliance.

Regulators provided a range of estimates of the costs to assess exemption applications. It is expected that the cost to process an application from a tourist and heritage operator would be between $10,000 and $25,000 for an application at the time of accreditation, and between $6,000 and $12,000 for an application after accreditation. The reason the costs differ is that the Regulator would be expected to be more familiar with the safety management system of an operator who is already accredited and may thus incur lower administrative costs in assessing the application. The ongoing savings to the Regulator from the reduced clerical workload have been estimated at 10 per cent of these costs.

Regulators have estimated that the number of applicants would be approximately 20 per cent of accredited organisations in the first year and approximately 10 per cent each year thereafter. The latter includes an allowance for turnover of operators within the industry. Of the anticipated applications, regulators expect roughly half of the applicants to apply for exemption from accreditation, a quarter to apply for exemption from the safety management system and a quarter to apply for exemption from components of the safety management system (e.g. drug and alcohol or fatigue).

It is anticipated that in the first year 75 per cent of operators applying for exemption would already be accredited. In subsequent years it is estimated that the proportion of accredited operators applying for exemption would decline to approximately 40 per cent. These figures have been provided by regulators based on their own understanding and consultations with operators.

Given the estimated cost to process exemption applications and the likely number and type of application applied for it has been estimated that Option 2 would result in a cost to the Regulator of high $0.60 million initially and a recurrent cost of $0.33 million. The equivalent low cost estimate is $0.26 million initial cost and $0.11 million per annum ongoing cost.

Rail transport operators

Small, low risk commercial and tourist and heritage

Survey respondents have alluded to the difficulty in identifying those operators that require and are eligible for exemption. It is expected that some of the smaller low risk operators would apply and be granted exemptions. Based on information provided by ATHRA, and verified through industry consultation, the average saving per small commercial or tourist and heritage**,** low risk operator would be as follows:

- Approximately $0.07 million for exemption from accreditation
- Approximately $0.045 million for exemption from the safety management system, and

- Approximately $0.02 million for exemption from components of the safety management system.

These cost savings are offset against the cost of the application for exemption, which would cost a small, low risk operator about 20 per cent of the expected exemption savings. This covers the additional administrative effort required to complete the application. Ongoing savings from the reduced compliance cost are estimated at 10 per cent of the initial cost.

It is anticipated that operators applying for exemption would be low risk and would have an established alternative risk management arrangements in place if required.

3.4.2 Economic benefits

The economic benefits generated by this amendment have been assessed as zero. The proposal (Option 2) is focused on maintaining safety benefits while reducing compliance costs for approved low risk rail transport operators. Accordingly, the current safety benefits are expected to be maintained at a lower cost.

3.4.3 Summary

The tables below provide a summary of the costs of Option 1 and Option 2. The economic benefits have been assessed as zero.

Table 17. Exemption framework, Regulator consolidated cost, $million ($2010)

	Initial Cost		Ongoing Cost Per Annum		Present Value Cost	
	high	low	high	low	high	low
Option 1	0	0	0	0	0	0
Option 2	(0.60)	(0.26)	(0.33)	(0.11)	(2.93)	(1.03)

Table 18. Exemptions framework, small, low risk commercial and tourist and heritage operators consolidated cost, $million

	Initial Cost		Ongoing Cost Per Annum		Present Value Cost	
	high	low	high	low	high	low
Option 1	0	0	0	0	0	0
Option 2	1.57	0.30	0.67	0.11	6.28	1.05

3.5 Powers for interfaces with parties whose operations may impact rail safety

This item is addressed in Section 6.4.5 of the regulatory impact statement.

The Model Bill does not provide any explicit requirements with respect to the regulation of third parties, or provisions for rail transport operators and third parties to collaborate with respect to the safety of their works in the vicinity of rail infrastructure.

The costs and benefits of the following options have been assessed:

Option 1

Status quo (no impact).

Option 2

Require that a person may not carry out works near a railway that are likely to threaten the safety or integrity of the railway operations, without prior consent of the relevant rail infrastructure manager or the Regulator.

The Regulator may also:

- direct persons who are or have proposed to undertake works that he or she believes are likely to threaten the safety or integrity of railway operations to cease or alter the work
- direct a rail transport operator who is or has proposed to undertake operations that are likely to threaten the safety of utility infrastructure or works, or safe provision of utility services, to cease or alter the operations.

Proposal

Option 2 is proposed.

3.5.1 Economic costs

Regulator

It is assumed that the Regulator would not be required to approve or monitor all rail works near utilities and utility works near rail and would not be required to manage a database of approved contractors or approved personnel, which would require maintenance of appropriate records. This appears to be the responsibility of the given rail infrastructure manager. It assumes that the Regulator would act if necessary on request by a rail transport operator or utility.

A majority of survey responses indicated that additional costs incurred would be minimal. However, one regulator estimated that this could cost approximately $0.20 million in set up costs (or $28,000 per annum for each of the seven states and territories). The $28,000 estimate includes the cost of a training consultant for ten days at $2,000 per day, followed by two training sessions, each lasting two days. The ongoing costs would be $4,000 per regulator per annum for training and education plus staff time at $24,000 to administer the provision. Following a review and consideration of other survey responses, this estimate has been determined to be at the high end of the cost scale. Consultation with other regulators has indicated there would be little or no additional cost in complying with Option 2. A low estimate of zero has therefore been assumed since it is possible the requirement could be met through use of existing resources.

Rail transport operators

The cost impact on rail infrastructure managers, in terms of increased administrative burden, arising from the proposed amendment is likely to be minimal. A majority of rail infrastructure managers already have established systems in place for dealing with third party works and these are actively managed. Operators surveyed thus believed that the cost of this was minimal.

Conversely, operators are also required to consult with utilities before undertaking operations that may interfere with their infrastructure. The additional costs of consultation have been assessed as negligible and are likely to be offset by the resultant safety benefits.

Tourist and heritage rail transport operators

ATHRA expressed that Option 2 was an important addition to the National Law as it was an issue for its members. However, it was considered that the proposed changes would have a negligible impact on the cost of compliance.

3.5.2 Economic benefits

It is assumed that this power would be exercised rarely although it would be exercised in circumstances where there could be a potentially serious accident or delays caused to the rail network. It is assumed that one significant accident every two years could be mitigated, representing a high safety benefit of approximately $0.52 million per annum. The low benefit would be no benefit at all.

3.5.3 Summary

The tables below provide a summary of costs and benefits for Option 1 and Option 2.

Table 19. Powers for interfaces with parties whose operations may impact rail safety, Regulator consolidated cost, $million ($2010)

	Initial Cost		Ongoing Cost Per Annum		Present Value Costs	
	high	low	high	low	high	low
Option 1	0	0	0	0	0	0
Option 2	(0.20)	0	(0.20)	0	(1.60)	0

Table 20. Powers for interfaces with parties whose operations may impact rail safety, economic benefit, $million ($2010)

	Benefit Per Annum		Present Value Benefits	
	high	low	high	low
Option 1	0	0	0	0
Option 2	0.52	0	3.65	0

3.6 Duty for loading and unloading rolling stock

This item is addressed in Section 6.4.6 of the regulatory impact statement.

As the loading and unloading of rolling stock does not fall within the Model Bill's definition of rail safety work, the loading and unloading of rolling stock currently has no rail safety duties applied with respect to this activity.

The costs and benefits of the following options are assessed:

Option 1

Status quo (no impact).

Option 2

Extend the definition of rail safety work to cover loading and unloading of rolling stock.

Option 3

Introduce a duty for parties who load or unload goods on or off rolling stock to ensure, so far as is reasonably practicable, that such operations were carried out safely.

Proposal

Option 3 is proposed.

3.6.1 Economic costs

Regulator

Under Option 2, inclusion of loading and unloading rolling stock within the definition of rail safety work would broaden the field of rail safety workers that the Regulator may need to examine, for example, as part of any enquiry or audit involving the management of rail safety worker issues (e.g. drug and alcohol, fatigue management and competency). Option 2 has the potential to encompass a considerable number of workers and places of loading and unloading. It was noted by industry analysts that the ratio of loaders to rail safety workers at some freight sites could be as high as 100 to one. More frequently the ratio would be in the region of four or five loaders to one rail safety worker.

Survey respondents estimated that Option 2 would impose an additional cost of approximately $1.00 million per annum. This figure, which has been adopted as the high cost estimate, includes components of staff training, regular audits, investigations and ongoing monitoring costs, and has been extrapolated to reflect potential costs nationally. The total high ongoing cost estimate for all states and territories is approximately $7.00 million. A more conservative low estimate of $3.50 million has been assumed.

Option 3, which introduces a new duty for parties loading and unloading rolling stock to ensure that it is carried out safely, would impose a minor additional cost to the Regulator. It is estimated that the additional cost would be approximately $10,000 per annum to provide education, training and guidance to freight operators in relation to the duty of care for workers engaged in loading and unloading of rolling stock. Industry research indicates that there are approximately 18 active freight operators (10 small to medium and 8 large) across all states and territories. Expanding the cost estimate per operator ($10,000) by the number of operators affected (18) gives a total additional cost of approximately $0.18 million per annum under Option 3. The initial setup cost, which includes Regulator staff training in duty of care responsibilities, has been estimated to be between $0.05 million and $0.10 million based on information supplied by survey responses and through industry consultation.

The costs to the Regulator of Option 3 would be lower than that for Option 2 since the Regulator would not be required to monitor compliance with other duties associated with being categorised as rail safety workers.

Rail transport operators

With Option 2, operator survey results indicate that to extend the definition of rail safety work to cover loading and unloading of rolling stock would impose an additional cost of $0.40 million for small to medium rail transport operators and $0.80 million to all large rail transport operators. This additional cost comprises such items as medicals, drug and alcohol testing, fatigue management and in house training. Expanding the cost estimate by the number of freight operators gives an additional total cost of $10.40 million per annum over the evaluation period. The figure is considered to be slightly conservative since the survey respondents were not representative of all freight operators, and excluded some operators that could incur more significant costs due to the volume of loading and unloading activities

undertaken, such as grain companies for example. Allowing for this, a high cost estimate of approximately $20.80 million per annum has been estimated.

For Option 3, operator survey results indicate that the introduction of a duty for loading and unloading of rolling stock to ensure, so far as is reasonably practicable, that such operations are carried out safely, would impose no additional cost. The reason being that under Option 3, the activity would continue to be bound by their obligations under the General (Rail) Safety Duties and is not likely to require amendments to current practices. The impact of Option 3 is thus to more evenly distribute the responsibility for safety by applying a similar requirement on other parties involved in the loading and unloading of rolling stock.

Tourist and heritage rail transport operators

Under Option 2, ATHRA has indicated that roughly half of the 82 tourist and heritage operators would incur additional costs of approximately $3,000 per annum. It is estimated that the total cost would be in the range of $0.05 million and $0.11 million. This estimate includes all costs associated with qualifying and maintaining registration as a rail safety worker, including medical tests, competence checking, coordination and administrative tasks for the operator such as contractor reimbursement and documentation.

ATHRA indicated that there would be no costs associated with the implementation of Option 3.

3.6.2 Economic benefits

It is assumed that the benefits of Options 2 and 3 would be similar.

It has been estimated based on industry consultation that there are approximately 14 train derailments per annum[61] across all states and territories that are directly attributable to the mishandling of loading and unloading of rolling stock. The cost of such accidents has been estimated to be in the range of $0.25 million to $20 million per accident. Due to the large spread, the average rail accident cost of $1.04 million (see Table 7 of this appendix), which allows for a higher frequency of lower cost derailments, has been assumed as the cost per accident. This gives a total cost of derailment accidents directly attributable to the loading and unloading of rolling stock of $14.56 million per annum.

To derive a potential safety benefit it has been estimated that the proposed options would have the effect of reducing those accidents attributable to the mishandling of loading and unloading of rolling stock by between five per cent and ten per cent.

This gives a safety benefit in the range of $0.73 million and $1.46 million per annum.

3.6.3 Summary

The tables below provide a summary of the costs and benefits of Options 1, 2 and 3.

[61] This is the equivalent of approximately ten per cent of total running line derailments based on the published 2010 figures (ATSB, 2011).

Table 21. Duty for loading and unloading rolling stock, Regulator consolidated cost, $million ($2010)

	Initial Cost		Ongoing Cost Per Annum		Present Value Cost	
	high	low	high	low	high	low
Option 1	0	0	0	0	0	0
Option 2	0	0	(7.00)	(3.50)	(49.17)	(24.58)
Option 3	(0.10)	(0.05)	(0.36)	(0.18)	(2.63)	(1.31)

Table 22. Duty for loading and unloading rolling stock, operator consolidated costs, $million

	Initial Cost		Ongoing Cost Per Annum		Present Value Cost	
	high	low	high	low	high	low
Option 1	0	0	0	0	0	0
Option 2	0	0	(20.80)	(10.40)	(146.09)	(73.05)
Option 3	0	0	0	0	0	0

Table 23. Duty for loading and unloading rolling stock, tourist and heritage consolidated cost, $million ($2010)

	Initial Cost		Ongoing Cost Per Annum		Present Value Cost	
	high	low	high	low	high	low
Option 1	0	0	0	0	0	0
Option 2	0	0	(0.11)	(0.05)	(0.76)	(0.38)
Option 3	0	0	0	0	0	0

Table 24. Duty for loading and unloading rolling stock, economic benefit, $million ($2010)

	Benefit Per Annum		Present Value Benefit	
	high	low	high	low
Option 1	0	0	0	0
Option 2	1.46	0.73	10.23	5.11
Option 3	1.46	0.73	10.23	5.11

3.7 Safety management system

This item is addressed in Section 6.5.1 of the regulatory impact statement.

Section 57 of the Model Bill and Model Regulation 10 require that rail transport operators develop a safety management system for their accredited railway operations. While the Model Regulations prescribe a range of content that must be included in a safety management system, they do not extend to addressing risk management principles (i.e. the guiding principles or steps that outline the decision making process or mechanics of how safety risks are to be addressed). Model Regulation 10 is silent on this matter, with a drafting note having reserved this provision for future development.

The costs and benefits of the following options are assessed:

Option 1

Status quo; this option would continue the Model Bill arrangement under which rail transport operators would develop a safety management system using self-determined principles (no impact).

Option 2

Prescribe risk management principles, including:

1. Risk identification

2. Risk assessment

3. Risk control

Proposal

Option 2 is proposed.

3.7.1 Economic costs

Regulator

Option 2 is considered to be cost effective in that it provides small to medium organisations a framework from which to work. These efficiency gains should result in fewer requirements for the Regulator to educate and provide guidance on requirements to small and medium rail transport operators.

However, in order to comply with the new requirements, it is estimated that half of the 152 small to medium rail transport operators could need assistance with reviewing their safety management system. Assumptions have been made that the large rail transport operators would not need assistance with the new requirements. It is estimated that the costs are likely to comprise:

- guidance material at a cost of $30,000
- incremental education and assistance plus evaluation of the reworked Safety management system estimated to be low $1,000 (1 day) and high $2,000 (2 days) per organisation.

This is an implementation cost to the Regulator of between low $0.11 million and high $0.18 million.

Ongoing costs have been estimated as approximately 10 per cent of the implementation costs.

Rail transport operators

Large operators

The large rail transport operators consider that Option 2 would result in little or no additional costs. This is because a majority of operators already comply with the Safety Management System requirements of Option 2 under the General Safety Duties provisions of the Model Bill. Accordingly, for large rail transport operators the high and low costs are zero.

Small and Medium Operators

Small and medium sized rail transport operators have been divided into two separate categories. Several respondents indicated that Option 2 could result in the requirement to modify or completely revise their existing safety management system. However, other rail transport operators indicated that they already comply with the requirements and that Option 2 would not lead to any additional costs. It is therefore assessed that approximately 50 per cent of small and medium operators would incur costs and that those costs would be between $5,000 and $15,000 per operator. The low $5,000 estimate is the approximate cost to undertake an internal review, whereas the high $15,000 estimate is the cost to employ an external consultant for three weeks at a rate of $1,000 per day.

Applying the cost estimates of $15,000 and $5,000 to the number of affected operators gives a total cost of high $0.55 million and low $0.18 million.

Tourist and heritage rail transport operators

ATHRA reported the cost of a review to be approximately $5,000 per organisation and observed that half of their membership of 76 rail transport operators would need to review their safety management system. A cost of $5,000 has been assumed for the review of a safety management system under Option 2.

Following further discussion with ATHRA, it has been estimated that for larger tourist and heritage operators (15 in total) the review cost would be approximately $15,000. This figure has been confirmed through independent review. The $15,000 is the estimated cost of an external consultant for three weeks. ATHRA also revealed that another 23 medium size members would need a review costing $10,000; the cost of an external consultant for two weeks. The resultant estimated high cost is $0.46 million. The ongoing costs are estimated as 10 per cent of the initial review costs.

3.7.2 Economic benefits

The economic benefits have been discussed with a selection of regulators and operators. One regulator noted (from direct experience with the inclusion of risk management principles in their legislation) that there are clear safety benefits as well as savings from having such principles articulated in legislation. It provides a common basis for undertaking compliance/enforcement activities and directing regulatory conversations. The absence of such principles would incur costs in attempting to clarify the principles expected by the Regulator, and work through deviations from these principles by industry.

The potential for safety benefits was supported in part by operator responses, with one such response indicating that the safety impact under Option 2 would be significant due to reduced likelihood of accidents.

There is no evidence on which to base an estimate of the likely decline in probability of an accident. The documents available online on this subject in Australia, UK (RSSB), USA (Federal Rail Administration), EU (ERA) and OECD (OECD and International Transport Forum) have been reviewed. The conclusion from this exercise, and in the absence of additional information, was that a decline in probability of 0.1 per cent is considered adequate. This figures allows the limited impact on those operators that already have a compliant safety management system.

Given the projected 300 accidents in 2010 (see Table 8 of this appendix), and the assumption that this figure will remain steady over the forecast period, a decline in probability of 0.1 per cent produces a safety benefit of $0.31 million per annum. The low estimate is half of this, being a safety benefit of $0.16 million.

3.7.3 Summary

The tables below provide a summary of the costs and benefits of Options 1 and Option 2.

Table 25. Safety management system, Regulator consolidated cost, $million ($2010)

	Initial Cost		Ongoing Cost Per Annum		Present Value Cost	
	high	low	high	low	high	low
Option 1	0	0	0	0	0	0
Option 2	(0.18)	(0.11)	(0.02)	(0.01)	(0.31)	(0.18)

Table 26. Safety management system, operator consolidated cost, $million ($2010)

	Initial Cost		Ongoing Cost Per Annum		Present Value Cost	
	high	low	high	low	high	low
Option 1	0	0	0	0	0	0
Option 2	(0.50)	(0.17)	(0.05)	(0.02)	(0.86)	(0.29)

Table 27. Safety management system, tourist and heritage consolidated cost, $million ($2010)

	Initial Cost		Ongoing Cost Per Annum		Present Value Cost	
	high	low	high	low	high	low
Option 1	0	0	0	0	0	0
Option 2	(0.49)	(0.21)	(0.05)	(0.02)	(0.83)	(0.35)

Table 28. Safety management system, economic benefit, $million ($2010)

	Benefit Per Annum		Present Value Benefit	
	high	low	high	low
Option 1	0	0	0	0
Option 2	0.31	0.16	2.19	1.09

3.8 Health and fitness management program

This item is addressed in Section 6.5.2 of the regulatory impact statement.

Section 64 of the Model Bill and Regulation 22 of the Model Regulations require that a rail transport operator must develop and implement a health and fitness program for rail safety workers. The program must, so far as is reasonably practicable, comply with Volumes 1 and 2 of the National Standard for Health Assessment of Rail Safety Workers, published by the National Transport Commission.

The costs and benefits of the following options are assessed:

Option 1

Status quo (no impact).

Option 2

Remove the 'so far as is reasonably practicable' qualification from Model regulation 22.

Proposal

Option 2 is proposed.

3.8.1 Economic costs

Regulator

It is anticipated that there be no impact of maintaining the status quo (Option 1). However, in implementing a single national rail safety Regulator, one regulator noted that under Option 1 it may be necessary to establish a medical panel, at a cost of $0.33 million per annum, to determine whether alternative health and fitness programs meet the requirements.

Since Option 1 represents the base case situation this cost estimate has been treated as a saving in implementing Option 2.

It has been assessed that there would be no additional costs incurred by adopting Option 2. However, relevant to Option 1 there is a potential saving of approximately $0.33 million per annum should it be necessary to establish a medical panel. Thus savings of high $0.33 million and a low of zero have been applied.

Rail transport operators

Large operators

A majority of large operators already comply with the National Standard, implying no additional cost for these operators. Survey responses demonstrated that some of the largest operators in Australia base their health and fitness program on the National Standard but use an alternative approach in some areas.

In order to fully capture the compliance costs to the large operators it is necessary to capture operator costs and the costs incurred by their contractors or by the operator on behalf of their contractors. From the survey, the large operators estimated an initial cost of $0.15 million to move to full compliance with the National Standard with an additional $0.1 million for their contractors. Based on operator responses the ongoing costs have been assessed as approximately $30, 000 every two years to undertake a risk assessment. The low cost estimate is zero as these operators are currently judged compliant. Thus the high estimate per operator is $0.25 million, which assumes that each operator would incur initial costs of $0.15 million and they and/or their contractors would incur additional costs of $0.1 million. Ongoing costs have been estimated at approximately $15,000 per annum. The low estimate is zero for both initial and ongoing costs.

Based on survey responses it has been assumed that one third of the 12 large operators would incur the additional costs. Accordingly, high costs would be $1.00 million initially with $0.11 million ongoing. The low estimate is zero for both initial and ongoing costs.

Small and medium operators

Under Option 2 the commercial small to medium operators would also incur costs. They average in employee size up to 20 per cent of the employee size of the large operators. It is assumed the high costs would be 10 per cent of the $0.25 million cost per large operator, which is $25,000 per small to medium operator. The low estimate is zero as these operators are currently judged compliant. It is assumed that the ongoing costs would be $6,000 per operator. It is assumed that only 10 per cent of commercial small to medium operators would need to incur additional costs

These estimates flow from a consideration that most commercial small to medium operators would follow the standard; most operators (70 per cent) are in states or territories where

compliance with the standard is mandatory, and most do have a person responsible for compliance. Moreover, while large operators have the depth, skills and experience to vary from the National Standard, the commercial small to medium operators may not have the requisite skills and may not be granted any leeway by the Regulator.

It is estimated that 10 per cent of commercial small to medium operators may not comply. This leads to a high cost estimate of $0.19 million initially and $0.05 million ongoing, and a low cost estimate of zero for both initial and ongoing costs.

Tourist and heritage rail transport operators

Many tourist and heritage rail transport operators currently use the 'so far as is reasonably practicable' qualification to specifically avoid compliance activity for certain tasks of their rail safety workers, such as fire protection clearing. They schedule such work when the trains are not running. Should the new single national Regulator concur with the tourist and heritage operators' interpretation of the requirements then the compliance costs become zero for both inception and ongoing.

If the new Regulator interprets the requirements differently than ATHRA estimates that extending coverage to all those working around the railway (whether trains are running or not) would cost the average operator approximately $15,000 per operator. ATHRA has indicated that the ongoing costs would be 12.5 per cent of these costs and that these costs would apply to the 65 tourist and heritage operators who own their own infrastructure. It is assumed that any tourist or heritage operator using shared rail infrastructure would already meet the standard required by the relevant rail infrastructure manager. This implies a high cost of $0.98 million, with $0.12 million ongoing, and the low costs have been assumed to be zero.

3.8.2 Economic benefits

The accidents this clause seeks to avoid are infrequent events with significant consequences. As such, it is impractical to robustly demonstrate safety benefits using the accident data available. The documents available on this subject in Australia, UK (RSSB), USA (Federal Rail Administration), EU (ERA) and OECD (OECD and International Transport Forum) have all been considered.

The importance of health and fitness and the use of the National Standard is demonstrated, for example, by the Waterfall (2003, NSW) and Footscray (2001, VIC) accidents where health and fitness were identified as causative factors. The Waterfall Special Commission of Inquiry recommended that rail transport operators have an absolute requirement to comply with The National Standard for Health Assessment for Rail Safety Workers. This accident is evidence of past failure by industry to adequately manage the associated health and fitness risks.

There is no readily available information on the economic cost of the Waterfall accident or of its ramifications. However, based on a statistical value of life approach (see 2.1 of this appendix) the value of life of the seven people who were killed has been used as an estimate of economic cost.

This is conservative as there has been no allowance for injury or the time spent in inquiries, etc. and gives the cost of the accident in 2010 dollars as $27 million. Over the ten year evaluation period, it has been estimated that the legislation could lead to a decline in probability of such accidents of 10 per cent and has a resultant safety benefit of $0.27 million per annum. The low estimate is half of this, being a safety benefit of approximately $0.13 million per annum. The assumption of a 10 per cent reduction has been adopted to reflect the likelihood that the proposed changes would reduce the frequency of such events and to

allow for the fact that other factors, in addition to health and safety, were influential in the Waterfall accident.

An alternative perspective is that if the adoption of Option 2 results in one major rail accident being avoided over the ten year evaluation period then the discounted safety benefit is between $14 million and $27 million.

3.8.3 Summary

The tables below provide a summary of the costs and benefits of Options 1 and Option 2.

Table 29. Health and fitness, Regulator consolidated cost, $million ($2010)

	Initial Cost		Ongoing Cost Per Annum		Present Value Cost	
	high	low	high	low	high	low
Option 1	0	0	0	0	0	0
Option 2	0.33	0	0.33	0	2.65	0

Table 30. Health and fitness, operator consolidated cost, $million ($2010)

	Initial Cost		Ongoing Cost Per Annum		Present Value Cost	
	high	low	high	low	high	low
Option 1	0	0	0	0	0	0
Option 2	(1.18)	0	(0.10)	0	(1.89)	0

Table 31. Health and fitness, tourist and heritage consolidated cost, $million ($2010)

	Initial Cost		Ongoing Cost Per Annum		Present Value Cost	
	high	low	high	low	high	low
Option 1	0	0	0	0	0	0
Option 2	(0.98)	0	(0.12)	0	(1.83)	0

Table 32. Health and fitness, economic benefit, $million ($2010)

	Benefit Per Annum		Present Value Benefit	
	high	low	high	low
Option 1	0	0	0	0
Option 2	0.27	0.13	1.89	0.94

3.9 Drug and alcohol management program

This item is addressed in Section 6.5.3 of the regulatory impact statement.

Section 65 of the Model Bill requires rail transport operators to prepare and implement a drug and alcohol management program for rail safety workers, as a mandatory element of the safety management system. However, the Model Regulations are silent on the specific requirements for such a program and allowed for local variations (intended as an interim arrangement until national agreement was reached).

The costs and benefits of the following options for the requirements of a drug and alcohol management program are assessed:

Option 1

Status quo; maintain local variations (no impact).

Option 2

No elements are prescribed in regulations.

Option 3

Considerations and mandatory elements, as per Regulation 29 of the draft National Regulations, are prescribed in regulations.

Option 4

Only the mandatory elements included in Regulation 29 of the draft National Regulations are prescribed; considerations are not prescribed in regulations.

Proposal

Option 3 is proposed.

3.9.1 Economic costs

Regulator

All operators currently have a compliant drug and alcohol management program under the Model Law (local variations).

For Option 2, which would require a drug and alcohol management program to be developed as part of the safety management system but with no prescribed elements, one regulator estimated that there would be a need to hire an additional resource to cope with the additional work of assessing compliance of a drug and alcohol management program that does not follow a prescription. Combined with the normal corporate overheads, it is estimated that an additional $0.14 million per annum would be required as an ongoing cost. The remaining regulators suggested that any additional costs would be minimal. It is noted, however, that the cost implications will depend upon the interpretation of the law by the Regulator, which may exercise discretion in the implementation of this option. Depending on interpretation, this option may yield the same outcome as Option 3 or Option 4, which have prescribed elements. Thus the high costs have been assumed to be the same as for Option 3 and Option 4, described below, and the low cost is zero.

With Option 3, it was generally perceived by Regulators that prescribing some of the mandatory requirements in the regulations could make the law easier to enforce. However, no indication was given of the potential ongoing savings, and it has been assessed that such savings would be marginal.

The Regulator is likely to incur additional one-off costs to assist in ensuring that operators, excluding New South Wales, have a drug and alcohol management program that is compliant with the prescription.

From survey responses and consultation with the industry is has been estimated that Option 3 could lead to an additional setup cost (education, training, administration systems costs) of between $4,000 and $5,000 per operator. Multiplying the cost estimate by the number of operators, excluding operators in New South Wales where drug and alcohol management program is currently prescribed, derives a total setup cost of low $0.45 million and high

$0.56 million. Consultation with industry and interpretation of the survey responses suggest that the ongoing cost the Regulator would be minimal and accordingly a zero value has been assigned to the recurrent cost.

In general regulators considered that the administrative costs of Option 4 would not be materially different to the costs of Option 3. Accordingly, the costs for Options 3 and 4 have been assumed to be the same.

Rail transport operators

Since Option 2 may be open to interpretation by the Regulator, it is difficult to estimate the particular costs of this option. Consequently, it has been assumed that the high costs may be similar to that of Option 3 and Option 4, described below, and the potential low cost estimate has been assessed as zero.

All large operators expressed the view that the preparation, process and content of the drug and alcohol management program would not change under either Option 2 or Option 3. In fact, most indicated that no additional cost would be incurred by adopting either option. Accordingly, no material incremental costs have been allowed for large rail transport operators for either option.

Survey responses and industry consultation suggest that small to medium sized rail operators would incur an additional cost as a result of the proposed changes under Option 3. The assumptions used to derive the figures are:

- Small to medium sized operators would require $10,000 to prepare a compliant drug and alcohol management program. The figure was estimated through discussions with stakeholders and a rail safety expert.
- It has been estimated that there are 53 small to medium sized rail operators reside outside of New South Wales (see 2.4 of this appendix). Operators in New South Wales are currently following a prescribed approach and have therefore been excluded from the calculation.

By expanding the drug and alcohol management program preparation costs by the number of small to medium rail operators affected (53), it is estimated that total costs up to $0.53 million would be incurred with the adoption of Option 3. The low cost is half this amount $0.27 million. These additional costs relate to the refinement of the drug and alcohol management program, use of a consultant, internal costs and the ongoing communication costs with the Regulator.

Industry consultation and survey responses indicated that the 53 small to medium sized rail operators would need to spend approximately an additional $1,000 per year to comply with the new requirements, which translates into a total annual recurrent cost of $0.05 million. The low cost is 80 per cent of this amount which is a total annual recurrent cost of $0.04 million.

This cost would be for help and advice on the implementation of their drug and alcohol management program.

In general, operators considered that the administrative costs for Option 4 would not be materially different to the cost of Option 3. Accordingly, the cost for Option 3 is also taken as the cost for Option 4.

Tourist and heritage rail transport operators

Since Option 2 may be open to interpretation by the Regulator, it is difficult to estimate the particular costs of this option. Consequently, it has been assumed that the high costs may

be similar to that of Option 3 and Option 4, described below, and the potential low cost estimate has been assessed as zero.

For Option 3, ATHRA has indicated that all of their membership of 76 would be required to review their drug and alcohol management program and train and educate their staff appropriately. ATHRA expect the high cost of any review of a drug and alcohol management program to be in the order of $7,500 for each member plus an additional $50,000 for guidelines to be prepared. The low set up cost takes into consideration that a proportion of the tourist and heritage operators may already have a drug and alcohol management program in place of standard similar to that which is required to be compliant with Option 3.

The low setup cost has been assumed to be half of the high cost. In addition, ATHRA is expected to incur costs of up to $50,000 per annum by establishing a helpdesk to assist its members to comply with the requirements in their drug and alcohol management program. The low ongoing cost is assumed to be half of the high ongoing cost. These costs are necessary as a large number of tourist and heritage organisations are not-for-profit volunteers that would require help and assistance to ensure compliance.

3.9.2 Economic benefits

Due to the related nature and similarities in the regulatory effects, a combined assessment of the economic benefits of the drug and alcohol program and testing is provided below.

The drug and alcohol testing results published by the New South Wales regulator, has been referenced to assist in determining the potential benefits of the options. A number of other studies on the UK (RSSB), USA (Federal Rail Administration), EU (ERA) and OECD (OECD and International Transport Forum) have also been reviewed.

The conclusions from those papers indicate that:

- drugs were a larger more persistent problem than alcohol
- at the onset of testing the reported testing positive rates were at least 4 times higher than after testing
- a drop in personal injury, inappropriate behaviour and a significant drop in accidents following the onset of testing. One USA railroad reported that following three years of testing the human factor train incidents rates had fallen from 22.2 per million train kilometres to 3.77 per million train kilometres. This is a reduction by a factor of almost six. The starting incidence rate was over 10 per cent.

This is not a strict statistical sample and so numbers are not completely comparable between years (e.g. sample sizes change). Information from the New South Wales regulator website indicates that alcohol incidence has dropped by a factor of 4, drugs by a factor of 3, and drugs are a larger problem than alcohol.

Information is not available to determine the exact relationship between drugs and/or alcohol and the number of rail accidents. It is assumed that drugs and alcohol are associated with between 15 per cent and 30 per cent of rail accidents. It is expected that in most cases this would be associated with other contributing factors, especially fatigue. The drug and alcohol testing results published by the New South Wales Regulator has been referenced to assist in determining the potential benefits of the options. A number of other studies on the UK (RSSB), USA (Federal Rail Administration), EU (ERA) and OECD (OECD and International Transport Forum) have also been reviewed. The US National Transportation Safety Board65 stated “The most frequently cited accident probable cause was fatigue (a probable cause in 31 per cent of sampled rail accidents in the US) followed by alcohol and other drug use impairment (a

probable cause in 29 per cent of sampled rail accidents in the US);"[62] The findings from these studies have been used to derive the estimate, for the purposes of this regulatory impact statement, of 15-30 per cent of rail accidents in Australia having involved a rail safety worker with drugs or alcohol present in their system.

It was estimated that there would be 210 rail safety accidents in Australia (excluding New South Wales) in 2010 with monetary impact of approximately $218.20 million. Given the assumption that between 15 per cent and 30 per cent of rail accidents involve drugs and/or alcohol as a key contributing factor, the potential economic cost of these accidents in 2010 is in the range $32.73 million to $65.46 million. However, drugs and/or alcohol would not be the sole factor and it is not clear from the literature what proportion could be attributed to drugs and alcohol ignoring all other factors.

It is estimated that the proposed measures could reduce the incidence of rail related accidents involving drugs and or alcohol by approximately 14 per cent.

The potential economic benefits of drug and alcohol accident savings is therefore between $4.68 million and $9.35 million. It is further assumed that the implementation of a drug and alcohol management program, incorporating steps to ensure operators implement appropriate testing regimes, either evidentiary or otherwise, then such accident costs could be reduced by 50 per cent. There is no scientific basis for this assumption; the 50 per cent estimate has been assumed as it is considered that drugs and/or alcohol could never be totally removed as a factor contributing to the incidence of accidents.

This implies that the benefit from introducing a package of measures to address drugs and alcohol, including testing, is likely to be in the range of $2.34 million to $4.68 million.

3.9.3 Summary

The tables below provide a summary of the costs and benefits of Options 1 to 4.

Table 33. Drug and alcohol management program, Regulator consolidated cost, $million ($2010)

	Initial Cost		Ongoing Cost Per Annum		Present Value Cost	
	High	low	high	low	high	low
Option 1	0	0	0	0	0	0
Option 2	(0.56)	0	(0.56)	0	(4.49)	0
Option 3	(0.56)	(0.45)	0	0	(0.56)	(0.45)
Option 4	(0.56)	(0.45)	0	0	(0.56)	(0.45)

[62] https://www.ntsb.gov/safety/safetystudies/SS9001.htm

Table 34. Drug and alcohol management program, operator consolidated cost, $million ($2010)

	Initial Cost		Ongoing Cost Per Annum		Present Value Cost	
	high	low	high	low	high	low
Option 1	0	0	0	0	0	0
Option 2	(0.53)	0	0	0	(0.53)	0
Option 3	(0.53)	(0.27)	(0.05)	(0.04)	(0.88)	(0.55)
Option 4	(0.53)	(0.27)	(0.05)	(0.04)	(0.88)	(0.55)

Table 35. Drug and alcohol management program, tourist and heritage consolidated cost, $million ($2010)

	Initial Cost		Ongoing Cost Per Annum		Present Value Cost	
	high	low	high	low	high	low
Option 1	0	0	0	0	0	0
Option 2	0	0	0	0	0	0
Option 3	(0.62)	(0.31)	(0.05)	(0.03)	(0.97)	(0.49)
Option 4	(0.62)	(0.31)	(0.05)	(0.03)	(0.97)	(0.49)

Table 36. Drug and alcohol management program, economic benefit, $million ($2010)

	Benefit Per Annum		Present Value Benefit	
	high	low	high	low
Option 1	0	0	0	0
Option 2	4.68	0	32.87	0
Option 3	4.68	2.34	32.87	16.44
Option 4	4.68	2.34	32.87	16.44

3.10 Fatigue risk management program

This item is addressed in Section 6.5.3 of the regulatory impact statement.

Section 65 of the Model Bill requires rail transport operators to prepare and implement a fatigue risk management program (FMP), as a mandatory element of the safety management system. However, the Model Regulations are silent on the specific requirements for such a program and allowed for local variations (intended as an interim arrangement until national agreement was reached).

The costs and benefits of the following options for the requirements of a fatigue risk management program are assessed:

Option 1

Status quo; maintain local variations (no impact).

Option 2

No elements are prescribed in regulations.

Option 3

Considerations and mandatory elements, as per Regulation 30 of the draft National Regulations, are prescribed in regulations.

Option 4

Only the mandatory elements included in Regulation 30 of the draft National Regulations are prescribed; considerations are not prescribed in regulations.

Proposal

Option 3 is proposed.

3.10.1 Economic cost

It has been noted by survey respondents and other industry professionals that fatigue management differs from drug and alcohol management in that the latter is more mature and fully established within the industry in comparison to fatigue management. Fatigue management is therefore potentially more difficult and expensive for organisations to adopt. This observation has informed the cost assessment given below.

Regulator

For Option 2, the New South Wales regulator suggested that it would need to hire an additional person to cope with the additional workload. This regulator indicated that the expertise in the fatigue area was scarcer and thus more expensive than that for the drug and alcohol management program. The additional staff cost has therefore been estimated at 25 per cent greater than the equivalent costs of staff for the drug and alcohol management program. This would be a cost of $0.18 million. It is noted, however, that the cost implications will depend upon the interpretation of the law by the Regulator, which may exercise discretion in the implementation of this option. Depending on interpretation, this option may yield the same outcome as Option 3 or Option 4, which have prescribed elements. Thus the high costs have been assumed to be the same as for Option 3 and Option 4, described below, and the low cost is zero.

With Option 3, it was generally perceived by regulators that by prescribing some of the mandatory requirements in the regulations could make the law easier to enforce. However, no indication was given of the potential ongoing cost savings and it has been assessed that such cost savings would be marginal.

The Regulator is likely to incur additional one-off costs to assist in ensuring that operators, excluding New South Wales, have a fatigue risk management program that is compliant with the prescription.

From survey responses and consultation with the industry is has been estimated that Option 3 could lead to an additional setup cost (education, training, administration systems costs) of between $4,000 and $6,000 per operator. Multiplying the cost estimate by the number of operators, excluding operators in New South Wales where fatigue risk management program is currently prescribed, derives a total setup cost of low $0.35 million and high $0.69 million. It is expected that ongoing costs would be incurred in demonstrating compliance with Option 3. No survey respondents provided ongoing saving data and hence it is assumed that the ongoing savings could be 15 per cent of these costs. Thus costs to the Regulator for education and training range from: low $0.35 million, with ongoing $0.05 million, and high $0.69 million, with ongoing $0.10 million.

In general regulators considered that the administrative costs of Option 4 would not be materially different to the costs of Option 3. Accordingly, the costs for Options 3 and 4 have been assumed to be the same.

Rail transport operators

Since Option 2 may be open to interpretation by the Regulator, it is difficult to estimate the particular costs of this option. Consequently, it has been assumed that the high costs may be similar to that of Option 3 and Option 4, described below, and the potential low cost estimate has been assessed as zero.

Both Options 2 and 3 are considered to result in no incremental costs to large operators. Large operators indicated that minimal amendments would be made to the fatigue risk management programs regardless of the selection of Option 2 or 3.

The small and medium operators surveyed indicated that there may be a significant cost to review and modify, or in some cases rewrite, their fatigue risk management program to meet the requirements of Option 3. These operators would incur costs during set up that would include establishing policies, systems and procedures, databases or equivalent record keeping systems, training programs and initial training for staff, and hiring of staff. The operators would further incur ongoing costs including awareness training, staff replacements during training, administration of their policies, procedures and systems, record keeping, projects to minimise fatigue risk, and costs in responding to Regulator audits and requests for information and work procedures required by Option 3. The ongoing costs are expected to be significantly higher than the initial set up costs. Accordingly, the high costs have been estimated to be $30,000 on average per organisation with $40,000 in ongoing costs, with the low cost being $15,000 for set up with $20,000 ongoing.

Approximately 101, or 62 per cent, of operators are not accredited in New South Wales (see Table 1 of this appendix). Of this number it has been assumed roughly 20, or 20 per cent, are compliant with Option 3. The remainder would be required to review their fatigue risk management program and adapt accordingly. It is estimated that the total costs to these operators of Option 3 would be a high one off cost of $1.29 million with ongoing costs of $1.72 million, and a low one off cost $0.65 million with ongoing costs of $0.86 million.

It considered that the administrative costs for Option 4 would not be materially different to the cost of Option 3. Accordingly, the cost for Option 3 is also taken as the cost for Option 4.

Tourist and heritage rail transport operators

ATHRA considered that there would be no incremental costs incurred with the adoption of Option 2.

In responding to the survey, ATHRA reported that fatigue management would be very expensive for their members. It was pointed out that while many ATHRA members may comply, they would not have the documentation, record keeping and work procedures required by Option 3.

For the high cost of Option 3, ATHRA suggested that any review of a fatigue risk management program could cost around $37,500 for each of the 15 large members, with costs at $30,000 for the medium sized 23 members and $15,000 for the remaining 38 members. The low cost has been estimated as an average of $15,000 for all members. ATHRA notes that all of their membership of 76 would need to review their, and train and educate their staff. There would be economies of scale in adopting a coordinated approach; however, this has not been assessed for the purpose of this CBA.

ATHRA has suggested that maintenance of the fatigue risk management program systems could be a low cost of $15,000 for the medium to larger sized organisations and $6,250 per

annum for all other organisations. The high cost would be for large operators who would need to hire a person at a cost of $37,500 per annum with the medium sized members spending $25,000 and the remaining members spending on average $15,000. This is in addition to the additional Regulator resource requirements detailed above. The low cost would see the smaller tourist and heritage operators incurring additional costs of $6,250. This implies for all tourist and heritage operators that the high costs would be $1.82 million with $1.71 million ongoing and the low costs would be $1.14 million one off and $0.81 million ongoing.

3.10.2 Economic benefits

There is a substantial amount of research in the general area of managing transport worker fatigue, but none that supports the definite conclusions on the relative economic benefits between the options presented in this regulatory impact statement. The documents available online on this subject in Australia, UK (RSSB), USA (Federal Rail Administration, US National Transportation Safety Board), EU (ERA) and OECD (both OECD and International Transport Forum) have been reviewed. The USA National Transport Safety Board discussed the impact of fatigue on train accidents in their report *Evaluation of U.S. Department of Transportation Efforts in the 1990s to Address Operator Fatigue*, Safety Report NTSB/SR-99/01 May 1999 PB99-917002 Notation 7155. The report commented "In summary, although the data are not available to statistically determine the incidence of fatigue, the transportation industry has recognised that fatigue is a major factor in accidents". This report contains indicative information on rail accidents and fatigue. The report quotes the Administrator of the FRA who stated that "about one-third of train accidents and employee injuries and deaths are caused by human factors. We know fatigue underlies many of them."

From this information and the review of the literature, it has been assumed that in Australia between 15 per cent and 30 per cent of train accidents include fatigue as a factor. There will, in most cases, be other contributing factors as well (health, obesity, drugs, alcohol, etc.) and so fatigue cannot be seen as solely responsible for those accidents.

The number of train accidents in 2010 is estimated as $218.20 million for 210 accidents (excluding New South Wales). From the assumption above it can be taken that, accidents with fatigue as a factor had an economic cost of between $32.73 million and $65.46 million. However, fatigue was not the sole factor and it is not clear from the literature the proportion that should be attributable to fatigue ignoring all other factors.

It is estimated that the proposed measures could reduce the incidence of rail related accidents involving drugs and or alcohol by approximately 14 per cent.

The potential range of fatigue accident benefits is therefore estimated in the range of $4.68 million and $9.35 million. It is further assumed that if a fatigue risk management program akin to Options 3 and 4 was introduced then costs accidents could be cut by 50 per cent. There is no scientific basis for this assumption; the figure is 50 per cent because it is considered that fatigue could never be totally removed as a factor.

This implies that the benefit from introducing the package of measures to address fatigue would be between $2.34 million and $4.68 million.

3.10.3 Summary

The tables below provide a summary of the costs and benefits for Options 1 to 4.

Table 37. Fatigue risk management program, Regulator consolidated cost, $million ($2010)

	Initial Cost		Ongoing Cost Per Annum		Present Value Cost	
	high	low	high	low	high	low
Option 1	0	0	0	0	0	0
Option 2	(0.69)	0	(0.18)	0	(1.95)	0
Option 3	(0.69)	(0.35)	(0.10)	(0.05)	(1.42)	(0.71)
Option 4	(0.69)	(0.35)	(0.10)	(0.05)	(1.42)	(0.71)

Table 38. Fatigue risk management program, operator consolidated cost, $million ($2010)

	Initial Cost		Ongoing Cost Per Annum		Present Value Cost	
	high	low	high	low	high	low
Option 1	0	0	0	0	0	0
Option 2	(1.29)	0	0	0	(1.29)	0
Option 3	(1.29)	(0.65)	(1.72)	(0.86)	(13.37)	(6.69)
Option 4	(1.29)	(0.65)	(1.72)	(0.86)	(13.37)	(6.69)

Table 39. Fatigue risk management program, tourist and heritage consolidated cost, $million ($2010)

	Initial Cost		Ongoing Cost Per Annum		Present Value Cost	
	high	low	high	low	high	low
Option 1	0	0	0	0	0	0
Option 2	0	0	0	0	0	0
Option 3	(1.94)	(1.23)	(1.71)	(0.81)	(13.93)	(6.90)
Option 4	(1.94)	(1.23)	(1.71)	(0.81)	(13.93)	(6.90)

Table 40. Fatigue risk management program, economics benefit, $million ($2010)

	Ongoing Cost Per Annum		Present Value Benefit	
	high	low	high	low
Option 1	0	0	0	0
Option 2	4.68	0	32.87	0
Option 3	4.68	2.34	32.87	16.44
Option 4	4.68	2.34	32.87	16.44

3.11 Testing for drugs or alcohol

This item is addressed in Section 6.5.4 of the regulatory impact statement.

The Model Bill provides for the testing for drugs or alcohol (section 66). As there was no agreement for testing arrangements when the Model Bill was developed, states and territories developed independent arrangements in accordance with the local variations allowed for in the Model Regulations (Regulation 24).

The costs and benefits of the following options are assessed:

Option 1

Status quo; maintain local variations (no impact).

Option 2

Do not prescribe the details of a rail transport operator testing regime in the National Law and do not mandate evidentiary drug and alcohol testing by operators.

Option 3

Prescribe the details of a rail transport operator testing regime in the National Law and mandate evidentiary drug and alcohol testing by operators.

Proposal

Option 2 is proposed.

3.11.1 Economic costs

Regulator

Regulators do not expect additional costs to be incurred as a result of Option 2, whereby rail transport operators are not required to conduct random testing to an evidentiary standard.

Regulator survey responses have suggested that under Option 3, which requires evidentiary standard testing, the cost per state to the Regulator would be between $50,000 and $100,000 per state or territory. This encompasses costs for systems, processes, education and training to the handling of information from operators regarding evidentiary testing. From this, it is estimated that the setup cost would be in the range $0.30 million to $0.60 million across all states and territories. The methodology is based on a $0.10 million state allocation which has been supplied by survey respondents, and excluding New South Wales, which is already testing to an evidentiary standard.

Further to the initial setup costs, the recurrent costs are made up of two major components:

- training and monitoring
- costs associated with prosecution.

For the purpose of estimating the total prosecution related costs accruing to the Regulator, survey results have been used. In order to derive a national estimate of prosecution costs, figures by the New South Wales regulator have been adopted and extrapolated. The New South Wales regulator revealed costs relating to prosecution activities of approximately $78,000 per annum. Dividing this value by the total number of principally accredited operators in New South Wales (49) produced an estimate of prosecution costs per operator of $1,600 per annum. This value is then multiplied by the 115 principally accredited rail operators (excluding New South Wales) and combined with ongoing training and monitoring costs of $50,000 per state or territory per annum. The resulting additional ongoing Regulator costs under Option 3 would be approximately $0.48 million per annum. This has been adopted as the high cost and the low cost has been estimated to be approximately half of the high cost.

It is important to note that in reality, this figure will vary significantly between operators. The average prosecution cost per operator has been multiplied by the 115 accredited rail operators (excluding New South Wales) and added to the ongoing training and monitoring costs. As a result, the additional ongoing Regulator costs under Option 3 would be

approximately high $0.48 million per annum. The low cost has been estimated to be approximately half of the high cost.

Rail transport operators

Under Option 2, the estimated ongoing cost savings have been estimated to be in the range of $1.02 million to $1.28 million. This has been derived based on the removal of evidentiary standard testing in New South Wales. Research and industry consultation reveals that on a per test basis, the cost for an evidentiary test would be $220 more than a non-evidentiary test. The per unit test cost savings has been applied to the total number rail safety workers (currently required to be tested in New South Wales) to arrive at a final saving as described above.

Industry survey responses have suggested that by migrating from Option 2 (evidentiary standard not mandated) to Option 3 (evidentiary standard and mandated), would generate an initial implementation cost in the range of $4.0 million and $2.0 million. These figures have been derived based on the following:

- estimated average initial implementation cost per accredited rail operator outside of New South Wales of approximately $75,000. The implementation cost includes education, training, external consultancy services, new systems and procedure documentation. This figure has been estimated based on industry consultation
- 53 commercial rail operators.

The product of the two values generates a high estimate of $4.0 million. An equivalent low estimate of $2.0 million has been assumed.

The main recurrent cost associated with the proposed regulatory changes under Option 3 is the cost of the more expensive evidentiary testing programs with which operators must comply. For the states and territories that are not currently testing to an evidentiary standard, there are major recurrent cost implications.

The assumptions used to derive the recurrent costs are summarised as follows[63]:

- there are approximately 24,000 rail safety workers in Australia
- there are approximately 8,000 rail safety workers in New South Wales
- 25 per cent[64] of the total number of rail safety workers outside New South Wales (16,000) are required to be tested under Option 3
- non-evidentiary standard test is estimated to be $30, and
- evidentiary standard test is estimated to be $250

By applying the estimated 25 per cent (the same proportion of tests undertaken in New South Wales) to the total number of rail safety workers outside New South Wales required to be tested, together with the unit cost difference between non-evidentiary tests and evidentiary tests, it is estimated that recurrent costs under Option 3 would be in the range of $1.15 million and $0.92 million.

[63] All assumptions were sourced from survey responses and through industry consultation.

[64] 25 per cent is the current minimum requirement for testing in NSW.

Tourist and heritage rail transport operators

The upfront implementation cost for tourist and heritage operators under Option 2 (evidentiary standard not mandated) would be minimal compared to that of Option 3. There would be a marginal increase in costs for operators under Option 2 as most have a drug and alcohol testing program in place. However, a sum of $0.30 million has been allocated to allow for those operators that do not have an adequate testing regime in place and would require additional resources to bring the testing program to an acceptable standard. The $0.30 million was allowed based on discussions and consultation with rail industry professionals.

ATHRA survey responses indicated that tourist and heritage operators would not be expected to incur any recurrent costs under Option 2.

Industry survey responses suggest that implementation of Option 3 (evidentiary standard is mandated) would incur an initial implementation cost in the range of $1.89 million and $0.95 million would be incurred. These figures have been derived based on the following:

- estimated average initial implementation cost per tourist and heritage operator of $33,800. The implementation costs include education, training, external consultancy services, new systems and procedure documentation. This figure was estimated based on industry consultation
- 56 ATHRA members outside of New South Wales

The product of the two values generates a high estimate of $1.89 million. Based on the information available, the conservative estimate has been estimated at approximately half of that, $0.95 million.

The derivation of recurrent costs has been based on three factors, being 1) total number of estimated tourist and heritage rail safety workers, 2) cost per evidentiary test, and 3) percentage of total number of tourist and heritage rail safety workers required under an evidentiary testing regime. The product of the three factors generates an annual ongoing cost estimate of low $0.20 million and high of $0.40 million.

3.11.2 Economic benefits

It is estimated that there would be no material difference in safety benefits between the options. Given the incremental nature of the proposed change it has been assessed that there would be no economic benefits in addition to those estimated under the drug and alcohol management program above.

3.11.3 Summary

The tables below provide a summary of costs and benefits for Options 1, 2 and 3.

Table 41. Alcohol or drug testing, Regulator consolidated cost, $million ($2010)

	Initial Cost		Ongoing Cost Per Annum		Present Value Cost	
	high	low	high	low	high	low
Option 1	0	0	0	0	0	0
Option 2	0	0	0	0	0	0
Option 3	(0.60)	(0.30)	(0.48)	(0.24)	(3.99)	(2.00)

Table 42. Alcohol or drug testing, operator consolidated cost, $million ($2010)

	Initial Cost		Ongoing Cost Per Annum		Present Value Cost	
	high	low	high	low	high	low
Option 1	0	0	0	0	0	0
Option 2	(0.29)	(0.15)	1.28	1.02	8.70	7.05
Option 3	(3.98)	(1.99)	(1.15)	(0.92)	(12.05)	(8.45)

Table 43. Alcohol or drug testing, tourist and heritage consolidated cost, $million ($2010)

	Initial Cost		Ongoing Cost Per Annum		Present Value Cost	
	high	low	high	low	high	low
Option 1	0	0	0	0	0	0
Option 2	(0.29)	(0.15)	0	0	(0.29)	(0.15)
Option 3	(1.89)	(0.95)	(0.40)	(0.20)	(4.68)	(2.34)

3.12 Network rules

This item is addressed in Section 6.5.8 of the regulatory impact statement.

The Model Bill does not explicitly discuss network rules. They are covered under the general duties and safety management systems provisions of the Model Bill. It is proposed to require consultation with rolling stock operators and rail infrastructure managers when developing or amending network rules.

The costs and benefits of the following options are assessed:

Option 1

Status quo; continue to manage through General Safety Duties without specific provisions in law (no impact).

Option 2

Strengthen and clarify the requirement to consult with affected parties including rail infrastructure managers, rolling stock operators, maintainers, and rail safety workers.

Proposal

Option 2 is proposed.

3.12.1 Economic cost

Regulator

Regulators estimate that they would incur no additional costs as a result of Option 2. The perception is that this option would bring about improved coordination and facilitate the development of more appropriate effective network rules.

It is anticipated that there would be a cost saving to the Regulator as it is expected to reduce the need for the Regulator to intervene when consultation has not been considered adequate. It is assumed that Option 2 may mitigate one such intervention per annum per

state or territory at a low cost of $5,000 per occurrence and a high cost of $10,000 per occurrence. These estimates reflect the range of time costs involved in dealing with occurrences of varying degrees of complexity.

Rail transport operators

Operators surveyed noted that complying with the consultation requirements would lead to a marginal cost increase.

However, offsetting the additional costs of consultation would be the cost savings by avoiding the need to comply with 'inappropriate' and potentially costly network rules, which may otherwise be implemented without the need for proper consultation. In extreme cases a network rule change may result in unnecessary and very costly implications for operators (such as the need to make an upgrade to all rolling stock). Improvements in consultation would help to optimise network rules.

It is considered that this amendment would also reduce the number of network rule breaches due to improved dissemination of information, although the cost implication of this is negligible.

Overall the cost impact for operators is assessed as neutral.

Tourist and heritage rail transport operators

ATHRA considered that the impact of the proposal would be minor.

3.12.2 Economic benefits

The objective of Option 2 is to ensure that rail infrastructure managers engage in appropriate consultation in advance of changing the network rules. A more holistic and coordinated approach is likely to reduce the risk of accidents and promote improved levels of safety.

However, this benefit may be tempered since under the current practice network rules are considered a very serious matter and changes are not undertaken likely. Additionally, there are only a few reported cases of network rules being changed without proper consultation for which there is no information to support the assertion that such cases have resulted in negative safety impacts. Therefore, it has been conservatively estimated that Option 2 may result in the avoidance of one rail safety accident per annum. This gives a high benefit estimate of $1.04 million per annum and the low estimate is zero.

3.12.3 Summary

The tables below provide a summary of the costs and benefits of Option 1 and Option 2.

Table 44. Network rules, Regulator consolidated cost, $million ($2010)

	Initial Cost		Ongoing Cost Per Annum		Present Value Cost	
	high	low	high	low	high	low
Option 1	0	0	0	0	0	0
Option 2	0	0	0.07	0.04	0.49	0.28

Table 45. Network rules, economic benefits, $million ($2010)

	Benefit Per Annum		Present Value Benefit	
	high	low	high	low
Option 1	0	0	0	0
Option 2	1.04	0	7.30	0

3.13 Regulator to conduct cost benefit analysis for mandatory safety decisions

This item is addressed in Section 6.6.2 of the regulatory impact statement.

The Model Bill provides the Regulator authority to make decisions that impact on how rail transport operators manage safety risks. Such decisions may potentially have significant cost impacts on rail transport operators, and perhaps may not represent a cost-effective outcome that delivers the desired safety objective.

The costs and benefits of the following options are assessed:

Option 1

Status quo (no impact).

Option 2

That the Regulator be required to undertake a cost benefit analysis for mandatory decisions made on behalf of a rail transport operator. Applicable decisions would include those made under the following provisions of the draft National Law:

- Conditions or restrictions placed on a rail transport operator's accreditation (Section 68 - Determination of application)
- Directed amendments to a safety management system (Section 74 - Regulator may direct amendment of safety management system)
- The issuing of improvement notices (Section 182 - Issue of improvement notices)
- Requiring specified safety or protective equipment to be fitted (Section 204 - Response to certain reports).

Proposal

Option 2 is proposed.

3.13.1 Economic costs

Regulator

Regulators estimate that they would incur additional costs as a result of Option 2. Many regulators have not, in the past, issued a direction that would under these rules have been subject to a cost benefit analysis. Use of a direction requiring a cost benefit analysis would be infrequent. It is estimated that two cost benefit analyses would be needed each year with a high cost of $0.1 million and a low cost of $50,000 each.

Rail transport operators

The commissioning of a cost benefit analysis would not lead to any additional costs being imposed on operators. Moreover, it would mean that any direction would be justified on both viability (by the cost benefit analysis) and practicality basis.

Tourist and heritage rail transport operators

ATHRA considered that the impact of Option 2 would be minor.

3.13.2 Economic benefits

Option 2 requires that the Regulator to conduct a cost benefit analysis of all mandatory decisions made on behalf of the rail transport operator. This approach should ensure the most efficient allocation of resources and may improve safety outcomes. However, there is currently no basis for comparison and so it has not been possible to measure or estimate the potential economic benefits of the proposal.

3.13.3 Summary

The table below provides a summary of the costs of Option 1 and Option 2. The economic benefits have not been assessed.

Table 46. Regulator to conduct cost benefit analysis for mandatory safety decisions, Regulator consolidated cost, $million ($2010)

	Initial Cost		Ongoing Cost Per Annum		Present Value Cost	
	high	low	high	low	high	low
Option 1	0	0	0	0	0	0
Option 2	0	0	(0.20)	(0.10)	(1.40)	(0.70)

3.14 Equity considerations

A key issue in regulation is the compliance burden imposed on businesses. While many of the changes to the legislation will have no compliance burden, there are some items where there are potentially significant compliance costs to rail transport operators.

The CBA undertaken and documented in this report has been developed to ascertain the aggregate economic costs and benefits to society. As such has not examined in detail to who those costs and benefits accrue. The CBA effectively separates efficiency effects from equity or distributional impacts. This CBA assessment does, however, disaggregate between the key industry segments impacted by the proposals being; regulators, rail transport operators (commercial), and tourist and heritage operators. This has facilitated identification of the equity impacts of the preferred options.

The overall impact of the amendments in terms of business compliance costs is as follows:

Table 47. Summary of Implementation Costs

	Initial Cost		Ongoing Cost Per Annum	
	high	low	high	low

Regulator	(1.80)	(1.13)	(0.21)	(0.01)
Rail Transport Operator	(7.42)	(3.04)	(0.64)	0.11
Tourist and Heritage Operator	(3.17)	(1.75)	(1.29)	(0.76)

The most significant initial cost burden is borne by rail transport operators. However, tourist and heritage operators are exposed to the most significant ongoing costs.

Of particular note are the costs accruing to tourist and heritage operators since it is considered that this group is least likely to have the financial capacity to implement the regulatory changes. Affordability will be an issue for many organisations in this sector.

Tourist and heritage railway operators are mostly non-profit organisations, resourced with volunteer labour. They have little funding available for operating expenses and capital works. Consequently it is unlikely that they will have the same capacity to respond to regulatory change as the commercial operators. The proposed changes are therefore likely to have a disproportionate effect on tourist and heritage operators. Financial assistance is likely to be required to prevent some of the tourist and heritage railways from ceasing their operations. For instance, we understand that in making changes to rail safety legislation, the Victorian government took steps to alleviate the financial cost of compliance to the tourist and heritage sector.

In regards to the jurisdictions, it is also likely that there will be differences in affordability between the states and territories. That is, the compliance cost burden will be relatively greater in some of the smaller states and territories, such as Tasmania. As with tourist and heritage operators, financial assistance may be required. Due consideration should be given to the impact on each state or territory as a proportion of overall operating expenditure to determine the scale of the impact.

4. Measurable impact items options summary

This report documents the methodology and findings of the CBA undertaken to evaluate the material impacts of the proposed amendments and additions to the existing Model Bill as part of the introduction of the proposed Rail Safety National Law. The CBA has been undertaken in accordance with the Office of Best Practice Regulation (OBPR) Best Practice Regulation Handbook Appendix E Cost Benefit Analysis.

The analysis has been heavily reliant upon key assumptions as detailed in the text. This is a specialist area and a proposal for which there is no direct parallel. As a result, and given the limits of available information (such as rail safety accident data) this CBA has focussed on identifying the likely range within which these costs and benefits may fall. Nonetheless it is considered that the high and low values presented represent informed and credible assessment of the likely impacts of the proposed amendments and additions to the Model Bill. The key determinants of the results will be the interpretation of the new National Law by the single national rail Regulator.

The Net Present Value of the preferred options, in 2010 dollars, is given below. The Net Present Value for each of the preferred options is summarised by item in Table 48.

- NPV $71.48 million to $27.71 million discounted at 7 per cent real

The results of sensitivity analysis using real discount rates of 3 per cent and 10 per cent are as follows:

- NPV $89.45 million to $34.91 million discounted at 3 per cent real
- NPV $60.99 million to $23.51 million discounted at 10 per cent real

Table 48. Cost benefit analysis summary results, proposed options, 7 per cent real

CBA item	Preferred Option	Net Benefit $2010 Millions					
		Initial Net Benefit		Net Benefit Per Annum		Net Present Value	
		High	Low	High	Low	High	Low
Railways to which the Act does not apply	1.2	0	0	0.06	0.02	0.42	0.17
	2.4	(1.02)	(0.45)	0.04	(0.06)	(0.74)	(0.87)
Private sidings exemption from accreditation	2	(2.75)	(1.38)	1.58	0.17	8.37	(0.20)
Exemption framework	2	0.97	0.04	0.34	0	3.35	0.02
Powers with respect to interface with parties whose operations may impact rail safety	2	(0.20)	0	0.32	0	2.05	0
Duty for loading and unloading rolling stock	3	(0.10)	(0.05)	1.10	0.55	7.60	3.80
Safety Management System	2	(1.17)	(0.48)	0.19	0.11	0.20	0.28
Health and fitness management program	2	(1.82)	0	0.38	0.13	0.82	0.94
Drug and alcohol management program	3	(1.71)	(1.02)	4.58	2.28	30.46	14.96
Fatigue risk management program	3	(3.92)	(2.22)	1.15	0.62	4.16	2.14
Testing for drugs or alcohol	2	(0.58)	(0.29)	1.28	1.02	8.41	6.90
Network Rules	2	0	0	1.11	0.04	7.80	0.28
Regulator to conduct CBA for mandatory safety decisions	2	0	0	(0.20)	(0.10)	(1.40)	(0.70)
Total	-	(12.29)	(5.84)	11.93	4.78	71.48	27.71

Table 49 provides a summary of implementation costs as they accrue to the Regulator and operators, including tourist and heritage operators.

Table 49. Costs to Regulator and operators, proposed options, 7 per cent real

Stakeholder group	Cost $2010 Millions					
	Initial Cost		Ongoing Cost Per Annum		Present Value Cost	
	High	Low	High	Low	High	Low
Regulator	(1.70)	(1.06)	(0.51)	(0.26)	(5.28)	(2.91)
Rail transport operator	(7.42)	(3.04)	(0.64)	0.11	(11.93)	(2.28)
Tourist and heritage operator	(3.17)	(1.75)	(1.29)	(0.76)	(12.22)	(7.12)
Total Cost	(12.29)	(5.84)	(2.44)	(0.92)	(29.43)	(12.31)
Social Benefit	0	0	14.37	5.70	100.91	40.02
TOTAL	**(12.29)**	**(5.84)**	**11.93**	**4.78**	**71.48**	**27.71**

Table 50 below presents a completed summary for each measureable item and for each option proposed. It also shows:

- the high and low estimate of the initial cost (the set up cost of each item)
- the high and low estimate of the forecast ongoing costs to the various parties. In some cases there are efficiency gains and so the costs are shown as positive values
- the high and low estimate of the forecast ongoing safety benefit. The benefits are not allocated to any party as they accrue to society as a whole. Benefits are shown as positive values
- the high and low net present values (sum of the discounted economic costs and benefits) for each item. Note the high and low reflect the costs of each item.

Table 50. Measurable impact items option summary, benefits and costs, Net Present Value ($million 2010)

CBA item	Economic Cost						Economic Benefit						Net Benefit					
	Initial Cost		Ongoing Cost Per Annum		Present Value of Cost		Initial Benefit		Benefit Per Annum		Present Value Benefit		Initial Net Benefit		Net Benefit Per Annum		Net Present Value	
	High	Low	High	Low	High	Low	High	Low	High	Low	High	Low	High	Low	High	Low	High	Low
Railways to which the Act does not apply																		
Regulator																		
Option 1.1	0	0	0	0	0	0												
Option 1.2	0	0	0.03	0.01	0.21	0.08												
Option 2.3	(1.20)	(0.60)	(0.12)	(0.06)	(2.04)	(1.02)												
Option 2.4	(0.60)	(0.30)	(0.06)	(0.03)	(1.02)	(0.51)												
Operator																		
Option 1.1	0	0	0	0	0	0												
Option 1.2	0	0	0	0	0	0												
Option 2.3	0	0	0	0	0	0												
Option 2.4	0	0	0	0	0	0												
T&H																		
Option 1.1	0	0	0	0	0	0												
Option 1.2	0	0	0.03	0.01	0.21	0.08												
Option 2.3	(0.42)	(0.15)	(0.06)	(0.03)	(0.84)	(0.36)												
Option 2.4	(0.42)	(0.15)	(0.06)	(0.03)	(0.84)	(0.36)												
Total Cost																		
Option 1.1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Option 1.2	0	0	0.06	0.02	0.42	0.17	0	0	0	0	0	0	0	0	0.06	0.02	0.42	0.17
Option 2.3	(1.62)	(0.75)	(0.18)	(0.09)	(2.88)	(1.38)	0	0	0.16	0	1.12	0	(1.62)	(0.75)	(0.02)	(0.09)	(1.76)	(1.38)
Option 2.4	(1.02)	(0.45)	(0.12)	(0.06)	(1.86)	(0.87)	0	0	0.16	0	1.12	0	(1.02)	(0.45)	0.04	(0.06)	(0.74)	(0.87)
Private sidings exemption from accreditation																		
Regulator																		
Option 1	0	0	0	0	0	0												
Option 2	0.89	0.45	0.33	0.17	4.03	1.62												
Operator																		
Option 1	0	0	0	0	0	0												

CBA item	Economic Cost						Economic Benefit						Net Benefit					
	Initial Cost		Ongoing Cost Per Annum		Present Value of Cost		Initial Benefit		Benefit Per Annum		Present Value Benefit		Initial Net Benefit		Net Benefit Per Annum		Net Present Value	
	High	Low	High	Low	High	Low	High	Low	High	Low	High	Low	High	Low	High	Low	High	Low
Option 2	(3.63)	(1.81)	0	0	(3.63)	(1.81)												
T&H																		
Option 1	0	0	0	0	0	0												
Option 2	(0.02)	(0.01)	0	0	(0.02)	(0.01)												
Total Cost																		
Option 1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Option 2	(2.75)	(1.38)	0.33	0.17	(0.41)	(0.20)	0	0	1.25	0	8.78	0	(2.75)	(1.38)	1.58	0.17	8.37	(0.20)
Exemption framework																		
Regulator																		
Option 1	0	0	0	0	0	0												
Option 2	(0.60)	(0.26)	(0.33)	(0.11)	(2.93)	(1.03)												
Operator																		
Option 1	0	0	0	0	0	0												
Option 2	0	0	0	0	0	0												
T&H																		
Option 1	0	0	0	0	0	0												
Option 2	1.57	0.30	0.67	0.11	6.28	1.05												
Total Cost																		
Option 1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Option 2	0.97	0.04	0.34	0	3.35	0.02	0	0	0	0	0	0	0.97	0.04	0.34	0	3.35	0.02
Powers with respect to interface with parties whose operations may impact rail safety																		
Regulator																		
Option 1	0	0	0	0	0	0												
Option 2	(0.20)	0	(0.20)	0	(1.60)	0												
Operator																		
Option 1	0	0	0	0	0	0												
Option 2	0	0	0	0	0	0												
T&H																		
Option 1	0	0	0	0	0	0												
Option 2	0	0	0	0	0	0												

CBA item	Economic Cost						Economic Benefit						Net Benefit					
	Initial Cost		Ongoing Cost Per Annum		Present Value of Cost		Initial Benefit		Benefit Per Annum		Present Value Benefit		Initial Net Benefit		Net Benefit Per Annum		Net Present Value	
	High	Low	High	Low	High	Low	High	Low	High	Low	High	Low	High	Low	High	Low	High	Low
Total Cost																		
Option 1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Option 2	(0.20)	0	(0.20)	0	(1.60)	0	0	0	0.52	0	3.65	0	(0.20)	0	0.32	0	2.05	0
Duty for loading and unloading rolling stock																		
Regulator																		
Option 1	0	0	0	0	0	0												
Option 2	0	0	(7.00)	(3.50)	(49.17)	(24.58)												
Option 3	(0.10)	(0.05)	(0.36)	(0.18)	(2.63)	(1.31)												
Operator																		
Option 1	0	0	0	0	0	0												
Option 2	0	0	(20.80)	(10.40)	(146.09)	(73.05)												
Option 3	0	0	0	0	0	0												
T&H																		
Option 1	0	0	0	0	0	0												
Option 2	0	0	(0.11)	(0.05)	(0.76)	(0.38)												
Option 3	0	0	0	0	0	0												
Total Cost																		
Option 1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Option 2	0	0	(27.91)	(13.95)	(196.01)	(98.01)	0	0	1.46	0.73	10.23	5.11	0	0	(26.45)	(13.23)	(185.79)	(92.89)
Option 3	(0.10)	(0.05)	(0.36)	(0.18)	(2.63)	(1.31)	0	0	1.46	0.73	10.23	5.11	(0.10)	(0.05)	1.10	0.55	7.60	3.80
Safety management system																		
Regulator																		
Option 1	0	0	0	0	0	0												
Option 2	(0.18)	(0.11)	(0.02)	(0.01)	(0.31)	(0.18)												
Operator																		
Option 1	0	0	0	0	0	0												
Option 2	(0.50)	(0.17)	(0.05)	(0.02)	(0.86)	(0.29)												
T&H																		
Option 1	0	0	0	0	0	0												
Option 2	(0.49)	(0.21)	(0.05)	(0.02)	(0.83)	(0.35)												

CBA item	Economic Cost						Economic Benefit						Net Benefit					
	Initial Cost		Ongoing Cost Per Annum		Present Value of Cost		Initial Benefit		Benefit Per Annum		Present Value Benefit		Initial Net Benefit		Net Benefit Per Annum		Net Present Value	
	High	Low	High	Low	High	Low	High	Low	High	Low	High	Low	High	Low	High	Low	High	Low
Total Cost																		
Option 1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Option 2	(1.17)	(0.48)	(0.12)	(0.05)	(1.99)	(0.81)	0	0	0.31	0.16	2.19	1.09	(1.17)	(0.48)	0.19	0.11	0.20	0.28
Health and fitness management program																		
Regulator																		
Option 1	0	0	0	0	0	0												
Option 2	0.33	0	0.33	0	2.65	0												
Operator																		
Option 1	0	0	0	0	0	0												
Option 2	(1.18)	0	(0.10)	0	(1.89)	0												
T&H																		
Option 1	0	0	0	0	0	0												
Option 2	(0.98)	0	(0.12)	0	(1.83)	0												
Total Cost																		
Option 1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Option 2	(1.82)	0	0.11	0	(1.07)	0	0	0	0.27	0.13	1.89	0.94	(1.82)	0	0.38	0.13	0.82	0.94
Drug and alcohol management program																		
Regulator																		
Option 1	0	0	0	0	0	0												
Option 2	(0.56)	0	(0.56)	0	(4.49)	0												
Option 3	(0.56)	(0.45)	0	0	(0.56)	(0.45)												
Option 4	(0.56)	(0.45)	0	0	(0.56)	(0.45)												
Operator																		
Option 1	0	0	0	0	0	0												
Option 2	(0.53)	0	0	0	(0.53)	0												
Option 3	(0.53)	(0.27)	(0.05)	(0.04)	(0.88)	(0.55)												
Option 4	(0.53)	(0.27)	(0.05)	(0.04)	(0.88)	(0.55)												
T&H																		
Option 1	0	0	0	0	0	0												
Option 2	0	0	0	0	0	0												

CBA item	Economic Cost						Economic Benefit						Net Benefit					
	Initial Cost		Ongoing Cost Per Annum		Present Value of Cost		Initial Benefit		Benefit Per Annum		Present Value Benefit		Initial Net Benefit		Net Benefit Per Annum		Net Present Value	
	High	Low	High	Low	High	Low	High	Low	High	Low	High	Low	High	Low	High	Low	High	Low
Option 3	(0.62)	(0.31)	(0.05)	(0.03)	(0.97)	(0.49)												
Option 4	(0.62)	(0.31)	(0.05)	(0.03)	(0.97)	(0.49)												
Total Cost																		
Option 1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Option 2	(1.09)	0	(0.56)	0	(5.03)	0	0	0	4.68	0	32.87	0	(1.09)	0	4.12	0	27.84	0
Option 3	(1.71)	(1.02)	(0.10)	(0.07)	(2.41)	(1.48)	0	0	4.68	2.34	32.87	16.44	(1.71)	(1.02)	4.58	2.28	30.46	14.96
Option 4	(1.71)	(1.02)	(0.10)	(0.07)	(2.41)	(1.48)	0	0	4.68	2.34	32.87	16.44	(1.71)	(1.02)	4.58	2.28	30.46	14.96
Fatigue risk management program																		
Regulator																		
Option 1	0	0	0	0	0	0												
Option 2	(0.69)	0	(0.18)	0	(1.95)	0												
Option 3	(0.69)	(0.35)	(0.10)	(0.05)	(1.42)	(0.71)												
Option 4	(0.69)	(0.35)	(0.10)	(0.05)	(1.42)	(0.71)												
Operator																		
Option 1	0	0	0	0	0	0												
Option 2	(1.29)	0	0	0	(1.29)	0												
Option 3	(1.29)	(0.65)	(1.72)	(0.86)	(13.37)	(6.69)												
Option 4	(1.29)	(0.65)	(1.72)	(0.86)	(13.37)	(6.69)												
T&H																		
Option 1	0	0	0	0	0	0												
Option 2	0	0	0	0	0	0												
Option 3	(1.94)	(1.23)	(1.71)	(0.81)	(13.93)	(6.90)												
Option 4	(1.94)	(1.23)	(1.71)	(0.81)	(13.93)	(6.90)												
Total Cost																		
Option 1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Option 2	(1.98)	0	(0.18)	0	(3.24)	0	0	0	4.68	0	32.87	0	(1.98)	0	4.50	0	29.63	0
Option 3	(3.92)	(2.22)	(3.53)	(1.72)	(28.72)	(14.30)	0	0	4.68	2.34	32.87	16.44	(3.92)	(2.22)	1.15	0.62	4.16	2.14
Option 4	(3.92)	(2.22)	(3.53)	(1.72)	(28.72)	(14.30)	0	0	4.68	2.34	32.87	16.44	(3.92)	(2.22)	1.15	0.62	4.16	2.14
Testing for drugs or alcohol																		
Regulator																		

CBA item	Economic Cost						Economic Benefit						Net Benefit					
	Initial Cost		Ongoing Cost Per Annum		Present Value of Cost		Initial Benefit		Benefit Per Annum		Present Value Benefit		Initial Net Benefit		Net Benefit Per Annum		Net Present Value	
	High	Low	High	Low	High	Low	High	Low	High	Low	High	Low	High	Low	High	Low	High	Low
Option 1	0	0	0	0	0	0												
Option 2	0	0	0	0	0	0												
Option 3	(0.60)	(0.30)	(0.48)	(0.24)	(3.99)	(2.00)												
Operator																		
Option 1	0	0	0	0	0	0												
Option 2	(0.29)	(0.15)	1.28	1.02	8.70	7.05												
Option 3	(3.98)	(1.99)	(1.15)	(0.92)	(12.05)	(8.45)												
T&H																		
Option 1	0	0	0	0	0	0												
Option 2	(0.29)	(0.15)	0	0	(0.29)	(0.15)												
Option 3	(1.89)	(0.95)	(0.40)	(0.20)	(4.68)	(2.34)												
Total Cost																		
Option 1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Option 2	(0.58)	(0.29)	1.28	1.02	8.41	6.90	0	0	0	0	0	0	(0.58)	(0.29)	1.28	1.02	8.41	6.90
Option 3	(6.47)	(3.23)	(2.03)	(1.36)	(20.72)	(12.79)	0	0	0	0	0	0	(6.47)	(3.23)	(2.03)	(1.36)	(20.72)	(12.79)
Network Rules																		
Regulator																		
Option 1	0	0	0	0	0	0												
Option 2	0	0	0.07	0.04	0.49	0.28												
Operator																		
Option 1	0	0	0	0	0	0												
Option 2	0	0	0	0	0	0												
T&H																		
Option 1	0	0	0	0	0	0												
Option 2	0	0	0	0	0	0												
Total Cost																		
Option 1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Option 2	0	0	0.07	0.04	0.49	0.28	0	0	1.04	0	7.30	0	0	0	1.11	0.04	7.80	0.28
Regulator to conduct CBA for mandatory safety decisions																		
Regulator																		

CBA item	Economic Cost						Economic Benefit						Net Benefit					
	Initial Cost		Ongoing Cost Per Annum		Present Value of Cost		Initial Benefit		Benefit Per Annum		Present Value Benefit		Initial Net Benefit		Net Benefit Per Annum		Net Present Value	
	High	Low	High	Low	High	Low	High	Low	High	Low	High	Low	High	Low	High	Low	High	Low
Option 1	0	0	0	0	0	0												
Option 2	0	0	(0.20)	(0.10)	(1.40)	(0.70)												
Operator																		
Option 1	0	0	0	0	0	0												
Option 2	0	0	0	0	0	0												
T&H																		
Option 1	0	0	0	0	0	0												
Option 2	0	0	0	0	0	0												
Total Cost																		
Option 1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Option 2	0	0	(0.20)	(0.10)	(1.40)	(0.70)	0	0	0	0	0	0	0	0	(0.20)	(0.10)	(1.40)	(0.70)

Note 1: all figures in $million 2010; positive figures show a net benefit.

13. Appendix E: List of submissions received

The following table includes a list of all submissions made on the public comment version of the regulatory impact statement.

Date received	Submitted by	
	Organisation	Person
25 July		Dan Healy
9 August	Derwent Group	Peter Hughes
9 August		Peter Hughes
11 August	Transfield Services – Rail	Colin Underwood
11 August	Australian Rail Association	John Fullerton
11 August	May Valley Heritage Railway Museum Association	Frank Lightfoot
11 August	Council of Tramway Museums of Australasia Incorporated	Craig Tooke
11 August	Rail Tram and Bus Union, Queensland	Les Moffitt
11 August	CRC for Rail Innovation	David George
11 August	South Australian Freight Council	John McArdle
11 August		An Le
11 August	South Australia Rail Commission	Peter Dogget
11 August	Australasian Medical Review Officers Association	William Isles
11 August	Macmahon MVM	Brian Lockwood Joe Hauser
11 August	Rail Tram Bus Union, Western Australia	Corey Fogliani
11 August	CitiPower/Powercor	Brent Cleave
12 August		Christopher Green
12 August	Heritage Rail South Australia	Brian Busch
12 August	Steam Ranger Heritage Railways	Brian Busch
12 August	Association of Tourist and Heritage Rail Australia	Warren Doubleday
12 August	Queensland Rail National	Neil Becker
12 August	O'Donnel Griffen	
12 August	Asciano	
12 August	Queensland Transport	
12 August	Transport Safety Victoria	Alan Osborne

12 August	AI Group	Tracey Browne
12 August	Downer EDI	Mark Davies
12 August	Australasian Medical Review Officers Association	Kevin Sleigh
12 August	SCT Logistics	Brian McNaught
12 August	Queensland Information Commissioner	Julie Kinross
12 August	Australian Narrow Gauge Museum society	Graham Wilson
12 August	Ansaldo - STS	
12 August		Teresa Murphy
12 August	Australasian Railway Association (ARA)	
12 August	Australian Rail Track Corporation	Jenny McAuliffe
12 August	Northern Territory Transport	Guy Riley
12 August	Yarra Ranges Shire Council	Douglass Dickins
14 August	South Australia Department of Transport, Energy and Infrastructure	Derek Heneker
14 August	Mary Valley Heritage Railway Museum Association	Jim Walker
15 August	Laing O'Rourke	Rob Boulger
15 August	Northern Territory Information Commissioner	Brenda Monaghan
15 August	Westnet Rail	Vic Bliss
15 August	South Australian Freight Council	John McArdle
15 August	Australian Logistics Council	Duncan Sheppard
15 August	Rail Tram Bus Union, Western Australia	Phillip Woodcock
15 August	Steam Ranges Heritage Railways	Brian Busch
16 August	New South Wales Transport	Dimi Rigas
16 August	V/Line	Todd Bentley
16 August	Rail Tram Bus Union, National Office	Bob Nanva
17 August	Australian Transport Risk Solution	Daniel Edwards
17 August	Port Kembla Port Corporations	
18 August	The Pilbara Infrastructure	Bob Pemberton
18 August	Victorian Department of Transport	Jenny Gabriele
18 August	Western Australia Transport/Worksafe	Lisa Fanciulli
19 August	Tasmanian Department of Transport, Energy and Infrastructure	Penny Nicholls
19 August	Queensland Public information commission	Donna Andrews Amanda Ross
11 August	RailCorp	Sarah Moss

12 August	Ararat Rural City Council	Alison Tonkin
22 August		Reem Mina
12 August	Genesee & Wyoming Australia	Robert Easthope
1 August		Dr. Robert J. Lewin
15 July		Dennis Camplin
15 July	BlueScope Steel	Ken Jenkins
15 July	Queensland Rail	Joe Hosking
12 August	Queensland Transport and Logistics Council	Neil Findlay
5 September	Rio Tinto	Greg Lilleyman

14. Appendix F: Responses to public comments

A summary of comments received on the public comment version of the draft regulatory impact statement, and responses are included below.

Ref.	Submitted	Comment Summary	NTC response
Comments on the draft National Law (Act)			
s. 3 **Purpose, objects and guiding principles of the law**	ATHRA	*Tourist and heritage Sustainability* The tourist and heritage sector has expressed concern that the long term sustainability of any tourist and heritage railway could be impacted through the over-zealous application of the regulatory system. The tourist and heritage sector recommends the words "and sustainable" be inserted after the word productivity in section 3 (3)(a).	The intention is to minimise these impacts through the application of the exemption framework provided for in the draft law. No changes proposed.
s. 3 **Purpose, objects and guiding principles of Law**	TSV	*The status of guiding principles in law is questioned* Principles of productivity and efficiency conflict with the principal objective to provide for safe railway operations.	The use of guiding principles in law is an established practice. They provide guidance for how regulatory decisions should be made, in conjunction with the objects of the law. COAG directed that principles of productivity and efficiency be included in the National Law. No changes proposed.
s. 3 Purpose, objects and guiding principles of Law s. 48 Principles of shared responsibility, accountability, integrated risk management, etc. s. 132 Guiding principle	TSV	Guiding principles for how the National Law should be applied should be prescribed in a consolidated fashion, in a single section.	Guiding principles have been prescribed in the sections of the National Law to which they apply. Different guiding principles apply to different aspects of the National Law and do not necessarily lend themselves to being applied generally. Those that may are prescribed in s.3. No changes proposed.
s. 4 **Interpretatio**	QLD TMR	*Definition of rail safety worker* Should be changed to exclude a rail	The definition of 'rail safety worker' has been cast broadly to ensure that those persons who carry out rail safety work

Ref.	Submitted	Comment Summary	NTC response
n		safety officer carrying out functions/exercising powers under the Act.	within the meaning of s.8 are captured. This is particularly relevant for the prescribed rail safety duties that are based on principles of shared responsibility; integrated risk management and the capacity for a person to have more than 1 duty and for more than 1 person to have the same duty (see s.49). In line with this, it is intended that if rail safety officers performing functions and powers under s.138 carry out rail safety work, they will be subject to the duties and responsibilities of a rail safety worker when acting in that capacity. The definition of rail safety worker will also be reviewed through the future maintenance programme. No changes proposed.
	NT	*Definition of road* Absence of definition of 'road'. A definition should be included that is wider than the current definition of 'road infrastructure' and should include areas adjacent to the road surface i.e. what is defined in the Australian Road Rules 13 as the road-related area.	The definition of 'road' will be included in state and territory application law. No changes proposed.
	Transfield CRC QR National	*Definition of participating jurisdiction* Sub-paragraph (b) indicates capacity for non-uniform adoption across Australia.	The Rail Safety National Law (NRSL) is an applied law scheme where it is intended that each state and territory (participating jurisdictions) will adopt and apply the NRSL as enacted in South Australia as the host jurisdiction. However, flexibility is incorporated in the definition in the form of sub-paragraph (b), to allow individual states or territories to adopt and apply the NRSL that satisfies and balances specific jurisdictional legislative and drafting requirements and the capacity to address issues that may arise due to the operation of other state or territory based legislation. No changes proposed.
	Transfield CRC QR National TSV	*Definition of notifiable occurrence* Inclusion of "significant property damage" extends beyond 'safety' which is defined as meaning the safety of people.	The definition of 'notifiable occurrence' is consistent with the model Work Health and Safety law definition. There is no conflict between the definition of 'notifiable occurrence' and the definition of 'safety' in the law. Under the definition, for significant property damage to be captured as a notifiable occurrence it must be the result of an accident or incident

Ref.	Submitted	Comment Summary	NTC response
			associated with railway operations. Significant property damage independent of rail way operations is not notifiable for the purposes of the NRSL. 'Railway operations' is given a specified meaning in s. 4 and includes those activities associated with construction, movement, and management etc. of rolling stock, rail infrastructure and railways in general. Significant property damage that occurs as a result of an accident or incident associated with those operations alone is considered a safety risk appropriate to be captured as a notifiable occurrence for the purposes of the NRSL.
	Derwent Group	*Definition of rail infrastructure* The definition does not include level crossings, civil infrastructure (bridges, culverts) or platforms.	Rail infrastructure is given a non-exhaustive and broad definition as the "facilities necessary to enable a railway to operate safely" and includes the things listed in sub-paragraphs (a) to (f). 'Level crossing' is defined in s. 4 and forms part of the definition of 'railway crossing'. The law recognises the critical interface between these parts of infrastructure and what is defined as rail infrastructure for the safety of rail way operations. However, level crossings, bridges etc. may not come within the managerial ambit of a rail infrastructure manager and may in fact come within the control of a public road manager. To mitigate safety risks in this regard, it is a requirement for road managers of road infrastructure and rail infrastructure managers to enter into 'interface agreements' under Part 3, Division 6 Subdivision 2 so that risks to safety arising from that interface are not unacceptable. No changes proposed.
	Council of Tramways Museums of Australasia Inc.	*Definition of level crossing* The definition should incorporate a similar approach as provided for in the Victorian Rail Safety Act in particular "an area where a public roadway and a tramway or light railway cross at substantially the same level and that has a level crossing sign on the roadway at each entrance to the area."	The definition of 'level crossing' in the law is adopted from the Australian Road Rules Definition. No changes proposed.
	O'Donnell Griffen Rail	*Definition of rail safety work* Overly restrictive. Does not reflect a	The definition of 'rail safety work' is on the maintenance program for the NRSL. It will be through the

Ref.	Submitted	Comment Summary	NTC response
		risk based approach that allows activities to be planned in such a way that imposes a responsibility to work through hierarchy of controls to manage the risk.	accreditation process, which incorporates a safety management system that will reflect a risk based approach to safety management. Operators will need to demonstrate to the Regulator that they have the appropriate systems etc. in place to mitigate risks to safety arising out of their operations. No changes proposed.
	Qld TMR	*Definition of amusement structure* Definition of amusement structure needs to be amended to ensure railway operations (passenger transport) within amusement parks are captured and which are delineated from roller coasters or thrill rides. For example, Dreamworld railway and Seaworld monorail.	S.7(3) provides the mechanism by which railways that would otherwise be excluded are able to be captured by the NRSL. As noted in the submission the Dreamworld railway is currently prescribed in the regulations as a railway to which the law does apply. Similarly, the Seaworld monorail could be 're-included' in this way if deemed appropriate. On this basis, amendment to the definition of 'amusement structure' appears unnecessary. It is not recommended that a definition of 'amusement park' be included due to the complexities surrounding the creation of a definition of general application. No changes proposed.
	VIC DOT TSV	*Definition of a Drug* The approach to defining a drug is confusing. The definition should be redrafted to make it clear what a drug is and when an offence is committed. This includes the distinction between a drug and a prescribed drug.	The definition of a drug has been drafted to provide: • a nationally consistent schedule of drugs, and • the power for Ministers to declare a substance a drug if necessary. It is an offence under s.126(1)(c) if a worker is under the influence of a drug so that they are incapable of effectively discharging a function or duty of a rail safety worker. A prescribed drug has been defined for the purposes of s.126 (1)(b). Under this section, the worker commits an offence if they have any of the prescribed drugs in their oral fluid or blood. This differs from an offence for other drugs, where in addition to the drug being present; it must be shown that the worker was incapable of effectively discharging a function or duty of a rail safety worker. This is based on the recommendations by the expert panel and reflects roadside legislation and practices.

Ref.	Submitted	Comment Summary	NTC response
			No further action proposed.
s. 4 and s. 6 **Definition of a drug**	RTBU National	*Definition of a Drug* What is the rationale for the definition of a drug being changed to include a substance declared by the national regulations to be a drug for the purposes of this Law?	Currently jurisdictions refer to different lists of drugs in their legislation. While these have common elements, it has proposed to reference the current Poisons Standard within the meaning of the *Therapeutic Goods Act 1989* in the draft law for the purpose of national consistency (r.5). As stated in section 6.5.2 of the regulatory impact statement, rail safety workers will benefit from the provision of clarity about which substances are drugs for the purposes of the national law. No further action proposed.
s. 7 **Railways to which this law does not apply**	SA DTEI	*Amusement railways* Where a railway used for 'amusement' purposes remains connected to a railway that is required to be accredited or registered under the rail safety law the regulatory oversight (for both the direct operations and the interfacing operations) should sit with the rail safety regulator, particularly if the connection to the other railway is operational or could be made operational. It is suggested that an additional qualifier, along the lines of, "is not connected to another railway for which the rail transport operator of the other railway is required to be accredited or registered under this law", should be included in s.7(2)(b).	This amendment has been made to the RSNL.
	QLD TMR	*Amusement railways* Clarity is sought regarding whether the definition provides that the railway does not operate on or cross a road **or road-related area.**	S.7(2)(b)(iii) prohibits a railway used for the purposes of an amusement structure from operating on or cross a public road. Public road or road will be defined in the state and territory application laws. No changes proposed.
	Queensland TMR	*Amusement railways* More specific definition of amusement structure and park, to more precisely differentiate between types of railways found in amusement parks.	Given the inexhaustible number of potential amusement railway types, attempting to prescribe them in a definition seems fraught. S.7(3) grants authority to prescribe an amusement railway as being subject to the NRSL, when it was otherwise exempted under s. 7(2)(b). It is considered that this eliminates any possibility of railways being inadvertently and inappropriately excluded from the NRSL.

Ref.	Submitted	Comment Summary	NTC response
			No changes proposed.
	QLD TMR	*Mining railways* The NRSL should more clearly delineate the scope of applicability between it and relevant mining law, for railways involved mining operations. It should clarify that exemption from the NRSL applies to underground railways that service mines, not just railways servicing underground mines. Operational provisions should also be implemented to ensure there is clear understanding of such delineation between the Regulator and relevant mining safety regulators.	It is considered the wording of the s.7(1)(a) is clearly indicates which mining operations are not captured by the NRSL. "a railway in a mine that is underground or chiefly underground and used in connection with the performance of mining operations" Operational provisions are outside the scope of developing the National Law. No changes proposed.
	NSW Transport	The definition of *amusement structure* in the National Law, in conjunction with that for *amusement device* in the Model Work Health and Safety Bill, allows scope for some types of railways to be excluded from both laws. These include railways of heritage value and others that may fall within the scope of both definitions, but involve operations of a nature that incur risks to safety of a degree that justifies their regulation under one or both laws. A clearer definition of *amusement structure* in the NRSL is preferred to the power to prescribe individual railways as being included within its scope.	Given the inexhaustible number of potential amusement railway types it would be impracticable to include them all in a definition. Narrowing the scope of the definition to address additional types, such as heritage railways, would risk including a greater number of amusement railways within the scope of the NRSL. This would defeat the principal purpose of the provision. S.7(3) grants authority to prescribe an amusement railway as being subject to the NRSL, when it was otherwise exempted under s.7(2)(b). This is the most effective means of eliminating any possibility of railways being inadvertently and inappropriately excluded from the NRSL. No further action proposed.
s. 8 **Meaning of rail safety work**	Transfield CRC QR National	*Meaning of 'rail safety work'* As notified on 18 January 2011 the definition of rail safety work is very clearly a major priority for industry members for further attention under the NTC legislation maintenance program.	The definition of 'rail safety work' is part of the future maintenance program for the NRSL. No changes proposed.
s. 9 **Single national entity**	TSV	Would the reference to a 'national' entity (Regulator) be correct, if not all states and territories had yet to pass the NSRL?	The provision was drafted with the intent that states and territories would pass the NSRL, and for it and the Regulator to take effect in January 2013. The accuracy of that reference depends on the NRSL being approved by the Standing Council on Transport and Infrastructure in November 2011 and passed by each state and territory

Ref.	Submitted	Comment Summary	NTC response
			in 2012. No changes proposed.
s. 12 **Establishment**		Does reference to the *State* mean the state of South Australia or all states and territories?	Reference to the *State* means the state or territory in which the NRSL has been applied. No changes proposed.
s. 13 **Functions and objectives**	TSV	*Should registration regime be included in section 13* *(1)(a)?* Does the phrase "*to work with rail transport operators.. to improve rail safety nationally*" place insufficient emphasis on the Regulator's role in enforcing the NRSL?	The functions and objectives are included in s.13(1). Although s.13(1(b) contains the phrase in question s.13(1)(e) refers to enforcement of the NRSL. The order of the contents of paragraphs (a) to (f) does not give priority to one over the other; all paragraphs are equally important. No changes proposed.
s. 19 **Functions of the Regulator**	TSV	Subject to sub-section 19(4), sub-sections 19(2) and (3) authorise the Regulator to otherwise act unilaterally and on behalf of the actions or recommendations of the Office of the National Rail Safety Regulator. Is this the intention?	Yes. This power is commensurate with the Regulator's position as the chief executive officer. It should be noted that oversight is provided in particular by two non-executive members of the Office of the National Rail Safety Regulator and the authority for responsible Ministers to remove an Office holder under specified conditions. No changes proposed.
s. 20 **Power of the Regulator to obtain information**	QLD TMR	Supports provision. Consideration should be given to persons who may have received information under other legislation. For example in situations where police and work health and safety may have received information protected by a confidentiality clause.	Information obtained under another law would be subject to the confidentiality provisions of that law. In the circumstance that the information is protected in such a way as to prevent disclosure that would otherwise be authorised or required under another law i.e. NRSL then the disclosure is limited. The Regulator's power here is limited to contraventions of the NRSL and monitoring or enforcing compliance with the NRSL. Broadly, s.20(5) would be sufficient to protect a person from breaching the requirements of another law under which the info was obtained. No changes proposed.
s. 22 **Vacancy in or removal from office**	TSV	Does the power for responsible ministers to remove a member of the Office of the National Rail Safety Regulator compromise the independence of the former?	Their independence is not materially compromised by the provision. It is noted that removal may only be under prescribed conditions and by decision of responsible ministers (collectively), rather than an individual minister. No changes proposed.

Ref.	Submitted	Comment Summary	NTC response
s. 23 **Disclosure of interests**	SA DTEI	Noting the application of s.23(3), it is suggested that a penalty provision be considered for a member of the ONRSR etc. failing to disclose a conflict of interest. The same consideration may be given to s.26 – Disclosure of conflict of interest.	Both s.23 and s.26 are new additions to the NRSL. A similar provision in the Model Work, Health and Safety law and the National Heavy Vehicle law around disclosure of conflict do not have a penalties attached. Based on the precedent from these two COAG reform projects, a penalty is not supported for the NRSL.
s. 28 **Decisions without meetings**	SA DTEI	Query whether s.28(2)(a) may be ultra vires under administrative law principles.	This section is adopted from s.14AB of the ***Transport Safety Act 2003*** (Cth). It is not considered ultra vires under administrative law principles. In administrative law an act may be considered ultra vires (beyond power) if that act/decision is outside of the scope of power provided for or has procedural defects. It is only the exercise of the power that may be considered ultra vires if it is outside the power provided. No changes proposed.
s. 31 **Payment in fund**	Transfield CRC QR National	Industry requests that ss.(c) be deleted or amended so that there is no nexus between the ONRSR having the power to both issue and collect industry fines. The industry concern is that the collection of fines directly by and to the Regulator may become a revenue raising exercise.	S.31(c) is removed from the section to ensure alignment with similar provisions of other major national transport reforms i.e. HVNL.
s. 39 **Regulator may be directed to investigate rail safety matter**	RTBU WA	Reference to 'minister of a participating jurisdiction' .. no definition of 'minister'. This creates ambiguities as to whether s.39(1) is referring to a specific minister within a jurisdiction; the minister belonging to the committee mentioned in s.3 or to any minister within a jurisdiction.	While minister is not defined, there is a definition of 'participating jurisdiction' in s.4. In line with that definition, the minister of a participating jurisdiction would refer to the minister of a jurisdiction in which the NRSL etc. applies. As to which specific minister within a jurisdiction would have this power, this would be left to respective administrative arrangements within individual jurisdictions. No changes proposed.
s. 39 **Regulator may be directed to investigate rail safety matter**	TSV NSW Transport	*Impact of Regulator's resources* Concerns were expressed about how the Regulator may comply with ministerial directions to investigate rail safety matters in a timely manner, where they impose pressure on its resources.	The NRSL provides a power for a minister to direct the Regulator to undertake and investigation. Whether the Regulator has appropriate resources is an operational matter not to be addressed in the NRSL. No changes proposed.
	TSV	*Independence of Regulator* Concern was expressed about how such ministerial directions may	The provision prohibits Ministers from giving certain types of directions, including how the Regulator may

Ref.	Submitted	Comment Summary	NTC response
		impact on independence of the Regulator. A query was raised as to how the Regulator would account for multiple directions being given for a single matter, by ministers in multiple states and territories.	conduct an investigation. This would preserve the pertinent elements of the Regulator's independence. It seems plausible that the Regulator could be directed to investigate single matter by ministers in multiple states and territories. Where ministers were to issue such directions independently, the Regulator would be bound to account for each of those directions in conducting its investigation(s). Never-the-less, it would still be a single investigation. It should be noted that such directions would not be permitted to require the Regulator to undertake investigations of a single matter in different ways or to arrive at different conclusions. No changes proposed.
s. 40 **National rail safety register**	Transfield CRC QR National ATHRA Asciano SA	Paragraph (k) of ss.(2) – any other matter, in the opinion of the Regulator, should be recorded in the register' Currently too broad, open to abuse by the regulator having the ability to publish material that may affect company commercial operations. Should be removed. Previous sub-clauses are sufficient. Issues with administration of the Register. Would an Improvement Notice remain on the register indefinitely even after the subject of the notice has been rectified? Formal admin arrangements need to be included in the law. ATHRA agrees with ARA submission on s.40(2)(k). This would not prevent the Regulator from publishing any other information that the Regulator thinks relevant to rail safety (in compliance with s.242) but it need not be part of the National Rail Safety Register.	To ensure a level of scrutiny about what matters should be included in the Register, sub-paragraph (k) of ss 2 has been replaced with sub-paragraph (n) and reads as follows – 'any other matter that is prescribed in the national regulations to be included in the Register.' In addition, new sub-paragraphs (i), (k) and (m)_have been included so that it is clear and put beyond any doubt that the variation, cancellation or expiry of an improvement notice, prohibition notice and a non-disturbance notice is able to be recorded in the Register.
	NSW Transport TSV VIC DOT	*Matters to be included on Register* The matters to be included in the National Rail Safety Register should be expanded to include infringement notices and withdrawals/variations of notices.	Under the proposal (see above response) additional information can be included. The publishing of additional information in the register, such as information to contextualise improvement notices (e.g. if the notice was subsequently withdrawn) will be addressed as operational policy

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			matters by the Regulator.
s. 41 **Annual report**	Transfield CRC QR National Asciano	*Include an additional matter that must be addressed in the annual report* 'measures that reflect the efficiency and effectiveness of the Commission's national regulatory function' Include a requirement for ONRSR to track and publish key performance indicators. These would include financial performance	Addressing measures of performance efficiency and effectiveness will form part of the cost recovery work undertaken by the National Rail Safety Regulator Project Office. No further action proposed.
	TSV	*Content of report* How will the requirements for elements to be included in the Office of the National Rail Safety Regulator's annual report interact with other/additional expectations and agreements on its content?	The requirements in the NRSL are a minimum set of requirements and do not restrict publication of additional information under the NRSL or required by the responsible ministers. No further action proposed.
s. 43 **Delegation**	Transfield CRC QR National Asciano RBTU	Opposition to a delegation power that would allow delegation of functions and powers to existing state based rail regulators or other government departments as this would impact on consistency of application of the NRSL. Delegation should be restricted to internal type delegations only. Not sufficient limitations on delegation power. For example, ONRSR could delegate investigatory function to a rail operator where that rail operator is directly involved.	In order for the NRSL to be administered effectively on a national scale a sufficient power of delegation is needed. A delegation is not a 'parting of powers'. Any power or function delegated will remain exercisable by the person/body to which the function/power was given in the legislation. Under s.43(3) a delegation may be subject to conditions. Such conditions could include the manner in which the power/function is to be exercised/performed and may include a reference to guidelines etc. In addition, cl.29 of Schedule 3 specifies requirements around the delegation of functions, in particular, cl.29(13) places on the delegator i.e. ONRSR or the Regulator an obligation to ensure the function is properly exercised. No further action proposed.
	VIC DoT TSV	Service level agreements are being formed between the Regulator and persons to whom powers under the NRSL are to be delegated (i.e. staff from existing rail safety regulator offices of each state and territory). Efficient and effective execution of their delegated duties by the latter would best be supported by provisions in the NRSL that formally recognise this arrangement, i.e. by requiring the Regulator to enter into	National Partnership Agreements, which include service level agreements between the Regulator and state and territory governments, were formed at the COAG meeting of 19 August 2011. These did not include any direction to formalise the nature of such agreements, current or future, in the NRSL. It is beyond the scope of the NRSL development process to bind COAG to a particular type or process

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		such agreements with relevant state and territory government bodies and staff.	of forming such agreements. No further action proposed.
Part 3 s. 44 to s. 131 **Rail safety and occupational health and safety**	TSV	<u>*Query title of Part*</u> Queries whether "*Rail safety and occupational health and safety*" is an appropriate title for this Part of the NRSL, given the breadth of matters falling within it.	The title is considered appropriate, as it addresses requirements for how rail safety shall be managed and interaction between the NRSL and work health and safety law. No further action proposed.
s. 44 **Management of risks**	Derwent Group	This section is cast too broadly and may be interpreted to mean, for example, a rail infrastructure manager is required to eliminate all risks no matter how they occur or under any circumstance.	A duty holder must ensure safety, so that risks are managed to an acceptable level. That safety does extend to the general public; however, s.44 must be read together with the specified duties that are imposed on persons. For example, the safety duty of a rail transport operator is to ensure the safety of the **railway operations** and would not extend beyond this as suggested. The management of such risks is also only to the extent that is reasonably practicable. No further action proposed.
s. 45 **Meaning of reasonably practicable**	Industry – Teresa Murphy	S.45(e) uses the term 'grossly disproportionate' but gives no definition of what this means. It appears to imply that even if the costs outweigh the benefits then a risk control should be applied. The SFAIRP criterion, as interpreted through the Edwards v National Coal Board case of 1949, is in serious conflict with the cost benefit criterion. The legal interpretation of SFAIRP is now out-dated. The judgement was sensible in 1949, but its interpretation no longer is. That is because of the radical improvements in valuing the prevention of fatalities (VPF) and injuries since 1949. In 1949 there were no willingness-to-pay based VPFs, and the only figure around was the compensation paid. The judges in 1949 were correct in sensing that the valuations were too low and calling for gross disproportion, but we have now responded to that by raising the VPF, so there is no longer any case for further disproportion.	The use of this term is taken directly from the model work health and safety law that incorporates the safety policy approved by COAG (Council of Australian Governments). To ensure alignment with work health and safety law the use of this term is to be retained. No further action proposed.
s. 48	QLD TMR	Reference to 'the public' as a class of	"Safety" is defined in the NRSL to

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Principles of shared responsibility, accountability integrated risk management etc.		persons that should be consulted is too broad. Suggest amendment to ss.(3) so that only those 'impacted' should be consulted. Alternatively, ss.(3) should only refer to ss.1(a) to (d) and therefore remove the requirement to automatically consult with the public. Consider inclusion of loaders and unloaders under s.48(1)(c).	include safety of the general public. The inclusion of the general public as a class of persons that should be consulted should be retained. A qualification of the term 'general public' would pose difficulties surrounding how it would be determined which parts of the general public are "impacted" and who would decide which parts of the general public are impacted. Given that loaders and unloaders have been given a specified duty under the law that goes to the even distribution of responsibility of risk, inclusion is appropriate. The degree of responsibility etc., is qualified in ss(2). No further action proposed.
s. 50 **Safety duties of rail transport operators**	SA DTEI	The primary focus of the re-drafting of the safety duties from the Model Rail Safety Bill 2006 was to align the duties of clause 28 of the model work health and safety law. This essentially involved re-drafting what were examples of failure to comply with the general duty (under the Model Bill) to a positive statement of a duty. In some instances the proposed drafting appears to establish a compliance/enforcement duty for a rail transport operator in relation to rail safety workers duty rather than a safety duty.	Section 50 has been amended to align with clause 28 of the model work, health and safety legislation that imposes positive statements of duty. This has been achieved by removing the reference to the relevant concentration of alcohol in section 50(2)(c) and removal of the reference to compliance with a fatigue risk management program under section 50(2)(d)(i).
	Derwent Group Genesee and Wyoming Australia	Opposes prescriptive requirements for risk management. Proposes more general requirement, such as under Rail Safety Duties in Part 3, Division 3.	Addressed in sections 6.2 and 6.3 of regulatory impact statement. No further action proposed.
	NSW Transport	This section specifies that a rail transport operator must ensure, so far as is reasonably practicable, that rail safety workers do not carry out rail safety work in relation to the operator's railway operations, and are not on duty, while the relevant concentration of alcohol is present in their blood or while impaired by alcohol or a drug. The italicised wording is inconsistent with the wording in section 126(1)(c) which refers to "influence" so as to be "incapable of effectively discharging	The NRSL has been drafted so as not to conflict with the model work health and safety law, as described in section 6.7 of the regulatory impact statement. This does not require duplicating work health and safety law in its entirety; it only applies to provisions that are necessary to support a functioning body of rail safety legislation and which correspond to a provision of that law. No further action proposed.

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		a function or duty". One of the stated aims of the National Law is to ensure that the National Law is aligned to the Model WHS Act. With this aim in mind, the drafting of obligations on a rail infrastructure manager and a rolling stock operator should be amended so that they align with the drafting of the general duties imposed on a person conducting a business or undertaking pursuant to section 19 of the Model WHS Act. In particular, sections 50(3)(d), 50(4)(d) and 50(4)(f) refer to systems and procedures being "established and maintained". In order to ensure consistency with the Model WHS Act, the drafting should be amended to ensure that procedures and systems are "provided and maintained".	
	VIC DoT	*Splitting s.50 into General safety duties and specific for the purposes of the exemption process* There seems to be a disconnect between the ability to exempt operators from specific things such as accreditation, safety management systems and health and safety plans, but not being able to exempt from general safety duties. For example, if an operator is exempted from having a fatigue management plan, does the operator breach s.50(d)? The terms of an exemption may therefore be inconsistent with the safety duties. Victoria agrees that rail operators should not be able to be exempted from general safety duties. However, given the degree of specificity in s.50, there is no real separation between general safety duties and specific safety obligations. One option may be to split s.50 into general safety duties and the specifics. The exemption clause would also need changing to allow exemptions to be given from some of those specific matters.	It is considered appropriate that the general duties in s.50 apply to all rail transport operators. However, the reference to an operator's fatigue management program in s.50 (2)(d)(i) has been deleted. This will remove any inconsistencies where an operator is exempted from having a fatigue management plan.
s. 52 (Omitted) **Duties of rail**	Ansaldo-STS	*Who is responsible for meeting costs of managing contractors' safety* Who would be responsible for funding the cost of managing the	A rail transport operator bears primary responsibility for ensuring the safety of rail operations within the scope of their accreditation. This duty extends to the safety of workers not directly employed

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transport operators extend to contractors		safety of rail safety workers, not directly employed by an accredited rail transport operator, but under whose operations those workers were conducting their work?	by the operator (i.e. contractors). The NRSL makes no provision for funding of consequential costs of this requirement; this is a commercial matter between the relevant parties. No further action proposed.
	Port Kembla Port Corporation	*Scope of accreditation* The party who employs and manages the labour should be responsible for managing safety matters arising from their work, rather than the accredited operator, who may be a separate entity. Propose that this could be achieved by an interface agreement between all relevant parties undertaking work on or adjoining a given railway.	Rail safety is most effectively assured by making a single entity (primarily) responsible for a given railway. The accredited operator is the party who is best placed to hold that responsibility. While the accredited operator may not have direct control over rail safety workers they have not directly employed, they do control the terms under which a contractor may undertake work on the railway and ultimately, physical access to the railway. Giving a single entity overall responsibility for ensuring safety on their railway helps avoid confusion over who is responsible for which element of a given railway operation. This does not diminish the responsibility of rail safety workers who are contractors; they are separately and additionally bound to ensure that they undertake work safely and abide by instructions issued by the relevant accredited operator. Managing safety on a given railway by means of an interface agreement between all relevant parties would risk distributing responsibility for its being established and implemented, to a point where it may be difficult to hold anyone accountable. This principle is applied in Part 3, Division 6, Sub-division 2 (Interface agreement), but only in circumstances where it is impractical to delegate responsibility, in absolute terms, to a single entity. No further action proposed.
	NSW Transport	There are also other persons that carry out railway operations in their own right, who are not rail transport operators. For example, constructors and maintainers of rolling-stock who do not operate or move rolling-stock but have a business of leasing rolling-stock to third parties. Under the current drafting of s. 52 of the NRSL, these persons will not be captured by the national Law, despite	It is unclear which types of railway operations it is proposed would not be bound by the NRSL. The construction and maintenance of rolling-stock is defined as railway operations, for which an accredited rolling-stock operator has responsibility. If such operations are undertaken on their behalf by a third party, those operations would be bound by s.52. The act of leasing rolling-stock is not in

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		the fact they are carrying out railway operations.	and of itself a railway operation under the NRSL. However, the responsibility for ensuring the safe operation of rolling-stock is under the NRSL. No further action proposed.
	NSW Transport	S.52 is drafted in a manner that makes available a defence to any alleged contravention, by introducing a 'control' requirement. That is, an offence may only be proven by establishing that an operator had actual control of the matters in relation to which the offence occurred, or had delegated control to and by agreement with another party.	The provision states "*in relation to matters over which the operator has control or would have control if not for any agreement purporting to limit or remove that control.*" A requirement of accreditation being granted to an operator is their having demonstrated effective management and control of the applicable railway operations. This would include circumstances in which elements of control had been delegated to another party. As such, it is unlikely that establishing the latter would present any significant hurdle to proving an offence under s.52. No further action proposed.
	NSW Transport	S.52 is drafted in a manner that assumes other persons that carry out railway operations for an operator are "engaged" or "employed" by that operator. In fact, corporations may undertake railways operations on an accredited operator's railway without having any formal, legal relationship with the operator.	The reference in s. 52 to "*any person employed or engaged by the person to undertake the railway operations*" refers to a person employed or engaged by a person to whom s.52 applies (e.g. an employee or sub-contractor of a contractor), rather than a rail transport operator. A person who has no legal relationship with the rail transport operator, but under whose accreditation they are undertaking railway operations, is bound by this provision. No further action proposed.
s. 51 **Duties of designers, m'facturers, suppliers etc.**	Derwent Group	Support expressed for provisions in this section.	No further action proposed.
s. 52 **Duties of persons loading or unloading freight**	Queensland TMR	It is important to ensure that the duty relates to how freight is loaded and unloaded and the potential consequences to rail safety (which may occur at a later time). It should be clear that loading and unloading duties relate to rail safety, as actual loading may have been done 'safely' (in a work health and safety sense). Request further clarification on who the duty applies to and how far 'up the chain' the duty goes.	S.52 has been amended so that the duty extends to loading and unloading of freight that ensures safe operation of rolling-stock and is not limited to the direct act of loading and unloading of rolling-stock. For who the duty applies to, it is restricted to those loading and unloading rolling-stock and is not designed as a 'chain of responsibility' provision. Rather the provision is

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	Queensland TMR	Provision should be amended to better clarify that it includes requiring freight to be loaded in a manner that does not affect safe operation of rolling-stock, rather than just matters of safety directly related to the act of loading/unloading.	drafted to address the specific risk and provide regulatory reach to the Regulator in order to address the risk in question directly, rather than through the safety management system of the operator.
	Macmahon/ MVM	Does not agree with the position adopted (Option 3) in the NRSL for parties loading/unloading rolling stock and certain statements made in the Option 2 impact assessment regarding safety risks associated with loading/unloading activities. Believe the Option 2 (including this work under the definition of rail safety work) should be adopted as the loading of rolling-stock is comparable with other safety critical roles. There is also a question over the certification of rolling-stock prior to travel, in particular where the responsibility will lie. A request made for a guide, similar to the NTC 'Load Restraint Guide', for road transport should be investigated.	Wording of the regulatory impact statement will be amended to not downplay the safety impacts associated with this risk. The definition of rail safety work is being considered in the maintenance program and the request to include loading/unloading will be considered during this process. Certification of rolling-stock is considered to be the responsibility of rail operator. Request for guidance material on procedural matters loading/unloading is considered to be outside the scope of the NRSL. No further action proposed.
	RTBU National	Supports the provision as drafted based on the evidence presented in the regulatory impact statement. This is a step forward in addressing an important rail safety issue, although it is argued that more work needs to be done in this area.	Support noted. In terms of further work, the definition of rail safety work is being considered in the maintenance program, and the request to include loading/unloading will be considered during this process. No further action proposed.
s. 54 **Duties on rail safety workers**	AI Group	*Alignment with work health and safety bill duties on workers* Why has the obligation to 'co-operate with any reasonable policy or procedure of the person conducting the business or undertaking relating to health or safety at the workplace that has been notified to the worker' been excluded from the duties for rail safety workers?	This obligation is addressed in s.99(2) which provides that a rail safety worker must not fail to comply with an operator's safety management system. No further action proposed.
s. 57 **Failure to comply with safety duty – Category 2**	Transfield CRC QR National	S.57 should be amended to align with s.56 which expressly places on the prosecution the burden of proving the person engaged in the relevant conduct without reasonable excuse.	S.56(1)(b) relates to a person engaging in reckless conduct, whereas s.57(1)(b) is a failure to comply with a safety duty. Reasonable excuse is afforded to the more serious offence only. No further action proposed.
s. 60	QLD TMR	Ss.(1) refers to the 'carrying- out' of	The intent of the removal of the words

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Accreditation required for railway operations		railway operations. A change from 'cause or permitted'. Important to ensure that the change still encompasses effective management and control of railway operations. The removal of the reference to 'cause or permit' in relation to railway operations is supported to make it clear that persons that own rail infrastructure or rolling-stock that cause or permit those assets to be used by another person (under the second person's effective management and control) is not required to be accredited. At this stage no adverse implications of removing the 'cause or permit' terms has been identified but this will need to be monitored over time and, if necessary, reviewed through a future maintenance process.	'cause or permit' is to improve management effectiveness and to ensure that owners who cause or permit assets to be used by another who has control, management etc. of those assets is not required to be accredited. No further action proposed.
s. 61 **Purposes for which accreditation may be granted**	Transfield CRC QR National	With regard to s.61(2) Suggest inclusion of a statement such as "there will only be one accreditation issued to an operator who may work in multiple jurisdictions for all their operations."	It is not drafting practice for policy statements to be included in legislation. It is clear from the provision that one (1) accreditation is only necessary for operations that cross state borders. No further action proposed.
s. 62 **Application for accreditation** s. 63 **What applicant must demonstrate**	VIC DoT TSV	An applicant for accreditation must only provide a "*description of the[ir] safety management system*", rather than evidence of steps being taken to develop and implement a comprehensive system, such as in the form of a detailed written plan that addresses each of the elements prescribed in the NRSL. This would require the Regulator to decide on whether to accredit the applicant or not, based on incomplete information.	Additional words have been added to s.62(2)(b) so that the description of the SMS must include a description of the measures to be taken to manage identified risks.
s. 65 **Determination of application** s. 102 **Regulator may direct amendment to safety management system** s. 74 **Annual fees**	Christopher Green (private citizen)	<u>*Requirement for cost-benefit analysis*</u> Raises various practical difficulties with the Regulator being required to undertake cost-benefit analyses in certain circumstances. Concerns expressed include: - The lack of criteria for triggering a cost-benefit - Request for further background as to why it has been included in the National Law. - Difficulty in gaining relevant	Most of the difficulties listed are inherent to the cost-benefit analysis process, which on balance and despite those difficulties, is still broadly agreed as beneficial. Guidelines are to be developed regarding the meaning of 'significant cost', which triggers the provision. Background information on the intent of the provision is included in the regulatory impact statement. No further action proposed.

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s. 173 **Issue of improvement notices** s. 196 **Response to certain reports**		information from operators - Resourcing of the Regulator	
	SA DTEI	*Requirement for cost-benefit analysis for improvement notices* The application of the cost-benefit analysis requirement on the Regulator has been broadly applied to situations where the Regulator directs a rail transport operator in regard to a specific risk control. When issuing Improvement Notices it will not always be the case that the Regulator is making a specific direction. The scenario where the content of an Improvement Notice affords the rail transport operator flexibility in remedying an issue and the operator has elected to pursue a solution that will incur a significant cost, then the cost benefit obligations should not be attached to the Regulator. To have consistent application of the cost benefit analysis throughout the national law (e.g. where the Regulator is exercising a power of direction over the elements of a safety management system or railway operations of the operator) it is suggested that s.173(3) be amended to read, along the lines of, "… likely to result in significant costs or expenses to the person as a result of including directions under s.174(2) or (3) in the notice, the Regulator must…"	Section 173 has been re-drafted to restrict the obligation on the Regulator to conduct a cost-benefit analysis only to circumstances in which significant costs are likely to be incurred as a result of a specific direction being issued by the Regulator.
	ATHRA	*Requirement for cost-benefit analysis* Concern around the definition of 'significant cost' with respect to how that may impact smaller operations (i.e. what is considered insignificant cost to a larger railway organisation could be a very significant cost to a very small organisation with a small turnover).	The impact on smaller operators *vs.* larger operators was one of the factors considered and supported the non-inclusion of a definition in the NRSL. It was considered a definition of 'significant cost' best sit in a guideline which could be applied on a case by case basis. No further action proposed.
	QLD Transport	*Requirement for cost-benefit analysis* It is indicated in the regulatory impact statement that a rail transport operator may waive the requirement on the Regulator to undertake a cost-benefit analysis if it accepts the Regulator decision. However, this is not reflected in the drafted provisions. Clarification is sought on	A Reference to the rail transport operator's ability to waive the requirements is to be removed from the regulatory impact statement, as the provision is not available in the NRSL. The cost-benefit analysis is triggered by a mandatory safety decision by the Regulator. The network rules provisions of Part 4, Division 4 of the

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		this matter. It is also noted that there does not appear to be a requirement to conduct a CBA in relation to a direction by the Regulator to amend railway safety rules (under Part 4, Division 4 of the Regulations) and it is questioned if the Regulator has this power at all in the Regulations.	National Regulations contain only consultation provisions; a direction power is not associated with these provisions and therefore there is no cost-benefit analysis requirement.
	An Le	*Requirement for cost-benefit analysis* Requirement for cost-benefit analysis to be conducted.	Given that the NRSL addresses the subject of cost-benefit analysis, guidance material on how to complete an acceptable cost-benefit will be developed. No further action proposed.
	NSW Transport RTBU National	Queries whether the cost benefit analysis provisions add anything to safety duties which must be undertaken so far as is reasonably practicable. Section 45 of the National Law provides that controlling risks so far as is reasonably practicable requires a person with a safety duty to take into account and weigh up a variety of matters. In effect, the requirement to control risks, so far as is reasonably practicable, requires the person with the safety duty to consider the costs and benefits associated with a risk. In this regard, it is considered that the test of reasonable practicability rather than an assessment of the costs and benefits of a particular measure is the preferable test when assessing the steps that a duty holder must take to ensure safety. It is not considered that duty holders should be required to do more than is reasonably practicable to ensure safety, taking into account the steps set out in section 45 of the National Law. It could be considered that the steps required by a cost benefit analysis are more limited than the assessment which is required in ensuring that risks are controlled so far as is reasonably practicable. That is, a cost benefit analysis focuses on economic impacts whereas an assessment of what is reasonably practicable requires a much broader assessment of known risks and the	The intent of the cost benefit analysis provision is to ensure that duty holders are not required to do more than is reasonably practicable to ensure safety The cost-benefit analysis is triggered by a mandatory safety decision by the Regulator made on behalf of a rail transport operator, as opposed to those decisions made by the rail transport operator itself as a duty holder within what is reasonably practicable. Although certain decisions of the Regulator are subject to review, a shortcoming of the decision making power of the Regulator, as well as the review process, is the lack of any requirement to subject a decision to rigorous analysis. There is a risk that such decisions may have significant cost impacts on rail transport operators, and may not represent a cost-effective outcome that delivers the desired safety objective. The proposal may safeguard against certain decisions of the Regulator resulting in costs being incurred (typically by rail transport operators) that are disproportionate to the safety benefits achieved. No further action proposed.

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		ways of controlling those risks coupled with an economic assessment.	
	NSW Transport TSV	Queried various aspects of the cost-benefit analysis provision and its appropriateness in the NRSL, particularly that the requirement may unintentionally compromise rail safety standards in the following ways: • The cost-benefit analysis would be time consuming and potentially costly. • The concern is that rail safety officers, contemplating the large amount of administrative time likely to be consumed when they issue, for example, an improvement notice in circumstances where the notice is likely to result in significant costs or expense, will be inclined not to invoke it. The result is that administrative notices will be significantly reduced in utility, with adverse consequences for rail safety. Also raised concern around the timeframes for the release of guidance material in relation to the provision.	It is not envisioned that normal day-to-day processes of the Regulator will be impacted by the cost-benefit analysis provision. For example, improvement notices would generally relate to the contravention of a provision of the NRSL and, without specifying a directed outcome, require the duty holder to remedy the contravention within what is reasonably practicable. This notice would not be likely to trigger the provision. On the other hand, a cost-benefit analysis would be triggered where an improvement notice includes a mandatory safety decision by the Regulator, dictating to the duty holder a specific outcome in order to remedy the contravention, and only where that outcome would impose a significant cost on the duty holder. The process for developing guidelines is under the responsibility of the National Rail Safety Regulator Project Office. Guidelines are to be made available prior to implementation in January 2013. No further action proposed.
	TSV	The requirement to provide the details of the results of any cost-benefit analysis is a departure from existing Victorian requirements and may cause confusion to operators as to their rights of review in this area (i.e. the regulator has complied so long as process requirements are met, not in relation to content of the cost-benefit analysis or the Regulator's action arising from the results of the cost-benefit analysis).	Reviewable decisions are outlined in s.213 of the NRSL. It is envisioned that the guidelines under development by the National Rail Safety Regulator Project Office will provide clarity to the Regulator and duty holders in relation to the processes involved with conducting a cost-benefit analysis and how this provision is to operate in practice. No further action proposed.
	TSV	Improvement notices should be able to be issued before a cost-benefit analysis is conducted where there are situations that present an immediate risk to rail safety.	S.173(3) requires that if an improvement notice requires a person to take action that is likely to result in significant costs or expenses to the person, that the Regulator conduct or cause to be conducted a cost-benefit analysis as soon as practicable after issuing a notice. No further action proposed.

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	VIC DoT	Welcomes the inclusion in the draft NRSL of a requirement for the Regulator to conduct a cost-benefit analysis in relation to decisions which may impose significant costs on operators. It is viewed as an important measure in ensuring considered and balanced use of regulatory powers.	Noted. No further action proposed.
	VIC DoT	The draft NRSL is currently silent on what constitutes a 'significant cost'. Guidelines issued by the Standing Council of Ministers need to outline what this means and should be circulated as part of this package of measures. It is inappropriate for the Regulator to issue its own guidance on this matter.	The process for developing guidelines is under the responsibility of the National Rail Safety Regulator Project Office. Whilst it is not intended for these to be issued by Ministerial Council, the guidelines will be developed with broad stakeholder input and consultation in order to ensure the appropriateness of their content. No further action proposed.
s. 66 **Application for variation of accreditation**	Transfield CRC QR National	Ss.2(c) should be amended or deleted to provide a clear definition as to what may constitute a required variance application. Has the potential to cause confusion and implies that any change to an accredited system will need to be managed under this clause.	A variation involves an assessment of proposed changes to railway operations for which accreditation is held and whether proposed changes should be reflected in the accreditation. It is on the applicant to demonstrate a variation is required given change in scale or nature of the railway operations. It is important to note that r.11 of the Regulations prescribes what must be included in an application to vary. In addition, it is proposed that guidance material will be produced to assist industry with the requirements of this section. No further action proposed.
	V/line	*Fee for Variation to Accreditation* Some operators do not support the requirement to submit a prescribed application fee with the lodgement of an application for Variation to Accreditation and consider that this cost be borne within the Annual Fee paid by the rail operator.	The requirement to submit a prescribed application fee for a variation to accreditation has not changed from the Model Law. No further action proposed.
s. 69 **Variation of conditions and restrictions**	NSW Transport	*Redundant provision* This section is redundant, as a variation of conditions or restrictions on accreditation is, in effect, a variation of accreditation. The latter is already provided for in section 666(Application for variation of accreditation).	S.62 allows a rail transport operator to apply for accreditation. If the Regulator is satisfied with the operator meets s.63 and s.64 the regulator may issue accreditation with or without conditions or restrictions. S66 allows the operator to apply for a variation of the accreditation whereas s.69 more specifically allows the operator to apply for a variation of any

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			conditions or restrictions not impacting on the general accreditation granted. No further action proposed.
Section 72 **Immediate suspension of accreditation**	TSV	The limit of six weeks on an immediate suspension of accreditation has the potential to reduce safety. Victoria has no such limit. Furthermore, limiting the power to "*immediate and serious risk[s] to safety*" also risks reducing safety, with other, similar provisions (e.g. section 177—Issue of prohibition notice) in the National Law referring only to "*immediate risk to safety*"	Only the Regulator's power to immediately suspend an operator's accreditation is limited to a period of six weeks. The Regulator may, under and subject to the conditions of s.71(Revocation or suspension of accreditation), suspend an accreditation for a further period of time. The reference to "*serious risk[s] to safety*" reflects the greater impact on operators of exercising this power; it is intended that it be reserved for more serious risks to safety than some other powers of the Regulator, such as issuing a prohibition notice to only a specific activity. No further action proposed.
s. 73 **Surrender of accreditation**	SA DTEI	The National Model Rail Safety Bill 2006 (Model Bill) provisions for the surrender of an accreditation required a rail transport operator to provide 28 days' notice of the intention to surrender, there was no hold point other that the ability of the Regulator to intervene (through normal compliance means) should the Regulator not be satisfied with the arrangements for surrender. The draft NRSL now introduces a hold-point being the satisfaction of the Regulator with the arrangements for surrender. There is no time limit set for the Regulator to respond (with an acceptance or otherwise) or clear means for the surrender to proceed in the situation where the Regulator, in the view of the operator, unreasonably withhold the permission to surrender under s.73(3) beyond the operator's intended surrender date. Surrender arrangements and the timing (in terms of lead notice) will vary from case to case and rather than re-establish a minimum notification period (as per the Model Bill) or include a response period for the Regulator, it is suggested that a decision of the Regulator to withhold the notification permitting a surrender under s.73(3) beyond the date	The NRSL now makes the decision to refuse surrender reviewable

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		specified by the rail transport operator be a reviewable decision under s.213.	
s. 75 **Waiver of fees**	Vic DoT TSV	***Basis for waiving fees*** The basis for a waiver of fees is not clear. If this is intended to apply to tourist and heritage operators, this should be specifically stated in the section.	S.74 provides the power for the Regulator to waive fees for an accredited person in circumstances where they consider this necessary. This could apply to a tourist and heritage operator if they are accredited; however, is not limited to these operators. The Regulator will be required to exercise its discretion in waiving fees. Further guidance material may be developed if considered necessary by the Regulator. The power to waive fees was covered in the Model Law. No further action proposed.
s. 79 **Keeping and making available records for public inspection**	Graham Wilson	*Business Hours* Suggest adding "or a Saturday or Sunday if that is the normal business day for that operator" as this is the case for many of the small Tourist and Heritage operators.	S.79 allows for documents to be available at the principal place of business during ordinary business hours or at another time or place as approved by the Regulator. This can incorporate weekends if that is the operator's usual business hours. No further action proposed.
	VIC DoT	Does ss.(1) apply to an accredited person? If so, the reference to "person" in the first line should say "accredited person" and paragraph (a) amended accordingly.	The 'person' referred to may either be accredited or exempted (i.e. not necessarily accredited if an exemption to accreditation has been granted). As such, the reference to 'person' is appropriate. No further action proposed.
s. 80 to s. 84 **Registration of rail infrastructure managers of private sidings**	QLD TMR	*Exemption from accreditation* Regulation of railway operations (including private sidings) may be more appropriately based on scale and risk as opposed to categories. Some private sidings may carry greater risk than accredited railways. While the Regulator can impose conditions on the registration, there is a perception that private sidings carry lower risk. Additionally, assessing large private sidings carries a considerable cost which is not reflected in registration fees.	The registration of private sidings under the NRSL is based on the principle of scale and risk posed by the specific operations. As part of the registration process, the rail infrastructure manager must provide detailed information regarding their operations as well as demonstrate that they have a scheme for the management of risks posed by the rail operations (see r.13). No further action proposed.
	RTBU National	*Registration requirements* Extending the scope to forming interface coordination agreements	Noted. Private siding exemptions are only available to those rail managers that

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		and the amendment of model r. 11 (maintenance and operational conditions) to better align with the risk management principles of the draft law is supported. RSWs should also be able to participate in the process for registration, given that the registration scheme is specifically designed to ensure an safety management system does not have to be prepared.	can demonstrate a substantially reduced degree of risk. The regulations require that they have a scheme for the management of risks posed by the rail operations. There is no explicit require to consult with rail safety workers in the draft law; however rail infrastructure managers may choose to do so in developing their registration application and would still be required to meet their obligations under the work, health and safety law. No further action proposed.
s. 80 **Private sidings**	TSV	*Private sidings not covered by the Law* There is a potential diminution in safety for those rail infrastructure managers that operate in sidings that are not connected (as there is no longer the requirement to apply for an exemption in some jurisdictions) and a potential increase in regulatory burden for rolling stock operators who are currently exempt (and do not exhibit any safety risks that warrant upgrade to full accreditation).	Implicit in the definition of a private siding under the NRSL is that it connects or has access to other rail infrastructure. 'Sidings' that are not connected to other rail infrastructure may be covered by the definition of railways to which the NRSL does not apply (s.7). If they are covered by the NRSL, they will be required to apply for an exemption from accreditation under s.203. Under the model law, the exemption from accreditation for private sidings does not extend to operators of rolling stock. This has been clarified in the NRSL. In jurisdictions where these operators have been granted an exemption, the Regulator will have the power to grant these operators an exemption from full accreditation under s.205 where appropriate. No further action proposed.
s. 81 **Private sidings**	VIC DoT	*Drafting* S.80 states that the manager of a private siding is not required to comply with Division 6. However, s.81(2)(a) states that the manager must comply with subdivision 2 of Division 6. Suggest further clarification.	S.83 applies to managers of private sidings that must be registered and are defined within the section. S.80 relates to private sidings that are not required to be registered. No further action proposed.
s. 82 **Private Sidings**	NSW Transport	*Registration process* The registration process set at in s.82 (corrected from s.81 in the submission) is too complex. The registration process should be streamlined and does not need to be a procedurally complex as the accreditation process.	The purpose of the registration process outlined in s.8582 is to ensure sufficient information is provided to enable the Regulator to determine if the private siding is appropriately dealt with through registration and any conditions might be necessary. No further action proposed.

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s. 83 **Private sidings**	TSV	*Appropriateness Test* The appropriateness test for granting registration in unclear, causing potential inconsistency by the regulator, and uncertainty for industry.	The NRSL outlines the information to be supplied by a rail infrastructure manager applying for registration. Based on this information, it is anticipated that the Regulator will be able to make an informed decision on whether they should be registered. No further action proposed.
s. 84 **Determination of application**	NSW Transport SA DTEI	*Conditions imposed by the Regulator* The model law (s.56(5)) provided that the conditions imposed through regulations or by the Regulator could be the same or similar to those required under accreditation. This has not been included in the NRSL.	The NRSL provides that any condition or restriction can be imposed by regulations or the Regulator on private sidings registered under Division 5. It is not considered necessary to further clarify that these may be the same or similar to those required under accreditation. No further action proposed.
s. 97 **Safety management system**	SA DTEI	The drafting of the provisions relating to risk assessment and risk management are supported, although the need for s.100(1)(b) is questioned with s.98(1) stating that to comply with s.97(1)(d) it is necessary to follow the methodology set out in s98. It is also noted that s.16(1) of Schedule 1 of the draft national regulations, setting out the required content of a safety management system in relation to risk management does not place any reliance on s.97(1)(b) to establish the requirement for procedures to comply with the risk management obligations set out in s.97(1)(c),(d) and (e). It is suggested that s.97(1)(b) be deleted. S.97(3)(iv) should refer to, "any other rail transport operator with whom the first mentioned operator is required to enter into an interface agreement relating to risks to safety…". The legal requirement for an interface agreement is to seek to enter, rather than have. At the time of establishing, and potentially at the time of reviewing or varying, a safety management system the operator may not have established interface agreements.	Section 97(1)b) has been amended to provide that a SMS must provide for systems and procedures for compliance with risk management obligations under the RSNL. Section 97(3) has been amended so that it is clear the mandatory requirement rests with the rail transport operator.
	SA DTEI	*Reference to rail transport operator* S.97(3) should refer to "*… such safety management system, the rail transport operator must, so far as is reasonably practicable…*", rather than refer to, "*… the manager…*".	Section 97(3)(iv) has been amended to ensure the legal requirement here aligns with the legal requirement contained in the interface Agreement provisions i.e. to seek to enter.

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	SA DTEI	The key requirement for consultation in the development, review or variation of safety management systems is established by s.97(3). The network rule provisions introduce a penalty provision for failing to consult and it is noted that under s.100 – Review of safety management systems there is also a penalty provision applicable to the failure to consult (r.17 must be followed to comply with s.100, with r.17(2) referencing the requirement to consult under s.97(3)). However, there does not appear to be a penalty attached to failure to consult in the establishment of a safety management system. It is suggested that a penalty provision be introduced for s.97(3) and a penalty of $10,000 (individual)/$50,000 (body corporate) is proposed, consistent with the penalty attached to s.97(3), by virtue of s.100 and r.17.	This matter has been referred to the maintenance program for further consideration. No further action proposed.
	ARA	<u>*Reference to risk management obligations*</u> Reference to s.98 in s.97(1)(b) is incorrect and should refer to r.13.	Existing provision seems correct. R.13 is for the registration of private sidings. No further action proposed.
	ARA	Industry has considered the amendments made to the NRSL in relation to all the relevant sections dealing with the identification, assessment and management of risks commencing with s.97(1)(c) - Safety Management System, and is pleased to support the current amendments and acknowledge the significant re-drafting in this area.	Noted. No further action proposed.
	Derwent Group	<u>*Scope of risk management*</u> Extending obligation for an operator to "*identify any risks to safety*" is unreasonable/ impractical.	S.44 includes the wording 'so far as is reasonably practicable' and is to be read in conjunction with s.97. No further action proposed.
	Derwent Group	<u>*Re-wording suggestions*</u> Various suggestions to reword provisions or exclude prescribing elements of a safety management system.	Developing requirements in the NRSL for a safety management system included a review of, and where possible, alignment with similar requirements in the model work health and safety law. Additionally, a broad justification for prescribing elements of a safety management system is discussed in

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			sections 6.2 and 6.3 of the regulatory impact statement. No further action proposed.
	RTBU Queensland	*Requirement to consult* Consultation requirements in NRSL are weaker than those in the model work health and safety law. Breaches of obligations on rail safety workers now carry more severe penalties. What is being done to ensure that they are made aware of their rights and responsibilities?	Consulting with unions is explicitly required for an operator to amend a safety management system (s.97(3)) and a minister to approve a code of practice (s.247(2)). Discrimination by employers against employees who complain to a current or former union member about breaches of rail safety law has also been made an offence. In making rail safety workers aware of their rights and responsibilities, an objective of the NRSL and a function of the Regulator is to provide advice, education and training on rail safety. The National Regulations, in r.31 and r.32, and cl.14 of Schedule 1, impose responsibilities on rail transport operators to inform rail safety workers of their duties under the operator's safety management system. No further action proposed.
	SteamRanger Heritage Railways	*Cost imposition* Frequent regulatory changes to safety management system requirements in applicable law have or will impose excessive costs, particularly on the tourist and heritage sector.	It is anticipated that transitional provisions, yet to be finalised, will assist operators in managing the costs of complying with the NRSL. Adopting the NRSL will support greater stability in rail safety regulatory requirements, which will deliver longer term cost savings to operators. No further action proposed.
	TSV	There is no express definition of safety management system.	The meaning of safety management system, as it applies in the NRSL, is defined in the form of the various, specified requirements that comprise the broader system. No further action proposed.
	TSV	Query the relationship between ss. (1) and ss.(2). If ss.(2) forms part of the offence, then it duplicates offences found later in the NRSL, where specific offences relate to not having a 'health and fitness management program' for example.	Ss. (2) does not form part of the offence under ss.(1). Ss.(2) does not carry a penalty provision itself, as the penalties for not having, preparing or implementing the plans and programs mentioned under the subsection are contained within specific sections relating to those plans and programs (refer s.104 and s.110-s.114). As such, duplication is avoided. No further action proposed.

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	TSV	Why should consultation be limited to 'so far as is reasonably practicable'? Also, in what contexts is it intended to be appropriate to consult the public?	The objective was to require rail transport operators to provide specified parties with a reasonable opportunity to consider and respond to the proposed safety management system (i.e. sets a minimum standard for the degree and quality of consultation). The requirement to consult 'so far as is reasonably practicable' conveys that objective. Consulting with the public may be appropriate in circumstances such as when they were likely to be directly impacted by a safety management system or part thereof. No further action proposed.
	Transport NSW ARA Transport SA	<u>*Reference to broader risk management obligations*</u> The reference in s.97(1)(b) to "*section 98*" as the standard for "*provid[ing] systems and procedures for compliance with the risk management obligations*" is incorrect, as section 98 provides only restricted elements of those systems and procedures, as prescribed in broader terms throughout the National Law.	The reference to "*in section 98*" has been amended to "*under the Act*".
	NSW Transport	<u>*Requirement for operator investigations*</u> The requirements of the safety management system do not include any provision for the internal investigation of incidents and accidents – particularly ss. (1)(e) and (f).	S.97(1)(e) and (f) impose performance-based duties on rail transport operators to develop safety management controls and procedures to ensure their adequacy, in an ongoing manner. To meet that "performance standard", operator-led investigations would, in practice, be expected to form an important element of their safety management system. The absence of a prescriptive requirement for investigations in the NRSL does not diminish that duty. No further action proposed.
	Worksafe	S.97(2), s.97(3), s.98(1), s.98(2), s.105(2) of the NRSL all impose mandatory duties on the rail transport operator or [rail infrastructure] manager (as appropriate). However, none of these clauses appear to contain a penalty provision. There is a need to make sure that those clauses could still be the subject of legal proceedings for non-compliance despite no penalty provision having been attached to them. WA's understanding is that if a mandatory provision does not have a penalty	S.97(2) specifies the various plans and programs than an operator's safety management system must include. Each of these plans and programs have specific sections (refer s.104 and s.110-114) and the failure to have, prepare or implement these plans carry penalties. As such, these provisions may be the subject of legal proceedings. S.98 provides further detail for the risk assessment requirements contained in s.97(1). A breach of s.98 would

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		clause attached to it, any action to prosecute for non-compliance cannot succeed as there is no sanction the court can impose if the alleged offender is found guilty.	constitute a breach of s.97(1), which has a penalty provision attached. In relation to the consultation requirements of s.97(3) and the interface requirements for public road managers under s.105(2), at this stage a penalties are not included. However, penalties for both will be contemplated during the maintenance process. No further action proposed.
s. 98 **Conduct of assessments for identified risks**	Derwent Group	<u>*Prescribe methods of assessment*</u> Proposal to prescribe also keeping records of methods used to monitor risks, in addition to the outcomes of assessments.	The provision was developed to be consistent with corresponding provisions of the model work health and safety law. The proposal is arguably also implicit in the existing requirement to "*include[e] reasons for selecting certain control measures and rejecting others.*" No further action proposed.
	MVM Rail and Macmahon Contractors	<u>*Hierarchy of controls*</u> The NRSL should require risk controls to be developed according to a hierarchy of controls, as specified in the national model work health and safety regulations.	S.44 of the NRSL includes a simpler hierarchy of controls than those referred to in the national model work health and safety regulations. The policy is scheduled to be considered further, as part of the NRSL maintenance program. No further action proposed.
	SA DTEI	The suggestion to delete s.97(1)(b) will remove the penalty provision applicable to s.98. It is suggested that a penalty provision for a breach of s.98, which would be a failure to follow the prescribed process or to keep records of the assessment, of $50,000 for an individual and $500,000 for a body corporate be added to s98 – using the penalty provisions for other elements of a safety management system as a guide.	S.97(1)(b) is to be retained, although the reference to s.97 was found to be inaccurate and amended drafting is to reflect that operator provide for "systems and procedures for compliance with the risk management obligations set out in this Act". This has now been amended.
s. 99 **Compliance with safety management system**	RTBU WA	<u>*Reasonable excuse*</u> The NRSL should include clarification of what constitutes a *reasonable excuse* for an operator not complying with their own safety management system.	Such a clarification would be more appropriate in a guideline, similar to that for the meaning of SFAIRP, than in the NRSL. Guidelines are scheduled to be developed by the Project Office of the National Rail Safety Regulator, leading up to the scheduled commencement of the Regulator in 2013. No further action proposed.
	ARA	Industry does not agree with this provision, as it "*places an evidential*	The imposition of an evidential burden is consistent with the established

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		burden on the accused to show a reasonable excuse". Industry requests that this section be redrafted to require the Regulator to hold the onus of proof, or delete the section.	principle of imposing a positive duty on operators, and with that, a duty to demonstrate positive steps taken to achieve compliance with safety management duties under the NRSL. No further action proposed.
s. 101 **Safety performance reports**	Transfield CRC QR National SCT, TRI, ARA ATRS, Asciano, V/Line NSW Transport	*Reporting Period* As many organisation have their data and reporting systems configured for end of financial year reporting, 'financial year' should be included within the definition of 'reporting period'	Section 101 has been amended to provide the financial year as a default reporting period; but, giving the Regulator the option of allowing a different period upon agreement with the operator.
	TSV	R.49 of the Rail Safety Regulations 2006 (Vic) (RSR) requires accredited operators to conduct an annual review and report on specified safety parameters (including achievement against key safety targets specified in the SMS, recommendations from internal/ external audits of the SMS, findings of inquiries and investigations and a summary of any changes to the SMS). This would be preferable to requesting such data.	The NRSL requires that the safety performance report contain a description and assessment of the safety performance of the operator's railway operations, comments on any deficiencies, and any irregularities, in the railway operations that may be relevant to the safety of the railway and a description of any safety initiatives in relation to the railway operations undertaken during the reporting period or proposed to be undertaken in the next reporting period. In addition, further requirements may be prescribed in the regulations if it is deemed necessary. Item 9 of Schedule 1, r.17(3) and s.118 all link reporting making it a robust system. No further action proposed.
	Derwent Group	This section does not explain what the safety performance indicators should be. The indicators should be based on the risk profile of the organisation. Request to include further detail in s.101 to explain that the safety performance indicators that should be selected based on the safety risks relevant to the accredited party.	S.101 details the requirement for operators to provide the Regulator a safety performance report in respect of each reporting period, with item 9 of Schedule 1 of the National Regulations including further detail on what safety performance measures are required. In this way, by linking the requirements for performance reporting to the safety management system and its effectiveness, the performance measures are intrinsically linked to the risk profile of that operator. This supports the co-regulatory and scalable nature of the NRSL in not prescribing the requirements, but rather allowing the performance measures to be determined through a

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			risk-based approach by the operator. No further action proposed.
s. 103 **Requirements for interface agreements**	Transfield CRC QR National Asciano	Improvements could be gained from combining with s.103 with s.110 – scope of interface agreements to provide a clear single section outlining all requirements.	Sections 103 and 110 have been combined. The new heading to the combined provisions reads- 'requirements for and scope of interface agreements.'
	WestNet Rail	*Transitional Arrangements – Safety Interface Agreements* The new Rail Safety Bill was introduced in W.A. February 2011 providing a 3 year time frame to achieve the development/ implementation of the Safety Interface Agreements for Road/Rail Managers. Therefore, the date to achieve this aim is currently February 2014. WestNet Rail trusts that the introduction of the National Rail Safety Regulatory Regime in January 2013 will not reduce this time frame and that the compliance date for these Safety Interface Agreements remains as February 2014.	Transitional arrangements for the national rail safety legislation will be developed once the Law has been finalised. These arrangements will take into current jurisdictional requirements and will be developed in consultation with industry to ensure timeframes are achievable. No further action proposed.
	SA DTEI	The interface agreement is a key part of the safety management system of a rail transport operator but attracts a low penalty for non-compliance in comparison with other elements of the safety management system, e.g. security management plan, emergency management plan, health and fitness plan, etc. It is suggested that the penalty provisions relating to the management of risks to safety at interfaces under s104, s105 and s108 be aligned with the penalties for the above mentioned plans by being set at $50,000 for an individual or $500,000 for a body corporate.	The penalties relating to the management of risks to safety at interfaces under sections 104, 105 and 108 have been increased to align with penalties of other elements of the safety management system.
	NSW Transport	In s.103(a) of the NRSL, is the reference to s.98 of the NRSL correct? Section 107 of the National Law would appear to be the correct reference. In the alternative, NSW submits that as s.103 of the NRSL is in substantially similar terms as s.25 if the NSW Rail Safety Act and s.25 of the NSW Rail Safety Act does not contain a cross reference to s.30 of the NSW Rail Safety Act (which is in substantially the same terms as s.	S.107 refers to the process by which parties to the interface agreement may go about identifying and assessing risks to safety that may arise from the operations carried out by other person. Therefore, it is not appropriate to reference this section in s.103(a) However, the reference to s.98 is incorrect. The correct reference is s.97(1)(c) which specific addresses safety risks identified in relation to the operator's railway operations. The RSNL has been amended

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		107 of the NRSL), the cross reference in s.103 of the NRSL, as currently drafted is obsolete.	accordingly..
s. 105 **Interface coordination – rail infrastructure and public roads**	Transfield CRC QR National	Suggest amendment to ss.(1) to read "A rail infrastructure manager (not being a private siding manager) must." This is to remove potential confusion as to the applicability of the provision upon a private siding manager who has to manage rail infrastructure.	The definition of private siding excludes a person who manages rail infrastructure with which the siding connects to or has access. No further action proposed.
	Transfield CRC QR National SCT Asciano	There should be similar penalties applicable to public road managers as for private road managers in a.106(2). Request that a penalty provision be added to s.105.	The issue of whether the NRSL should include penalties for public road managers under s.105(2) is a matter that has been referred to the maintenance program. No further action proposed.
	QLD TMR	Query whether a provision analogous to s.105(3) should apply to private road managers as well as public.	Separate roads legislation covers public roads, but does not apply in the same way to private roads. As such, the analogous provision for road managers is not required in the NRSL. No further action proposed.
s. 106 **Interface coordination - rail infrastructure and private roads**	QLD TMR	Raises concern that a private road manager can receive a significant penalty under section 106(2) if a number of steps following receipt of a notice under section 106(1)(c)(i) are not taken. It is noted that, if the private road manager is refusing to enter into an interface agreement, further action can occur under section 108 (Regulator may give directions). It is requested that the penalty under section 106(2) be removed and the penalty under section 108 be relied upon following the Regulator intervening through issuing a notice.	The NRSL, under s.106(2) requires road managers to assess manage risks arising from the rail interface and seek to enter into an interface agreement with the rail infrastructure manager. The road manager will not be penalised if agreement cannot be reached with the rail infrastructure manager; in this case, the direction power may be utilised. The provision for a penalty under s.106(2) has been included in order to avoid over-reliance on the Regulator being required to make directions as a matter of course. Over-reliance on the National Regulator to issue notices may add an administrative burden, which is not preferable. No further action proposed.
	QLD TMR	Query whether failure to comply with any of s.106(a)-(d) constitute an offence, and whether further clarification is required. Queried the phrase 'seek to enter into' in s.106(d) and whether the provision is sufficiently clear.	The provisions of s.106 relating to the identification, assessment and management of risks are considered to be linked (by virtue of the term 'and' included within each subsection). The provision as drafted is considered to be clear. The term 'seek to enter into' has been included to protect rail infrastructure managers from being liable in the

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			event that a road manager is unwilling to enter into an interface agreement or agreement cannot be reached. In that case, other powers exist under s.108 for the Regulator to direct. No further action proposed.
s. 110 **Security management plan**	SteamRanger Heritage Railways	Security issues for some railways may require only preparation of security procedures, rather than a more comprehensive plan.	The requirement to prepare a security management plan is scalable and need only include matters that are relevant to a given rail transport operator. Operators may also apply for an exemption to this requirement. No further action proposed.
	TSV	Do issues such as 'theft, assault, sabotage, terrorism and other criminal acts' go beyond the scope of the NRSL?	While the management of these matters may also be addressed in jurisdictions by other legislation, the purpose of their inclusion in the NRSL is to ensure that their management accounts for the objectives of the NRSL (i.e. rail safety), in addition to those of any other applicable laws. No further action proposed.
	VIC DoT	Victorian transport operators are currently required to have security management plans under the Terrorism (Community Protection) Act. It is not clear how these requirements will apply to those existing plans. It would be unacceptable for this Bill to duplicate the Victorian requirements.	The objective is to set nationally uniform requirements for security management in the NRSL. While some jurisdictions have separate and additional security management requirements, these vary from both each other and those in the NRSL. In practice, rail transport operators would be required to comply with all applicable laws, as is the case for other laws such as for work health and safety. Any duplicative requirements need only be complied with once and do not impose additional burden on operators. No further action proposed.
s. 111 **Emergency management plan**	QLD Transport	The Qld TRSA Act contains a definition of emergency service. Will the NRSL contain a definition or will that be contained in the application acts?	The following definition will be included in the NRSL. ***emergency service*** means an entity that has a statutory responsibility to respond to an emergency and includes the following— (a) an ambulance service; (b) a fire brigade, including a volunteer fire brigade; (c) a police force or police service; (d) a disaster or emergency

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			organisation of the Commonwealth or a State or Territory.
	SteamRanger Heritage Railways	It is impractical to involve emergency services in reviewing emergency management plans or conducting test drills, if they are unavailable to support such activities.	The requirement to develop and implement an emergency management plan is subject to the *so far as is reasonably practicable qualification*, which would place limited responsibility on an operator for the decisions of persons over which they have no or limited control. No further action proposed.
s. 112 **Health and fitness management program**	ARA	<u>*Removal of SFAIRP*</u> Proposal for the management of rail safety worker health and fitness (in general, rather than just its assessment to the National Standard) to be required SFAIRP.	The National Standard underpins a system for monitoring the health of rail safety workers and enables consistent application of health standards across the Australian rail industry. The National Standard was approved by all Transport Ministers, as was its inclusion in the Model Law. Further discussion of the National Standard and its inclusion in the NRSL is included in section 6.5.3 of the regulatory impact statement No further action proposed.
	VIC DoT	The NRSL requirements for health and fitness management are dispersed between two sections of the Bill, the National Regulations and publications on the NTC website. This tends to make interpreting the requirements a laborious task.	Clarification of these requirements and their location would more practically be achieved through a guideline, than re-drafting the legislative provisions. No further action proposed.
	MVM Rail and Macmahon Contractors	Proposal is supported.	Noted. No further action proposed.
	Heritage Rail SA ATHRA	<u>*Cost to the tourist and heritage sector*</u> Cost impact on tourist and heritage sector of assessing rail safety workers to National Standard is disproportionately high, due to age profile of workers and their lack of exposure to risk (e.g. due to occasional volunteering, as opposed to full time work). Greater flexibility in how to comply, or the provision of subsidies for the cost of assessments is proposed.	The SFAIRP provision is not intended to exempt operators from duties under the NRSL. The SFAIRP provision is intended to require operators to balance costs and benefits, in determining an appropriate control for a given risk. This is not as necessary for health and fitness assessment, as such an assessment is already (partially) built into the standard itself. Additionally, operators may apply to the Regulator for an exemption. No further action proposed.
s. 113 Reg. 31	Heritage Rail SA SteamRange	<u>*Cost of Drug Testing for T&H Operators*</u> Initial drug tests can detect other	To address the differing risk profiles for operators across the rail industry and within the tourist and heritage sector, the NRSL provides an exemption

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Drug and alcohol management program	r HR	drugs that are not illegal. These can be screened out but at a cost of $110 per screening. This is a high cost for not for profit organisations and produces minimal safety benefits, given the age profile of the sector use likelihood of drug use is low.	framework where operators with lower risk profiles can be exempt from certain accreditation requirements, which includes drug and alcohol testing requirements. No further action proposed.
	RTBU Queensland RTBU National ARTC	*Testing standards* The testing standard for employers should at the minimum be Australian Standards and specifically included in the regulations. There should also be training standards for persons conducting testing for companies.	It is a general COAG principle that Australian Standards are not referenced in legislation. Employers are required to develop a testing regime as part of their drug and alcohol management program. In accordance with the draft law, this program must be approved by the Regulator. The Regulator will develop guidelines that address the minimum standards rail operators should undertake with respect to their internal testing. No further action proposed.
	Standards Australia Committee for urine drug screening AMROA Reem Mina	*Review of results by a medical review officer* There is no reference in the draft law as to who arranges the drug and alcohol screening and who reports on the screening results. On-site drug screening can be requested by administrative personnel with no medical training. Particularly for non-negative results, this may lead to misinterpretation or to the revelation of private medical information to which the employer has no right of access. To protect privacy and prevent discrimination, a medical review officer (a medical practitioner who has training and competence in the field of interpreting drug and alcohol test results) can review and investigate results prior to reporting them to employers. This is the approach taken by CASA.	The NRSL has been developed on the principle of co-regulation to allow for adequate flexibility to accommodate differences in operating environments of states and territories and within the rail industry itself. Details of how an operator intends to undertake their drug and alcohol testing regime will be contained within their drug and alcohol program. Operators may choose to engage the services of a medical review officer if they consider it necessary to ensure the robustness of their program and to address possible privacy breaches. It is expected that this choice will largely depend on the nature and size of the operator's business. However, due to the diversity within industry it is not proposed to prescribe the use of a medical review officer in the law. No further action proposed.
	RTBU National	*Consultation Requirements* There is no explicit requirement to consult in the drug and alcohol program provisions and while there is a requirement to consult with workers in developing an safety management system; regulators do not audit an operator's compliance with this requirement.	An operator is required to consult affected parties in developing their safety management system. This includes their drug and alcohol management program. In applying for accreditation, an operator must demonstrate they met the consultation requirements of the law in relation to their safety management system. No further action proposed.

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	RTBU National	*Prescription of Requirements* The Union supports the drug and alcohol management program being required as part of the safety management system; however, believes that more detail should be set out in the regulations regarding education, rehabilitation and testing.	The NRSL aims to maintain a performance based and co-regulatory approach by allowing flexibility to account for the scope and nature of railway operations. The elements prescribe in the regulations address minimum requirements to assure good practice and allow the operator, in consultation with their workers, to develop the best approach for addressing these requirements. No further action proposed.
	RTBU National NSW Transport	*Prescription of Requirements* There is support for the drug and alcohol management program being required as part of the safety management system; however, some parties believe that more detail should be set out in the regulations regarding training for managers and supervisors, appropriate personnel management practices, education, rehabilitation and testing.	
	RTBU National	*Prosecution by Operators* There is the perception that operators do impose penalties and sanctions based on their testing regimes.	Operator testing will not be used to prosecute offences under the NRSL. However, operators will be able to develop internal drug and alcohol policies that may include disciplinary action for breaching company policy. The NRSL requires that workers are provided with information on an operator's drug and alcohol policies. However, disciplinary action imposed under internal company policy, including dismissal, will continue to be addressed through industrial relations legislation. No further action proposed.
	Downer EDI	*Nominated person definition* There is a requirement that a rail safety worker notify the operator, or a nominated person, if the worker is aware that their ability or the ability of another worker, to carry out rail safety work may be impaired by alcohol or any other drug. Industry finds the reference to "nominated persons" unclear in regards to who this person will be. Suggest it be removed.	The NRSL does not define a nominated person. In relation to the drug and alcohol management program requirements, a nominated person would be someone nominated by the operator themselves. This has been included for administrative efficiency. The operator may choose not to nominate persons for the purpose of their drug and alcohol management program. No further action proposed.
	NSW Transport	*Evidentiary Standard Testing by operators* NSW does not support the removal of mandated requirements for the rail	The expert panel recommended that the NRSL should not require operators to provide to the Regulator evidentiary test results and full details of the rail safety worker to enable the Regulator

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		transport operator to conduct drug and alcohol testing to evidentiary standards and provide the test results to the Regulator for the purpose of prosecution.	to take prosecution action against the individual. This recommendation was accepted by ATC in May 2011. No further action proposed.
	NSW Transport	*Minimum number of rail safety workers to be randomly tested* In order to ensure that the NRSL does not lead to a diminution in safety standards, rail transport operators must be required to undertake a prescribed minimum number of random drug and alcohol tests.	The expert panel did not recommend the prescription of a mandatory minimum level of random testing for rail transport operators in the NRSL. This was accepted by ATC in May 2011. The requirement to conduct random drug and alcohol testing will be included in the drug and alcohol management program of each operator in accordance with their risk profile. No further action proposed.
s. 115 **Assessment of competence**	Heritage Rail SA SteamRanger Heritage Railways	*Relevance to the tourist and heritage sector* AQF qualifications and units of competence predominantly cater to mainline rail transport operators and have limited applicability to much of the rail safety work undertaken in the tourist and heritage sector. Also, assessing competence to the AQF/AQTF is typically an expensive or cost-prohibitive proposition for tourist and heritage operators. In-house training, such as to 'lesson plans' developed by ATHRA, is typically the preferred option.	The provision does not strictly tie operators to assessing rail safety worker competence in accordance with the AQF. It offers flexibility to adopt other means of assessment, where the former is impracticable and the Regulator may be satisfied with alternative arrangements. No further action proposed.
	O'Donnel Griffen Rail	*Supplier approval alternative* It is proposed that a more cost-effective alternative to the proposal would be to adopt a *supplier approval* model, in which an organisation (e.g. one providing services to a number of rail transport operators, under contract) and its relevant employees may be certified as competent for a given type(s) of rail safety work. Such a scheme may be administered by either an industry body or bodies, or the Regulator. This would alleviate the need for competence of the same organisation and/or rail safety worker to be assessed on multiple occasions, by each operator for whom they work under contract.	Enhanced portability of labour in the rail (safety) sector was an important factor in proposing the requirement for competence to be assessed, where reasonably practicable, in accordance with the AQF. Under a transparent, national qualifications standard and curriculum, it is more practicable for a rail transport operator to ascertain a rail safety worker's qualifications. The portability of labour for a worker trained in-house, by a given rail transport operator, is less clear; such training may not be sufficient or applicable to the type of work undertaken on another operator's railway. The NRSL would require operators to keep records for the competence of persons undertaking rail safety work within the scope of the operator's

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			accreditation. No further action proposed.
	RTBU Queensland	*Effect on current state and territory provisions and meaning of not reasonably practicable* How would the proposal impact on existing provisions in state and territory rail safety laws? Under what circumstances would it not be reasonably practicable for a rail transport operator to assess the competence of a rail safety worker?	The intent is that the NRSL will replace state and territory laws upon implementation in January 2013. However, it is possible that the requirements for assessing competence may be subject to transitional provisions, which may preserve some existing arrangements beyond the scheduled commencement of the NRSL. Those provisions are yet to be developed. The Office of the National Rail Safety Regulator is developing guidance material on interpreting *reasonably practicable*, as it applies generally within the NRSL and specifically in this provision. No further action proposed.
	MVM Rail and Macmahon Contractors	Proposal is supported. Most rail transport operators already comply with the proposal. The rail industry is still a long way from having a truly national, transportable competence standard.	Noted. No further action proposed.
	QLD TMR	Queried why the penalty for failing to ensure competence of railway safety worker is less than for failing to prepare drug and alcohol management program, fatigue risk management program and health and fitness program.	The misalignment of this penalty was identified as a drafting error and has been amended. The maximum penalty for an individual is now $50 000 and in the case of a body corporate is $500 000.
	SA DTEI	*Purpose of prescribing competencies and qualifications* S.115(2)(a)(i) and (ii) appear to be in the wrong order. In all likelihood any move to prescribe a requirement for rail safety worker competency will involve a reference to competencies or qualifications under the AQF, to be obtained under the AQTF. Therefore, a prescribed requirement should have precedence over the broader set of competencies and qualifications available under the AQF.	The purpose of prescribing any competencies or qualifications under the AQF would be unclear, as a rail safety worker would already be required to obtain them under s.115(2)(a)(i) (so long as they applied to the type of work undertaken by a given worker). It is envisaged that competencies and qualifications would more likely be prescribed where they were not available under the AQF and where appropriate alternatives were identified. No further action proposed.
116 **Identification of rail safety**	RTBU Queensland RTBU National	It is proposed that a rail safety worker, if requested by a rail safety officer to produce the required identification and fails to do so, then a maximum penalty of up to $5,000 applies. This proposal seems	The maximum penalty for a failure by a rail safety worker to produce identification has been reduced to $2,500.

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workers		unnecessarily harsh and we suggest it be revised to a graduated scale with a first offence warning and the fines up to a maximum of $1,000	
	RTBU WA	In relation to s.116(2) the potential penalties have no relation to other penalties imposed through the Road Safety Act for the same offences in Western Australia. Queried where how the penalty figures were arrived at.	In attempting to arrive at a national scheme for penalties in the law, a comparative analysis was conducted of maximum penalty amounts amongst the states and territories for any given offence. The analysis did not reveal consistency in how states and territories assigned dollar amounts to penalties and, as such, a national penalty framework was developed. The methodology behind this framework is detailed in the regulatory impact statement under section 6.7.2. No further action proposed.
s. 117 **Other persons to comply with safety managemen t system**	Queensland Transport	<u>*Reasonable excuse*</u> A rail safety worker, who is not carrying out rail safety work as an employee, should be able to offer a *reasonable excuse* defence for breaching any element of an operator's safety management system that was not made available to them.	There are many views of this matter including a reasonable excuse defence would not provide sufficient incentive for rail safety workers to find out about an operator's safety management system. It is also considered that the offence is open to a defence of reasonable mistake. This matter will be referred to the maintenance program for further consideration. No further action proposed.
s. 119 **Notification of certain occurrences**		How is joint reporting of notifiable occurrences intended to work in practice.	This would simply allow operators to submit a single, consolidated report that must comply with each of the prescribed requirements, as would be the case for a report submitted by an individual operator. Practical considerations arising from this process may be addressed with guidance from the Regulator, i.e. at an operational level, which is beyond the scope of the National Law and its development. No further action proposed.
S. 120 **Investigatio n of notifiable occurrences**	Transfield CRC QR National NT SA DTEI	Suggest a new sub-clause be added to provide the following words, "Any such investigation report prepared by the operator under instructions by the Regulator cannot be used in a criminal prosecution against the operator. The purpose of an investigation requested by the Regulator under this provision is about requiring the operator to undertake a systematic	The following has been included in the NRSL. *However, information or a document provided by a rail transport operator in a report under this section is not admissible as evidence against the operator in civil or criminal proceedings other than proceedings arising out of the false or misleading nature of the information or document.*

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		investigation into notifiable occurrence for the purpose of identifying contributing factors (looking for safety learning from the occurrence). It is implied, as it is not the Regulator undertaking the investigation, that the evidence identified and the final investigation report is not intended to be used for prosecution purposes. To preserve the frankness of content of an investigation report prepared by an operator and provided to the Regulator under this provision it is suggested that the contents of any report provided to the Regulator under s120(4) need to be made inadmissible in any proceedings in relation to the occurrence. It is noted that this protection is currently provided in SA under s75 of the SA Rail Safety Act 2007 and a similar provision is suggested.	
		Under the NRSL, a rail transport operator would only be required to investigate a notifiable occurrence if and when directed by the Regulator. Under Victorian rail safety law, this requirement applies automatically to all such occurrences. It is proposed that the latter would better support rail safety.	The requirement under s.120 to investigate is not restrictive; an operator may still be obliged to undertake their own internal investigation of an incident to comply with broader duties under the NRSL, despite not receiving any explicit direction from the Regulator. The discretion of the Regulator to withhold such a direction would help reduce the frequency of rail transport operators being required to undertake unnecessary investigations, for which the causes may be immediately apparent or which do not warrant the Regulator's specific attention. No further action proposed.
s. 126 **Drug and Alcohol – Offences**	RTBU Queensland	**Penalty Levels** How have the penalty levels been set in the draft law?	In attempting to arrive at a national scheme for penalties in the law, a comparative analysis was conducted of maximum penalty amounts amongst the states and territories for any given offence. The analysis did not reveal consistency in how states and territories assigned dollar amounts to penalties and, as such, a national penalty framework was developed. The methodology behind this framework is detailed in the regulatory impact statement under section 6.7.2. No further action proposed.
s. 127 **Oral fluid or blood sample or results of analysis etc. not to be used for other**	RTBU Queensland	Queried how the penalty figure was arrived at.	

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purposes			
s. 129 **Disclosure of train safety recordings**	Qld Gov. Transfield CRC QR National SRHR ATHRA ALC	Restriction on recordings should apply to instances where recording was obtained under NRSL. Should not restrict ability for industry to utilise their recordings as required for their operations. Concern over inability for industry to publish or communicate recordings. Raised internal policy issues. Concern about s.129(e) not including regulations made under the law. Division 10 of Part 3 of the Bill limits the capacity to use communication information, for privacy reasons. ALC acknowledges the confined commercial use rail operators can use recordings conferred by r.29 of the draft regulations but nevertheless reflects the industry view that such communications should properly be regarded as business records, as much as any other piece of information generated as an ordinary part of operating a rail business. ALC also notes the breadth of the definition of 'train safety recording' contained in s.128, which reads: train safety recording means a recording consisting of (or mainly of) sounds or images or data, or any combination of sounds, images or data, produced by a device installed in a train, signal box, train control complex or other railway premises for the purpose of recording operational activities carried out by rail safety workers operating a train and other persons. It may be one thing for use of 'sound or images' to be restricted for privacy reasons. However, presuming the word carries its usual English meaning, it is another thing to preclude the use of 'data' produced by a rail network generally which very well record 'operational activities' carried out by rail safety workers in a manner that would make identification of a person extremely difficult and not in a 'readily ascertainable' way. ALC also notes that Schedule 3 to	The definition of train safety recording has been modified and the last line now reads, "*purpose of recording activities carried out by rail safety workers in relation to the operation of a train*." "*or an Act*" has also been inserted after "law" in paragraph (e). It is considered the restrictions on the release of information etc., are sufficient to meet the requirements of the NRSL.

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		the Privacy Act 1988 establishes National Privacy Principles that govern how personal information should be handled. This is the regulation that should govern this area of interest. ALC is finally of the view the public interest is served if independent courts have full access to recordings for civil and criminal proceedings. Justice must not only be done but be seen to be done. ALC recommends that train safety recordings be treated as personal information regulated by National Privacy Principles contained in national privacy information. At the very least the term 'or data' should be removed from the definition contained in s.128 of the Bill.	
s. 130 **Admissibility of evidence of train safety recordings in civil proceedings**	Transfield CRC QR National	Concern about use of recordings in criminal proceedings.	S.130 is about civil proceedings. Use of recordings in criminal proceedings has been removed.
s. 131 **Audit of railway operations**	Jim Walker (MVHR)	*Flexibility of audit tools* Audit tools (used by the Regulator) need to be flexible as some requirements are not applicable for tourist and heritage operators.	S.131 outlines what may be included in the Regulator's audit program. This provides the Regulator with a degree of discretion in determining the focus of an audit program. It is anticipated that the Regulator will take into account the nature and scope of an operation when develop their audit program. No further action proposed.
	TSV	*Clarification of parameters and notice period* It is suggested that the parameters of an audit could be clarifies and that the 24 hour notification period does not apply in circumstances where an audit is for investigative purposes.	It is not considered necessary to clarify the parameters of an audit. Ss.(2) provides further information on areas upon which an audit may focus. Additionally, it is not considered necessary to exclude audits undertaken for investigative purposes from the notification period. If a rail safety officer requires immediate access to a rail premise for investigative purposes, they can do so under the powers of entry in s.141. It should be noted that this section has

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			not been changed from the Model Law. No further action proposed.
	TSV	*Annual program may not be risk based* Referring to an 'audit program for each year' implies a routine approach to auditing all operators which is not risk-based. If this is intended- this would clearly represent a potential diminution in safety. Further information is needed on how an audit program will be prepared/ reviewed/ changed in relation to intra-jurisdictional railway operations and how jurisdictional delegates will have input into this process.	S.131 provides the power for the Regulator to audit rail transport operators. The details of how these audits are conducted will be at the discretion of the Regulator; however, it is anticipated that these will continue to be based on risk. Operational policies relating to the audit program will be developed by the Regulator's office. It should be noted that this section has not been changed from the Model Law. No further action proposed.
s. 138 **Functions and Powers**	TSV	*Extension to all enforcement tools* The function of requiring compliance should be extended to all enforcement tools available under the law (e.g. rail safety undertakings), rather than just being limited to notices.	Notices as referred to under s.138(b) has a broad meaning and would capture all written notices made by the Regulator. In accordance with s.248(1), the Regulator accepts a rail safety undertaking by written notice. No further action proposed.
s. 141 **Powers of entry**	Transfield CRC QR National SCT TPI ARA ATRS Queensland Rail Asciano	Industry opposes the open ended power to enter "at any time". This should be constrained by requiring that the inspector, on reasonable grounds, suspects a breach of the Law, accreditation, safety notices, or as a result of an incident etc. The current notice of entry should be retained. Industry requests the provision be amended to include these aspects.	The power to enter at any time is in line with the powers under the Model Law. An officer entering a rail premise under this section is limited in what they can do by s.143. The actions listed under this section relate to compliance and investigative purposes. No further action proposed.
s. 143 **General powers on entry**	ARA Asciano	*Limits on power of rail safety officers* It is proposed that the powers delegated to rail safety officers in this section are excessive. These include powers to direct the movement of rolling stock, for which an officer may not fully appreciate the impacts on safety and potential for asset damage. The exercising of such powers may also breach other laws, such as those governing access to security-sensitive and radioactive substances. Potential amendments may be to require such directions to be made through senior representatives of a rail transport operator	These powers were developed to align, as much as possible, with the model work health and safety law, a standing policy in developing the NRSL. It is agreed that the general powers on entry would only reasonably be exercised with due consideration of their impact, including on those matters highlighted in the comments. However, it is considered that risks arising from exercising powers of entry would most effectively be mitigated by appropriate training and guidelines being provided by the Regulator to rail safety officers. It is also noted that rail safety officers, as for all other persons, are bound to comply with all applicable laws,

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			beyond just the NRSL. No further action proposed.
s. 147 **Securing a site**	QLD TMR	S.147(1) refers to authorised person. Should be amended to say 'authorised officer' to be consistent with the remainder of the section.	It is not necessary to amend this section as suggested. This is because 'authorised officer' is defined for the purposes the section 147 only, whereas an 'authorised person' is a police officer or a person appointed for the purposes of drug and alcohol testing. They are therefore different functions.
s. 152 **Power to require production of documents and answers to questions**	SA DTEI	The application of powers under s.152 should not be linked to a rail safety officer having to enter a place. One of the functions of the Regulator is to, under s.13(1)(b), "work with rail transport operators … to improve safety …". In practice, this is largely achieved through the activities of rail safety officers meaning that the function of a rail safety officer is broader than being workplace inspector and the powers of an officer to obtain information should not be limited to being in a workplace. (It is noted that the functions of a rail safety officer under s.141 have been drawn from the model workplace health and safety law and do not reflect the broader functions of a rail safety officer). It is current practice for rail safety officers make requests for documents (in order to evidence parts of a safety management system or records generated by the system) or require a person to answer a question relating to rail safety without attending a place. This ability, which needs to be supported through an appropriate power, is a key element of enabling the officer (and thereby the Regulator) to effectively evidence information regarding the management of safety by an operator under this regulatory framework. It is noted that the power of a rail safety officer to require a document to be produced under clause 98 of the Model Rail Safety Bill 2006 was not limited to the entry to a place. It was not the intention to introduce restrictions to the powers of a rail safety officer in aligning the enforcement provisions of the	The matter has been referred to the maintenance program for further consideration. No further action proposed.

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		national law with the model workplace health and safety law. Suggest that s.152(1) should read, along the lines of, "A rail safety officer may, in connection with the administration, operation or enforcement of this Act – (a) require a person to tell the officer who has custody of, or access to, a document; or (b) require a person who has custody of, or access to, a document to produce that document to the officer within a specified period at a specified place; or (c) require a person to answer any questions put by the officer."	
s. 156 **Power to seize evidence**	NSW Transport	The provisions of s.156 of the NRSL are not consistent with the broader powers set out s.171 of the model work health and safety law. In particular, s.171 allows an inspector to seize evidence so long as the entry is in accordance with the inspector's right to entry. In contrast, the right to seize evidence under the NRSL is restricted to circumstances in which a search warrant has been issued. The provisions of the NRSL with respect to the seizure of evidence should be aligned with the provisions of the model work health and safety law. In addition, for the sake of consistency the NRSL should adopt provisions which are aligned to s.173, s.174, s.176 and s.177 of the model work health and safety law in relation to seizures rather than adopting the existing provisions in Model Rail Safety Bill.	The intention of s.156 and the powers related to seizure without a warrant was to align to s171 of the work health and safety law. The power to seize evidence in section 156 has now been broadened to align with model WHS legislation. The other sections referred to have been reflected in s158 – s.162 of the NRSL. The NRSL has a broadly similar objective to work health and safety legislation, but focuses on matters of safety management more specific to railway operations; therefore the NRSL complements work health and safety legislation without necessarily duplicating the latter. Rather than adopting the sections referred to in their entirety, the drafting has contextualised the provisions to be appropriate to the rail environment.
s. 161 **Return of seized things**	SA DTEI	S.161(1) requires the return of a thing, on application, after the end of 6 months after it was seized unless, as per s.161(2), the Regulator has reasonable grounds to retain the thing. A reasonable ground is the Regulator retaining the thing because it may be evidence in proceedings that have or may be commenced for an offence, which was specifically addressed in the Model Rail Safety Bill. It is noted that the treatment of	The current provision as drafted is to be retained. The reasonable grounds test to retain the seized thing is sufficient to cover retention for the purposes of evidence in proceedings. No further action proposed.

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		the return of seized things has moved from a positive obligation on the Regulator to return the thing, to requiring a person to apply for the return of their thing. It seems unreasonable to have to establish this ground on application by a person that may be the subject of the proceedings, it would be better to have this reason already established in the law (as is the case under clause 91(1) of the Model Rail Safety Bill 2006).	
s. 163 **Damage etc. to be minimised**		Is it appropriate to refer to 'inconvenience' caused in relation to activities conducted for investigative and compliance purposes?	It is appropriate that the Regulator use his or her compliance powers in the course of fulfilling his or her duties, while causing minimum disruption and inconvenience to third parties. This does not limit the Regulator in fulfilling those duties, nor expose the Regulator to any increased liability (as limited under section 165). No further action proposed.
s. 166 **Power to require name and address**	SA DTEI	S. 166(3) should be amended to read, "If the rail safety officer reasonably suspects that the name or residential address is false…". If the rail safety officer, "reasonably believes", that the name or address is false then the action available to the rail safety officer is to take action against the breach of s166(1).	It is not considered necessary to amend section 166 as suggested. The current wording is sufficient.
s. 121 **Testing for the presence of drugs or alcohol**	Qld Gov. NSW Rail Medical Examiner	*Definitions for testing* Should the NRSL include definitions for breath test, preliminary breath test, drug screening test, oral fluid analysis and blood test?	As discussed in section 6.5.4 in the regulatory impact statement, it is not practical or cost efficient to introduce a nationally uniform testing regime for rail. Therefore, it is not proposed to include testing definitions or procedures within the NRSL. These details will be addressed in each jurisdiction's applying law. It is expected that most jurisdictions will reference their roadside testing legislation. The process in the road environment has been tested and proven through the court process over many years. It is a widely accepted methodology and can adequately support prosecution under rail safety law. No further action proposed.
s. 121 – 127 **Drug and alcohol**	RTBU National	*Increased Testing of Rail Safety Workers* There is concern the NRSL	The NRSL provides for the Regulator to conduct testing to ensure compliance with the law. Operational procedures to support this purpose will

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testing by regulator		introduces another layer of testing and potential sanctions for rail safety workers. It is also unclear how the testing program will be operated by the Regulator.	be developed by the National Rail Safety Regulator Project Office. The purpose of testing by rail operators is to mitigate the risks to safety from rail safety workers being affected by either drugs or alcohol. Operator testing will not be used to prosecute a rail safety work under the NRSL. Disciplinary action for breaches of the operator's drug and alcohol policy are not addressed by the NRSL. The NRSL does require that operators set out the actions they will undertake when a rail safety worker breaches their safety duties. This information must be provided to rail safety workers. No further action proposed.
s. 122 **Appointment of authorised officers**	RTBU Townsville RTBU National	*Qualifications of authorised persons* Training requirements for persons authorised to conduct testing should be included in the law.	Currently there is no national qualification or competencies for testing. However, the Project Office will be developing appropriate competencies and training requirements. No further action proposed.
s. 124 s. 125 **Authorised person may require preliminary breath test or breath analysis**	QLD TMR	*Testing of RSWs for Category A occurrences* Will the Regulator conduct drug and alcohol testing of rail safety workers that may have been indirectly involved in an incident? (E.g. in the control room).	The NRSL allows for any rail safety worker that has been involved in a prescribed notifiable occurrence to be testing, up the time prescribed in state and territory application laws, after the incident has occurred. This includes rail safety workers both directly and indirectly involved in the incident. No further action proposed.
Authorised person may require drug screening test, oral fluid analysis and blood test	QLD TMR	*Clarification of criminal conduct* Is there a penalty for failing to provide name and address details to an authorised officer in subsections (2)?	The RSNL now includes a maximum penalty of $10,000 for a failure to submit to this requirement.
	QLD TMR NT Transport	*4 hour testing period – alcohol consumed after completion of a shift* While the draft law allows for breath testing to be conducted up to 4 hours (sub-section (4)) after a rail safety worker has completed their shift, it does not address the situation where a worker may have consumed alcohol after they completed their shift. This was included in a previous version of the draft law and should be re-inserted to ensure drug and	This will be dealt with in each state and territory's application law. It will generally reflect what is currently happening. No further action proposed.

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		alcohol offences are workable and enforceable.	
	RTBU Townsville RTBU HQ RTBU WA	*4 hour testing period* Testing should only be conducted on employees while they are on duty. Refer sub-sections (4).	
	Railcorp	*4 hour testing period* Industry has commented that in some instances 4 hours may not be long enough, particularly in remote locations. Suggested that the testing period be lengthened, or "until reasonable practicable" be included	
	VIC DoT	*4 hour testing period* The 4 hour testing period is not in line with the 3 hour period currently in place in the majority of jurisdictions. It is inappropriate to require a worker to undergo a breath test up to 4 hours after stopping work. A worker should only be tested where there has been an incident.	
	NSW Transport	*4 hour testing period* Having the ability to delay a breath analysis by up to 4 hours, when in that time a person's blood alcohol concentration could fall below 0.02 could subject the regulator to claims of corruption.	
	NSW Rail Medical Examiner Asciano Standards Australia Committee for urine drug screening AMROA	*Drug Screen Testing* It is not clear if drug screen testing allows for urine testing. The law makes specific reference to oral fluid analysis and blood test but there is no mention of urine drug testing. Further clarification of this term is required If urine drug test is not specified, it implies a blood test for which there are no Australian standards. Additionally, ss.(5) and ss.(6) provide authority for the collection of oral fluid and blood for the purpose of drug testing but no authority is provided for the collection of urine specimens.	The definition of what constitutes a drug screen test, breath test or blood test is left to jurisdictions' application law. It is understood that jurisdictions that currently use urine testing (NSW and WA) will continue to do so. No further action proposed.
	RTBU Townsville RTBU National	*Drug Screen Testing* It is unclear if drug screen testing allows for urine testing. Urine testing should not be included as it is not	The definition of what constitutes a drug screen test, breath test or blood test is left to jurisdictions' application law.

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	NSW Transport ARTC Reem Mina	provided for in roadside testing legislation and the RTBU do not believe RSWs should be treated differently.	It is understood that jurisdictions that currently use urine testing (NSW and WA) will continue to do so. No further action proposed.
	NSW Transport	*Post incident testing by rail transport operators* The NRSL only provides that an authorised person may require a rail safety worker to submit to breath testing or drug screen testing. It does not provide that they must submit to post incident testing in these circumstances. It was agreed at ATC in May 2011 that this should be amended.	It is not proposed to amend the RSNL as suggested. Post incident testing will be managed through policies and procedures that underpin the power of a n authorised officer to require a rail safety worker to submit to testing.
s. 124 **Drug and Alcohol – Testing by the Regulator**	NSW Transport	*Power to conduct a breath test and breath analysis* The NRSL requires that a rail safety worker submit to a preliminary breath test; a breath analysis; or both. It is suggested that there be two distinct phases: a preliminary breath test; and if the rail safety worker fails the preliminary breath test, then a breath analysis. Additionally the national law should include a provision for a testing officer to conduct a sobriety test where testing equipment is not available.	The purpose of the drug and alcohol provisions in the NRSL is to create the powers for an authorised person to conduct testing. Testing procedures will be included in jurisdictions' application law to ensure alignment with procedures under state road legislation. No further action proposed.
	NSW Transport	*Requesting a blood test* S.124(8) inadvertently allows for a blood test to be requested upon the rail safety worker being required to undergo a breath test. A rail safety worker should be entitled to request a doctor or nurse to take a blood sample if they are required to undergo a breath analysis not merely a breath test.	
	Reem Mina	*Requesting a blood test for medical reasons* If a worker requests a blood test by reason of some physical or medical condition preventing them under taking a breath analysis, this condition should be confirmed by a medical practitioner. Additionally, the onus should be on the authorised person to organise the medical practitioner to conduct the blood test as allowing the worker to	

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		choose a medical officer may allow them to delay the process.	
s. 125 **Authorised person may require drug screening test, oral fluid analysis and bold lest**	VIC Dot	*Basis for subjecting a person to testing* It is suggested that a show cause provision be included in this section, i.e. that there is a reason why the person must be subjected to the testing.	The agreed purpose of Regulator testing is to ensure compliance with the NRSL. This was recommended by the expert panel and agreed to by ATC. S.125 provides the power for the Regulator to undertake drug testing for this purpose. Operating procedures for Regulator testing, which will provide the rationale behind targeted testing, will be developed by the National Rail Safety Project Office. No further action proposed.
s. 126 (1) **Drug and Alcohol - Offences**	Dan Healy Graham Wilson	*Alcohol Limit* Allowing an alcohol limit of 0.02 undermines those companies which have a policy of 0.00. Additionally, it is inconsistent with other laws governing public passenger vehicles, which all have a limit of 0.00	The prescribed concentration of alcohol has been amended to 0.00 as agreed by the Rail Safety Regulation Reform Project Board.
	RTBU WA	*Alcohol Limit* The union has noted the limit is lower than that prescribed for the road. It does not support operator's being able to override the limit through company policy, based on the argument that presences does not mean impairment.	
	Graham Wilson	*Alcohol limit* Supports the 0.02 limit as a pragmatic level that takes into account medications or confectionary that contains alcohol but would not impair a Rail Safety worker.	
	RTBU Townsville RTBU National	Queried how the penalty figure was arrived at. Appears to be an increase from some existing state and territory penalty amounts.	In attempting to arrive at a national scheme for penalties in the law, a comparative analysis was conducted of maximum penalty amounts amongst the states and territories for any given offence. The analysis did not reveal consistency in how states and territories assigned dollar amounts to penalties and, as such, a national penalty framework was developed. The methodology behind this framework is detailed in the regulatory impact statement under section 6.7.2. Due to the lack of consistency, in determining a nationally consistent

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			framework, some existing state or territory penalty amounts for a given offence will increase and some will decrease in order to bring them to a common figure. No further action proposed.
	Qld TMR	*Clarification of criminal conduct* Subsection (2) may not be clear enough in defining criminal conduct. It is suggested that regard be had to s 328A of the Criminal Code (Qld) which talks about being 'adversely affected' by an intoxicating substance and to s 80(24A)(c) of the Transport Operations (Road Use Management) Act 1995 which deems a person to be adversely affected by alcohol where their blood alcohol content is or is greater than a specified percentage.	The drafting of section 126(2) is considered sufficiently clear. This subsection is limited to the purposes of 126(1)(c) and assists in the interpretation of that section. It does not limit the operation of that section.
s. 126 **Offence relating to prescribed concentration of alcohol or prescribed drug** s. 130 (Omitted) **Concentration in breath taken to be concentration in blood**	Vic DoT RTBU - WA	*Offences may be subject to challenge in some jurisdictions* It should be noted that the drafting of this provision may cause prosecution and judicial difficulties in Victoria. For example, the concept of being 'under the influence' and impaired are different in Victoria. Additionally, the deeming of a reading from a breath test to be the same as the number of grams of alcohol in 100mls of blood may be contentious.	Legal advice sought by the NTC indicates that 'under the influence' and 'impaired' have the same meaning in law. For the presence of drugs other than the prescribed drugs defined in s.126(5), it will also need to be demonstrated that a worker is incapable of effectively discharging a function or duty of a rail safety worker (i.e. they are impaired or under the influence of a drug). This may be done through a sobriety test. Testing procedures will be addressed in jurisdictional application law. Section 130 of the RSNL has been removed. This issue will now be dealt with in jurisdiction application Acts.
s. 133 **Appointment** s. 134 **Identity Cards**	Asciano	*Disclosure of rail safety officers' delegated powers* Any limitations imposed by the Regulator on a rail safety officer's delegated functions should be included on their identity card, so that they may be known by any person who has cause to interact with the rail safety officer while they are exercising their powers.	This is a matter most appropriately addressed by the Regulator in developing operational policy and procedures, rather than to be prescribed in the NRSL. No further action proposed.
s. 153 **Abrogation of privilege against self-incriminatio**	TSV	*Abrogation of privilege against self-incrimination* TSV notes that this is a new provision for Victoria and therefore queries how this provision has	This provision aligns with the model work health and safety laws. No further action proposed.

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n		operated in practice e.g. in OH&S.	
s. 177 **Issue of prohibition notice**	NSW Transport	S.177(1)(a), (b) and (c) of the NRSL should be aligned to be consistent with s.195 of the model work health and safety law.	S.195 of the model work health and safety law has been reflected in s.177 of the NRSL. Rather than adopting the section in its entirety, the intent has been retained and the drafting has contextualised the provision to be appropriate to the rail environment. No further action proposed.
s. 180 – 183 **Non-disturbance notices**	Queensland TMR	This provision should be expanded to authorise the Regulator to direct that specified things not be removed or interfered with.	The NRSL already provides the Regulator with that power, by requiring the Regulator to specify which "*measures [must] taken to preserve a site or prevent disturbance of a site*". No further action proposed.
s. 188 **Variation or cancellation of notice by rail safety officer**		Why are rail safety officers limited to making only minor amendments to improvement, prohibition and non-disturbance notices?	The intention is that more significant amendments should, to avoid confusion, be given effect by issuing a new (replacement) notice. No further action proposed.
s.196 **Response to certain reports**	ATSB	Suggest that the Regulator's power to issue directions in response to specified reports contained in ss.(5) be cast more broadly to include other inquiries into matters concerning rail safety such as those undertaken by a royal commission or an occupational health and safety authority or an inquiry undertaken by the Regulator itself.	It was agreed at Advisory Committee level not to expand section 200 so that other inquiries concerning rail safety would be included as a report for the purposes of the section as this would represent a significant shift from a previously agreed policy position.
	NSW Transport	Ss.(5) needs to include "a report of an investigation held under the rail safety investigation legislation of a State or Territory"	See response above.
	VIC DoT	Subsection (3) requires the regulator to conduct a CBA after giving a direction to an operator. Undertaking the CBA after the event is pointless. This section should be rewritten so that the CBA is conducted prior to giving a direction.	The RSNL has been amended so that a CBA is required to be conducted before a direction to an operator is given.
s. 197 **Power to require works to stop**	Citi power	*Existing practice* Acknowledge and agree with comments that rail operators and utility companies already adopt a collaborative approach as good practice under health and safety legislation. Agree that 'the Regulator would be required to give directions infrequently' and, as such, consider	Noted. No further action proposed.

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		that the requirement to consult the regulator to mediate negotiations is far preferable to an obligation to undergo an approval process. Interfacing parties should be required to consult the regulator only when the interfacing parties are unable to 'successfully negotiate a suitable arrangement'.	
	QLD TMR	Queries the interaction of the state-enacted NRSL with utility work that is provided for under Commonwealth legislation.	The NRSL will be enacted as state law and, as such, Commonwealth acts will have primacy where there may be inconsistencies between the two pieces of legislation. No further action proposed.
	RTBU National	Supports the provision as drafted, noting that this is an important issue for the safety of rail safety workers.	Noted. No further action proposed.
	QLD TMR	Raises a number of operational issues associated with the provision, including the general existing process for such works and the interaction between the Regulator and rail infrastructure managers in approving access. Is 'threaten or likely to threaten' clear enough? Is it an objective test? Should this be clarified?	Generally, rail operators and utility companies already adopt a collaborative approach as good practice under health and safety legislation. The process of gaining approval from the Regulator to conduct utility works has been reconsidered in response to submissions received through public consultation. As the rail infrastructure manager is best-placed to address whether utility works may threaten rail operations, the provision has been redrafted to require notification only to the rail infrastructure manager. It is considered that the words 'threaten or likely to threaten' is sufficiently clear.
	QLD TMR	*Approval process* Raised the interaction between the Regulator and rail infrastructure manager in approving access, stating: • Should the Regulator be approving work which threatens or is likely to threaten the safety or a railway (this might be more appropriately a decision of the rail infrastructure managers) in consideration of the Regulator's role to stop work that is threatening or likely to threaten the safety of a railway? • Should there be a process of negotiation (or at a minimum notification) between the Regulator	The provision has been amended to require approval from the relevant rail infrastructure manager rather than the Regulator. A new ss.(7) has also been included requiring review and service details to be included.

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		and the RIM of the railway when a person applies to the Regulator to undertake works that are likely to threaten the safety of the railway (as opposed to seeking the rail infrastructure managers approval under section 201(1))?	
	Citi power	*Approval process* Preference to amend the provision from the requirement for a person to seek approval (increasing the administrative burden) to requiring consultation between the parties. Limiting the requirement in s.201 to consult is consistent with ensuring that the Regulator is a consultative body as discussed in the draft regulatory impact statement.	
	Citi power VIC DoT QLD TMR	Preference to amend the provision from the requirement for a person to seek approval (increasing the administrative burden) to requiring instead consultation or notification between the parties. Query whether the Regulator should be approving work which threatens or is likely to threaten the safety or a railway, as this might be more appropriately a decision of the rail infrastructure manager.	
	Yarra City Council	It is hoped that this new National Rail Safety Regulations will enable improved communication by local governments and developers regarding future works across and abutting existing and future rail networks	Noted. No further action proposed.
	VIC DoT	The specific utility Acts (e.g. VIC Electricity Industry Act 2000, Gas Industry Act 2000) impose general safety duties on the companies in relation to works on or in the immediate vicinity of rail infrastructure or rolling stock. It is strongly recommended that amendments are made to comparable utility Acts in all jurisdictions to provide for general safety duties.	The suggestion is noted and has been the subject of discussion with state and territory stakeholders throughout the policy development process on this issue. However, it is considered beyond the scope of the NRSL to address matters to be contained in separate legislation; this is a matter best contemplated by states and territories if it is deemed necessary by these parties to support the provisions in the NRSL. No further action proposed.
	SA DTEI Transfield	Request deletion of ss.(3) providing power to the Regulator to direct a rail transport operator to stop rail operations that threaten the safety of	The provision has been amended to require notification to the relevant rail infrastructure manager rather than

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	CRC	nearby water/gas/electricity utilities	approval by Regulator.
	QR National SCT NSW Transport	Issues cited include: - The competence of the Regulator to make such decisions; - The preference for this aspect to be left to jurisdictional utility legislation (as may already be the case in some states/territories).	The decision to serve a notice under this section is now reviewable.
s. 213 **Reviewable decisions**	RTBU WA	Concern over no right of review for breaches of safety duties.	Breaches of safety duties are not administrative decisions made by the Regulator capable of an internal or external review process. They are criminal offences.
s. 215 **Application to court**			No further action proposed
	NSW Transport TSV	<u>*Application to court*</u> Which body should be "the court" for the purpose of reviewing appeals of reviewable decisions.	It is expected that each jurisdiction will define the relevant 'court' in their application law. No further action proposed.

General liability and evidentiary provisions – *Draft national law (Act)*

s. 216 **Period within which proceedings for offences may be commenced**	QLD TMR	The NRSL does not specify how proceedings are to be commenced and whether some offences are to be crimes rather than simple offences (and therefore prosecuted in indictment). It is assumed in the absence of this, offences will be prosecuted as simple offences. Given this, it is questioned whether s.216(3) which allows proceedings to be brought outside the limitation period is appropriate in that it effectively makes the time limit open ended.	How offences are to be prosecuted i.e. summarily or on indictment will be a matter for jurisdictions. However, this issue will placed on the maintenance program. It was agreed at the Advisory Committee level that section 220(3) remain as drafted to align with model WHS legislation.
	ATSB	Concern about the impact on ATSB as a 'no-blame' investigator of prescribing the ATSB as a prescribed authority for the purposes of s.216 to extend the limitation period within which proceedings may be brought. There is potential for the specification of ATSB to have a negative effect on cooperation in ATSB investigations. It is suggested that ss.(4) be omitted.	The reference to the ATSB has been removed. The law now defines a 'prescribed authority' in (c) to be 'any other relevant authority established under a law of a participating jurisdiction.'
s. 218 **Authority to take proceedings**	Transfield CRC QR National Asciano	Concern over ss.(4) that could potentially be used to authorise a union member to bring proceedings for an offence.	It is considered that the section is appropriate as drafted.

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s. 224 (Omitted) **Offences by body corporate & employees**	Transfield CRC QR National	Concern over extension of liability to directors and officers of an operator.	Section 224 has been removed to align with model WHS legislation.
	NSW Transport	The vicarious liability of officers for the offences of body corporate is not supported. The model work health and safety law has moved away from this concept and we suggest that this section be removed in alignment with that law. The concept of due diligence has been added to s.55 but this section (224) introduces the concept of reasonable precautions.	Section 224 has been removed to align with model WHS legislation
	VIC DoT	What about offences by partnerships or unincorporated bodies or associations?	This issue will be placed on the maintenance program.
s. 223 – s. 230 **Discrimination against employees**	NSW Transport	Queries the inclusion of Part 8, Division 2 (Discrimination against employees) in rail safety law as it should be covered by the general and specific OH&S legislation in each participating jurisdiction.	While this may be the case, it is considered necessary to include such provisions in the NRSL so as to provide clarity to rail safety workers and also to ensure consistency in the penalty provisions nationally. No further action proposed.
s. 226 s. 227 **Applying brake or emergency device**	RTBU WA	<u>*Definition of a person*</u> The use of the term person includes a rail safety worker. The Union is concerned that this could be used to remove prerogative power the rail safety workers have over rail safety work under their charge. They propose these sections be amended to apply to persons who are not in charge of the train or tram.	These clauses have not changed from the model law. They are not intended to remove a rail safety workers prerogative power over their work. No further action proposed.
s. 247 **Approved codes of Practice**	Graham Wilson	It is suggested that the approved codes of practice make provision for their application in part as applicable where the code of practice is beyond the scope of operation of a particular operator due to the extremely wide variation in the scopes of operation and risk profiles of the all the sectors of the rail industry.	The proposal is noted and agreed. It would be inappropriate to develop codes of practice that did not account for the varying scope of railway operations and risk profiles across the sector. However, this is a matter to account for in the process of developing such codes, rather than the NRSL itself. No further action proposed.
	ALC	<u>*Change in policy for codes of practice*</u> ALC notes that an approved code of practice can be used as evidence as whether a duty or obligation imposed by the NRSL has been complied with. This is a departure from the	The status of approved codes of practice has been amended in the NRSL to align with that of the model work health and safety law. Such alignment is a standing policy for developing the NRSL. Although no specific reference to

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		status of compliance codes under the model law, in which compliance with a code is taken to be compliance with duties or obligations to which the code relates. This amendment was not discussed in the regulatory impact statement. ALC proposes that the NRSL is amended to retain the model law approach to approved codes of practice.	codes of practice has been made, such alignment is discussed in section 6.7 of the regulatory impact statement. No further action proposed.

Comments on the draft National Law (Regulations)

r. 7 **Act to apply or not to apply in certain cases**	QLD TMR	Reference to s.7(g) in sub-section (1) should refer to s.7(1)(g)	This reference will be amended.
r. 8 **Application for accreditation**	NSW Transport	Question the practicality of providing the names of all contractors and subcontractors at the time of accreditation application. This is difficult because of the broad definition of railway operations and rail safety work.	Under r.8(j), if any of the activities that the operator (applicant) intends to carry out under the accreditation are to be carried out by any other person on behalf of the applicant, the operator must supply the name and contact details of each such person and the details of the activities that it is intended the person will carry out on behalf of the applicant. To support the demonstration of capacity to undertake railway operations, this requirement is considered reasonable. No further action proposed.
r. 12 **Private Sidings**	NT Transport	*Automatic registration of a private siding* Under r.12, registration of a private siding is automatic so unlike operator accreditation, the safety measure commitment is not something that has been satisfied in order to gain registration.	Registration of a private siding is not automatic under r.12. R.12 outlines what an application for registration must contain. The application is to be determined by the Regulator in accordance with s.84. No further action proposed.
	NSW Transport	*Application for registration* Jurisdictional application forms currently require more detailed information than the regulations and it is recommended that this detail be included in the regulations	The NRSL and regulations outline what must be contained in an application for registration. They do not prevent the Regulator from obtaining additional relevant information. This can be included on the application form, which will be developed as part of the Regulator's operational procedures. Additionally, under s.82 the Regulator has the power to require an applicant to supply further information in relation

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			to their application. No further action proposed.
r. 13 Private Sidings	Transfield CRC QR National	*Risk register requirements* As this regulation pertains to the management of private sidings, industry suggests that p.(b) should be deleted as they are not relevant to a private siding manager	It is not a new requirement for a rail infrastructure manager of a private siding to have a risk register. This requirement was included in r.11 of the model regulations. However, the draft regulations will be reworded for better alignment with the work health and safety laws.
r. 19 (3) **Emergency Management Plan**	SteamRanger HR	*Emergency Management Plan testing* Testing the emergency management plan required the involvement of emergency services in either mock or desk top audits. Most are reluctant to be involved as they have budget constraints. The Regulations need to include these parties or be changed to knowledge their stance.	The requirement to develop and implement an emergency management plan is subject to the so far as is reasonably practicable qualification, which would place limited responsibility on an operator for the decisions of persons over which they have no or limited control. No further action proposed.
	NSW Transport	R.19 of the National Regulations does not include s.16(2) (*NTC note: have assumed intention was to refer to section 17(2)*) of the National Model Regulations, where the Rail Safety Regulator may exempt a rail transport operator from the requirement to consult with any particular person or body under sub-regulation (1). It is recommended that this provision be included.	The need for this specific exemption power has been made redundant by including a power for the Regulator, under Part 6 – Exemptions, to grant exemptions to provisions of the NRSL that may have the same effect as the excluded provision. No further action proposed.
Reg. 22 to 25 **Network Safety Rules**	QLD TMR	*Recourse for affect parties* The sections in this division do not prescribe a course of action in the situation where a rail infrastructure manager and other managers do not reach agreement. This could create the situation where a rail infrastructure manager imposes commercially prohibitive conditions on an operator without that operator being able to have the conditions reviewed by the regulator. Additionally there is no recourse for affected parties following the establishment or amendment of network safety rules.	
	Transfield CRC QR National GWA ALC	*Explicit requirement* It is unclear why network rules have been specifically included in the NRSL. It is acknowledged that network rules is an important safety critical Industry standard; however, is	Network rules have been specifically included in the draft regulations to address an identified problem of network rules being changed by rail infrastructure managers without prior consultation (see s.6.5.8 of the regulatory impact statement). Making

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	Bluescope Steel	not considered more important than a range of another industry standards. These should all be managed through the development and maintenance of an appropriate safety management system. It is not appropriate to manage them by regulation.	the consultation requirement explicit ensures rail stock operators are made aware of changes and have the opportunity to raise any concerns with the rail infrastructure manager. No further action proposed.
	Transfield CRC QR National	*Correct Terminology* Industry suggests that the existing generic use of the term "Network Safety Rules" throughout the regulations should be amended to reflect the correct term of "Network Rules", and that this term should be applied consistently throughout the regulations. Other references to incorrect terms such as safe working system rules, and safe working systems all need to be amended to the correct use of the term "Network Rules".	The next version of the regulations will be amended accordingly.
	SteamRanger HR	*Mandatory Requirement* Assurance is sought from the tourist and heritage sector that they will not have Network Safety Rules imposed upon them.	The intention behind the network rules provisions is to ensure affected parties are made aware of any changes made to the rules and have the opportunity to comment on proposed changes. According to ATHRA, there has been a misunderstanding that these provisions require mandatory use of the Australian National Rule Book. Network safety rules will be amended to read network rules.
	Transfield CRC QR National	*Interpretations* R.21 – Industry suggests that this section be redrafted to remove the definitions of 'non-local' change and 'local change' as this does not reflect reality and adds unnecessary confusion. Industry also suggests that the definition of stakeholders be amended by adding either: "Rail infrastructure managers with whom interface agreements are required" or "Rail infrastructure managers with management control of adjoining infrastructure"	The next version of the Regulations will be amended accordingly.
	RTBU National	*Explicit Consultation Requirement* The RTBU supports the inclusion of an explicit requirement to consult	Noted. No further action proposed.

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		affected parties.	
r. 28 **Interface coordination - rail infrastructure and private roads**	NT Transport	NT has requested the description of what is prescribed in the r.28 be changed to a single protocol.	The description will be amended as follows – 'the protocol made under s.21 of the AustralAsia Railway (Special Provisions) Act on 25 March 2004 and published in Northern Territory Government Gazette G13 on 31 March 2004.'
r. 29 **Disclosure of train safety recordings**	Asciano	Reference to s.133(e) should be to s.129(e).	This reference will be amended.
Reg. 32 **Fatigue risk management plans**	HRSA (Industry)	Comments provide some context as to the differing operational environments between tourist and heritage and commercial operations, citing the relative simplicity of tourist and heritage rostering practices versus the more complex environment of commercial rosters with stop-overs.	The fatigue risk management provisions included under r.32 have been drafted to prompt operators to take into account the variety of risks in this complex area. The operator must consider a number of factors, as they may be appropriate to their operations, with relatively few mandatory items included under the regulation. The drafting of the provision and the 'considerations' provide for the flexibility to account for differing operating and rostering environments, and scalability as required by particular operations. No further action proposed.
	HRSR	Considers that there is significant self-regulation and broader industry pressure with the belief that there is currently good management of the problem. Therefore raises concerns as to the appropriateness of including the detailed provisions in the NRSL.	This is discussed in s. 6.5.3 of the regulatory impact statement. No further action proposed.
	Downer EDI	It is considered very onerous for some operators to maintain awareness of and demonstrate compliance to developments in research related to fatigue.	This provision is drafted as a 'consideration' and provides for a level of flexibility in its application, which would be 'so far as is reasonably practicable'. Awareness of advancements in technology and techniques with regard to fatigue risk management may be achieved through independent research, the use of advice from consultants or potentially the Regulator

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			itself in its role in the provision of advice, information, education and training. No further action proposed.
	QLD TMR	S.52 of the draft NRSL provides that the rail transport operator is required to have systems and procedures for the scheduling, control and monitoring of railway operations are established and maintained so as to ensure the safety of the manager's railway operations. S.32 of the draft NRSL Regs. provides for what the rail transport operator must consider in fatigue management. However, it appears that there are currently no specific mandatory requirements on the documentation of education and scheduling procedures to monitor the effectiveness of fatigue management (as stated on page 57 of the regulatory impact statement).	R.32(2)(c) provides for the rail transport operator to establish and maintain documented procedures to manage, so far as is reasonably practicable, fatigue related risks, including the provision of appropriate education and information in relation to the identification and management of fatigue risks that are relevant to the rail safety work being undertaken. No further action proposed.
	RTBU WA QLD TMR	Support for defining hours of work and rest.	The expert panel put recommendations to the ATC in May 2011 suggesting that a fatigue framework be adopted and that additional work on defining the outer hours and to whom they apply be the subject of further work. This work is being undertaken by the NTC and will be the subject of an additional regulatory impact statement to be developed in early 2012. No further action proposed.
Reg. 32 **Fatigue risk management plans**	QLD TMR	Page 62 of the regulatory impact statement states that a prescriptive approach (to fatigue management) may only require those regulated to achieve minimum standards and may not encourage continuous improvement or innovation. This statement does not recognise that the majority of industry is innovative, have a mature safety culture and are serious about safety (as previously stated by industry: 'safety is good for business).	The regulatory impact statement is to examine all potential impacts of a given policy option, including theoretical outcomes. It should also be noted that Regulators have indicated that the level of maturity with respect to fatigue risk management varies amongst the industry. The difficulty noted is inherent to a more detailed approach to fatigue risk management, which on balance and despite this difficulty, is still broadly agreed as beneficial. A detailed discussion of the proposed risk management requirements is included under section 6.3 of the regulatory impact statement. No further action proposed.
	NSW	Scl.(a-c) are not fatigue-related risks	The breach for operators is not to have

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	Transport	as the wording of cl.(2) might suggest. The main problem is that it is unclear if the breach is a failure to have documented procedures, or a failure to manage fatigue-related risk. NSW General Regulations cl.13(c) pertaining to quantitative measures has been omitted. This may be covered in the safety management system requirement, Schedule 1 cl 9; however, this contains no express obligation for the operator to measure the effectiveness of the fatigue program. NSW General Regulations cl.13(e) lists the need for education and training as a matter for consideration by the operator. The current clause makes education and information a mandatory provision which is supported however, reference to training has been omitted and replaced with 'information'. Training is a different and higher level requirement. Omission of 'training' may signify that training is never applicable. NSW advocated for 'information' to be included as an option in recognition that workers performing low risk tasks may require only basic written material. Consider recommending reinstatement of reference to training as an option. Suggested drafting amendment "provision of appropriate information, education, or training'. This means that training is not mandatory but may be applicable.	prepared and implemented a fatigue risk management program in accordance with the prescribed requirements. This would include the documented procedures listed in r.32 (2) which are required to manage fatigue related risk. These are mandatory minimum procedural requirements. An operator may choose to include additional procedures to manage specific fatigue related risks for their operations. It is not considered necessary to include a reference to 'training' The provision as drafted is sufficient.
	QLD TMR	Raises a number of concerns around the impact assessment contained in the regulatory impact statement regarding the issue of prescribed hours of work and rest for rail safety workers, particularly with respect to the removal of New South Wales existing provisions. Notes that a framework is being developed to supplement Option 2 (to develop suitable boundaries as a component of the risk based approach), therefore, it would be more appropriate to include the assessment in the subsequent	Due consideration has been provided to the safety, practical and economic impacts of the option to remove the existing limits in New South Wales. It should be noted that the options provided are to be supplemented by a later regulatory impact statement. The expert panel's proposed framework for regulating hours of work and rest is to be completed by November 2011 and presented to transport Ministers for voting. The fully-developed framework and options for how this framework will be handled within the NRSL will be the subject of a

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		regulatory impact statement as opposed to including the fatigue risk management (and the potential benefits) in this regulatory impact statement.	separate regulatory impact statement. No further action proposed.
	TSV	Queries why r.32(1) is relatively lengthy in comparison to r.32(2).	R.32(1) requires that the operator 'consider' certain elements when preparing a fatigue risk management system if those elements are relevant to their risk profile. It embodies the latest in human factors research, included to prompt operators to take into account a variety of risks in this complex area, without being unnecessarily onerous for smaller operators (i.e. drafted as considerations rather than mandatory elements). Such clauses are not drafted to indicate an exhaustive list, but rather to recognise that such factors would need to be at least considered when considering fatigue risk management. The mandatory requirements under r.32(2) are few, relating to safe scheduling practices, education for rail safety workers and monitoring of management systems. Drafting in such a way is considered to support the performance-based nature of the NRSL and retain scalability. No further action proposed.
	QLD TMR Westnet	Support for a hybrid risk-based model for setting hours of work.	The expert panel put recommendations to the ATC in May 2011 suggesting that a fatigue framework be adopted and that additional work on defining the outer hours and to whom they apply be the subject of further work. This work is being undertaken by the NTC and will be the subject of an additional regulatory impact statement to be developed in early 2012. No further action proposed.
	HRSA Westnet	Operators require flexibility in working hours due to delays or emergency situations	The hybrid approach recommended by the expert panel will allow the risk management process to operate within boundaries, and provide a degree of flexibility to assist operators in managing such circumstances. No further action proposed.
	HRSA	Flexibility provided in working hours should not be provided in such a	As proposed by the expert panel, for those operators requiring longer hours

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		manner that yet more “paper work” has to be undertaken for little or no return.	or greater flexibility in working time arrangements than ‘standard hours’, an application process exists. It was proposed that operators that want to work under these ‘non-standard hours’ would be required to provide evidence to the Regulator about how they propose to control any increase in fatigue-related risk attributable to the non-standard working time arrangement. These operators would need to demonstrate that the additional controls they put in place will produce the same or a lower level of risk than is associated with ‘standard hours’. The National Project Office is currently progressing the development of operational guidelines to enable the implementation of the expert panel’s report. No further action proposed.
	RTBU Queensland	Query whether a rail transport operator, under the expert panel majority proposal, makes an application to the Regulator that could impact on working time arrangements in an Enterprise Bargaining Agreement.	As with the variety of other law that rail transport operators must comply with (including work, health and safety law), operators must too comply with both enterprise bargaining agreements (EBA) as well as the NRSL. The NRSL is concerned solely with rail safety. Industrial agreements, EBA and rostering committees are the mechanisms by which the multitude of other considerations, such as the family, social, work/life balance, and staff productivity aspects that impinge upon working time arrangements, are managed. In needing to comply with EBAs, working hours may be limited further beyond what is specified by the Regulator for safety purposes. For example, where a rail transport operator may apply to the Regulator to work to a maximum shift length of 14 hours, but the EBA for the relevant rail safety worker specifies a maximum shift length of 10 hours, the rail safety worker will only be required to work a maximum shift length of 10 hours or the operator will be in breach of the industrial agreement. In effect, any limits based on a safety perspective will safeguard those employees not covered by an industrial agreement or place a ‘safety net’ within which industrial agreements will

Ref.	Submitted	Comment Summary	NTC response
			operate. No further action proposed.
	RTBU Queensland	Request to provide examples of rail operating circumstances in which employers may apply to the Regulator for alternative working time arrangements under 'non-standard hours'.	Operators will need to demonstrate to the Regulator how they propose to control any increase in fatigue-related risk attributable to the non-standard working time arrangement. This may include accounting for emergency situations where additional controls are put in place or standard routes of service where engineering controls, such as automatic train protection, are employed to effectively manage the increased level of fatigue-related risk. No further action proposed.
	NSW Transport	It is considered that the proposals for the management of fatigue contained within the NRSL are an improvement from the national model law (which was silent other than for the general requirement for a Fatigue Management Program). However, they are still overall insufficient to manage this critical area for safety without the inclusion of a "safety net" (legislated hours of work and rest) within which the risk management framework of the Act can operate. The suggestion is to include hours of work as set out in Schedule 2 of the NSW Rail Safety Act) with the capacity for rail transport operators to apply for exemptions. It is understood that the further work being conducted on fatigue risk management in developing the expert panel framework will be the basis of a second regulatory impact statement to be available in the first half of 2012. It is considered that this process is necessary to ensure that the NRSL manages fatigue in a comprehensive manner.	The comment is noted and will continue to be considered during further policy development, the details for which are outlined in the regulatory impact statement. No further action proposed.
	RTBU National	It is argued that the lack of progress in advancing fatigue since the model bill was passed in 2006 is disappointing. It is further argued that the formation of an expert panel in late 2010 has not designed a framework that will produce the best outcome for all parties and will not produce a long term solution.	
r.32. 33, 34	NT	R.32, 33, 34 and 35 – the cross	Noted –The references will be

Ref.	Submitted	Comment Summary	NTC response
and 35 **Rail safety workers** **Exemptions conferred by the Regulator**		references should be to s.270(2) of the 4 July version of the NRSL.	amended in the next version of the Regulations.
r. 33 **Application for exemption**	TSV	Reference to s.211(2)(c) should be to s207(2)(c).	The references will be amended in the next version of the Regulations.
r. 34 **Prescribed details for notices** r. 35 **Application for variation of an exemption**	TSV	*Incorrect Act References* TSV queries whether the reference in r.34 to s.213 should read s.209 and the reference to s.215 should read s.211 TSV queries whether the reference in r.35 to s.214 should read s.210 and the reference to s.217 should read s.213	The next version of the NRSL will be amended accordingly.
r. 41 **Periodic information to be supplied**	NSW Transport	*Scope of operations for which reporting is required* In relation to s.41(1)(b)(i), it is recommended that the NSW General Regulations wording be used: "in respect of a railway over which the operator has management and control" should be replaced with "in connection with the operator's railway operations".	It is unclear that the proposed amendment would have any effect, as an operator is accredited to have effective management and control of a railway. The 'operator's railway operations' may be read to have the same meaning. No further action proposed.
	NT Transport	Queries the requirement for an operator's annual report to forecast the number of rail safety workers and contractors in the current (next) year.	It is considered valuable to the Regulator to gain an understanding of an operator's future projections for its operations (as required under r..41(1)(b)(ii) and (iii)). It may utilise the information required under 41(1)(b)(i) to assess the capacity of the operator to undertake its projected railway operations. No further action proposed.
	NSW Transport	*Reporting of rail operator data* A requirement for rail infrastructure managers to report the number of kilometres travelled by freight trains, passenger trains and self-propelled infrastructure maintenance vehicles on track over which the manager has control, has been excluded. NSW believes that the clauses should be included, as they provide useful information for the Regulator.	The reporting requirements for rail infrastructure managers have remained consistent with those in the Model Law. An early draft of the National Regulations extended reporting requirements to those as mentioned. However, on review, it was determined that this information was substantially available from rolling stock operators, to which the requirements continue to apply.

Ref.	Submitted	Comment Summary	NTC response
			No further action proposed.
Reg. 43 **Fees**	Heritage Rail SA SteamRanger HR Graham Wilson	*Cost Recovery* The tourist and heritage sector has expressed concern that the principle recovering the full cost of accreditation would see the sector closed down. However, the tourist and heritage sector does not expect commercial operators to subsidise not for profit operations. The sector believes State Governments should continue to support their local Heritage operators proportionally or that tourist and heritage operators should be exempt from fees.	The issue of cost recovery is outside the scope of the regulatory impact statement. However, the tourist and heritage sector concerns have been noted and forwarded to the National Rail Safety Regulator Project Office. No further action proposed.
Miscellaneous			
Interaction with the Model Work Health and Safety Laws	AI Group	Suggests adoption of the model work health and safety law as the primary legislation for implementing the NRSL that will be regulated by the National Regulator and developing a set of regulations, with appropriate supporting codes, which include all of the requirements that are specifically relevant to rail safety. If this cannot be achieved in the short term, a review process should be agreed to enable further analysis of the interaction of the two sets of laws at the earliest possible time.	COAG has directed that the NRSL be developed under the 'umbrella' of work health and safety legislation. Work health and safety law aims to ensure the health and safety of workers and workplaces, including rail workers and others exposed to railway operations (for example, rail patrons and road users). The NRSL has a broadly similar objective to work health and safety legislation, but focuses on matters of safety management more specific to railway operations. The NRSL complements work health and safety legislation. The NRSL has been aligned with the model work health and safety law in a number of areas. This does not require duplicating the latter in its entirety; it only applies to provisions that are necessary to support a functioning body of rail safety legislation and which correspond to a provision of the Model Work Health and Safety Bill. A list of the draft National Law provisions that have been harmonised with the Model Work Health and Safety Bill is included in Appendix C of the regulatory impact statement. No further action proposed.
General comment	QLD Transport	Non-inclusion of whistle blower protection provisions	It is proposed that this matter be placed on maintenance program. The NTC will explore what currently exists in states and territories. Note that the law does include anti-discrimination provisions against employees – see

Ref.	Submitted	Comment Summary	NTC response
			section 223. No further action proposed.
Fee Structure	V/line	*Fee Structure* V/Line understands that the structure of Fees has yet to be determined	This project is currently being undertaking by the National Rail Safety Regulator Project Office. No further action proposed.
Full cost recovery	WestNet Rail	*Principle of full cost recovery* Industry remains concerned that the aim of achieving full cost recovery from industry to fund the National Regulator office may have serious impacts compare with the current jurisdictional structure.	
Regulator Duties	MVHR	*Regulator Duties* Further clarification is requested regarding how a member of the public can report unsafe infrastructure under the draft laws and how the regulator will deal with these allegations.	It is anticipated that the Regulator will develop processes by which concerned members of the public can report concerns with rail infrastructure. The Regulator will have the ability to investigate any allegations in accordance with their power under the NRSL. No further action proposed.
Transitional arrangements	ATHRA	Seeking 5 year transitional period.	Once substantive law is settled, transitional arrangements will be considered. No further action proposed.
	NSW Transport	Clause 22 Rail Safety (General) Regulations 2008 (NSW) specifies that the operator notify the regulator in writing of details of consultation: • accreditation is subject to the condition that the operator notify of any decisions, events or proposed changes listed in column 2 of the Table to the clause, and details of consultation about such decisions, events or changes, within the period specified in column 3 of the Table. • For the purposes of the above requirement, details of consultation are to include details of the persons consulted and when and how those persons were consulted and the results of consultation. It is recommended that these provisions be included in the National Regulations.	It is noted that the National Regulations (r.8 and r.9) include equivalent provisions to Rail Safety (General) Regulations 2008 (NSW) in so far as general consultation reporting requirements for the safety management system and an equivalent provision requiring notification to the Regulator in the event of a decision, event or change as described in the Table to the clause. It is further noted that the existing NSW regulation requires more specific consultation reporting requirements in relation to the Table to the clause than is required in the National Regulations. There are extensive consultation requirements throughout the NRSL. It is considered that such reporting requirements; however, may be onerous for all operators under a national scheme; although it is noted that the Regulator may impose an equivalent condition on an operator's accreditation if it is deemed necessary based on the application.

Ref.	Submitted	Comment Summary	NTC response
			No further action proposed.
Fatigue and drug and alcohol programs	NSW Transport	It is recommended that the following requirements be included in the National Regulations: - A description of the applicant's fatigue management program; and - A description of the applicant's drug and alcohol management program.	It is noted that a safety management system is broader than just the written plan that describes it; the latter being what is referred to in the NRSL (as well as any other relevant information). It is noted that existing provisions already grant the Regulator sufficient powers to request further information if it is required to assess as operator's competence and capacity to conduct railway operations. It is considered that adding explicit provisions as suggested may serve to limit the provision to only those programs listed, limiting the Regulator's broader powers to require further information as is currently the case. As such, no change is proposed for this provision in the NRSL; instead it is considered more appropriate for further details on the documentation required for accreditation to be addressed via comprehensive guidelines. No further action proposed.
Evidential burden of proof	QLD TMR	Concerns over inconsistencies throughout the law regarding offences that provide a defence of reasonable excuse about who bears the evidential burden of raising evidence of reasonable excuse.	For offences against safety duties the policy intent is for these to be consistent with the model work health and safety law. In this regard s.56 – s.58 are consistent with respect to the evidential burden i.e. s.56 (reckless conduct) places the evidential burden on the prosecution to show no reasonable excuse. For all other offences that provide for a defence of reasonable excuse there should be consistency regarding where the evidential burden is placed. This will ensure alignment with model work health and safety law as well. It is proposed that the following offences specify that the evidential burden rests with the accused to raise evidence of reasonable excuse to be consistent with other offences in the law that already specify this requirement – s.73(omitted), s.196, s.226 and s.227. These changes will be made in the next version of the RSNL.
Location of	AI Group	Suggest movement of provisions	Noted.

Ref.	Submitted	Comment Summary	NTC response
provisions		about accreditation, Registration, and safety management to the Regulations.	No further action proposed.
Application of the NRSL	Public Service Commission – QLD (PSC)	**Exclusion of certain State based Acts** PSC does not support the exclusion of the *Public Sector Ethics Act* from National Laws. PSC supports the view that it is appropriate that the *Public Service Act* not apply to National bodies established under National Laws, and also supports the view that the *Public Interest Disclosure Act* apply under National Laws, including the RSNL.	The exclusion of certain state based Acts is considered justified in NRSL as their intention is to introduce a national system for the regulation. Given the nature of a national system, consistency across jurisdictions is critical. The proposed law currently does not provide a list of excluded state based Acts. However, if specific legislation is to be excluded, uniform provisions of a kind usually contained in the equivalent Act of a state will be included in the Law. If uniform provisions are not provided, jurisdictions will be able to reference these state based Acts in their application law. No further action proposed.
General comment	VIC DoT	*Application Legislation* It is unclear from the NRSL which procedural and evidentiary provisions can/will be included within the application legislation	A template application law will be provided for consideration of states and territories. *Rail Safety National Law (South Australia) Bill 2011.* No further action proposed.
Custodial penalties	AI Group	Noting the comment box around the issue of custodial penalties in the NRSL: With respect to the interaction between model work health and safety law and the NRSL, it appears to be incongruous to have similar provisions in both pieces of legislation with variations that impact on obligations and/or different penalty levels. As most of the variations relate to lower penalties being applicable within the draft NRSL, it would be expected that serious breaches would be prosecuted under the work health and safety laws, rather than the NRSL. If this is the case, it would appear that the variations may lead to "rail" duty holders to underestimating the ultimate obligations and penalties that may apply to breaches of the work health and safety laws that apply. The final analysis of the NRSL must include a direct comparison of similar obligations, duties and penalties	When considering model work, health and safety law, the same cause of action may give rise to breaches under both regulatory schemes. Therefore, it was necessary to align the penalty framework where similar offences were involved. If alignment is not achieved between model work, health and safety law and the NRSL, an unfavourable situation of 'penalty shopping' between Regulators may develop. This is described in the regulatory impact statement. An analysis of the areas of model work health and safety laws which overlap with the NRSL, and those offences that constitute a breach under both regulatory schemes, was completed. The regulatory impact statement outlines the methodology for aligning the relevant penalties. A custodial penalty has been included for a breach of a safety duty with reckless conduct to align with the approach in the model WHS legislation.

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		within the work health and safety laws.	
	Macmahon/ MVM	Agree with the penalty structure proposal. Believe that, except for penalty type 1 offence that may attract similar penalties under common law, the application of custodial penalties is not warranted.	Noted. Custodial penalties have been aligned to the model work health and safety precedent, with such penalties applicable for a breach of a safety duty with reckless conduct (up to five years imprisonment).
	Teresa Murphy	*s.172 - Offence to assault, threaten or intimidate rail safety officer* Maximum penalty of $10,000 with no imprisonment is not aligned to analogous provision in model work health and safety (offence to assault, threaten or intimidate inspector), which is $50,000 for an individual, or 2 years imprisonment or both, or $250,000 for a body corporate. Query why this is not aligned.	The methodology focussed on aligning with model work health and safety where the same cause of action may give rise to breaches under both regulatory schemes. As assaulting a rail safety officer would not be prosecuted under the equivalent provision under model work health and safety for assaulting/threatening/intimidating a health and safety inspector, the two penalties were not aligned. Instead, the assessment of this penalty was performed through the methodology outlined in the regulatory impact statement (refer 6.7.2). A common sense approach, however, would suggest that the penalty should be aligned with this very similar model work health and safety provision. The penalty for this offence has been aligned with the model WHS legislation and now reads as suggested.
	NSW Transport	Request the alignment of custodial penalties of model work health and safety law for the following reasons: • Consistency amongst states and territories • Consistency with the consequences for breach of a duty set out in the model work health and safety law. • That the legal consequences of a breach should not depend on the industry in which a breach is committed. That is, it would be unjust for the penalty regime under the National Law to be different to the penalty regime under the model work health and safety law. • S.48 of the NRSL provides that a person may not be punished	The custodial penalties have been aligned to the model work health and safety precedent, with such penalties applicable for a breach of a safety duty with reckless conduct (up to five years imprisonment).

Ref.	Submitted	Comment Summary	NTC response
		twice in respect of the same offence under the NRSL and the model work health and safety law. A failure to align penalties would lead to comparisons between the Rail Safety Regulator and OHS Regulators.	
General penalties	NSW Transport VIC DoT	Query why penalties for certain offences have been increased or reduced under the NRSL compared to existing state-based rail safety acts.	In attempting to arrive at a national scheme for penalties in the law, a comparative analysis was conducted of maximum penalty amounts amongst the states and territories for any given offence. The analysis did not reveal consistency in how states and territories assigned dollar amounts to penalties and, as such, a national penalty framework was developed. The methodology behind this framework is detailed in the regulatory impact statement under section 6.7.2. Due to the lack of consistency, in determining a nationally consistent framework, some existing state or territory penalty amounts for a given offence will increase and some will decrease in order to bring them to a common figure. Prosecutions since state and territory implementation of the Model Bill have been made infrequently, with most states and territories reporting that they have not prosecuted any offences under their rail safety legislation. The impact of any change to maximum penalty amounts in the NRSL is therefore considered to be low. No further action is proposed.
	TSV	Notes that the 3 high level categories only apply to breach of safety duties (which are often difficult to prove). For consistency, proposes that this framework equally apply to other significant obligations under the Law e.g. in relation to risk management/ safety management systems requirements, accreditation/ registration requirements or non-compliance with notices. More particularly, queries whether: • Breach of enforcement requirements like compliance with improvement/ prohibition should be elevated to the maximum penalties contained in	Breaches relating to the safety management system, accreditation required for railway operations and compliance with prohibition notices have a penalty consistent with a Category 2 offence. This is considered adequate as Category 1 offences involve an element of recklessness and carry a significant penalty, which should be reserved for the most serious of breaches. Alignment with Category 1 for these offences would serve to increase maximum penalty amounts by a significant amount against current state and territory practices and is not supported. No further action proposed.

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		Category 1 (given that this is a critical part of the regulator's toolkit). • Breach of core accreditation/registration provisions, like operating without accreditation or breaches of condition/restriction of accreditation, should be elevated to the maximum penalties contained in Category 1 (given these are the pinnacle of the safety regime).	
	VIC Transport VIC TSV	*Infringements* Both s.231 and r.36 define what an infringement penalty provision is, which causes confusion. All infringement penalty provisions should be contained in the regulations, which can refer to the Act. This allows greater flexibility to include new provisions or amend infringement amounts.	Noted – however, it is not proposed that all infringement penalty provisions be contained in the National Regulations as opposed to the Act.
	VIC DoT	*Indictable offences* It will be necessary to provide clarity around which offences are taken to be indictable.	The comment is noted. To ensure consistency in court proceedings nationally, it is considered that the NRSL prescribe which offences are to be dealt with summarily and which are to be indictable. Consideration of this matter has not yet occurred and it is recommended that the issue be referred to the maintenance program.
	VIC DoT TSV	*Infringement notices* Various issues and significant concerns raised about which offences should be infrangible (i.e. which are strict liability offences), infringement penalty values, their appropriateness given the maximum penalty amounts and the interplay with state and territory infringements legislation.	• The comments are noted. The table that sets out offences that are infringable has been significantly re-drafted and take into account the concerns raised by Vic Transport and TSV
Regulatory impact statement			
pages 78-81 **Drug and alcohol**	QLD TMR NSW Transport	**Offences – tampering, interfering or destroying samples** The RIS makes reference to offences for interfering, tampering or destroying samples, however these do not appear to be included in the draft law.	These offences will be included in each jurisdictions application law. No further action proposed.
	RTBU	*Discrepancy between RIS and draft*	The recommended offences for alcohol

Ref.	Submitted	Comment Summary	NTC response
	National	*Law* There appears to be an inconsistency between offences recommended in Option 2 in the regulatory impact statement and what has been included in Division 9.	and drugs under Option 2 (p78 RIS) have been included in s.126 of the NRSL. Other offences are covered in s.124 and s.125, with the exception of offences for tampering, interfering with or destroying a test sample. These will be included in the application law of each jurisdiction. No further action proposed.

Comments on the regulatory impact statement

General comment	VIC DoT	DOT outlined a number of concerns with the RIS: • the primary consideration for fundamental change in regulatory and institutional settings should be improving safety outcomes. Cost and efficiency considerations should be secondary objectives for the proposed change; • the assumptions in the RIS needed to be tested against the different operational and regulatory settings in each jurisdiction; • there was a lack of industry support from major metropolitan operators and some intrastate operators; and • there was a lack of evidence and rigour in defining the problem, assessing the costs and benefits of the proposal and alternative options to address the problem.	Responses to those respective concerns are as follows: • A body of rail safety law that supports improved levels of safety within the rail industry is a primary objective of this reform. The RIS has assessed safety impacts of the proposed NRSL. Furthermore, cost/efficiency impacts and safety are not mutually exclusive. It is reasonable to conclude that reducing safety compliance costs that do not support enhanced safety (i.e. regulatory red tape) would release funds that may be allocated to measures with genuine safety benefits. • (this comment has been addressed further below in this table) • The NTC will refrain from asserting levels of industry support for the reform. Comments and concerns with the RIS have been responded to on an individual basis.
General comment	VIC DoT	An adequate RIS assessment would need to properly examine the following: • the benefit of a single national regulator is to harmonise (and avoid a duplication of) process burdens that impact a small number of interstate operators in a relatively minor way; • harmonisation and a national system of regulatory practice could best be achieved	Those matters were addressed in the 2009 RIS that formed the proposal for a Single National Rail Safety Law and Regulator. In approving that proposal, COAG directed that the Project Office and NTC take steps to develop a NRSL. The NTC has no mandate to redress the 2009 COAG decision or matters pertaining to it; it is therefore beyond the scope of this RIS.

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		through means involving less drastic change such as increased cooperative activity including national guidelines and common working and training arrangements between regulators; • economies of scale benefits can be achieved by alternative means (e.g. pooling training and recruitment activities and cross-vesting enforcement powers); and • determining the differences in net benefits and costs between all alternative options to achieve harmonisation of regulatory practice under a cooperative national scheme.	A more detailed discussion of what was addressed in the 2009 RIS and how this regulatory impact statement (and NRSL) build upon it is included in section 5 (Basis and structure of the regulatory impact statement) of this RIS.
Need to assess the impact of local variations from the Model Law	Transport NSW Transport WA Vic DoT	The RIS has assessed the impact of the NRSL by measuring the cost of adopting the proposed provisions, relative to arrangements under the Model Law. States and territories have, to varying degrees, adopted rail safety laws that have varied from the Model Law. Therefore, the approach taken in the RIS does not accurately reflect the true costs that would be incurred in moving from existing regulatory arrangements in each state and territory, to a NRSL and Regulator.	The RIS does not attempt to assess the costs of moving from existing state and territory, to a national rail safety law and Regulator. This was substantially undertaken in the 2006 RIS for the Model Law and the 2009 RIS that formed the proposal for a Single National Rail Safety Law and Regulator. Rather, it assesses what the impact would be of moving from provisions under the Model Law, to those under the NRSL. The purpose is not to assess the costs that would be incurred in practice. Rather, as is standard practice for amendments to national laws, the purpose is to measure the impact of NRSL proposals against the existing national rail safety law, i.e. the Model Law. Some states have indicated that they may undertake additional RISs, to assess the cost of moving from regulatory arrangements in their state to those under the NRSL and Regulator. However, these would be undertaken separately to this RIS. Further discussion is included in section 5 (Basis and structure of the regulatory impact statement) of

Ref.	Submitted	Comment Summary	NTC response
			this RIS.
Operational and governance arrangements for the Regulator	VIC DoT	If the current draft RIS is restricted to the national legislation, as proposed, there will be no further opportunity for assessment of other key elements of the national proposal. These include: ▪ size of the national regulator ▪ relationship between the national regulator and State/NT regulators ○ direct regulation by the national regulator vs. Service Level Agreements with local regulators ▪ degree of centralisation of the functions of the national regulator ▪ governance arrangements for the national regulator ○ financial accountability ○ powers of responsible ministers to direct the national regulator ▪ reporting requirements ▪ means and extent of cost-recovery for regulatory services	The regulatory impact statement is restricted to assessing amendments to the Model Law, necessary to form a functional National Law. Some governance matters are included in Part 2 of the National Law. However, other matters, such as the forming of service level agreements between the Regulator and state and territory government agencies, were addressed within the scope of the Regulator's proposed delegation powers. Some of those were addressed within the National Partnership Agreements between those bodies and do not constitute legislative amendments.
s. 2.4 **Rail Industry Overview**	WA Regulatory Gatekeeping Unit	Error in the draft Regulatory Impact Statement Page 8 of the regulatory impact statement states that in 2009 the train kilometres for each State and Territory were proportional to the population of each State and Territory. This statement is contradicted by available evidence as well as the sources cited in the regulatory impact statement itself. According to Australian Bureau of Statistics (ABS) population data (ABS, cat no. 3101.0) WA accounted for 10.2 per cent of the national population as of the December quarter 2009. However, WA had a 17.7 per cent share of national train travel in 2009 according to the ATSB Transport Safety Report. In 2009 WA's share of train travel was significantly greater than the national share on a per capita basis. Figure 1.5 of the report Rail Accident	This is correct. Suggest inserting the word "generally" into the sentence, or if further information is considered necessary, inserting a sentence which reads "with the exception of states such as WA and QLD where population density is relatively low and trains are required to travel long distances.

Ref.	Submitted	Comment Summary	NTC response
		Costs in Australia 2002 Report 108, Bureau of Transport and Regional Economics, cited by the regulatory impact statement for its railway accident data, shows that the share of train kilometres and population for WA and Victoria over 1979 to 2000 contradicts this statement.	
	RTBU National	The RTBU suggests this section has missed an opportunity to be forward looking in light of: the implementation of the Federal Government's National Transport Plan; historically high levels of investment by the Federal Government in rail freight transport; the change in the Federal Government's involvement in funding urban public transport; the creation of Infrastructure Australia; the development of land transport and national port strategies; the investigation of high speed rail; the impacts of climate and technological change which will impact on the industry; and the part played by the rail industry into the future as the resources boom transforms the Australian economy. An expanding, more technologically complex industry, in the view of the RTBU, will require expanded rail safety regulatory resources.	Comments noted. However, the purpose of this section is primarily to give a current overview of the rail industry rather than future trends.
s. 2.5 **Rail Safety**	RTBU National	The regulatory impact statement argues that it is difficult to draw reliable conclusions on any trends from accident data alone. It states that Figure 4 shows what appears to be a gradual reduction in rail fatalities in NSW between 2001 and 2009. The RTBU argues that a reduction from 34 to 6 fatalities in 9 years is far more than a gradual reduction. The RTBU argues the dramatic reduction is because of the implementation of the recommendations of the two special commissions of inquiry, the transformation of the NSW rail safety legislation, the creation of an independent rail safety regulator and accident investigator, together with a substantial increase in funding for rail safety regulatory functions. These have all been key factors in explaining rail safety trends in NSW.	Figure 4 (p.10) indicates that there has been a general trend downwards relating to fatalities and injuries over the past 10 years; s.2.5 acknowledges this, although it is still difficult to determine the extent to which this decrease may be attributed to any specific regulatory change. Further elaboration has been added to s.2.5 to discuss what regulatory changes may have contributed to this decreasing trend.
	VIC DoT	The analysis in this section is limited and possibly misleading. The view that Figure 5 shows a general	Comment is noted and the latest ATSB data has been reviewed to amend

Ref.	Submitted	Comment Summary	NTC response
		reduction in rail injury serious personal injuries is not supported by the data, especially if the Victorian data is excluded on the basis of the comment in footnote 20. A problem with the use of fatalities and serious injuries to determine safety trends is that, fortunately, these outcomes are infrequent and make trend analysis difficult. The ATSB publication Australian Rail Safety Occurrence Data 1 January 2001 to 31 December 2010 includes a wider range of rail safety indicators. Analysis of this information may enable more useful analysis of rail safety trends.	Figures 4 and 5.
	WA Transport	Rail safety trends have become confused in the regulatory impact statement as in the Introduction the figures related to rail injuries include level crossing accidents whereas Appendix D states motor vehicle level crossing accidents have been excluded from calculations. As the calculations of pedestrian injuries at level crossings do not differentiate between those accidents that involve the general public (akin to motor vehicle level crossing accidents) and those that involve rail safety workers the benefits resulting from the introduction of the NRSL are questionable. As is mentioned above this results in applying benefits to those areas that may develop improvements following introduction of the NRSL to unrelated areas. The transfer of these benefits suggests there may be more benefits being realised than could actually be achieved for that accident group, i.e. rail safety workers level crossing accidents.	An amendment will be made to ensure there is a consistent definition of incident.
s. 4 **Scope and Objectives of Reform**	Vic DoT RTBU National	The regulatory impact statement argues that governance arrangements were considered in the July 2009 regulatory impact statement The earlier regulatory impact statement related to the proposal before COAG for a single national rail safety regulator. In Victoria's view that regulatory impact statement was flawed and did not demonstrate a case for change or provide sufficient support for the	The regulatory impact statement addresses the difference between the model bill and the NRSL. It does not attempt to re-address matters leading to the COAG decision to establish a national regulator. Many of the matter mentioned are being developed by the National Project Office as operational matters and are running in parallel to the NRSL.

Ref.	Submitted	Comment Summary	NTC response
		proposal which was taken to COAG. If the current draft regulatory impact statement is restricted to the national legislation, as proposed, there will be no further opportunity for assessment of other key elements of the national proposal. These include: • size of the national regulator • relationship between the national regulator and State/NT regulators - direct regulation by the national regulator vs. Service Level Agreements with local regulators • degree of centralisation of the functions of the national regulator • governance arrangements for the national regulator - financial accountability - powers of responsible ministers to direct the national regulator - reporting requirements • means and extent of cost-recovery for regulatory services These decisions are important to the outcome of the national process and have been made subsequent to the initial COAG decision yet under the processes currently proposed they will not be subject to any form of impact assessment or public scrutiny. Given that the Draft RIS states that it does not address governance arrangements, it is puzzling that many the benefits of a single national system of rail safety regulation claimed in the Executive Summary of the report are not actually assessed. Whilst it is claimed that governance impacts have not been assessed, Appendix A: Amendments to the Model Bill and Regulations with no measurable impact includes a section (s9.2) on Governance provisions – Establishment of the National Regulator. This implies that these governance provisions have been assessed. If this is the case, why is it that a broader range of governance issues have not also been assessed?	
s. 6.1	WA	The statement at dot point 4 on page	This is not considered necessary. The

Ref.	Submitted	Comment Summary	NTC response
Overview of proposed risk management requirements	Transport	16 that the proposals included in the impact analysis are required for a harmonisation of the NRSL with the model work health and safety law. It should be amended to note that the model law was drafted to avoid any inconsistencies between that law and the Occupational Health & Safety (OH & S) laws and in particular contained provisions that resolved this by stating that to the extent of any inconsistencies the OH & S laws prevailed. All jurisdictions implemented the provisions that provided that the OH & S laws would prevail and the NRSL also includes these provisions.	statement regarding harmonisation of the NRSL with the model work health and safety law is correct. It should be noted that the NRSL also contains provisions that state that in the event of inconsistencies, the occupational health and safety legislation prevails (see s.46).
Transport WA	s. 6.3 Application of co-regulatory model	Prescribing requirements may, in some of the circumstances proposed in the NRSL and in comparison with alternative measures, be a sub-optimal means of supporting compliance. A better alternative may be more effective management by the Regulator of industry compliance with positive (rail safety) duties, such as “observations” and “non-conformance reports” as utilised in WA.	The potential benefits and risks of prescribing requirements in the NRSL are addressed in section 6.3 (Overview of proposed risk management requirements) of the RIS. It should be noted that the NRSL includes very few truly prescriptive requirements. Rather, some of the proposed amendments provide more detailed guidance on elements that must be addressed in an operator’s safety management system. For the most part, these requirements are scalable to the operator’s circumstances. They would not substantially impact on an operator who could demonstrate that the matter did not pose any significant safety risk to their individual railway operations. It is acknowledged in the RIS that more effective compliance management by the Regulator is an alternative to a greater degree of prescription in the NRSL. For the most part, this is how the NRSL has been structured. It is noted that more effective regulation of the NRSL is not precluded by the inclusion of additional degrees of prescription within it. However, there are circumstances, particularly those where a given

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			requirement has broad application across the industry, where it has been assessed that prescribing it in law would have benefits. These include better clarifying the compliance standard and supporting the Regulator in more effectively and efficiently managing compliance with the NRSL.
s. 6.4 **Scope and Objectives**	RTBU National	The RTBU argues there is a major weakness in this section as it does not recognise the role of rail safety workers, occupational health and safety representatives and trade unions. The purpose, objects and guiding principles of Model Law clauses have been altered to provide for effective involvement, consultation and cooperation in relation to the safety of rail operations. The RTBU argues that the relevant stakeholders should be more explicit, as in model work health and safety law, and include reference to rail safety workers, occupational health and safety representatives, unions and other parties. While the RTBU supports the additional objects in the NRSL, it believes the objects providing for effective involvement, consultation and cooperation should be amended as suggested by the union to more align it with the provisions of the model work health and safety law and to provide greater clarity.	Comment advocates for more discussion around unions, rail safety workers, occupational health and safety representatives and unions. In order to address the concern, rail safety worker impacts have been strengthened with respect to the enhanced consultation requirements in the NRSL as opposed to the Model Bill.
s. 6.4.2 **Railways to which the Act does not apply**	QLD TMR	It is important to be clear as to the intent of this option as section 7(2)(b)(iii) of the draft NRSL refers specifically to 'does not cross a public road' in relation to an excluded amusement railway. However, page 27 of the RIS provides that the railway does not operate on or cross a road or road related area (within the meaning of the Australian Road rules). Clarity on this is important in relation to railways such as the Seaworld monorail which crosses a road or road related area (a car park open to the public), however, does not cross a public road under the definition of the draft NRSL.	Noted. The regulatory impact statement has been be updated to reflect the definition in s 7.
6.4.4	RTBU	The RTBU argues that to grant	The exemption framework is

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Exemption Framework		exemptions to parts of an operator's safety management systems is wrong in principle. Accredited parties address their general safety duties in developing their safety management systems, and managing risks to safety, "so far as reasonably practicable". The regulator determines whether the system is compliant. The RTBU does not support option 2 for the introduction of an exemption process for rail transport operators from elements of their safety management systems. If option 2 proceeds, the RTBU emphasises the need for transparency and accountability in the process. Reasons for exemptions, and alternative risk management strategies, should be made available to the public. There should be a requirement that accredited parties' safety management systems stakeholders should be notified of an application for an exemption, and have the ability to make their views known to the regulator.	considered an integral part of regulating an industry such as rail where there is a great diversity in the nature and size of operations. It should be noted that operators applying for exemptions are still required to demonstrate they have the competence and capacity to manage safety risks associate with their operations.
s. 6.4.4 **Exemption framework**	TAS DTEI	Tasmania supports legislative capacity for exemptions to rail safety law and recognises that provisions of the draft law may impose an excessive regulator burden for some operators, while having only minor or negligible benefits to safety. Tasmania currently regulates low risk micro railways under all provisions of the Rail Safety Act 2009. Under the proposed exemption provisions, these railways may be partially or fully exempted from provisions of rail safety law establishing and appropriate regulatory oversight without diminution to safety	Noted
s. 6.4.5 **Powers with respect to interfaces with parties whose operations may impact rail safety**	NSW Transport	Not confident that the NRSL adequately provides for situations like a recent NSW Monorail investigation where there was a stand-off between the operator and the Foreshore Authority over a tree obscuring a section of line and station entrance, and there was no overarching authority to resolve the issue. Similarly, it's not clear whether situations of trees overhanging the corridor or trees outside the corridor boundary in	It is not practical for the NRSL to address all interfaces that rail transport operators may encounter; under the co-regulatory model the onus is placed on operators to manage such risks to safety.

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		danger of falling onto the track or potentially damaging other pieces of important infrastructure are covered. It is desirable that “regulatory reach” will be able to resolve all perceivable interface difficulties.	
	RTBU National	This is an important issue for rail safety workers as works by non-accredited parties in and around the rail infrastructure can pose a risk to rail safety workers. The RTBU supports option 2.	Noted.
s. 6.4.6 **Duty for loading & unloading**	BlueScope Steel	BlueScope Steel endorses the proposal of Option 3, BlueScope Steel would be opposed to any change that would adopt Option 2 A change would add approximately 150 rail safety workers to the Port Kembla Steelwork site alone. BlueScope steel agrees that option 2 would impose excessive obligations and requirements on rail transport operators for little apparent benefit beyond that able to be realised under Option 3.	Noted.
	RTBU National	The RTBU is disappointed the regulatory impact statement has not gone into any great depth about the extent of the problems in loading and unloading. Such an exercise would have involved a joint project between rail safety and work health and safety regulators. An examination of work health and safety reports reveals there have been deaths in the grain industry where employees have fallen from grain wagons during loading and loading operations. Whether this may have changed with rail safety regulator superintendence is an open question. The distribution of load irregularities between locations supervised by both sets of regulators should be more thoroughly investigated. It would appear that the options have been presented to favour Option 3 which calls for the inclusion of a safety duty for persons loading and unloading rolling stock in the national law. This option expands the regulatory reach of the rail safety regulator and does not expand the scope of employees deemed to be rail safety workers.	Information regarding load irregularities provided by the RTBU has been incorporated. There may be an overlap between work health and safety duties and the NRSL. The latter concerned with how rolling stock is loaded and the first more with behaviour during actual loading. The work health and safety law is an umbrella law and although there may be an overlap both should work together. It should be noted that the definition of rail safety worker has been included on the maintenance program.

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s. 6.5.1 **Safety Management System**	Macmahon/ MVM	Macmahon/MVM Rail agree with the proposal to adopt Option 2. Macmahon/MVM Rail note that s.44 and s.98 only make reference to "minimise the risk" if it cannot be eliminated. Macmahon/MVM Rail identify the s.44 and s456 of the draft NRSL are similar to s.16 and s.17 of the model work health and safety law. Macmahon/MVM rail feel that this does not go far enough in providing best practice and that Option 2 should be amended to include reference, within s.44 and s.98, to the hierarchy of control. This would further align rail safety and work health and safety legislation as the model work health and safety regulation utilises the hierarchy of control when referencing the elimination or minimisation of risk. Specifically this is references in the model work health and safety regulations s.6.3.1 Control of risk in construction work.	Reference to a hierarchy of control is not considered necessary. The NRSL requires that an operator consider a range of available control measures to minimise risk. This allows the operator to choose the most appropriate controls based on the safety risks posed by their operations, and is consider the best approach to support the principle of co-regulation and address the diversity of operators in the rail industry.
6.5.1 Safety Management System	RTBU – Head Office	The RTBU argues the regulatory impact statement needs to incorporate rail safety workers as an important active component of risk identification, risk assessment and risk control. The RTBU refers to the following clauses in the national law: s.3 'Objects of the Act' and s.48 'Principle of shared responsibility, accountability, integrated risk management' which includes participation, consultation and involvement in the formulation of measures to manage risks. We also refer to s97 'safety management system' which provides for consultation with rail safety workers, OHS reps and unions in the establishment, variation or review of the safety management system. The RTBU argues rail safety workers should be given training in their rights and responsibilities under rail safety law including the tools for their effective participation which includes risk management	As noted the NRSL creates an obligation for operators to consult with rail safety workers, occupational health and safety representatives and unions in the establishment, variation or review of the safety management system. The most appropriate mechanisms for meeting this consultation obligation should be developed between these parties, based on the nature and size of the rail transport operator's business.
s. 6.5.3 **Drug and Alcohol and fatigue risk managemen**	NSW Transport	Also, there are several areas of road/rail safety in NSW where The Independent Transport Safety Regulator (ITSR) provides information to NSW agencies. For example, detailed reporting on level	This is an operational matter for the National regulator.

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t plans.		crossing incidents. Clarification is needed on whether ITSR will continue to provide this level of information or whether that task would fall within the responsibilities of the national regulator.	
6.5.3 D&A and fatigue risk management	Macmahon/ MVM	Agree with the proposal to adopt Option 3 with the following provisos: - Macmahon/MVM Rail agree with all aspects of the drug & alcohol provisions. - Macmahon/MVM Rail agrees with in principle with the aspects of the fatigue risk management provisions. Comment: Macmahon/MVM Rail believes that there is a need to define minimum requirements in relation to fatigue. Macmahon/MVM Rail believe that full agreement with the fatigue risk management proposal must be deferred until the anticipated guideline is provided for consultation. Macmahon/MVM Rail also have concerns that, without a defined framework, contractors may still be required to comply with multiple, often conflicting, network owner rail transport operator fatigue risk management systems. This will continue to be an onerous burden on compliance to each rail transport operator's safety management system.	Programs need to be relevant to an operators risk profile and their assessment; as such, different rail transport operators will develop their own programs to suit their risk profiles. The minimum requirements for the fatigue risk management program will ensure a more consistent approach towards management of fatigue-related risks, which should serve to alleviate some of the concerns raised for contractors.
6.5.3 D&A and fatigue risk management	TSV	Page 89 A key issue discussed by the expert panel was a change to a "multi-tiered" or "performance-based" fatigue management regime. Under this framework, it was proposed that operators will need to adhere to 'standard hours' limits with respect to maximum work hours and minimum rest periods. Also, under this regime, operators may apply for 'non-standard' arrangements which allow for hours beyond these standard limits, and seek to demonstrate competence and capacity to operate under these conditions. A change to such a framework represents a significant change in fatigue management in the rail industry. While the draft regulatory impact statement does not discuss this potential change, it does note that: 'The framework will be fully developed by November 2011 and will be the subject of a separate	Noted.

Ref.	Submitted	Comment Summary	NTC response
		regulatory impact statement' (p.89). While the framework for fatigue management has yet to be finalised, there needs to be an adequate scientific basis to any framework proposed.	
6.5.3 D&A and fatigue risk management	QLD TMR	Page 85 states that 'there is insufficient evidence or research to suggest that removal of the 'safety net' from NSW will adversely affect safety. Page 86 states that 'the removal of the 'safety net' from NSW may result in changes to train driver hours. Such changes could include an increase in driver-only operations, shorter break times and potentially longer driving times'. These two statements might be considered contradictory when recognising that NSW introduced legislated hours provisions, because there were concerns about an increase in the prevalence of drivers doing extremely long shifts following privatisation of the government-owned railways. Has an assessment been done to ensure that operations currently undertaken in NSW will not suffer a reduction in safety following the removal of prescribed maximum hours (and minimum rest periods) as COAG agreed that any efficiencies gained in national legislation should not compromise safety? Queensland considers that a combined 'rules' and 'risk management' option would provide flexibility for industry that have the capacity to implement mature fatigue management strategies while provide a safety net to ensure that there is no reduction in safety. It is noted that a framework is being developed to supplement Option 2 (to develop suitable boundaries as a component of the risk based approach), therefore, it would be more appropriate to include the assessment in the subsequent regulatory impact statement as opposed to including the fatigue risk management (and the potential benefits) in this regulatory impact	Due consideration has been provided to the safety, practical and economic impacts of the option to remove the existing limits in NSW applicable to drivers only. The 'outer hours' to attach to the framework will be the subject of continued work and a later regulatory impact statement.

Ref.	Submitted	Comment Summary	NTC response
		statement.	
6.5.3 Fatigue Management Program	QLD TMR	Page 62 states that a prescriptive approach (to fatigue management) may only require those regulated to achieve minimum standards and may not encourage continuous improvement or innovation. This statement does not recognise that the majority of industry is innovative, have a mature safety culture and are serious about safety (as previously stated by industry: 'safety is good for business'), however, a 'safety net' will assist those without the capacity or maturity to effectively manage fatigue risks. While the RIS largely reflects the agreed policy position, and the content of the draft NRSL and regulations, there are still some issues relating to fatigue management that require resolution and finalisation. Therefore, it may be appropriate to include the assessment in the subsequent regulatory impact statement as opposed to including the fatigue risk management (and the potential benefits) in this regulatory impact statement. Queensland recommends removing the fatigue management content (including the estimated financial benefit) from the draft regulatory impact statement prior to the document being submitted to Ministers for approval.	Agreed.
6.5.3 Fatigue Management Program	RTBU National	The regulatory impact statement indicates that "based on the information available, the number of fatigue related incidents in Australia appears to be relatively low suggesting current arrangements are effective". In the next sentence the comment is made that "fatigue is frequently implicated in crashes as a principal cause or as a contributing cause". Two old sources, one 1988 and the other 1994, both non rail specific are referred to. The RTBU is concerned that much of the research, expertise and views which have informed the discussion about fatigue have been based on the experiences of the road freight industry, a recognised worst practice fatigue industry in Australia.	Noted - suggest quotes referenced are amended to not conflict with each other.

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		The RIS refers to "a general shift from purely prescribed approaches focused on working hours to a more systematic approach to managing fatigue related risk". The regulatory impact statement provides no evidence from the rail industry in Australia or overseas. The RTBU makes the point that working hours are determined by legally enforceable industrial agreements and many issues referred to in the RIS intersect with these instruments. This has not been recognised by the regulatory impact statement.	
6.5.3 Alcohol and drug management	RTBU National	The reference in the regulatory impact statement to alcohol and drug use in the rail industry is based on a generalisation. No evidence has been provided about the comparative use of drugs or alcohol in the rail industry, compared to other industries. Furthermore, there has been no examination of accidents; incident or investigation reports or coroner's court inquires where alcohol or drugs may have been a contributing factor. The RIS indicates that given public expectations generated by the road environment, drug and alcohol management has been a focus of recent policy development in the rail industry.	Little data is available to definitively draw data on drug and alcohol related accidents. The regulatory impact statement has used available data and made assumptions to assess the impact of the provisions.
s. 6.5.4 Testing for Drugs and Alcohol	NSW Transport	It is noted that during the development of the National Model Rail Safety Legislation there was no agreed national position on drug and alcohol testing. Similarly, the cost impact of the introduction of this requirement was not addressed in the associated regulatory impact statement the NTC prepared in 2005 in relation to the Draft Rail Safety (Reform) Bill (i.e. the National Model Legislation). Therefore, it is considered a significant omission that the most recent regulatory impact statement does not examine the cost associated with this proposal, particularly as NSW is currently the only jurisdiction to include a comprehensive drug and alcohol testing program. In addition, the regulatory impact statement does not examine the	The model law s.65 requires a rail transport operator to establish a drug and alcohol management plan. S.66 allows the regulator to enter into an agreement with a rail transport operator, and others, for the testing of the presence of alcohol or drugs. The current NSW operator testing program would come within the auspices of s.66 (testing by the regulator). The policy position agreed was that an operator would not test for compliance purposes but allows for testing by the regulator for compliance. The shift from the model law to the NRSL has simply been to simply remove operators from testing for compliance. No other jurisdiction adopted the NSW practice. It should be noted that assumptions regarding cost impacts where based on responses from all regulators.

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		proposal for the regulator to undertake post-incident testing, including the likely costs associated with the Regulator assuming responsibility for this function. Without this analysis, no estimate can be made of the likely impact this requirement will have on the resources of the Regulator, including whether the Regulator would in fact be capable of performing this function nationally.	
s. 6.5.4 **Testing for Drugs and Alcohol**	NSW Transport	The regulatory impact statement does not examine the cost to the NSW industry and regulator associated with the proposal to remove urine testing which is the predominant form of drug testing in NSW. Nor does the regulatory impact statement address the cost of introducing saliva testing. For instance, NSW understands that it is more expensive to undertake saliva testing than urine testing, both in terms of the cost of the kits and the laboratory analysis. It is also more time consuming to undertake on-site saliva testing (approximately 15 mins) as opposed to urine testing (approximately 5 mins) which imposes an additional cost.	Urine testing as a drug screening test has not being excluded under the national law. Testing procedures will be addressed in jurisdictional application law. It is anticipated that most jurisdictions will reference their roadside legislation. However, in jurisdictions such as NSW where a separate testing regime for rail has been developed, they have the option of including this in their application law. However, it should be noted that other testing methods will be required of prosecution purposes as the drug offence stated in the NRSL specifically states presence in oral fluid or blood. This is considered to have a low cost impact due to the low number of drug offence prosecutions undertaken in the rail industry.
6.5.4 Testing for Drugs and Alcohol	NSW Transport	It is noted that the statement on page 77 that “To date, there have not been any drug-related prosecutions” is incorrect. NSW Independent Transport Safety Regulator has successfully prosecuted for the offence of being under the influence of drugs, which is in fact reflected on page of 82 of the regulatory impact statement where it is stated that there are approximately 3 to 4 drug and alcohol prosecutions per year in NSW.	This sentence should be deleted.
6.5.4 Testing for Drugs and Alcohol	QLD TMR	The regulatory impact statement proposes that drug and alcohol testing procedures not be prescribed in the NRSL; however, it is important to clarify as the draft NRSL does prescribe some of the testing procedures. However, Queensland does support the proposal in the regulatory impact statement to maintain current	The NRSL provides the powers for the Regulator to undertake testing. It does not prescribe testing procedures; this will be left to the application law.

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		Queensland testing standards.	
6.5.5 Fatigue risk management – hours of work and rest	RTBU National	The introductory analysis in the RIS has a fundamental weakness in that it fails to recognise the pivotal role of collective bargaining between RTO's and unions. It fails to address hours of work and rest periods in legally enforceable industrial instruments, which legally override risk based approaches which cover the same subject matter. Additionally, the RBTU notes that evidence has not been provided to support statements relating to the NSW safety net; the impact of technological development and the exemption applications made in NSW and that further analysis is required in these areas. The RTBU opposes the option favoured in the RIS. The RTBU argues that options about a legislated safety net should be dealt with simultaneously with the risk based framework referred to in the RIS. This will be developed by November 2011 and will be the subject of a separate regulatory impact statement.	Agreed.
6.5.5 Fatigue risk management – hours of work and	WA Transport	The comment is made that a regulatory impact statement will be developed for fatigue amendments in defining working hours for rail safety workers. It is our understanding that the setting of outer hours will have the most significant effect on a cost benefit analysis for fatigue as most jurisdictions have in place fatigue management requirements that did not prescribe outer hours. Therefore, WA's outlook is that fatigue Net Present Value (NPV) should be excluded from Table 1 (page x) and Table 2 (page xi) calculations until this analysis is provided.	Agreed.
6.5.5 **Fatigue risk management – hours of work and rest**	WA Transport	WA notes that in this section and s.6.55 assesses the impact of not implementing NSW variations to the Model Law. WA queries why the regulatory impact statement does not include an analysis of not implementing Model Law variations from other jurisdictions.	The NSW provisions were put as an option for consideration and therefore costed. The COAG direction was to use the model bill as the benchmark and therefore costs of the NRSL were compared to the model bill and not the changes made by jurisdictions. A separate regulatory impact statement will be developed for the actual hours and the costs will include

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			the current jurisdiction positions.
s. 6.5.6 **Assessment of Competenc e**	TAS DTEI	Tasmania supports the recommended approach to the assessment of competence for rails safety workers. In adopting the model Rail Safety Bill 2006, Tasmania provided an alternative competence framework to the AQTF applicable to low risk isolated tourist and heritage reflecting the low risk nature of these operations. Tasmania's approach followed extensive industry and union consultation and the legislative provisions are supported by gazetted guidance material.	Noted.
s. 6.5.6 Assessment of Competence	RTBU National	Option 2 includes a provision to allow, if it is not reasonably practicable for the rail transport operators to assess competence in accordance with the AQTF/AQF, that they may assess competence by other means. The regulatory impact statement does not mention that the operator would have to satisfy the regulator of the other means or other applicable qualifications. No discussion or explanation is made as to what qualifications and competencies may satisfy the regulator, what benchmarks are to be used, if the reasons behind the operator satisfying the regulator are to be made publicly available, and how consistency of regulator decision making in relation to the new provision is to be assured. The RTBU opposes the introduction of the not reasonably practicable test. A further issue not referred to in the RIS is the need for the industry to develop two units of competency for rail safety workers in understanding their rights and obligations under rail safety law. The RTBU, during the development of the national law, has again raised the need to develop these units of competency and include provision for them as a sub clause in the assessment of competence clause of the NRSL.	The requirement for the Regulator to assess alternate proposals is not new. However, the wording in the NRSL has been amended to clarify that a rail operator has this option. The process for assessing alternative competence will be addressed under the Regulator's operating policies. It is anticipated that these will build on existing jurisdictional processes. The development of units of competencies for rail safety works in understanding their rights and obligations will be dealt with in a separate process.
s. 6.5.7 **Train Communica**	RTBU National	The importance of train communication systems was highlighted in the recommendations of the Glenbrook inquiry. As a	The standard for train communication systems will continue to be addressed under the maintenance program.

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tions		consequence of the implementation of these recommendations, NSW rail safety law was altered. The proposed national law does not transfer the NSW regulation to the National Law. The issue is covered in broad terms in s.51 'safety duties of rail transport operators'. Ss.(4)(f) states "the communications systems and procedures are established and maintained so as to ensure the safety of the operator's railway operations". The RTBU is concerned that the non-inclusion of elements of NSW regulation may weaken current rail safety standards. The RTBU argues that specific NSW regulations should continue as part of the national law until the review is undertaken, with this being the performance benchmark against which change is measured – or – be allowed to continue in NSW law until the process foreshadowed in the RIS produces a regulation which is at least equal to or superior to the existing NSW provision..	
6.5.8 Network Rules	BlueScope Steel	Under the current NSW Rail Safety Act and General Regulations the network rules are the domain of Rail Infrastructure Owners as defined in the NSW Transport Administration Act 1988, That is RailCorp, ARTC and Country rail infrastructure authority. Under the draft and regulation this appears to have been extended to rail infrastructure managers including private sidings and private rail networks. Bluescope Steel is concerned that the draft Law and regulation regarding network rules may impose additional unwarranted obligations on the managers of private sidings and private rail networks.	It should be noted that network rules do not apply to registered rail infrastructure managers of private sidings as they are exempt from safety management system requirements under the NRSL.
s. 6.7.2 **Penalties in NRSL**	NSW Transport	The proposal to remove custodial sentences from the NSW arrangements is a loss of an effective deterrent of a prison sentence for an individual involved in a breach.	Some states and territories currently include custodial sentences; however, as for monetary penalty amounts there exists little consistency in their application. Due to the lack of consistency, in determining a nationally consistent framework, some existing state or territory penalties for a given offence will increase and some will decrease in order to bring them to

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			a common arrangement. The penalty framework, including custodial penalties, has been aligned to model work health and safety law for the reasons described in s.6.7.2 of the regulatory impact statement.
s. 6.7.2	QLD TMR	The figures for subtype A and B breaches of duty should be amended to reflect the amounts contained in the draft NRSL (s.58 and s.59).	Error noted in the regulatory impact statement – amended.
s. 6.7.2	QLD TMR	Page 113 states that Queensland does not have corporate multipliers in their rail safety legislation. While technically this is correct (corporate multipliers are not included in the TRSA), under section 181B of the Penalties and Sentences Act 1992 (Qld) there is provision for a corporate multiplier for offences under Queensland legislation, including the TRSA. Penalties and Sentences Act 1992 181B Corporation fines under penalty provision (1) This section applies to a provision prescribing a maximum fine for an offence only if the provision does not expressly prescribe a maximum fine for a body corporate different from the maximum fine for an individual. (2) The maximum fine is taken only to be the maximum fine for an individual. (3) If a body corporate is found guilty of the offence, the court may impose a maximum fine of an amount equal to 5 times the maximum fine for an individual.	Noted - will amend RIS to ensure that the information provided is reflected.
6.6.2 Regulator to conduct CBA for mandatory safety decisions	NSW Transport	The regulatory impact statement fails to demonstrate what additional "safety" benefit will be derived from a cost benefit analysis requirement that is not otherwise achieved from the application of the 'reasonable practicable" test currently imposed on rail transport operators. Nor does the regulatory impact statement address whether this proposal will result in improved safety outcomes.	'reasonably practicable' part of this comment is addressed via the NRSL. Safety is assessed under s.6.6.2. Improved safety is not the major objective of this provision; rather, by requiring more rigorous analyses of applicable decisions by the Regulator, a cost-effective outcome for the rail transport operator is more likely.
s. 6.7.2 **Penalties in NRSL**	QLD TMR	The figures for subtype A and B breaches of duty should be amended to reflect the amounts contained in the draft NRSL (s.56 and s.57).	Table 4 to be amended.

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	QLD TMR	Page 113 states that Queensland does not have corporate multipliers in their rail safety legislation. While technically this is correct (corporate multipliers are not included in the Transport (Rail Safety) Act 2010), there is provision in s. 181B of the Penalties and Sentences Act 1992 (Qld) for a corporate multiplier for offences under all Queensland legislation.	This information will be included.
s.6.8 Impact assessment summary (General comment)	VIC DoT	It is noted that: ▪ a high proportion of the assessed benefits derive from provisions relating to fatigue and drugs/alcohol, which are not yet fully developed and therefore cannot be assessed with any accuracy ▪ the draft RIS estimates that tourist and heritage operators will face substantial net costs (between $m7.12 and $m12.22). ▪ there is no assessment of the aggregate impact of this impost on tourist and heritage operators ▪ there is no specific consideration of alternative options for tourist and heritage operators ▪ no estimates are provided of impacts by State/Territory ▪ it is stated that the estimated costs and benefits 'effectively form an addendum to those estimated in the previous regulatory impact statement of 2009', however the estimates in the 2009 RIS have not been reconsidered in the light of more recent decisions on the nature and structure of the National Rail Safety Regulator.	Responses are as follows: ▪ The RIS has been amended to only assess policy proposals that will form part of the National Law submitted to Transport Ministers for voting in November 2011. The assessment of some policy elements, i.e. maximum hours of work, has been removed from this version of the regulatory impact statement. ▪ Noted. ▪ A discussion of the impact on tourist and heritage operators is included in section 6.8 (Impact assessment summary). ▪ Flexibility for how tourist and heritage operators may comply with the National Law is in-built, i.e. through 'scalable' safety management duties and the potential for the granting of exemptions. Only options within the scope of COAG's direction to develop a National Law to support a single national rail safety regulator were assessed. ▪ Under a national Regulator model, the impact of a National Law by individual state and territory is of reduced significance; assessment of such impacts was deemed unnecessary. ▪ It is acknowledged that significant progress has been made in implementing arrangements that would support operation of the Regulator. However, the NTC is unaware that any of these

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			contradict or negate the conclusions drawn in the2009 regulatory impact statement.
Further disaggregating the impact of the NRSL to individual industry segments	DTEI Tasmania Vic DoT	The RIS should provide a more detailed analysis of the impact that the proposals would have on individual industry segments, particularly those operating on a smaller scale, such as many tourist and heritage operators. It should consider affordability, beyond just assessing the numerical cost.	The RIS and CBA have been updated in recognition of the issue of equity/affordability, which is particularly pertinent for tourist and heritage operators.
Appendix D (Cost-benefit analysis – general comment)	WA Regulatory Gatekeeping Unit	More stress testing and sensitivity analysis would be helpful - the sensitivity analysis conducted in the CBA is limited to a high and low discount rate. Stress-testing would be helpful, especially by escalating the standard costs (Appendix D page 148-149) and varying the assumed reduction in accident rates.	Sensitivity of the cost data was analysed also by assessing each proposal with high and low range estimates. This provides, according to best estimates, the highest and lowest costs and benefits that would reasonably be expected to result from implementing the reform.
Appendix D (Cost-benefit analysis – general comment)	WA Regulatory Gatekeeping Unit	For the purposes of the CBA, a representative group of operators was surveyed and their responses categorised into large companies, small to medium companies and tourist and heritage organisations. The distribution of these operators as well as the type of operators in the various jurisdictions may differ, leading to differential impacts across jurisdictions, especially in WA where the growth in train kilometres over 2001 to 2009 has been due to the growth of the mining sector. These differential impacts should be fleshed out in more detail. It would be useful to have some feedback from the mining sector on the proposals. The survey of rail operators that provided the information for the assessments identified 164 accredited operators nationally that would be affected. It is noted only 12 operators responded, or	The initial survey that formed the basis of the assessments in the draft regulatory impact statement was deliberately circulated to a restricted, but representative sample of rail transport operators. Feedback from the broader industry was sought through the publication of the draft regulatory impact statement and invitation for further comment.

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		7.3 per cent of the pool, to the survey.	
Appendix D (Cost-benefit analysis – general comment)	WA Regulatory Gatekeeping Unit	It is unclear whether the proposed National Law poses a significant barrier to operators entering or remaining in the market. It would be helpful to consider the impacts of the proposals upon persons currently employed by the railway regulators in each jurisdiction and whether additional or reduced staffing would be required under a National Regulator.	More detailed discussion on impact of the National Law on affordability to rail transport operators has been included in section 6.8 (Impact assessment summary). The broader impact of a National Regulator on the operations of state and territory policy and regulatory staff was the major focus of the 2009 regulatory impact statement, which assessed the case for establishing a National Regulator and Law. The cost impacts of the specific proposals assessed in this regulatory impact statement provide an indication of the demands on resources of the Regulator.
Appendix D (Cost-benefit analysis - use of baseline safety figures)	Transport WA	The main problem I'm trying to confirm is have they taken the 1999 data being both the incident data and costing and then adjusted the total costing for CPI plus added in VOSL - willingness to pay. Or adjusted the property damage costing by CPI and then adjusted the personal death and injury for VOSL - willingness to pay ? Or did they do as I would hope used the latest ATSB death and injury and incident statistics and apply the CPI/VOSL ? The reason I ask is although they have used the wrong numbers from the BITRE report, and I believe they have not taken into account a series of disclaimers applied by BITRE, plus they should have used the ATSB reports to establish the base incident data - what has taken my eye is the 1999 accident cost - table 4 escalates from $133M to $311.71M - table 7 (which I question as this is far more than the 40% CPI increase plus the 2.21 human factor escalation), however the 1999 level crossing cost (table5) actually decreases from $10M to $7.46M - table 8	**Note: a few values** the tables in section 2.1 which have been corrected. This reflects some earlier changes which had been overlooked in updating the final CBA report. The accidents costs have been derived as follows: **1 -** BITRE 1999 rail accident cost information was used as it is considered to be the latest available data relating to the cost of rail safety accidents. The latest ATSB Rail safety Occurrence data was used to adjust the number of accidents observed in the 1999 BTRE report to reflect recent trends. It was not possible to completely rebase using current ATSB data since corresponding cost data was not available. Furthermore safety benefits will accrue through the reduction in accidents and not through a reduction in occurrences per se. **2** - the approach taken to adjust the 1999 BITRE cost estimates was to apply CPI to all components of cost to derive a 2010 value. The ABS property index was used to escalate the property component. The human cost

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		(which I question as statistics show that level crossing deaths / injury has remained constant over the last 10 years not to mention when you adjust for CPI plus VOSL its meant to go up). If these tables (4,5,7 and 8) form the basis of the costing for the rest of the RIS this is not good.	component was then adjusted (by 121%) to reflect the current WTP measure. This is based on the values given in the RISSB costing model. Thus the human cost component per accident increased as follows - 1999 original = $0.21, 2010 CPI adjusted = $0.29 , 2010 CPI and WTP adjusted = $0.65. **3** - in regards to the total number of rail safety accidents, the 1999 number was adjusted based on observed trends in Rail Safety **Occurrence** data (similar historical information was not available specifically for accidents). **4** - in regards to the total number of rail safety accidents at level crossings involving motor vehicles it was assumed that the 1999 number (89) declined slightly up to 2010 (76), as per overall trends rail safety occurrences. Note that the overall number of such accidents in 2010 is not significant in this instance since we have only used the cost per accident.
Appendix D (Cost-benefit analysis - use of baseline safety figures)	Transport WA	Table 1 (Page x) and Table 2 (Page xi) provide calculations of CBA NPV amounts. The RIS summarises the NPV outcomes of the changes to the Model Law in Table 1 (page x) and Table 2 (page xi) and these amounts are drawn from the CBA calculations set out in Appendix D of the RIS. The calculations, while excluding motor vehicle level crossing deaths and suicides, does include pedestrians, being both the public and RSW. WA's view is that non-RSW pedestrians hit by trains should be treated the same as deaths in motor vehicle accidents at level crossings and therefore excluded. This is because the amendments assessed in the RIS are not aimed at reducing the incidence of non-RSW pedestrians (and possibly RSW) being hit by trains. WA believes	The approach adopted in deriving the rail safety accident cost estimate has been determined in consultation with BITRE. It was not possible to disaggregate the rail safety accident cost data such as to exclude non-RSW incidents at level crossings. The proposed approach described is considered an oversimplification and assumes that all costs are associated with deaths and serious injuries i.e. other costs such as delays and damage are not considered. Also, according to the rail accident cost data used in the report only 20% of the total annual cost is attributable to level crossing rail accidents, which, as well as pedestrian accidents, includes RSW and all other accidents. It is therefore considered that cost values adopted are reasonable. and would not be impacted significantly by the exclusion of non-RSW level

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		that the focus should be solely on accidents involving RSW, and not factor in non-RSW pedestrian accidents. If non-RSW pedestrian accidents are excluded it is estimated that the total cost is reduced by 42 per cent and cost of those incidents per accident is reduced by 36 per cent. To test the influence of the general public pedestrian costs in the calculations if the $100M high and $40M low NPV to society set out in Table 2 (page xi) is divided by the Bureau of Infrastructure, Transport and Regional Economics human cost of a fatality (as escalated by the Halcrow formulae) it suggests a reduction of between 16 and 6 deaths. As the Australian Transport Safety Bureau (ATSB) report lists 28 fatal and serious personal injuries in 2010 this represents a reduction of between 57 per cent and 21 per cent of deaths in the rail environment. Even if the effects of the drug and alcohol and fatigue impacts are discounted this would result in 9 or 31 per cent and 2 or 8 per cent reduction in deaths. To summarise the logic NTC has used, it suggests if there are 43 pedestrian deaths at level crossings and by implementing amendments that relate to general rail safety that would not influence a reduction in these deaths it follows benefits of $55M to $14M by saving between 9 and 2 lives across the rail industry. Clearly there is no relationship between safety benefits and implementation of these changes to the model law that is estimated above to a degree of at least 36 per cent.	crossing accidents.
Appendix D (Cost-	TSV	**Table 4** The costs per accident are based on data that is 12 years old and no longer relevant. They	As stated in Appendix D this report is considered the latest reliable source of rail safety cost data for

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benefit analysis - use of baseline safety figures)		are also based on just one years' worth of data, and the uncertainty of this being a reliable figure has not been accounted for in the analysis. In 1999 the Glenbrook collision accounted for 7 fatalities and 57 injuries. This single incident accounted for more than half the injuries in Australia for 1999. The costs of more recent accidents should be assessed to average out the high consequence incidents that do not happen every year. Improvements have been made in rail safety since 1999, such as improvements in the crashworthiness of rolling stock, signalling, safe working, legislation, etc.	Australia. Whilst the data include the major collision at Glenbrook, BITRE note that they "considered this collision carefully to determine whether 1999 was a typical year with regard to rail accidents. Table 4.7 shows the casualties and estimated property cost caused by the Glenbrook accident. Glenbrook accounted for less than ten per cent of the total $55.9 million in property damage costs definitely attributable to rail accidents, and 7 of the 43 fatalities attributed to rail accidents by the Australian Transport Safety Bureau. Its contribution is significant, but not dominating."
Appendix D (Cost-benefit analysis - use of baseline safety figures)	TSV	**Table 4** The source quoted is not geographically equivalent to the Regulatory Impact Statement (RIS). Tasmania and Northern Territory are excluded from the data source.	As stated in Appendix D this report is considered the latest reliable source of rail safety cost data for Australia. Rail safety cost data was not available for each state and territory. However, it is considered that the average accident cost figure applied in the CBA analysis is reasonable.
Appendix D (Cost-benefit analysis - use of baseline safety figures)	TSV	Table 5 is titled '199 level crossing accidents involving motor vehicles'. A decline in Rail Safety Occurrences cannot be deduced form table 5. The document may be referencing the wrong table.	Reference corrected to Table 6.
Appendix D (Cost-benefit analysis - use of baseline safety figures)	TSV	ATSB statistics show a 7% increase from 2001 to 2020. The NTC report does not show a doubling in rail freight, and this is reflected by the modest observed increase in the ATSB statistics. Occurrence numbers have decreased with an increase in train km and this decrease should be expected to be the most likely outcome, not an increase as stated in the RIS.	Text has been amended to clarify regarding the increase in the freight task. The NTC report supports the assertion that there will be significant growth in freight kilometres in a short period of time and makes reference to other sources which indicate the freight task will roughly double around 2020. The CBA assumes that the slow declining trend in rail safety occurrences would be countered by the growth in train kilometres (both freight and passenger). Given

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			the variability in occurrences year on year and the likelihood that the current declining trend would slow down, this is considered a reasonable assumption. If the CBA assumed declining occurrences at a similar rate to that outlined it would have the effect of reducing the overall benefits but this would not be significant.
Appendix D (Cost-benefit analysis - use of baseline safety figures)	TSV	The cost per accident for the 1999 data is based on 351 accidents of a certain type. The RIS makes no attempt to calculate the number of these types of accidents that have occurred in the most recent years for which data is available. The cost per accident will obviously be dependent on the type of accident.	This is correct. It is considered that there was no reason to expect a material change in the proportion of accident types.
Appendix D (Cost-benefit analysis - use of baseline safety figures)	TSV	No forecast growth for rail traffic is provided in the RIS, and it seems incredible that the benefits of a change to the legislation would be considered without providing projected growth figures for rail transport.	The CBA assessment has not attempted to assess the impact of the regulatory changes given increased train kilometres. The declining trend in rail safety occurrences was assumed to counter the projected growth in train kilometres as stated in the report.
Appendix D (Cost-benefit analysis - use of baseline safety figures)	TSV	An accident is not defined. The ATSB documentation refers to occurrences, not accidents and it is not stated in the RIS what types of occurrences are picked up in the determination of benefits as accidents are not defined.	Accidents are defined in Section 2.1 of Appendix D.
Appendix D – s. 2.1 (Rail safety accident data)	TSV	In Victoria, the benefits of the concrete sleepering program have not been realised due to an issue with mud holes.	Noted.
Appendix D, s. 3.3 Private sidings	Transport WA	"The statement is made on page 29 that "…private sidings are usually small in size…", however this conflicts with the statement on page 158 whereby the economic assessment of this	Reference to "large" private sidings has been amended. In regards to the benefits estimation, it is considered by rail safety experts that the proposal would improve safety. Given a lack of available

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		option states “In particular it was indicated that there are many large private sidings…”. A consistency of statements is required. The proposed option on page 33 bases the NPV on the assumption that benefits will arise from private sidings for which implementation of interface agreements is required, while page 158 of the RIS states that there is no accident data and surveys suggest that there would be minimal differences. The assessment however, still determines a $8.01M NPV benefit based on “experience”. As the provisions contained in the private siding exemption specifically exclude the rail infrastructure manager from having to enter into interface agreements, and as only the road manager is obligated to seek an interface agreement, it is suggested the benefits alluded to in the manner described would not eventuate. Table 1 on page x should be adjusted accordingly.	data to estimate the potential improvement a conservative assessment of possible benefits has been made. A high benefits estimate of 1.14m per annum and a low estimate of zero is considered to adequately represent the likely range of accident savings.
Appendix D, s. 3.3 Registration of rail infrastructure managers of private sidings	Queensland Transport	The draft RIS (page 148) states that $75,000 is the cost for small, low risk and tourist and heritage operators to apply for exemption from accreditation. Page 160 of the draft RIS states that the average saving is $0.07 million for exemption from accreditation (the cost of the application for exemption is estimated at 20% of the savings). Are these figures presenting the same cost ($75,000 for the cost to apply for exemption from accreditation compared to $14000)? See also cost to apply for SMS exemption (or components of the SMS exemption).	The first year savings from exemption from accreditation are 75,000 or $0.07 million. The cost of applying for accreditation is 20% of this or 15,000 or $0.01 million.
Appendix D, s. 3.7 Safety manageme	TSV	Section 167 page 3.7.1 The cost quoted is, in TSV’s view, much too low - considering this should include production, consultation,	The assessment of the initial set up cost of $30,000 for guidance material was assessed as adequate given survey response

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nt system		drafting, printing, and communication to the industry.	data and following discussion with industry professionals.
Appendix D, s. 3.7 Safety manageme nt system	TSV	Section 167 page 3.7.1 The estimate of 1,000 to 2,000 for the three tasks quoted is too low. Also this would not be a 'once off' cost, as risk identification, assessment and controls will change through the period of the proposed legislation.	Ongoing costs have also been included which recognise costs post-implementation. The text has been amended to make reference to the ongoing costs.
Appendix D, s. 3.7 Safety manageme nt system	TSV	Section 168 page 3.7.2 There may be an error in the calculation of the economic benefits which means that they may be overstated. Firstly, it is assumed that the additional benefits will be accrued by all rail transport operators in the use of the '300 accidents' figure. If the large operators, and half the small and medium operators already comply with the SMS requirements under option 2 then these benefits cannot be included for option 2 and excluded for option 1. This possible error has been repeated for various items with measurable impacts in the RIS.	It was not possible to disaggregate accident data at the level of the operator. The assumed percentage reduction in accidents (0.1 per cent) includes allowance for the limited impact on the operators that already comply with the SMS requirements.
Appendix D, s. 3.7 Safety manageme nt system	TSV	Table 25, option 2, ongoing cost per annum No advice is provided in the RIS as to how the costs of (0.02) and (0.01) are derived.	Explanation of the these costs has been provided in section 3.7.1
Appendix D, s. 3.8.2 Health and fitness manageme nt program	TSV	Section 3.8.1 Option 1 assumed costs per annum. It has not been necessary for any State regulator to establish and employ a medical panel under the status quo yet this cost is assumed. A retainer to a suitably qualified medical expert to call upon their advice when required would significantly reduce this cost.	The CBA assessment recognises the response of the NSW regulator by adopting a high cost estimate of the implementation of Option 1, which includes the cost of establishing a medical panel. This is considered a realistic cost estimate for such a provision. The adopted low cost (zero) estimate recognises the views of other regulators that such a panel would not be necessary.
Appendix D, s. 3.8.2 Health and fitness	TSV	Page 170 - large operators The ongoing costs have been underestimated. There is no explanation of where the 12.5%	Text has been amended to clarify . The estimate of ongoing costs has been informed by operator responses.

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management program		comes from.	
Appendix D, s. 3.8.2 Health and fitness management program	TSV	Section 3.8.2 There may be an error in the calculation of the economic benefits which means that they may be overstated. The economic benefits are based on an incident the magnitude of Waterfall being avoided every year (1% of $27 million per annum). Observed data indicates that the frequency of such incidents is more likely to be once every 10 years. The benefits may thus be exaggerated by approximately a factor of 10.	Text error. The assumption in the calculation is that the proposal could result in a reduction in the occurrence of such incidents by 10%. The text has been corrected.
Appendix D, s. 3.8.2 Health and fitness management program	TSV	Section 3.8.2 This is in conflict with page 171 which states 'it has been estimated that the legislation could lead to a decline in probability of such accidents of 1 per cent'.	As above.
Appendix D, s. 3.8.2 Health and fitness management program	Teresa Murphy	section 3.8.2 (factor of 10 error) - where benefits assume that the cost savings associated with an accident such as Waterfall will be accrued every year with option 2. Fortunately accidents such as Waterfall have a frequency of an order of magnitude less than this. The benefits have been overestimated in section 3.8.2 by a factor of approximately 10 because of this error.	As above.
Appendix D, s. 3.9 D&A and fatigue risk management	Transport WA	The RIS improperly assesses the benefits of proposed amendments to fatigue, and drugs and alcohol management requirements. It neglects the fact that state and territory governments have already implemented, and industry members complied with, requirements for relevant safety management systems.	The CBA has adopted an incremental approach to the estimation of costs and benefits. Industry consultation has enabled the identification of those states and territories that have implemented drug and alcohol and fatigue management plans in some form and this has been taken this into account in the estimation of costs and benefits. Section 1.1.1 of Appendix D has updated to clarify this point.
Appendix D, s. 3.9	TSV	3.9.1 It has not been necessary for any State regulator to	The CBA assessment recognises the response of the NSW regulator

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D&A and fatigue risk management		establish and employ such a resource under the status quo yet this cost is assumed. A retainer to a suitably qualified medical expert to call upon their advice when required would significantly reduce this cost.	by adopting a high cost estimate which recognises the need to hire an additional resource for Option 2. The assessment of the cost of this resource is considered a realistic assessment. However, this estimate is not applied in the assessment of high and low implementation costs for Option 2 since these are assumed to be the same as for Options 3 and 4, recognising Option 2 implementation costs are dependent upon the interpretation of the Regulator. [assume reference to medical panel is on error]
Appendix D, s. 3.9 D&A and fatigue risk management	TSV	3.9.1 The benefits are assumed to apply to all 300 rail safety accidents in Australia in 2010. Given that NSW has a drug and alcohol management program that is compliant with the prescription, the number of 300 should be discounted accordingly.	The assumption of a 10% reduction in accidents made allowance for the exclusion of NSW in the calculation of potential benefits since NSW already has a compliant drug and alcohol management program i.e. a lower percentage was adopted to allow for the exclusion of NSW. However, it recognised that this is potentially confusing and so the description of the derivation of the safety benefits has been amended to reflect a reduced number of accidents. The percentage reduction factor has been adjusted accordingly.
Appendix D, s. 3.9 D&A and fatigue risk management	TSV	Page 176 It is not clear how the cost has been reduced significantly. It appears that the costs have been reduced to 10 precent not by 10 precent.	The assumption of a 10% reduction in accidents made allowance for the exclusion of NSW in the calculation of potential benefits since NSW already has a compliant drug and alcohol management program i.e. a lower percentage was adopted to allow for the exclusion of NSW. However, it recognised that this is potentially confusing and so the section has been amended. The comment that costs have been reduced to 10 per cent and not by 10 per cent is correct.
Appendix D, s. 3.9	TSV	3.9.2 There may be an error in the calculation of the economic benefits which means that they	The data referenced in the assessment of benefits were the most appropriate data available at

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D&A and fatigue risk management		may be overstated. A review of the contributing factors in ATSB investigations shows that the estimate of 15% to 30% is grossly overestimated. Further, post incident testing in Victoria also shows the estimate to be erroneous. The assumption is also erroneous because source (reference 65 in the RIS) has been misquoted.	the time the analysis was undertaken. It is acknowledged that there are some considerable assumptions made in the estimation of benefits and that is why high and low values have been adopted. It is understood that contributing factors data was requested during the course of the study but none was provided/available. The analysis has therefore relied upon desktop research. The reports cited are the most comprehensive studies sourced. If TSV can provide the full ATSB reference this can be taken into consideration. Nevertheless it is considered that the high and low values adopted are reasonable in identifying the likely range of benefits.
Appendix D, s. 3.9 D&A and fatigue risk management	TSV	3.9.2 The reference of a 1990 NTSB report, and the text that "The most frequently cited accident probable cause was fatigue (a probable cause in 31 per cent of sampled rail accidents in the US) followed by alcohol and other drug use impairment (a probable cause in 29 per cent of sampled rail accidents in the US);" is incorrect. For fatal-to-the-driver heavy truck accidents the most frequently cited accident probable cause was fatigue (57 drivers or 31 precent) followed by alcohol and other drug use impairment (53 drivers or 29 precent);	The quote has been taken from the NTSB website, which summarises the findings. The reference has been updated accordingly.
Appendix D, s. 3.9 D&A and fatigue risk management	Transport WA	Table 36 The RIS assumes that full benefits will be achieved in the first year of the legislation. This is unsound, as it is more common in CBA for benefits to be built up over time.	In CBA whether or not benefits build up over time is assessed on a case by case basis. It is considered here that benefits will accrue in full once the proposed measures are implemented. The assessment has therefore not made any allowance for ramp-up. It is also considered that any potential lag in achieving benefits is offset by the adoption of a conservative 10 year evaluation period.
Appendix D,	Transport	The assessment made in the RIS	Note: type in RIS - incorrectly

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s. 3.9 D&A and fatigue risk management	WA	regarding D & A management programs is flawed. The proposal, as set out on page 64, is that "The outcome of all options is that a rail transport operator must develop a risk-based D & A management program..." should note that all jurisdictions have already implemented the model law D & A program requirements (clause 65), as stated on page 54. The basic assumption that the assessment uses is that because jurisdictions implemented different D & A requirements there has effectively been little impact as a result. The assessment then uses this basis to forecast safety improvements similar to those that NSW gained on implementing its D & A programs. This double counts the benefits as it assumes the same set of benefits are available to be taken again with a lesser degree of D & A program requirements, i.e. one that is consistent rather than new. It is questioned whether these safety improvements are actually available. There is however qualitative merit in a consistent D & A program in that rail operators travelling between jurisdictions can apply one D & A management regime with assurance of compliance, with possible flow on safety benefits. The other area in which the assessment is questionable is its use of crash statistics from a 1990 American report that relates to a USA heavy vehicle survey. It appears the main calculating factor that 30 per cent of crashes may be attributed to D & A is taken from a statement by the aviation regulator in a congressional hearing. The regulator suggested the data didn't necessarily support the statistic but it was his belief that from anecdotal evidence a complete survey would establish	states the low benefits as $14.96 - should be $4.96. The CBA has adopted an incremental approach to the estimation of costs and benefits. Industry consultation has enabled the identification of those states and territories that have implemented drug and alcohol and fatigue management plans in some form and this has been taken this into account in the estimation of costs and benefits. Section 1.1.1 of Appendix D has updated to clarify this point. The data referenced in the assessment of benefits were the most appropriate data available at the time the analysis was undertaken. It is acknowledged that there are some considerable assumptions made in the estimation of benefits and that is why high and low values have been adopted.

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		this. Care should be taken in using such evidence to establish a case for regulation. Given the factors above particularly WA believes that the NPV benefits from the D & A assessments should be excluded. The RIS also addresses a proposal for fatigue regulations (page 56) and undertakes a fatigue assessment however on pages v and 89 outlines that a further RIS is being developed to specifically look at defining working hours for RSW, which will have a major impact on the fatigue assessment. Given the importance of this undecided component of fatigue management, being the working hours, WA believes that the inclusion of an assessment that does not address the impact of setting working hours may be misleading in determining whether to accept the proposal or not. For these reasons WA believes the fatigue proposal should be excluded from this RIS and considered as a whole in the subsequent RIS.	
Appendix D, s. 3.10 Fatigue risk management	TSV	3.10.1 The setup costs don't reflect the procurement of the necessary expertise. They are an order of magnitude too low.	The cost estimates have been based upon survey responses and consultation with the industry. The setup cost estimate provided includes items such as education, training, administration and systems costs. It was considered that the high and low costs adopted made sufficient provision for the procurement of necessary expertise. Further details would be required to confirm.
Appendix D, s. 3.10 Fatigue risk management	TSV	Page 53 Have the estimates used in the cost-benefits analysis (CBA) drawn on such Australian incident data mentioned on p.53?	Costs and benefits referenced in the CBA have been estimated based on survey response data, rail safety expert advice and other reports as referenced in Appendix D.
Appendix D, s. 3.10	TSV	3.10.1 Given that this statement appears in the section 3.10 Fatigue risk management	The text has been amended to reflect that the reference is made to fatigue.

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Fatigue risk management		program, the statement appears to relate to fatigue rather than drug and alcohol. Also, it is not clear how the cost has been reduced significantly. It appears that the costs have been reduced to 10 precent not by 10 precent.	Interpretation that costs have been reduced to 10 per cent and not by 10 per cent is correct i.e. reflecting the potential proportion of these costs that could be offset by the improvements.
Appendix D, s. 3.10 Fatigue risk management	TSV	3.10.1 – 3.10.2 There may be an error in the calculation of the economic benefits which means that they may be overstated. There are minimal amendments to large operators (who account for a large proportion of train km travelled), yet large operators have not been excluded from the benefits associated to the assumed reduction to the 300 accidents a year.	It was not possible to disaggregate accident data at the level of the operator. The assumed percentage reduction in accidents (0.1 per cent) includes allowance for the limited impact on the operators that already comply with the SMS requirements.
Appendix D, s. 3.10 Fatigue risk management	TSV	Page 180 While the RIS has acknowledged the difficulty in estimating the cost of fatigue in rail accidents, the method used is questionable, in particular: - the prevalence of fatigue in accidents cannot be assumed from the finding that “about one-third of train accidents and employee injuries and deaths are caused by human factors. We know fatigue underlies many of them” (p.180), as it would be extremely difficult to identify which of these were due to fatigue alone without further significant analysis; - fatigue-related costs go well beyond what is captured in accident data, and it is suggested that other costs such as those associated health, productivity, and other indicators of safety (e.g. SPADs) be consulted in estimate costs; - estimated prevalence of fatigue-related accidents were based on US data and not Australian data, and analysis is required to gauge the role of fatigue in Australian rail accidents; and	The data referenced in the assessment of benefits were the most appropriate data available at the time the analysis was undertaken. It is acknowledged that there are some considerable assumptions made in the estimation of benefits and that is why high and low values have been adopted. It is agreed that fatigue related costs go beyond what is captured in the accident data. However, medical and productivity impacts are included in the "human cost" component. Regarding SPADS and other occurrences, it would be a time consuming and data intensive process to assess and incorporate the cost implications of these. It is therefore likely that the safety benefits have been underestimated although this is not considered material. The year-to-year variability in rail accidents is random and unpredictable. The derivation of a typical annual accident rate is considered reasonable.

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		- estimates were based on a single year of data (2010) and do not capture the year-to-year variability in rail accidents. Since the estimate of the benefits (in this case, the savings derived from preventing accidents) were based the above estimate, these may also be inaccurate. Note that a similar approach was used to estimate the cost in relation to drug and alcohol and, therefore, the above comments also apply to the cost-benefit analysis for drug and alcohol.	
Appendix D, s. 3.10 Fatigue risk management	TSV	3.10.2 There may be an error in the calculation of the economic benefits which means that they may be overstated. The estimate of 15 to 30% of train accidents include fatigue as a factor is an overestimate of the contributing factors stated in ATSB rail incident investigations.	The data referenced in the assessment of benefits were the most appropriate data available at the time the analysis was undertaken. It is acknowledged that there are some considerable assumptions made in the estimation of benefits and that is why high and low values have been adopted. It is understood that contributing factors data was requested during the course of the study but none was provided/available. The analysis has therefore relied upon desktop research. The reports cited are the most comprehensive studies sourced.
Appendix D, s. 3.10 Fatigue risk management	TSV	3.10.2 There may be an error in the calculation of the economic benefits which means that they may be overstated. The 'cut by 50%' factor appears not to have been applied	There was an error in the text which has been amended. The benefits should read low 2.34 and high 4.68.
		Table 40 The RIS assumes that full benefits will be achieved in the first year of the legislation. This is unsound, as it is more common in CBA for benefits to be built up over time.	In CBA whether or not benefits build up over time is assessed on a case by case basis. It is considered here that benefits will accrue in full once the proposed measures are implemented. The assessment has therefore not made any allowance for ramp-up. It is also considered that any potential lag in achieving benefits is offset by the adoption of a conservative 10 year evaluation period.

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Appendix D, s. 3.10 Fatigue risk management	Queensland Transport	Page 180 – there is a paragraph which states that 'it is estimated that the proposed measures would reduce the incidence of rail related accidents involving drugs and or alcohol by 10 per cent'. Should this paragraph be referring to fatigue instead of drugs and or alcohol (the paragraph is located in the section on the fatigue management)?	Correct. Text has been amended.
Appendix D, s. 3.10 Fatigue risk management	Teresa Murphy	Benefits have been incorrectly calculated in section 3.10.2 (factor of 2 error, as 50% referenced in second to last paragraph not applied)	There was an error in the text which has been amended. The benefits should read low 2.34 and high 4.68.
Appendix D, s. 3.10 Fatigue risk management	NSW Transport	Fatigue Risk Management. The industry cost estimates should be closely scrutinised. The range of implementation costs is substantial from $85M and $340M, which simply highlights the uncertainty of the analysis. If the estimated cost for implementing a program for managing hours of work and rest suggests there is already a considerable existing risk which is not being addressed.	Risk analysis data was not available for consideration in undertaking the analysis. It could be implied that there is significant existing risk that is not being addressed. However, many of respondents considered their existing fatigue management arrangements to be superior to the proposed Option 3 and that Option 3 would result in costly changes. The cost estimates have been based upon operator responses and the range of costs are representative of the uncertainty associated with the changes implied under Option 3 (changing train schedules, rosters, hiring additional drivers etc.).
Appendix D, s. 3.11 Testing for drugs or alcohol	NSW Transport	It is noted that during the development of the National Model Rail Safety Legislation there was no agreed national position on drug and alcohol testing. Similarly, the cost impact of the introduction of this requirement was not addressed in the associated Regulatory Impact Statement the NTC prepared in 2005 in relation to the Draft Rail Safety (Reform) Bill (i.e. the National Model Legislation).	The proposed regulatory changes do not differentiate between different types of evidentiary testing and so this was not required to be assessed as part of the CBA. It is not considered that this level of detail is required to demonstrate the impact of the National Law compared with the Model Bill.

Ref.	Submitted	Comment Summary	NTC response
		Therefore, it is considered a significant omission that the most recent RIS does not examine the cost associated with this proposal, particularly as NSW is currently the only jurisdiction to include a comprehensive drug and alcohol testing program. In addition, the RIS does not examine the proposal for the regulator to undertake post-incident testing, including the likely costs associated with the NRSR assuming responsibility for this function. Without this analysis, no estimate can be made of the likely impact this requirement will have on the resources of the NRSR, including whether the NRSR would in fact be capable of performing this function nationally. Similarly, the RIS does not examine the cost to the NSW industry and regulator associated with the proposal to remove urine testing which is the predominant form of drug testing in NSW. Nor does the RIS address the cost of introducing saliva testing. For instance, NSW understands that it is more expensive to undertake saliva testing than urine testing, both in terms of the cost of the kits and the laboratory analysis. It is also more time consuming to undertake on-site saliva testing (approximately 15 mins) as opposed to urine testing (approximately 5 mins) which imposes an additional cost. Accordingly, it is recommended that as with the approach to fatigue management, the drug and alcohol proposals should be the subject of a separate RIS to enable a complete analysis to be undertaken of these proposals once they are formulated. It is noted that the statement on page 77 that “To date, there have	

Ref.	Submitted	Comment Summary	NTC response
		not been any drug-related prosecutions" is incorrect. NSW ITSR has successfully prosecuted for the offence of being under the influence of drugs, which is in fact reflected on page of 82 of the RIS where it is stated that there are approximately 3 to 4 drug and alcohol prosecutions per year in NSW.	
Appendix D, s. 3.11 Testing for drugs or alcohol	NSW Transport	It is noted that during the development of the National Model Rail Safety Legislation there was no agreed national position on drug and alcohol testing. Similarly, the cost impact of the introduction of this requirement was not addressed in the associated Regulatory Impact Statement the NTC prepared in 2005 in relation to the Draft Rail Safety (Reform) Bill (i.e. the National Model Legislation). Therefore, it is considered a significant omission that the most recent RIS does not examine the cost associated with this proposal, particularly as NSW is currently the only jurisdiction to include a comprehensive drug and alcohol testing program. In addition, the RIS does not examine the proposal for the regulator to undertake post-incident testing, including the likely costs associated with the NRSR assuming responsibility for this function. Without this analysis, no estimate can be made of the likely impact this requirement will have on the resources of the NRSR, including whether the NRSR would in fact be capable of performing this function nationally. Similarly, the RIS does not examine the cost to the NSW industry and regulator associated with the proposal to remove urine testing which is the predominant	The proposed regulatory changes do not differentiate between different types of evidentiary testing and so this was not required to be assessed as part of the CBA. It is not considered that this level of detail is required to demonstrate the impact of the National Law compared with the Model Bill.

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