Response to Rail Safety National Law

Draft Regulatory Impact Statement

August 2011

Rail, Tram and Bus Union

National Office

Executive Summary

The Rail, Tram and Bus Union notes that supporters of a single national rail safety regulator have advocated that such reforms may minimise duplication and address inconsistencies that rail stakeholders deal with when protecting the safety of rail workers.

It is imperative, however, that this process does not become a 'race to the bottom' on safety regulation and instead strives to achieve the highest standards possible so that employees retain the right to perform their jobs in a safe and secure environment.

In this sense, the RTBU believes the rising tide should lift all boats.

A number of larger jurisdictions, which have had to deal with a number of high-profile rail tragedies, have tended to favour stronger regulations with a strengthened attitude to compliance and enforcement.

In contrast, some jurisdictions and industry have tended to pursue a co-regulatory approach which devolves much of the decision making about appropriate standards back to the level of the operator.

The RTBU is concerned that a number of reforms in the proposed national rail safety laws may:

- Adopt the lowest state standards on a number of issues;
- Assign a co-regulatory approach to far too many safety critical issues using the rationale that co-regulation is more flexible and cuts red tape; and
- Use a national process to bring about a regime of national inconsistency.

As such, this submission outlines wide ranging concerns that the RTBU has with the draft laws as proposed. These concerns particularly include, but are not limited to, fatigue management, drug and alcohol testing, competency assessment and consultation with rail safety workers.

Any accident on the rail network brings immeasurable costs to the community - personal costs in terms of deaths and injuries, as well as economic costs from lost productivity and damage to infrastructure.

That's why the RTBU strongly believes that improved safety, if delivered by appropriate national reforms, could become one of the major competitive advantages for rail over other modes of freight and passenger transportation in the future.

This submission contends that the development of strong, prescriptive national laws, under the guidance of a well-resourced national regulator, could raise safety standards in the rail industry.

Unfortunately, in the areas of fatigue management, drug and alcohol testing, competency assessment, stakeholder consultation and a number of other safety critical areas, the draft bill fails to meet that objective.

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1. Introduction

1.1 Council of Australian Government Reform Agenda

The Regulatory Impact Statement (RIS) notes that COAG has committed to regulatory and red tape reduction under the National Reform Agenda announced in February 2006.COAG identified rail safety regulation as a cross jurisdictional "*regulatory hot spot where overlapping and inconsistent regulatory regimes were impeding economic activity"*. The focus of both Government and employer organisations has been on regulatory burden and costs. This approach is referred to in 2.4 of the RIS: Rail Industry Overview.

The RTBU argues that quantitative analysis undertaken by both the NTC[1] and ARA reveal that the argument rail safety regulation is impeding economic activity was not in fact the case.

The ARA commissioned a report [2] examining the costs of rail safety regulation. The conclusion of the Report contained in the Executive summary was that "*the total compliance cost for respondents is modest at $23m per annum when compared to turnover or operating costs"*.

The focus of much attention, in a modal competition sense, has been on interstate rail and road freight. However the size of the interstate rail freight operations task should be kept in perspective. This market is primarily made up of non-bulk traffics, which in 2005/06, constituted 4% of domestic rail tonnes. In both turnover and employment, interstate freight and passenger traffic is a small component of the Australian rail industry.

The RTBU notes the decision of ATC concerning the maintenance of current rail regulatory resources and the assumption made by the NTC in the document referred to above that *"the total number of full time equivalent staff employed by a single national regulator, as previously indicated has been assumed to be equal to the total number of current rail regulatory staff"*.

The RTBU argues that in a number of jurisdictions rail regulatory resources are sub optimal and that - given projections for substantial increases in both rail freight and passenger tasks - that rail regulatory resources will need to expand. The financing of the national regulator is a key issue and is addressed through separate processes.

RTBU policy[3] supporting a national rail safety regulator is based on

1. Minimum benchmarks concerning the functions and resources of a regulator reflecting those of the more successful state based regulators, including ITSRR in NSW;

2. Strict provisions for hours of work for train drivers being included in national legislation; and

3. Improving the basic training rights for workers and union delegates under rail safety legislation.

2. Background

2.1 The current rail safety regulatory framework (Section 2.1)

The RIS refers to the NTC being directed to develop a body of safety law to support national law *"by utilising a co-regulatory approach to risk management between rail transport operators and the regulator"*.

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[1] NTC Single National Rail Safety Regulatory and Investigation Framework :Final Draft Regulatory Impact Statement 2009
[2] Synergies Economic Consulting : The Costs of Rail Safety Legislation ,September 2008
[3] RTBU 8th National Council Meeting ,Adelaide 2009

The co regulatory approach has had a checkered development and there are sharp differences between governments, regulators, employers and unions as to what they view as co regulation.

The issue has been commented on in the Special Commission of Inquiry in NSW, academics and the NTC itself.

The NTC has made the observation that during consultation on the single national regulator it was evident that co-regulation was practiced differently across jurisdictions and the level of regulatory intervention varied significantly.

The current RIS observed "*co regulation is generally thought of as middle ground between highly prescriptive regulation, which is less flexible for industry and government and self regulation"*.

The RTBU argues that under co -regulation the active involvement of rail safety workers in rail safety, underpinned by legal entitlements as in WHS law, has not been extended sufficiently to rail safety law.

The RTBU argues that in most jurisdictions, co- regulation as currently practiced, acts as a brake on worker involvement as it is interpreted as a bi-partite system between the regulator and the accredited party.

The RTBU further argues that changes need to be made to rail safety legislation to enable more effective participation by rail safety workers, OHS representatives and Unions.

The National OHS Review[4], in its first report, underlined the importance of involving employees and their unions.

Safety academic Neil Gunnningham[5]supports the need for worker participation in rail safety law. He makes a number of points:

1. Numerous commentators from the time of the Cullen report onwards have argued unions and their representatives have an important contribution to make to the identification and abatement of hazards.

2. There are sound reasons for requiring worker participation in systems based and safety case regimes. Workers have the most direct interest in safety of any party: it is their lives and limbs that are at risk when the law fails to protect them. Moreover, workers often know more about the hazards associated with their workplace than anyone else.

3.Workers that have the capacity to participate in third party audits(subject to confidentiality) and members of safety committees that participating in workplace inspections - play an important role in whistleblower legislation and in triggering safety enforcement agency inspections. This in turn provides much needed checks and balances.

The RTBU notes that a number of underlying principles of WHS law - built on consultation and effective participation of rail safety workers, OHS delegates and their union - has not been easily accepted by those administering the development of national rail safety law. Some improvements have been made in these issues, though more remains to be done as rail safety law lags significantly behind WHS law in these areas.

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[4] National Review of OHS Law First Report. In relation to objects and principles we recommend a structure "that places the provisions relating to duties and workplace participation as early as possible in the model acts…. There is considerable evidence that effective participation of workers and their representatives are crucial elements in improving health and safety performance in the work place…we recognise the importance of consultation ...

[5] Best Practice Rail safety Regulation, Working Paper 31, National Research Centre for OHS Regulation, ANU. December 2004

The National OHS Review considered the overlap between OHS law and other safety laws regulating safety in specific industries and noted[6] that "*although a single OHS legislative system would conform to the Robens model , there are some types of industry or hazards where separate legislation may be justified only where periodically and objectively justified. As far as possible the separate legislation should be consistent with the nationally harmonised OHS laws."*

The RTBU argues that the current understanding by rail safety workers of their obligations and rights under rail safety law is low when compared to their knowledge of WHS legislation. The RTBU argues there is an opportunity to take a step forward to address these shortcomings by incorporating the consultation, participation and training provisions of the WHS Bill in the national rail safety law.

2.2 The Single National Rail Safety Regulator (Section 2.3)

A number of jurisdictions, particularly NSW and Victoria, have pursued policies of ensuring that the level of resources and regulatory intervention that characterised their current regulatory approach is not downgraded in the establishment of a national regulator. The objective of these jurisdictions has been pursued through the development of Service Level Agreements and is supported by the RTBU.

The RIS notes the Regulator will be established as an independent statutory agency under legislation of the South Australian Parliament. The RTBU recommends that an Advisory Committee at both national and regional level consisting of national rail safety regulator representatives, employers and unions - be established to advise on rail safety matters.

2.3 Rail industry overview (Section 2.4)

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.

2.4 Rail Safety trends (Section 2.5)

The RIS argues that it is difficult to draw reliable conclusions on any trends from accident data alone. It states that Figure 4 in the RIS 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.

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[6] National OHS First Review

3. Nature of the problem

The RIS refers to issues the Model Law did not address, explicitly providing for local variations. Four items are referred to

- The management of alcohol and drug 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 concerning interface coordination agreements; and
- Penalties for breaches of rail safety law.

Three of the four major issues directly involve rail safety workers. The RTBU is opposed to many of the amendments on three of these issues proposed in the RIS. The RTBU argues in this submission that significant changes will need to be made to the proposals that have been outlined.

The RTBU does not agree with the statement in the RIS that the amendments to the Model law that are proposed will address a specific problem relevant to that provision.

The RTBU argues to the contrary, that a number of the proposed amendments will create greater problems than currently exists with local variations especially in relation to fatigue management.

Furthermore, the RTBU argues that - particularly in relation to Drug and Alcohol specific issues –many legitimate concerns of rail safety workers have failed to be addressed.

In a number of other areas the RTBU has made suggestions for varying the amendments that have been put forward in the RIS.

4. Scope and objectives of national reform

The RIS notes that issues involved in establishing a national regulator include governance, institutional and funding arrangements which are being addressed separately by the National Rail Safety Regulators Office and are not addressed in the RIS.

The RTBU views these issues as critical to the success of the National Rail Safety Regulator, and more involvement of all stakeholders on these matters should occur.

5. Basis and structure of the RIS.

The RIS focuses on those elements of the national law that vary with, or were not addressed by the Model Law. In total, approximately 100 amendments have been proposed to the Model Law. The overwhelming majority of the changes have been assessed as not having a measurable impact.

The proposals assessed as having a measurable impact are grouped under the following themes

- scope and objectives of the national law;
- rail transport operator safety management;
- specific authorities and responsibilities of the regulator; and
- alignment with the Model Work Health and Safety Bill.

The RTBU argues given the nature of the problems and the policy areas which will impact on rail safety workers, there should be a fifth major theme: rail safety worker issues and impacts.

The RTBU argues the most important influence has been the alignment with the Model WHS Bill although in the view of RTBU a number of alignment issues remain to be addressed.

6. Impact analysis

6.1 Overview of proposed risk management requirements (Section 6.3.1)

The problem statement refers to the co-regulatory nature of rail operations imposing a responsibility on Rail Transport Operators (RTOs') to develop and implement a safety management system. Reference is made to the fact that capabilities and standards of risk management vary between rail operators. This variation has been found as result of regulator audit or the findings of inquiries and courts.

In many circumstances this discussion has focused on small operators and the tourist and heritage (T and A) sector because of their stretched financial capacity. The RTBU argues that risk management capability can vary for a variety of reasons and is not confined to smaller operators and the T and A sector.

These reasons include: commercial reasons; large rail companies expanding too quickly and not being able to seamlessly integrate the new operations; companies taking their eye off the ball because of corporate takeover battles; or companies shedding costs because of market conditions and downgrading their risk management capabilities.

This section of the RIS once again focuses on RTO's and regulators. No mention is made of the role of rail safety workers in risk management.

The national law in Division 3 – 'Rail safety duties' includes s49 - Principles of shared responsibility, accountability, integrated risk management etc. Sub clause (1) says that rail safety is a shared responsibility of RTO's, rail safety workers and other persons, the regulator and the public.

Sub clause (3) states that persons with the shared responsibility for rail safety should participate in, or be able to participate in; be consulted on; and be involved in the formulation of measures to manage risks to safety associated with railway operations.

An RTO, before establishing, varying or reviewing an SMS must consult with rail safety workers, health and safety representatives and unions representing rail safety workers. The RTO is required to provide the persons consulted with a reasonable opportunity to make submissions on the proposed SMS and advise those persons in a timely manner of the outcomes of the consultation process.

The RTBU argues that for rail safety workers to have shared responsibility, to be involved in the formulation of measures to manage risks to safety and to effectively participate in the consultative processes set out in the national law - they should be trained in their rights and responsibilities under the national law. The RTBU argues that specific units of competency should be developed for rail safety workers and OHS representatives to enable them to participate in risk management as set out in the national law.

The RIS refers to disadvantages of purely performance regulations being a greater potential for operators to exploit such measures - which can lead to compromises by regulators on how standards of safety management are upheld.

The RIS proposes that the National Law include more specific requirements in a variety of circumstances. The RTBU supports the general principle, though in specific circumstances the Union would argue it has not gone far enough. The RTBU argues rail safety workers must be involved in the various proposals that are expected to

result in higher standards of rail safety management - and be given the tools to ensure their effective participation.

6.2 Scope and Objectives of the National Law (Section 6.4)

The RIS indicates that the objects clause of the national law sets out how the law should be administered. It argues that a better alignment with the WHS Bill was a key part of the review.

Another issue to be addressed was how far the regulatory net should be cast.

The RIS problem statement argues that the current Objects Clause does not address some principles of rail safety law and, as a result, does not fully recognise the regulator's role in compliance, enforcement and provision of advice and training. These roles are recognised under the WHS Bill and the RTBU supports their inclusion in the objects and purposes clause of the national law. The RTBU believes a new approach to compliance and enforcement will need to be taken in the application of the national law as, unlike WHS regulators, rail regulators - with a few exceptions - have brought few prosecutions.

The RIS indicates that *"principles are also included and explain more directly how the law should be administered and understood"*. The RIS indicates the objects and guiding principles "*were developed by reviewing the objects of state and territory laws as well as the Model Work Health and Safety Bill"*.

One of the three guiding principles to be adopted is *"to assist rail transport operators to achieve productivity by the provision of a national rail safety scheme"*. This guiding principle is not in any state or territory rail safety law, nor the Model WHS Bill. Its inclusion has not been explained. It should be rejected as not reflecting principles in the existing legislation referred to, nor explaining more directly how the law should be administered and understood.

The RTBU argues the RIS in this section has a major weakness as it does not recognise the role of rail safety workers, OHS 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 WHS Review was forceful in its advocacy of the need for encouraging effective participation of unions and the involvement of the parties in consultation. This was recognised in the decision of ATC to expand the Objects clause and was based on the WHS Bill provision.

The new objects clause of the national law includes the need to promote the effective involvement of relevant stakeholders, through consultation and cooperation, in the provision of safe railway operations. The RTBU argues that the relevant stakeholders should be more explicit, as in WHS law, and include reference to rail safety workers, OHS representatives, unions and other parties.

While the RTBU supports the additional objects in the national law, 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 WHS Bill and to provide greater clarity.

The RTBU disagrees with the RIS impact assessment statement that the "*additional objects do not materially impact on other stakeholders*". The RTBU argues a key issue for the national law is the avenues for ensuring rail safety workers, OHS representatives and unions effectively participate - and there is both a cultural change and change in processes and tools, including training, which will reflect the new objective in practice.

6.3 Private sidings exemption from accreditation (Section 6.4.3)

The problem statement refers to sidings as *"being small in size used for purposes such as the loading and unloading of rolling stock at intermodal terminals*".

The RTBU queries this statement on two aspects, firstly, the size and complexity of sidings varies considerably, and secondly, the proposed definition in the model law specifically excludes a freight terminal from the definition of private siding, which for a number of reasons the RTBU believes should continue.

The categorisation of a private siding, or a freight terminal, depends on the activities undertaken at the location. The ITSR publication, *Regulation of Private Sidings Policy*, outlines issues in Appendix A to be considered in determining whether the location of rail activity is a private siding or a freight terminal. One key factor is the role of rail safety workers and risk controls relating to rail operations for the protection of employees. This is an area where supporting guidance material is important. The RTBU requests that this issue be clarified.

Currently, siding mangers not managing mainline railways or operating rolling stock are exempt from accreditation. Sidings are important for rail safety workers and other employees from a number of perspectives. These include the layout of the siding including points; the condition of the infrastructure; sighting distances; and environmental characteristics including condition of walkways, requirements for lighting and vegetation control. Incidents and accidents at private sidings do occur.

The RIS indicates for the most part the amendments are a clarification of existing policy with two suggested changes. One extends the scope for forming interface coordination agreements, and the other, the amendment of regulation 11 (maintenance and operational conditions) to better align with the risk management principles of the model bill. These principles are drawn from the Victorian rail safety regulations. The RTBU supports both of these proposed amendments.

One area which the RTBU seeks further discussion is in relation to the management of risks and consultation processes that would be involved, given that the scheme of registration is specifically designed to ensure a safety management system does not have to be prepared. The principles of rail safety duties, proposed in the national law, provides for rail safety workers to be able to participate in, be consulted with and involved in the formulation of measures to manage risks to safety. The RTBU suggests this link to private sidings needs to be articulated and provided for in rail safety law.

6.4 Exemption Framework (Section 6.4.4)

The RIS indicates that there are currently no provisions for regulators to exempt RTO's from any provision(s) of the model bill. However, the broad scope of general rail safety duties, to manage risks so far as is reasonably practicable, provides a degree of latitude to operators as to how they manage their safety management systems.

The RIS argues that some of the more prescriptive provisions including, health and fitness, security and emergency plans do not provide a lesser degree of flexibility. The RIS says "*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*".

The RIS says this may be made worse by additional prescriptive provisions and refers to alcohol and fatigue risk management programs.

Another issue raised in the RIS relates to parties who are not in effective management and control of railway operations - and the example of the Victorian Director of Transport is referred to.

In the options, considerable discussion is given to ministerially granted exemptions. The option refers to short term exemptions (of up to three months for urgent or pressing circumstances) which would be granted by the Minister. For longer periods of time, an exemption application would be subject to an assessment process administered by the regulator.

Long term exemptions relate to the *"prescriptive"* requirements referred to earlier. A number of these requirements have not been finalised e.g. alcohol and fatigue risk management as they are subject to implementation working group processes. It is difficult, for example, to contemplate fatigue risk management programs being onerous for small operators in the T and H sector as many operate during daylight hours and on a restricted basis.

The RTBU argues that to grant exemptions to parts of an operator's SMS 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 RTO's from elements of their safety management systems. The RTBU argues that the issue of these exemptions for small operators should not proceed, and should be included in, the maintenance process after the stakeholders have had the ability to experience the operation of the national law in practice.

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' SMS stakeholders should be notified of an application for an exemption, and have the ability to make their views known to the regulator.

The RTBU suggests greater detail should be made available in the RIS to enable clarity around the issues of "*effective management and control"* and the impacts of the proposed changes.

6.5 Powers with respect to interfaces with parties whose operations may impact rail safety (Section 6.4.5)

The RIS problem statement states the regulator is not authorised to regulate works occurring around or in the vicinity of rail infrastructure which impact on rail safety - but do not fall under the definition of rail safety work.

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. A number of examples include the release of hazardous fumes, the severing of signaling cables and plant, and equipment fouling running lines with resultant collisions.

The RIS supports Option 2 which requires that a person may not carry out works near a railway that is likely to threaten the safety or integrity of railway operations - without prior consent of the relevant railway infrastructure manager and regulator. In addition, the regulator is given power to direct persons, or an RTO, to cease or alter work that could be a threat to the safety of railway operations. The RIS notes that a number of jurisdictions already have these provisions.

The RTBU supports option 2.

6.6 Duty for loading and unloading rolling stock (Section 6.4.6)

The loading and unloading of goods is an important rail safety issue.

A recent ITSR safety report[7] has noted that there were 170 load irregularities notified in 2009-10.

Load irregularities included loose load fastening, door open, load shift, out of gauge, and uneven distribution of load. In relation to door open incidents, it noted that one third of all running line incidents between trains involved open doors swinging into the path of trains on adjacent lines. Steps undertaken by freight operators to reduce such occurrences, including wagon and door modifications, have had a positive effect.

Incidents of load shift can threaten the safety of passengers on platforms. The uneven distribution of loads has been the suspected cause of a derailment.

The issues are about the intersection of rail safety law and WHS law; whether rail safety regulators should extend their reach beyond rolling stock operators (in some ways analogous to road/rail interface issues); and whether rail safety work should be extended to include workers engaged in the loading or unloading of rolling stock who - under the national model bill – have not been regarded as rail safety workers.

Three options are outlined. Option 2 involves a major departure for the industry as rolling stock operators would be required to extend their SMS to cover other parties and many "*non direct rail employees"* involved in the loading and unloading of freight.

The RIS argues this would involve additional costs in the areas of health and fitness, alcohol and drug use, fatigue and competence. No examination is undertaken of whether employees loading or unloading rolling stock are already covered in whole, or in part, by similar provisions in the associated industries engaged in that loading and unloading - whether they be other sections of the transport industry or in the grain or coal industries. From the RTBU's experience many companies in these sectors have extensive programs in the areas referred to.

The RTBU is disappointed the RIS 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 WHS regulators. An examination of WHS 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.

On the evidence presented in the RIS, the RTBU supports Option 3. It is a step forward in addressing an important rail safety issue, although the RTBU argues more work needs to be done in this area.

There has been structural change in the Australian economy where freight movements are seen in a wider logistics and supply chain perspective. There is a growing importance of integrated operations where

[7] ITSR Rail Industry Safety Report 2009-10

agricultural, industrial, mining and manufacturing conglomerates are vertically and horizontally integrated or contract their entire transport requirements to companies who provide a total transport and logistics service.

6.7 Operator safety management (Section 6.5)

The current Model Bill provisions require RTO's to adopt relevant prescribed requirements about risk management principles, methods and procedures to identify, assess and control the risks to safety.

There are no prescribed requirements as to the decision making process or mechanics of how safety risks are to be addressed as Model Regulation 10 is silent on the matter with a drafting note having reserved this provision for future development.

The problem, as reported by regulators, is that standards of risk management vary across the industry. A weakness of a performance based standard is that there is a greater potential for operators to exploit such a measure as de facto deregulation and a lack of a prescribed standard can make prosecutions more difficult.

The RIS sets out two options, firstly, a statue quo option or a set of risk management principles for risk identification based on the current sections 50 and s51 of the Victorian Rail Safety act. In addition, it is proposed to elevate risk management principles from the regulations to the National Law due to risk management being an integral part of the national law and an important legislative requirement.

The RIS, in discussing Option 2, indicates that for rail safety workers it was anticipated they would benefit from improved levels of safety from this proposal being adopted.

The RTBU argues the RIS needs to incorporate rail safety workers as an important active component of risk identification, risk assessment and risk control. The RIS refers to the rail transport operator's role in developing and maintaining a compliant safety management system.

The RTBU refers to the following clauses in the national law: s3 'Objects of the Act' and s49 '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 s100 'safety management system' which provides for consultation with rail safety workers, OHS reps and unions in the establishment, variation or review of the SMS.

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.

6.8 Health and fitness management program (Section 6.5.1)

A number of accidents and incidents and the resultant inquiries and recommendations saw the development of the National Standard for Health Assessment.

The RTBU was involved in the development of the standard and the recent review which is currently the subject of a public consultation process. It is a risk based standard. The aim of the standard is to prevent or minimise work related deaths and injuries caused by medical conditions, particularly where a rail safety workers incapacitation may present a risk to the public or other rail safety workers.

The National Standard is a very important issue for rail safety workers as it can both identify emerging conditions and monitor existing conditions allowing preventative strategies to be implemented. Changing or emerging medical conditions are an important issue for an industry which has a higher than general industry age profile and because of the predominantly shift work operating nature of the industry.

The outcomes of health assessment, and the medical diagnosis underpinning them, can have major impacts on the careers and/or income levels of rail safety workers. At one end of the scale, certain medical conditions can prematurely end a railway career while some conditions may narrow the scope of duties that can be performed with either a temporary or permanent reassignment of duties. Health assessments involve highly sensitive information, so issues of confidentiality of information are paramount. Rail safety law has been amended to give immunity to certain medical professionals.

The RIS refers to the issue as one of interpreting the standard so far as is reasonably practicable. This has enabled some rail transport operators to deviate from the standard or to assess a reduced number of classes of rail safety workers or allowing some operators to manage rail safety workers' health by alternative means.

The RTBU supports option two which removes the 'so far as reasonably practicable' qualification from model regulation 22.

6.9 Alcohol and drug and fatigue risk management (Section 6.5.3)

The RIS argues "*the nature of the rail industry and its working requirements is such that fatigue is a complex risk".*

The RTBU is disappointed at the lack of progress in advancing fatigue since the model bill was passed in 2006.

The RTBU argues the formation of an expert panel in late 2010, which met on 8 occasions, was not a process designed to produce the best outcome for all parties but rather aimed at a quick fix.

The route being pursued, the RTBU argues, will not produce a long term solution. It is vigorously opposed by the RTBU. The path being pursued is not consistent with recommendations made the Federal Parliament in its 2001 Report, *Beyond the Midnight Oil*.

The RIS fails to take into account that fatigue is an industrial issue for rail safety workers, with many collective agreements containing fatigue provisions which go beyond the traditional prescription of hours approach.

Working time arrangements, and the myriad of details relating to hours of work, rostering, consultation rights and the processes for the involvement of rail safety workers in the consideration and resolution of these issues are contained in collective union agreements. They are legally enforceable under federal law. Over 95% of rail safety workers are covered by these agreements.

In a legal hierarchy these industrial laws are similar to the relationship between WHS law and rail safety law; if there is any inconsistency between the two sets of laws then the industrial federal law will prevail over inconsistent state based rail safety law.

This section of the RIS does not refer to the consultation rights of rail safety workers, OHS and unions in the establishment, variation and review of a safety management system which includes fatigue and drug and alcohol management programs. Consultation rights were included for the first time in rail safety law in the 2006 national model bill. The implementation of the bill is still in its infancy in most jurisdictions. Unlike WHS law, a culture of worker involvement and consultation is far from being established in rail safety law.

The drug and alcohol management programs of rail transport employers were established a number of years before the introduction of consultation rights in rail safety law. Very few rail safety workers are aware of their right to be consulted when an SMS is a reviewed, which according to law, generally occurs on a yearly basis. The RTBU is unaware of any action taken by regulators to audit the compliance of RTO's concerning the consultation with rail safety workers, OHS representatives and unions when an SMS is varied or reviewed.

For rail safety workers, the rail transport operator's drug and alcohol management program (DAMP) is where the framework for issues for drug and alcohol management is centered.

Currently, it is effectively deregulated from a rail safety worker's perspective.

It is under the DAMP that testing occurs. The employer, regardless of wider community developments, can determine what testing regime shall take place: blood, urine or oral fluid analysis.

The DAMP is where disciplinary action procedures, whether fair or otherwise, are set out. The impacts of disciplinary action taken under a DAMP can far outweigh the implications of action taken in a prosecution by a regulator. Action can include dismissal, regression or restrictions in duties which can mean a loss of income in the thousands of dollars.

Thus, even before a rails safety worker is prosecuted by a regulator - as is the case in NSW and is proposed in Division 9 of the national law - the rail safety worker could have already been dismissed by an employer.

The DAMP is also where education programs are formulated, self-identification issues developed together with issues concerning rehabilitation and counseling.

The most recent ITSR Safety Report indicates that almost 72,000 alcohol and 14,300 drug were conducted by RTO's in NSW in 2009-10.The Report also states that ITSR also undertook D and A testing on two occasions, with 95 alcohol and 45 drug testing being undertaken during the year.

By comparison testing by regulators is minute.

The RTBU argues the development of the national law for drug and alcohol management has been focused, as reflected in this RIS, on a very narrow range of issues.

The RTBU believes issues of importance for rail safety workers have not been considered in detail. The focus in the drug and alcohol area has almost exclusively been on the role of the regulator in testing and penalties, without addressing the threshold issue of whether the case for regulator testing been justified or based on any evidence?

The NSW jurisdiction has the most comprehensive provisions in rail safety law for drug and alcohol management. It is the only jurisdiction where the regulator, albeit on small scale, directly conducts testing and takes prosecutions against rail safety workers. It has urine based testing mandated - again the only jurisdiction to do so. It also has random testing, whereas a number of jurisdictions do not or do so on a qualified 'reasonable cause' basis.

In mid-2010, the NTC as part of the development of the national law convened a workshop on D and A issues at short notice. The RTBU had nine delegates attend, including the current National Secretary, with poor representation from employers and regulators. RTBU delegates were unequivocally of the view that their issues were not seriously considered at this workshop or in the subsequent report.

The RTBU has previously noted its strongly held concerns about the content of the report and its failure to provide an evidentiary basis for its recommendations – particularly given readily available academic literature with contrary conclusions.

The Rail Expert Panel was asked to address a number of carefully crafted questions, the overwhelming majority of which were designed to address the impasse between NSW and other jurisdictions about the role of the regulator in drug and alcohol testing.

The RTBU argues that matters of concern for rail safety workers have been airbrushed. For many thousands of rail safety workers, the indignity of invasive urine testing for drug screening is part of a daily routine. The RIS notes "*in recent years there has been a focus on managing the alcohol and drug related risks in the road environment and the public expects that this would be translated and applied to the rail industry"*. This environment includes testing for drugs by swab and does not include urine testing.

The RTBU also refers to decisions of industrial tribunals, including the Shell Refinery decision, in which support was given for swab testing over invasive urine testing.

The duality of the approach adopted by the rail safety law is seen by an examination of the virtual self-regulation which applies to the employer's DAMP, compared to the testing and allied procedures proposed for the regulator which will reflect state and territory roadside legislation.

As discussed in the RIS, there are only subtle differences between jurisdictions' roadside legislation.

The RTBU argues that road testing as practiced in all jurisdictions in recent years has created a community standard in such areas as oral fluid analysis for drug screening. It is the standard for millions of motorists, hundreds of thousands of heavy vehicle drivers in both freight and passenger operations and the airline industry.

Allowing RTO's to determining testing procedures is an anachronism which should end.

The regulations should stipulate the use of oral fluid analysis for drug screening tests.

The RIS indicates that it is not the intent of the proposed regulations for D and A matters to be prescribed, but only specify high level considerations as minimum requirements.

The RTBU argues that the high level considerations, and the policies and practices underpinning them, should have been examined in detail in order to understand their application and operation to drug and alcohol management within the Australian rail industry.

For example, what are the education and information courses undertaken by employers and are they competency based? Perhaps more importantly, what are the respective amounts spent by RTO's on worker education compared to expenditures spent on testing?

The emphasis of the RIS is overwhelmingly on deterrence, testing and penalties compared to the range of issues which need to be addressed when drug and alcohol management is addressed as primarily a health issue.

The RTBU remains concerned about the availability and effectiveness of rehabilitation services offered by RTO's. Furthermore, concerns are also expressed about the internal disciplinary procedures adopted by RTO's, how they vary between companies and whether fair procedures are adopted.

6.10 Specific comments about the RIS

Alcohol and Drug use

The reference in the RIS 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. The RTBU argues the policy development, as set out in the RIS, has erroneously been very narrowly focused and has not extended to an employer DAMP

Fatigue in the rail industry

The RIS 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 RIS argues that a well-formed platform of knowledge on fatigue issues has developed in the rail industry over the last decade. The RTBU in the early 1990s was a driving force in this development and the advanced nature of the rail industry compared to the road industry was referred to in the 2001 Federal Parliamentary Report "*Beyond the Midnight Oil"*.

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.

The unwritten, unspoken assumption is that the hours of work of the long distance road freight industry should be applied to rail safety workers. This is the assumption that has guided the work of the NTC and is the policy position of the ARA.

For the RTBU, the adoption of worst practice is not the path to obtain best practice fatigue management.

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 RIS 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 RIS.

Drug and alcohol management program

The RIS refers to model bill provision s28 –duties. The RTBU seeks to underline the reference in this clause to "on duty" as some of the proposals in Division 9 go beyond this reference as do references in the same clause which relate to being impaired by a drug. The RTBU argues there has, and continues to be policy confusion about presence versus impairment and this has implications in a number of areas.

This section, in referring to relevant sections of the national model bill, does not refer to the consultation provisions highlighted earlier in this submission. Their importance is underscored by the RIS reference to the rail safety worker duties referred to in s71 (c) where a rail worker must cooperate to comply with a requirement imposed by the act or regulations and the RIS draws the conclusion *"this duty on rail safety workers ensures their conformance with the operators drug and alcohol management program".*

It is doubtful that any rail safety worker in Australia knows the existence of this particular clause. This reinforces the need for and education program for workers to know their responsibilities and rights under rail safety law. It also highlights the fact that aspects of the rail operator's DAMP program are odious to rail safety

workers and that DAMP's, under the current provisions, are extraordinarily self-regulating and one sided in their nature.

The RIS discusses 4 options. Option 3, based on a alcohol and drug management program being required as part of a SMS with prescribed elements to be included in national regulations. The RTBU argues that more detail should be set out in the regulations concerning the various considerations.

Of the options, the RTBU gives qualified support to option 3. Many of the mandatory requirements and proposed considerations are already in the drug and alcohol programs of operators and would not represent any material change. The RTBU suggests this information should be gathered and published.

The RTBU does not support the performance based co-regulatory approach which gives the power to one regulated party, the RTO, to *"have the utmost flexibility in determining how they achieve compliance in these key areas of rail safety*". It does not produce national consistency, it produces variable outcomes and can cause confusion as rail safety workers change employers.

A disturbing aspect of the discussion around the four options is the reference in the RIS as to how various options were dependent on how the law was interpreted and enforced by the regulator. To the RTBU it is alarming for the RIS to indicate that, if the regulator chooses to administer the law rigidly, it may encourage operators to apply for an exemption. The RTBU argues such a development would be completely at odds with the concepts underlying the exemption framework as set out earlier in the RIS. At a practical level, it is difficult to imagine a forceful application of drug and alcohol frameworks by a regulator could lead to the same RTO, going through the back door to the same regulator, who would be determining the exemption.

6.11 Testing and for alcohol and drugs (Section 6.54)

A key issue not directly discussed in this section is the type of testing undertaken by rail transport operators. In NSW, current provisions mandate urine testing by both the RTO and ITSR. It is overwhelmingly resented by rail safety workers in NSW and has been a potent source for dissatisfaction by rail safety workers.

ITSR responded to this in 2009 by establishing a public consultation to address two issues, whether urine testing should be substituted by oral fluid for initial screening and whether specific offences for drugs, and in particular the offence of presence, should be introduced. On COAG's decision to commence negotiations for a national regulator, the ITSR initiative was referred to the NTC[8].

The issue causing the most passion in NSW, and indeed elsewhere, has not been pursued in the development of the law and regulations – with a failure by all parties to provide an explanation.

This section of the RIS discusses the roles of the regulator and rail transport operator in testing.

What is strikingly absent from the discussion is hard evidence upon which to base policy.

Under the heading 'problem statement' the RIS indicates *"a fundamental consideration is to consider the role of the operator under the national model law and the obligations under its DAMP".* The RIS says "*through the DAMP an operator manages the safety risk, supported by an appropriately resourced and quality alcohol and*

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[8] ITSR Information Alert, 8 April 2010." The NTC is developing national legislation including a new Rail Safety Act and regulations for drug and alcohol testing. The comments received by ITSRR on the discussion paper have been referred to the NTC for consideration in the development of a national position on drug and alcohol testing in the rail industry".

drug management program." There is no evidence as to what are appropriate resources, whether this is achieved by RTO's and what a best practice D and A education program is.

There are statistics from the ITSR drug and alcohol Discussion Paper that shows how many tests are taken, and the costs of which are in the millions of dollars. Many drug experts argue that education should be at least 50% of an employer's DAMP. As an industry no information is available as to whether industry is meeting such objectives.

The RIS states that an operator's program is required to consider other factors including: the identification and proactive management of alcohol and drug misuse through competency based education and self-identification; support for rehabilitation; confidentiality arrangements; as well as a testing program.

The RTBU again makes the comment that given the narrow platform for discussing drug and alcohol issues in the RIS, nothing has enabled industry to assess the level of support for rehabilitation or proactive management - or whether these issues are only viewed as a 'paper policy'.

There is nothing in the proposed regulation, either at mandatory or consideration level, which requires competency based education. The RTBU argues this is major omission and should be made a mandatory requirement of the regulation.

The RIS supports option 2, meaning the national law does not prescribe the testing requirements of rail transport operators and does not require operators to provide evidentiary test results to the regulator. The RTBU argues testing requirements should be prescribed, and urine testing be replaced by oral fluid testing.

The RIS indicates, in discussing its favored option, *"safety could be compromised if the role of the operator was broadened from one of rail management to include a prosecution element as the focus of the testing regime would be altered*".

Reference is made to operators not being required to undertake an enforcement role. At the moment RTO's can, and do, impose a range of sanctions and penalties for breaches of their policies.

This includes a rail worker losing their job, and in a number of instances the union has used the provisions of Fair Work Australia to argue the dismissal was unreasonable or unfair. From a rail safety worker's perspective, the discussion does not reflect their day to day realties where, for all intents and purposes, a prosecution element exists and is enforced.

The discussion around the testing focuses on evidentiary testing and whether the employer should be required to do so. Once again, the RTBU argues the discussion is too narrowly focused. It should have also included a discussion about the testing standards to be required if non-evidentiary testing is to be pursued. The RTBU argues that the advice of the expert panel on this issue should be adopted and its recommendation that testing standards should, at the minimum, be based on Australian Standards.

The RIS also notes that *"considerations should be given to employer and employees relationships that may become stressed when the operator conducts tests for evidentiary purposes which may also impact on productivity"*. The RTBU argues that any real source of tension between employers and employees would be eased if oral fluid testing were made as a mandatory component of an employer's DAMP – rather than entrenching an operator's ability to test using urinalysis.

The RTBU does not support option 2.

Types of alcohol and drug tests and procedures for testing by the Regulator

The RIS refers to NSW as the only state to vary from their roadside methodology and NSW being the only state to employ urine testing - while all others employ oral fluid testing. The RIS does not refer to the actions undertaken by ITSR to examine the continuance of urine testing in that state.

The RIS supports option 1 which is the status quo, where the national law does not prescribe alcohol and drug testing procedures undertaken by the regulator and thus retaining local variations. There appears to be some discrepancies between this position and Division 9 of the national law.

From the discussion in the RIS around the issues in this section, the RTBU concludes that testing by the regulator in NSW will be based on oral fluid analysis and the current practice of urine testing by the regulator will cease. The RTBU requests confirmation from the NTC that this is the intention of the proposal they have put forward.

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

The RIS indicates it is important for the purpose of defining offences to have national consistency.

The RIS makes no reference to the findings of the Rail Expert Panel on this issue of definition of a drug. The panel, in its report, stated that it was its understanding that the definition of a drug would be retained. The RTBU asks why this recommendation has not been taken up.

The RIS argues that the option recommended would benefit rail safety workers as it would give clarity about which substances are drugs, including prescription and over the counter drugs, and that such a list would inform and educate rail safety workers.

In this regard the Expert Panel states: "*Given the wide application of the meaning of drug under the proposed definition it underscores the need for comprehensive education programs for rail safety workers. These should cover not only definitions, but how drugs can affect performance and coping mechanisms to avoid reaching the point at which safety or health may be jeopardised*".

The RTBU suggests education components should be included in a competency based education program which is mandated in the regulations.

Requirements for a "testing Officer" or other " authorised person" to compel and coordinate testing of rail safety workers

The RTBU suggests if a definition is to be included in the national law, a number of maters need to be addressed. These include specific provisions for the testing to be undertaken, and that the training be competency based. In addition, specific safeguards must be adopted which indicate that the testing officer does not have the power to arrest a rail safety worker, that this can only be done by a police officer, and that a rail safety worker has the power for an alternative test.

The RIS, in its options, indicates that including a definition may assure rail safety workers that the testing process and sample analysis has been controlled - and the results are accurate and reliable.

In light of the nature of many disciplinary actions conducted autonomously by operators under their DAMP's, the RTBU asks why these quality assurance issues would not equally apply to an operator's DAMP testing. The RTBU therefore requests that they should.

Alcohol and Drug Offences

The objective of the RIS is to "*develop regulatory requirements that represent best practice and produce improved management of alcohol and drug use*". No examination is undertaken of what constitutes best practice in any jurisdiction or other mode of transport, including roads, maritime or civil aviation. Nor has there been any examination of current management of drug and alcohol use.

This section of the RIS is entirely within the context of the regulator prosecuting rail safety workers for a variety of offences. The RTBU has earlier pointed out that a number of regulators do not conduct a testing program, nor do they bring prosecutions against rail safety workers. No discussion has occurred within the RIS about what level of testing is envisaged and what the potential prosecution policy of a national regulator might be.

For the RTBU these are major shortcomings in the RIS.

The RIS in option 2 sets out a number of offences: for a prescribed concentration of alcohol, an offence of presence for drugs which relates to three nominated substances and an offence of indicia, being impaired by a drug.

The RIS argues that these offences *"mirror those currently existing locally in each state and territory albeit removing variances due to different testing regimes"*. The RIS does not indicate if this statement is made concerning the adoption of these offences in roadside legislation in the various jurisdictions, or under local rail safety law. They do not represent offences under rail safety law, in particular the offence of presence of nominated drugs.

The offences are taken from the recommendations of the Rail Expert panel report. The RTBU is concerned that the offences referred to in option 2 appear not to be what has been included in Division 9 of the draft national rail safety law.

The RTBU is also concerned that the RIS has been very selective about which of the Rail Expert Panel's D and A recommendations have been adopted, despite an indication from the meeting of Ministers that all the drug and alcohol recommendations had been accepted.

The RIS, in commenting under safety benefits from option 2, refers to a national scheme eliminating confusion. The discussion does indirectly highlight the need for comprehensive education for rail safety workers, matters which were the subject of recommendations by the Expert Panel but which are not within this RIS. The various proposals concerning drug and alcohol management by the regulator will bring substantial changes for workers in many jurisdictions.

The RIS argues national law will ensure rail safety workers are treated equally. The point needs to be made that NSW is the only jurisdiction undertaking regulator testing. Introducing another layer of testing will be the reality for the majority of rail safety workers, who are far from convinced about the need for an active testing program by the regulator. However this concept of equity of treatment does not exist in the DAMP programs of the RTO's. There exists many differences between RTO's, yet this fundamental matter of principle has not been addressed in this RIS.

For workers, the reality of the new offences is that it brings another layer of penalties to be administered by the national regulator, in addition to the disciplinary procedures which include a wide array of fines and options, including dismissal. For workers, an extra level of fines will be incurred for what are similar offences.

The RIS argues that it is expected prosecutions will remain infrequent and the total number of successful prosecutions for D and A breaches since the implementation of the model bill is 21.

There are a number of weaknesses in this argument.

In most jurisdictions, the national model bill has only recently commenced, there exists no uniform approach to prosecution by jurisdictions, and the national regulator is yet to frame a testing and prosecutions policy.

NSW is the only jurisdiction to have actively pursued a prosecutions policy. With the proposal for RTO's not to test to evidentiary standards, a question arises as to whether there will be a requirement for regulators to have a larger testing program.

The RIS in summary proposes that RTO testing requirements not be prescribed, and places no obligations on an RTO to conduct evidentiary level testing. The RTBU is opposed to no testing requirements being prescribed, as the union argues there is a community standard for drug testing and that urine testing should be replaced by swab testing.

The RTBU argues that the RIS support for placing no obligation on RTO's to conduct evidentiary testing needs to first answer the question as to what standard of testing will be required. The Rail Expert Panel recommended that if evidentiary testing for RTO's was not required, then the standard to which RTO's should test should be, at a minimum, Australian Standards.

The RTBU further argues this should be mandated in an RTO's DAMP requirements. An important issue not addressed by the RIS is what percentage of RTO's will continue to test to evidentiary standards. Currently some national operators do so and all RTO's in NSW currently have to test to this standard.

The policy underpinning the national law for drug and alcohol management is the principle of risk management by RTO's. The RTBU argues there is a fundamental tension with community standards as expressed by roadside legislation.

The RTBU is concerned that the DAMP of RTO's' has not been examined as part of the examination of drug and testing issues. The legitimate requirements of workers have not been addressed. The RIS and policy process has worked on addressing the issues of RTO's and regulators. Issues concerning rail safety workers have not been part of the agenda, and the RIS proposals are narrowly focused and deeply flawed.

Fatigue risk management –hours of work and rest

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.

Thus the statement in the RIS "*that where is no legislated hours of work , the approach to working time restrictions is through the normal risk management process in all states and territories*" comprehensively fails to recognise industrial arrangements. Unlike the road industry, from which the NTC bases its philosophical rational for fatigue management, the rail industry has over 95% of rail safety workers covered by union collective agreements.

Some of the prescribed requirements in NSW are not referred to in the RIS. This includes requirements that any exemption sought must conform to existing industrial arrangements and, as part of the exemption process, consultation with the impacted rail safety workers must occur.

The RIS problem statement refers to a general trend in international rail settings and in other transport industries to move away from traditional prescriptive working time restrictions to a more risk based approach.

No evidence is produced about changes in international rail settings. It is an assertion only and should be rejected outright.

The terms of the discussion are attempted to be framed in an either or approach that is a traditional hours versus risk based approaches. The RTBU argues the approach of the Australian rail industry has been a combination of both. They are not mutually exclusive. Thus the RTBU argues that the hours working time legislative requirements are supplemented by a risk based management approach, and that this represents international best practice.

The RIS outlines 3 options. An earlier reference was made to the advanced stage of Queensland adopting the NSW legislative provisions for train driver hours. This would mean that over 60% of Australian train drivers would be covered by similar legislation before the national regulator came into operation in 2013.

The RIS has not considered the operational and risk profile of several other jurisdictions, where, because of these characteristics, they are unlikely to be impacted by the NSW/Queensland legislative provisions.

The RIS indicates in relation to the removal of the NSW safety net "*such changes could include a gradual drift towards an increase in driver only operations, shorter break times and potentially longer driving times"*. No evidence is produced supporting this statement, which operator or to which sectors of the rail industry it may apply to e.g. electric suburban, inter urban, single manned passenger, various freight operations etc.

The RIS does question the maturity of certain operators or segments of the industry which may be insufficient to produce an acceptable safety outcome, and for such other cases tools such as guidelines or codes of practice should be employed. The RIS does not refer to the 2007 fatigue guidelines produced by the NTC, which have not been utilised by the industry.

The RIS refers to "*where the NSW safety net may have been overly restrictive*". No evidence is produced of this being the case. Further reference is made to the cost of the NSW exemption process, and difficulty in gaining an exemption may have served as deterrent for doing so. No evidence about the costs of the exemption process or the potential difficulties in gaining an exemption is produced. No reference is made in the RIS to the employer having rights of appeal that RTO's have against decisions of the NSW regulator.

The RIS argues that rail infrastructure managers would not be affected as all states and territories allow employers to determine hours of work for rail safety workers other than drivers via risk based approach.

The risk management approach is always qualified by the existence of legally enforceable industrial instruments.

The RIS in discussing option 3 refers to the extension of the NSW provisions capturing extreme rostering situations. Operational considerations extend far beyond rostering, which is only one component in fatigue considerations. It includes daily hours, unrostered shifts etc.

The RIS refers to a number of circumstances where the legislated safety net may have prevented a practical drift to harsher duty hours in response to commercial pressures. The RIS says this may not accord with industry best practice, or continuous improvement, without discussing or providing evidence as to what industry best practice is.

The RIS makes reference to technological development making a schedule obsolete over time. No international or local examples are referred to.

The RTBU makes the point that the legislation will be mandatorily reviewed after five years in operation. The NSW schedule has been operation for 7 years and the theoretical potential problems referred to in the RIS have not been experienced.

The RIS refers to only 3 exemption applications having been made in NSW and that it was foreseeable under a national scheme, with differing operating environments, the number of applications would increase - particular initially. No examination is made of the NSW exemptions, their characteristics and what factors may prompt an increase in applications.

The discussion about the potential impacts on rolling stock operators does not take into account the comprehensive regulations which currently exist in NSW concerning fatigue, and the range of factors that go beyond a one dimensional consideration of lengths of shifts and rest breaks.

The RIS makes reference to the major risk of a safety net which may excessively limit operators, particularly in the mining sector and more remote areas, who have indicated that the restrictions on driver only operations may be a significant impact. The RIS undertakes no analysis of the operational activates of the mining companies, the history of their operations, risk profile, industrial arrangements, work and social arrangements including fly in and fly out operations.

The RIS makes the unsubstantiated claim that "*the application of the NSW safety net will impact train drivers nationally restricting hours of work for many drivers''*. No evidence is produced where shifts would be shorter shifts with longer breaks. The RIS also makes the statement "*the (NSW) option gives more flexibility for affected rail safety workers"*. No analysis is undertaken as to how hours of work are arrived at, the role of collective bargaining and the democratic practices that inform the setting of the hours of work for train drivers.

This section of the RIS finishes with a box in which reference is made to the proposals of a Rail Expert Panel. The proposals were not unanimous and the RIS should reflect this. No mention is made of the risk based assumptions of the expert panel being replaced, or a recommendation of the Panel being unilaterally altered by the NTC. Furthermore, no mention is made of the Ministerial Council resolution on this issue being significantly amended by the NSW Government.

The RTBU opposes the option favored 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.

6.12 Assessment of competence (Section 6.5.6)

The RIS indicates in the problem statement that a review revealed a lack of clarity for the standard to be used in assessing competence. The RTBU has negotiated with many employers for the creation of competency based classification structures using the AQT/AQF. There has been no confusion between the parties as to the interpretation of the legislation. This is recognised in the RIS which states in option 2 "i*n practice, rail transport operators and most safety regulators have interpreted it this way"*.

The RIS refers to a broader issue, and concerns by some stakeholders, about whether RTO's should be required to assess rail safety worker competence by reference to the AQF/AQTF or whether they should be able to do so internally. The RIS notes "*this would constitute revisiting a policy agreed to in the process of developing the model bill, this issue was considered to be beyond the scope of developing the model law"*. The RTBU agrees with this position.

The RIS notes small or remote operators have raised concerns with the requirements to assess competence against the AQF/AQTF. The RTBU notes that some remote operators e.g. Rio Tinto and BHP Billiton in the Pilbara region are amongst the most profitable companies in the world.

In the development of the Model Bill, the T and H sector raised a number of concerns about the then s68(3) which required an assessment in accordance with the AQTF/AQF - and in particular - the costs in utilising RTO's to undertake assessment.

These issues were discussed in an NTC policy statement on transitional arrangements[9]. At 5.7.2, the competency requirements of the T and H Sector were discussed and two particular issues were referred to as posing concerns.

One issue related to gaps in the coverage in the units of competency of the industry training body and the potential costs arising from the requirement to ensure the rail safety worker competency assessment are undertaken or validated by an AQTF Accredited Assessor.

The NTC proposed that these issues be monitored in the first year of transition, and should compliance costs be unsustainable, then the legislative provision applying to the T and H sector be reviewed.

The policy document noted if gaps in the AQTF existed, that the industry training body would assist operators to prepare the unit of competency and this *"will ensure both the duplication of effort and creation of a parallel system to the AQTF were avoided"*.

A proposed compliance strategy for RTO's was set out, yet, the strategy was not carried through.

If it had been, there would have been no need to even contemplate the 'not reasonably practicable' option being suggested in this RIS.

Costs as an issue for the implantation of s68 of the model bill was further examined by the NTC and the then existing Advisory Committee.

A paper[10] said of a proposal to use a person who qualifies in Certificate IV, without recourse to an RTO, had at least five disadvantages:

- Variability in quality of assessment
- Insufficient Access to Certificate IV assessors
- No portability of statement of attainment
- Inconsistent with model rail safety legislation and requirements of RTO's
- Liability in the event of an incident. `

The introduction to the NTC publication said *"in preparing this paper it became apparent that the underlying concerns of the T and H sector about the requirements of s68 (3) should be considered holistically. The NTC supports a coordinated approach that assists the T and H sector to make the transition to the requirements of the model rail safety legislation s68 (3). Such would involve rail safety regulators, ATRHA and the T and H sector and the NTC, where required"*.

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[9] NTC: National Policy Statement for Transitional Arrangements for the Implementation of National Mode Rail Safety Legislation November 2006 .see 5.7 Rail safety worker competency pages 9-13.

[10] NTC Assessing Rail Safety Worker Competence in Tourist and Heritage Railways: Draft for Discussion with Working Group Members, August 2008.

This approach was not adopted for a variety of reasons including a lack of leadership which would have required national coordination, which was not forthcoming. The RTBU argues that the approach referred to, of addressing the issues of the sector holistically, remains the way forward - not through exemptions or short cuts.

The RIS sets out two options, a status quo and an option which clarifies that rail safety worker competence must be assessed in accordance with the qualifications or units of competence under the AQF.

Option 2 also includes a provision to allow, if it is not reasonably practicable for the RTO's to assess competence in accordance with the AQTF/AQF, that they may assess competence by other means. The RIS does not mention that the operator would have to satisfy the regulator of the other means or other applicable qualifications.

There is no discussion in the RIS about what other qualifications would be (whether in house, oversees qualifications etc). The impact assessment refers only to the clarification issues, and not the important policy principle surrounding the new 'not reasonably practicable' test and how it would be applied.

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 RIS argues that option 2 better supports the policy objective of assessing rail safety worker competence and does not impose any additional burden on any parties.

The RTBU opposes the introduction of the not reasonably practicable test.

Firstly, it contradicts the policy principle of the review that it would be revisiting a policy agreed upon in the process of developing the Model Bill.

Secondly, the proposal clashes with overarching federal government policy objectives concerning the training reform agenda, the need for continuous improvement in training ,occupational mobility for employees and the development of a seamless national economy.

Thirdly, the proposed change is referred to in one paragraph, no supporting evidence is adduced and arguments against the proposal are not set out. The only thorough investigation of the issue which involved the T and H sector did not support the direction now being advocated in the RIS.

Fourthly, the issue would not have arisen if the transitional strategy had been followed through. Despite this failure, no evidence based arguments have been put forward in the intervening period for changes to the original model bill provisions.

Fifthly, the RTBU does not agree with the RIS that *"option 2 does not impose any additional burden on any parties"*. *T*he RTBU believes it will impose obstacles for the development of a seamless national economy, will decrease national consistency, will lower safety outcomes due to the use of non-registered training organisations that are not auditable to nationally agreed standards and will adversely impact rail safety workers who will not have access to national units of competency and qualifications.

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 Transitional Arrangements policy document, in referring to the role of the industry training body included "*the establishment of two new rail safety worker units of competency for the requirements of the new legislation: one at Operational level (AQF Certificate Level 1or Certificate II) and Management Level (AQF Certificate Level IV). Once developed, national endorsement of the new units is to be sought and a nationally consistent training and assessment tool for the two new units and an electronic records system will be developed".*

The work on developing the two units was progressed through the industry training body to the public consultation phase but did not proceed to finalisation.

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 national law. The RTBU, and the Federal Government through the Workplace Relations Minster, will approach the industry training body to produce a unit competence to ensure rail safety workers are able to be trained in their rights and responsibilities under the rail safety law. The increasing complexity of national rail safety law reinforces, more than ever, the need for this training.

The RTBU is very disappointed that various aspects of rail safety worker competency requirements have not been - despite supporting policy - realised.

The RTBU argues the assessment of competence proposal included in the RIS represents a backward step for the industry, the economy and rail safety workers.

6.13 Train communication systems (Section 6.5.7)

The problem statement refers to rail safety regulators reporting instances where insufficient means of communication had been identified, and that effective means of communication were imperative during emergencies.

RTBU members, from their daily work experiences, are aware of the deficiencies of train communications systems. The age of infrastructure, rolling stock, and train control systems vary widely across Australia. A number of reports have referred to interoperability issues and the use, and application of, different technologies. An ARA report referred to the average age of mainline diesel locomotives being over 35 years old.

A range of issues can cause train communication systems failures. In one system the network has well known black spots in certain areas, with the strategy to have overlapping coverage areas underpinned by repeater stations. These stations are solar powered and can by rendered ineffective by snowfall. In another section of the same network, a tunnel inhibits train/train control communications and a second best "temporary" safe working protocol has been developed to address this operational circumstance.

A range of factors impact on the continuity of communications, and inquires have identified circumstances where, in emergencies, the communication systems have failed and the front line operating staff are put in a life threatening situation (for example hi rail derailment on the Leigh Creek line in 2004 or a derailment of a passenger train which fouls the adjacent running line).

Other reported failures are due to lack of effective maintenance causing radio units to fail during train operations, and black spots on the network. This weakness can be made worse during adverse weather including electrical storms.

The RIS identifies 3 options with the favored option, option 2, prescribing requirements for train communications systems that 'so far as reasonably practicable' support: communication between train drivers and relevant network control centres and the transmitting of emergency communications from network control centres to all trains on the network.

Option 2 also proposes that, should the Ministerial Council approve the national law, policy makers plan to develop a performance standard with a view to potentially amending the provision to mandate the standard.

The importance of train communication systems was highlighted in the recommendations of the Glenbrook inquiry. As a consequence of the implementation of these recommendations, NSW rail safety law was altered to provide that:

- a rolling stock operator must ensure each of their trains, when on the NSW network, is fitted with a radio trains communications system and a back up means of communication
- a rail infrastructure manager must ensure that a roiling stock operator complies with this requirement
- radio communications systems must have certain features including: enabling the driver of the train to verbally communicate with any network control officer responsible for the area in which the train is operating; be working at all times; be capable of receiving and transmitting emergency calls; be fitted with an emergency button that enables an emergency call from the train to be given priority over all other calls; and be capable of transmitting an emergency communication in a form that will allow any network control officer responsible to transmit the communication to other trains in the area.
- ITSR can exempt from operation of the clause a particular train or class of trains.

The proposed national law does not transfer the NSW regulation to the National Law. The issue is covered in broad terms in s51 'safety duties of rail transport operators'. Sub clause *(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. Our members report ongoing problems with train communications systems, and both operators and infrastructure managers not complying with their obligations.

The RIS recognises there is a problem, and proposes a solution that, in the first instance, is to keep the general provision - having flagged it is an important issue and then seek concurrence from the Ministerial Council to form a working party to investigate the production of a performance standard.

There is no reference to the standard being based on the NSW provision.

The RTBU argues the RIS proposal is too equivocal. The RTBU notes that the RIS has flagged that several employers are arguing a standard could cost them hundreds of millions of dollars. The RIS proposal has too many black spots. Pending the production of a regulation, the only legal requirement will be that contained under general duties. The process depends on approval by the Ministerial Council and then has to go through a development stage, which from the indications in the RIS, is likely to be fiercely contested.

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.

One concern in the discussion about train communications systems is the variance between rail transport operators and regulators as to the costs of implementing train communications systems, and differing understandings of the qualification ‘so far as reasonably practicable’.

6.14 Network rules (Section 6.5.8)

Structural changes to the rail industry, particularly vertical separation of operations and infrastructure, have necessitated the need for this provision. In various jurisdictions there can be one, two or three network owners with a single train crossing all networks in the course of a journey. In a number of networks, there is no employer/employee relationship between the rail infrastructure manager and the train operating company - so a new framework of consultation has to be adopted.

There have been a number of examples of differences between RTBU train driver representatives and rail infrastructure managers about a lack of consultation concerning proposed changes to network rules.

The RIS refers to s57(2) of the Model Bill (SMS) requiring RTO’s to consult with affected parties prior to establishing, varying or reviewing their SMS. These provisions, in many jurisdictions, have only recently been introduced and a culture has to evolve amongst both RTO’s and some regulators that the consultation provisions are required to be utilised.

Any changes proposed to network rules must be subject to consultation with rail safety workers before they are varied. For train drivers, train control and infrastructure workers, the knowledge and understanding of the application of the rules is essential for the safeworking of trains and infrastructure maintenance.

The RTBU supports a more explicit requirement in the law for consultation concerning changes to network rules.

6.15 Regulator to conduct cost benefit analysis for mandatory safety decisions (Section 6.6.2)

The RIS refers to current provisions for the regulator to make decisions on how RTO’s manage safety risks and that the Model Bill includes provisions by which decisions may be subject to review. In the discussions leading up to the 2006 Model Bill, employers argued that review provisions would act as a check on regulator decision making and were absolutely essential.

The RIS contains no information as to how often such reviews have taken place, and what the outcomes of applications for review have been. The RTBU suspects that, despite the initial fervor, the provision has not been utilised.

The RIS refers to there being no requirement for regulator decisions, or the review process, to be subject to rigorous analysis. No evidence was referred to in the RIS of particular regulator decisions or reviews that were not subject to rigorous analysis. If a party were aggrieved, then presumably the matter would be taken to the administrative appeal tribunal for review. These regulatory review decision mechanisms exist in WHS law, but the cost benefit requirement does not.

The NTC produced a cost benefit discussion paper to which the RTBU replied in detail. The issues raised by the RTBU were not responded to, nor were the views of all stakeholders responding to the discussion paper circulated for comparative purposes.

The RTBU stated that the analysis and arguments presented in the discussion paper, fell well short of establishing the case for a cost benefit test to be included in the national law. The issues raised include a

change in the role and functions of the regulator and the application of a test about which no empirical evidence was produced.

The RTBU noted that all the mandatory safety decisions, as defined, included matters in which an eligible person could ask for a judicial review or internal review by the regulator under existing model law.

The RTBU argued that the adoption of a cost benefit test would: appear to be changing the function of the regulator; would fundamentally alter the power of the regulator; and tilt the co-regulatory system to the accredited party.

This RIS has not advanced any new material. It notes that the only state which has this provision, Victoria, has not utilised it since it was introduced in 2006.

The RTBU argues the general duty provisions of WHS law which have been adopted by rail safety law requires duty holders to do what is reasonably practicable .This test addresses the question of how to balance cost against risk, and in reality renders a cost benefit analysis unnecessary.

The RTBU further argues that cost benefit analysis is not an appropriate tool for regulatory decision making on rail safety issues.

The RTBU supports option 1 in which the regulator would continue to make certain directions without undertaking a cost benefit analysis.

6.16 Appointed person may give directions (Section 6.6.3)

The RTBU supports the regulator being prescribed as the appointed person. The regulator has: sufficient expertise in relation to rail interfaces or rail and road interfaces; is independent of the parties; and will ensure nationally consistent outcomes which are important for rail infrastructure managers.

It is likely that the provision would only be sparingly used and would assist good faith negotiation between the parties. The RTBU understands in some jurisdictions the progress in reaching interface agreements has been slow and could be assisted by the type of provision outlined.

6.17 Alignment with the Model Work Health and Safety Bill (Section 6.7)

General alignment (Section 6.71)

The model bill states that WHS legislation prevails where it is inconsistent with a provision of the model bill. Rail safety law complements WHS law. A note to Part 2 of the model bill details the relationship very well: *"This part explains how this Act fits with the OHS legislation and creates additional protections, rights and obligations necessary because of the special risks associated with railway operations. This Act should be read as if it were part of the OHS legislation. This Part makes it clear that this act provides for an increase in the standard of protection of people at work in railway operations, in addition to the protections that the OHS legislation provides. The review of the WHS bill was the most thorough ever undertaken by federal and state governments and the objectives were those which have been adopted for the development of national rail safety law"*.

The RIS indicates that the 2009 review of the WHS Bill has created inconsistencies with the corresponding provisions of the model bill.

The RTBU has argued throughout the development of the national rail safety law process that a number of WHS provisions - especially in relation to the rights of workers, WHS representatives and trade unions - needed to be applied to rail safety law.

The specific provisions which the RTBU has referred to are the objects of the Act and allied issues concerning consultation and training of rail safety workers in their rights and responsibilities. Some incremental advances have been made to the objects clause and consultation provisions in the Division covering the safety management system.

Neither of these changes is referred to in any section of this RIS.

The RIS, in supporting option 2 states "*it is not the role of this (rail safety national law) 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.*"

The RTBU fully supports this position, though in practice applying provisions of the WHS Act which involve unions to rail safety law has not been an easy task. This partially reflects the evolution of rail safety law which was originally based on an accreditation model and has been slow under a co-regulatory framework to recognise the rights of workers and WHS representatives and unions.

An examination of the combined changes to the 2006 model bill and the 2009 national review on rail safety law reveals the all-pervasive impact of WHS law.

The RIS in Appendix C sets out a list of the draft national law provisions that have been harmonised with the WHS Bill. It does not include provisions of rail safety law such as objects and safety management system concerning consultation - which have been altered to partially reflect WHS provisions.

Appendix C has failed to include all provisions which have been aligned.

Appendix C does not include

- Part -10, Division 5 -Codes of Practice. The national law is taken directly from the WHS Law. It departs from the national model bill in a number of ways including dropping the use of guidelines and changing the 'deemed to comply' legal status of codes of practice. The National OHS Review recommended at 48.30 of the Review that "*Codes should be developed through a tri partite process to ensure they are relevant, useful and accepted as pro active guidance.*"
- The RTBU believes that that the model bill provision now contained in Part 8, Division 2 Discrimination against employees, should have been have been included in Appendix C. It is closely aligned to its counterpart in the WHS Bill.
- The WHS Bill has a number of provisions concerning an officer of a body corporate. In the definitions section of the Bill, it is defined as an officer within section 9 of the Corporations Act 2001 of the Commonwealth. Clause 26 covers Duty of officers which includes a definition of due diligence, the same as appears in the WHS Bill. Penalties are included for an officer who contravenes that duty or obligation. In Division 5, Offences, penalties are set out with 3 categories of offences. The penalties relate to an individual, or an officer of a body corporate or an offence committed by a body corporate. In the national law s8, s59 and 60 which cover the three categories of offences are adopted from WHS law, as are the monetary penalties attaching thereto.

Penalties in the National Law (Section 6.7.2)

The RIS refers to a range of inconsistencies between jurisdictions including: corporate multiplier maximum offences; loading for repeat offenders; and lack of consistency in penalty amounts. It is necessary, where the same cause of action may give rise to breaches under both schemes, to align the penalty framework to prevent penalty shopping between regulators.

The RIS outlines a comparative analysis of maximum penalty amounts. It did not reveal consistency between jurisdictions, but the severity of each penalty examined showed a high level of consistency. From this examination four groups of penalties were identified severe, high, medium and low.

In addition, penalties in the national laws were aligned with penalties in the WHS Bill. By combining both of these approaches, a penalty framework was developed for the national law together with penalty amounts. The RIS notes that in some cases the penalty amounts will increase significantly and in other cases a number of penalty amounts will decrease.

The RTBU argues that there are a number of anomalies in the penalty provisions.

For example, a rail safety worker not producing his/her ID to a rail safety officer can be fined up to $10,000.This appears to be out of all proportion to, for example, the penalty for a truck driver failing to produce a license when requested to do so by a police officer. The RTBU suggests this offence be covered as an infringement under the regulations. For a first offence, the rail safety worker would be given the opportunity to produce the ID within a specified period of time with a subsequent offence attracting a penalty of up to $1000.

Another example is the fine specified in Division 9 in the national law of up to $10,000 for alcohol or drug offences. Current provisions include a maximum penalty of $1100 in NSW, Victoria first offence $1300 and maximum penalties of $5000 in SA, NT and WA. These latter provisions should set the benchmark.

The RTBU notes the penalty framework and proposed penalties represent major changes for rail safety workers. The RTBU argues that rail safety workers need to be informed and educated in their responsibilities under the national law – including the offences, the circumstances applying to each type of offence and the penalties involved for each of the categories of offences.

The RIS made recommendations for the corporate multiplier and did not include a loading for repeat offenders. This was in line with the WHS Bill.

The RIS notes "*prosecutions since state and territory implementation of the Model Bill have been made infrequently, with most states and territories indicating that they have not prosecuted for any offences under their rail safety legislation. Since 2005, there have been 21 successful prosecutions for alcohol and drug related offences in NSW*".

There could be a number of explanations for this low prosecution rate. The absence of general duties provision may have hindered an ability to launch prosecutions and a number of jurisdictions have only recently enacted the 2006 national model bill.

7. Matters not referred to in the RIS

7.1 Train Safety Recordings

Division 10 of the proposed national law includes s136 Interpretation, s137 Disclosure of train safety recordings and S138 Admissibility of evidence of train safety recordings. These are new provisions in the national law. The provisions are taken from the NSW rail safety law.

The RTBU argues the RIS should be amended to analyse the impact on stakeholders of these provisions. Brief discussion on these provisions took place at Advisory Committee level where the views were not unanimous, with a number of jurisdictions not having equivalent legislation and not having fully formed views.

For RTBU members, there is one sub clause which has dropped out in the transition of the NSW provision to the national law. It concerns the current NSW provision that a train safety recording is not admissible in criminal proceedings against a rail safety worker.

The RTBU believes this provision should be included in the national draft law and should be the subject of detailed analysis and discussion in the maintenance process.

The RTBU argues that issues relating to 'just culture' - whereby rail safety workers should be encouraged to be frank about any incident being investigated - and the absence of the current NSW provision may discourage rail safety workers from maximisng the information gathered in train safety recordings.

7.2 Keeping and making available documents for public inspection

Provision 82(1)(b) of the national law states that a document prescribed by the regulations for the purposes of this section are to be prescribed to be available for public inspection. In the Model Rail Safety Regulations 2007, an RTO's Safety Performance Report is a prescribed document for the purposes of the section.

An examination of the national law regulations indicates that the former provision establishing a safety performance report, as a prescribed document to be made available for public inspections, has been deleted from the national law regulations.

The original provision was inserted as part of the RIS for the National Model Law in order to increase accountability and transparency. The public are referred to in the national law in a number of areas including the objects and in the consultative provisions of the safety management systems. The ability of the public to substantively understand what is happening to rail safety is extraordinarily limited, even though they are responsible for billions of dollars being allocated to freight and passenger railways every year.

One mechanism available for the public, researchers and rail safety workers to understand changes to rail safety law - in a meaningful way - is by gaining access to the safety performance report of RTO's. These reports are covered in s104 of the national law which provides that it must contain: a description and assessment of the safety performance of the operator's railway operations; comment on any deficiencies and any irregularities that may be relevant to the safety of the railway; and a description of any safety initiatives undertaken during the year.

A guiding principle for approaching changes to the national model bill was that existing provisions should not be changed unless overwhelming reasons existed for doing so. Reasons do not exist in this case. The reasons for the national regulation prescribing safety performance reports were clear and precise: to assist transparency and accountability. The RTBU argues that this provision must be restored.

7.3 Records of competence.

S118 Assessment of competence provides in (6) that an RTO must maintain records in accordance with national regulations. The 2007 National Regulations provided in Regulation 26 for the details of what was required in order to comply with national law. It would appear the 2011 national law regulations have omitted this provision.

The RTBU argues the provision should be reinstated. They are an integral component of assessment of competence, without which, the provision is quickly rendered meaningless.