



RTBU

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SUBMISSION TO ONRSR CONSULTATION REGULATORY IMPACT STATEMENT: IN-CAB VIDEO AND AUDIO SAFETY RECORDINGS

The Rail, Tram and Bus Union (RTBU) represents over 30,000 workers across Australia in the rail, tram and bus industries. We thank the Office of the National Rail Safety Regulator for the opportunity to provide feedback to this Consultation Regulatory Impact Statement (CRIS).

The RTBU strongly supports measures to improve safety and regular works with employers to do so on the rail network. Indeed, safety is at the heart of our role in representing the interests of our members. We are deeply concerned, however, that this CRIS presents a misleading view of the safety benefits of In-Cab Recording (ICR) devices) and underplays the safety risks associated with these devices. Moreover, we contend that the extended use of ICR devices will have little if any impact on the efficacy of rail safety investigations while the significant detrimental effect on the mental health of workers is underplayed or completely ignored.

INVESTIGATIVE TOOL OR MONITORING TOOL?

The need for evidence and to gather information for safety investigations should not be conflated with the unjustifiable desire of employers to impose electronic surveillance techniques on their employees.

The RTBU contends that there is little benefit to be gained from mandating the use of ICR. All of the investigations that the CRIS refers to, have been successfully investigated without the reliance on ICR. This, in itself, demonstrates that the need for it is not as great as made-out by the CRIS. Should ICR be mandated without extremely strict regulation, employers are likely to use ICR to increase surveillance and monitoring of employees. This goes well beyond the stated intention of using ICR for investigative purposes. There is no direct evidence to suggest that ICR would have aided the investigations into any of the incidents directly mentioned in the CRIS. The CRIS itself claims only that ICR “may” have been beneficial to investigations, although this is purely speculative.

Additionally, it should be noted that there is a requirement for all train radio/safety critical audio information to be recorded in Australia, and that an extensive amount of data is already available from any Crew Cab (data Logger/Event recorder and Forward-facing camera) for any investigations, compliance, and assessment - as the following table shows:

Rail, Tram & Bus Union Australia **The Power of Union**

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Recordable Item	Mandatory Prior to Operational Mode	Mandatory Following Operational Mode
Pneumatic/air brake step sequence	✓	
Brake pipe pressure	✓	
Brake cylinder pressures	✓	✓
Compressor Synchroniser	✓	
Head / Ditch Light operation		
Horn activation	✓	✓
Master controller/Throttle positions	✓	✓
Wheel Slip / Park Brake	✓	
Traction Current		✓
Vigilance Control	✓	
Reverser Handle position	✓	✓
Speed Signal as displayed to the Driver	✓	
Car Number	✓	
Date of each event	✓	
Time of each event	✓	
Distance travelled & Acceleration/Deceleration (m/s ²)	✓	
Deadman Circuit operation	✓	
Door open/close	✓	

Furthermore, the contention that ICR would **not** provide a major benefit to investigators is confirmed by the CRIS itself. In Section 6.2, the RIS lists “Improved monitoring of rail operations” as one of the key benefits of expanded use of ICR. In fact, the RIS goes so far as to say:

The use of in-cab recording devices for proactive compliance and monitoring is especially important given the limited number of investigations undertaken by the ATSB and ONRSR each year and the time required to complete an investigation. If in-cab audio and video are to be used for ATSB and ONRSR investigations only, the benefits are likely to be minimal and may not outweigh the costs associated with implementation and operation.¹ [emphasis added]

The CRIS thus concedes that introducing mandatory ICR **cannot be justified on investigatory reasons alone** and would only be cost effective if employers could use it for workplace surveillance.

ICR IS NOT A PREVENTATIVE MEASURE

The RTBU notes that the CRIS presents a startling picture of some very gruesome rail safety statistics. However, the CRIS fails to connect these statistics to a compelling reason in support of the expanded use of ICR. Indeed, the RTBU strongly contends that ICR will do nothing to reduce such incidents as it is of no use to traincrew, and does not address any of the major causes of rail safety incidents.

A case in point is the reference in the CRIS to the collision of a passenger train with a buffer stop at Richmond (NSW) in January 2018, which is presented as a case study to support the argument in favour of extending the use of ICR. The CRIS notes that in-cab video

¹ ONRSR Consultation Regulatory Impact State: In-Cab Audio and Video Safety Recordings, 2020, p32

may have shown what the driver was doing and his state of consciousness leading up to the collision. The presence of a camera would not have prevented the collision, but would have assisted the post-incident analysis. An audio recording, synchronised with the camera, may have provided additional information about the driver's actions, and possible alarms inside the cab.²

The above passage ignores the basic facts of the Richmond incident, including contributory factors such as:

- Driver fatigue;
- Questionable rostering practices (opposing shifts rostered on adjacent working days, eg, movement from PM shifts to an early AM shift, commonly referred to as “Doubling Back”);
- Lack of speed restrictions;
- Improper Signalling arrangements; and
- Lack of engineering controls for example:
 - the provision of Intermediate Trainstops
 - Identified engineering issues with the incompatible and misaligned buffer stop/structure.
 - Effectiveness of the Operating Enabling Pedal OEP/OEH-Waterfall-safety systems.

The circumstances of the Richmond incident are not a mystery. RTBU contends that the presence of ICR would not only have failed to prevent the incident, it would not have been of any further benefit to the investigation.

Furthermore, the references to statistics regarding rail suicides and attempted suicides leads one to infer that ICR may lead to a reduction in suicides or attempted suicides. This inference is not only unsupported, it is ‘highly’ offensive to rail workers as it implies that, somehow, Drivers workers are to blame for suicides and their monitoring at work may somehow address this.

PREVENTION MUST COME FIRST

The RTBU maintains that any genuine program to improve safety and reduce the number of safety incidents on the rail network must focus on addressing the causal factors of those incidents. **Prevention must come first.** To that end, the RTBU has been pursuing a number of genuine preventative measures, however there has been little progress on these issues.

In particular, the RTBU is dismayed over the failure of regulators to address the issue of fatigue. If we are to learn from fatigue-related accidents in the rail industry we must look at the actual causes of fatigue, and not make the absurd assumption that training a camera on a fatigued driver will somehow deter him or her from being tired.

Sadly, we are left to conclude that the focus on additional investigative measures such ICR is a distraction from measures which actually save lives, and reflects a determination to push blame for incidents away from operators and on to individuals.

Key issues that must be addressed prior to any expansion in the use of ICR include:

- Strengthening the current inadequate fatigue management regime (through the national implementation of 8-hour maximum shift lengths, provision of adequate rest-breaks, provision of adequate minimum recovery breaks between shifts, minimising the number of shifts ending between 0000 and 0600, and ensuring a minimum two-night break between work sequences);

² ONRSR Consultation Regulatory Impact State: In-Cab Audio and Video Safety Recordings, 2020, p8

- Reviewing the use of Driver-Only Operations (DOO); and
- Establishing nationally-consistent safe-working rules across Australia to eliminate confusion for train drivers travelling across different jurisdictions.

MENTAL HEALTH IMPACT ON DRIVERS

The CRIS does not address the issue of increasing anxiety and stress on train drivers from being under constant video and audio surveillance. This well documented fact has been completely omitted from the CRIS as though those on the front line are a nullity in the consideration of this issue.

It is well-established that constant electronic workplace surveillance can have a negative impact on stress and anxiety for workers.

American researchers Aiello and Kolb reported that:

Even when opportunities for social support, demands for productivity, and perceptions of control are held constant, as was done in two laboratory studies, monitored respondents have reported feeling more stress than non-monitored respondents. ³

Similarly, Rosenblat, Kneese and Boyd found that:

While many psychologists and organizational behavioural consultants see monitoring technologies as neutral, their measurements signal recognition that while these tools are used to achieve organizational goals, they can also negatively impact employees.⁴

The RTBU contends that an environment that places anxiety and stress on train crew is not conducive to improved safety outcomes. Conversely, it is likely to lead to increased levels of fatigue, which impedes the ability of workers to perform their tasks safely. In this sense the expanded use of ICR brings a significant risk of *undermining* rail safety, rather than improving it.

At the very least, there must be more research conducted into the relationship between increased electronic monitoring of traincrew and stress, anxiety and fatigue before any significant expansion in the use of this technology.

PRIVACY OF WORKERS

The RTBU contends that the expanded use of ICR constitutes a serious breach of privacy for rail workers. In practice, cabins serve as de-facto meal rooms for train drivers. Breaks for meals and rest are thus taken in the cabin and during these times workers engage in personal and private conversations. Electronic surveillance of this time is inappropriate; particularly audio recordings. Indeed, we contend that it would be considered highly inappropriate, if not illegal, for employers to electronically monitor the private conversations of employees in meal rooms in any other workplace settings.

The various privacy and surveillance laws around the country prohibit the use of surveillance devices to *record a private conversation* without the consent of the parties to the conversation or being a participant to the conversation.

³ Aiello JR & Kolb KJ, "Electronic Performance Monitoring", in Sauter SL & Murphy LR (Eds), *Organizational Risk Factors for Job Stress*, (pp. 163–179), American Psychological Association, 1995.

⁴ Rosenblat A, Kneese T & Boyd D, "Workplace Surveillance", Data & Society Working Paper, 2014.

LEGALITY OF RECORDINGS

The Privacy Act 1988 (Cth) does not make specific reference to surveillance in the workplace. Workplace legislation is also inconsistent across jurisdiction. Specific workplace surveillance laws exist only in NSW the ACT and, to some extent, in Victoria.

For example:

Workplace Surveillance Act 2005 (NSW)

In New South Wales the Act refers to camera (no mention of audio), computer and tracking surveillance and requires an employer to give notice to employees on these types of surveillance devices is in use in the workplace.⁵ The Act also sets up additional requirements for each type of surveillance⁶. In regard to optical surveillance device they need to be visible and have signs notifying people that they may be recording.⁷ Surveillance devices must also not be used in a change room, toilet, or shower facility⁸

The Act places restrictions on the use of disclosure of surveillance records unless it is required for a legitimate purpose of employment or by law.⁹

Although the Act allows surveillance without the consent of employees to find out if any of employees are engaged in unlawful activities, before conducting any covert surveillance, the employer needs to seek consent from the court authorising such surveillance and ensure the retention and use of any information gathered with strict control.¹⁰

Workplace Privacy Act 2011 (ACT)

In the ACT the Act refers to optical surveillance (no mention of audio), data surveillance or a tracking device. The ACT provides for similar provisions to do with notice but requires for the employer to consult with employees in good faith before surveillance is introduced and has to include who will regularly be subject of the surveillance.¹¹ The Act like NSW also sets up additional requirements for each type of surveillance. The Act prohibits surveillance of employee's places such as toilets, change rooms, nursing rooms, first-aid rooms and prayer rooms, and surveillance of employees outside the workplace.¹² The employer is also not allowed to use a surveillance record to take adverse action against the worker.¹³ The Act allows for surveillance without the consent of employees to find out if any of employees are engaged in unlawful activities. Before conducting any covert surveillance, the employer needs to seek consent from the court authorising such surveillance and ensure the retention and use of any information gathered with strict control.¹⁴

⁵ *Workplace Surveillance Act 2005 (NSW)*, s 10

⁶ *Workplace Surveillance Act 2005 (NSW)*, s 11,12,13

⁷ *Workplace Surveillance Act 2005 (NSW)*, s 11

⁸ *Workplace Surveillance Act 2005 (NSW)*, s 15

⁹ *Workplace Surveillance Act 2005 (NSW)*, s 18

¹⁰ *Workplace Surveillance Act 2005 (NSW)*, s 23

¹¹ *Workplace Privacy Act 2011 (ACT)*, s 15

¹² *Workplace Privacy Act 2011 (ACT)*, s 41,42

¹³ *Workplace Privacy Act 2011 (ACT)*, s 22

¹⁴ *Workplace Privacy Act 2011 (ACT)*, s 26

Surveillance Device Act 1999 (VIC)

In Victoria this act regulates the installation, use and maintenance of listening devices, optical surveillance, tracking device and data surveillance by law enforcements. This act provides an offence of the use of an optical device or listening device to carry out surveillance of the conversations or activities of workers in workplace toilets, washrooms, change rooms or lactation rooms¹⁵

List of Acts

- Western Australian Surveillance Act 1998 (WA)
- Surveillance Devices Act 2016 (SA)
- Surveillance Devices Act 2007 (NT)
- Invasion of Privacy Act 1971 (Qld)
- Surveillance Devices Act 2007 (NSW)
- Surveillance Devices Act 1999 (VIC)
- Listening devices Act 1991 (TAS)

DATA PROTECTION

The RTBU has serious concerns over how data from recordings would be protected. If data from ICR devices is in the hands of employers, there would be little to stop them from accessing it or using it for punitive purposes. RTBU members have little trust in employers to maintain data security. The RTBU firmly believes that the approach taken across the rest of the highly well-regulated transport sector, should be applied if ICR is considered allowable in cabs.

USE OF RECORDINGS IN BROADER TRANSPORT SECTOR

The term On Board Recordings (OBR) is used under the *Transport Safety Investigation Act 2003* to describe “a recording that consists of sounds and/or images of persons in the control area of a transport vehicle” and was “made at the time of the occurrence of an immediately reportable matter that involved the transport vehicle”.¹⁶

ATSB acknowledges that On-Board Recordings (OBR):

*constitute an invasion of privacy for the operating crew that most other employees in workplaces are not subject to.*¹⁷

As such, the use of OBRs is heavily restricted under the *Transport Safety Investigation Act 2003*.

In aviation, the International Civil Aviation Organisation (ICAO) recognises the invasion of privacy that is inherent in OBRs. The introduction of Cockpit Voice Recorders was done on the understanding that “recorded information be of a specific duration (30 minutes), be erasable by the flight crew on the ground and be used only for its intended purpose; accident investigation.”¹⁸ The *Civil Aviation Act 1988* places extremely tight restrictions around access and limits the use of Cockpit Voice Recordings (CVR). It

¹⁵ *Surveillance Devices Act 1999 (VIC)*, s 9B

¹⁶ *Transport Safety Investigation Act 2003 (Cth)*, s 48.

¹⁷ Australian Transport Safety Bureau (ATSB), *Transport Safety Investigation Act (2003) Question & Answer*, https://www.atsb.gov.au/about_atsb/legislation/trans_safety/tsi_qa/#12 accessed 14/10/2020.

¹⁸ Fenwick L, “Security of Recorded Information”, paper for International Symposium on Transportation Recorders, 1999., <http://www.iasa.com.au/folders/archives/sp050399.htm>, accessed 14/10/2020.

also specifies that “a person is not entitled to take any disciplinary action against a crew member on the basis of CVR information.”¹⁹

The RTBU contends that there is a clear need for consistency in the management of video and audio recordings across the broader transport industry. In this regard, the regulations around the use of cockpit voice recorders in the aviation sector should be considered the ‘gold standard’ and should be applied to rail in the same manner. A regime for ICRs the rail sector should therefore be based on the best practice approach taken in civil aviation which would not interfere with the purported intended use of ICR by the CRIS.

CONCLUSION

Rail workers are deeply committed to improving rail safety. After all, it is most often **their** safety, and **their** lives, at stake. In this sense, rail workers understand the importance of a strong and effective framework for the conduct of rail safety investigations and understand the need to gather clear evidence to shed light on the causes of safety incidents. However, the CRIS itself notes that there is little benefit from mandating ICR for investigative purposes. The RTBU is strongly opposed to the expanded use of ICR devices for surveillance and monitoring of workers by employers for the reasons outlined above. If the use of ICR is to be expanded, then there must be strict rules and regulations placed around the use of ICR to protect the privacy of workers and to ensure that it is not used improperly for non-investigative purposes. In this respect the model used in civil aviation should be applied across the broader transport sector.

Prior to any extension to the use of ICR, ONRSR and the relevant State Ministers must address a range of preventative measures as addressed on page 3 (Key Issues). These safety measures include:

- Strengthening the current inadequate fatigue management regime;
- Reviewing the use of Driver-Only Operations (DOO); and
- Establishing nationally-consistent safe-working rules across Australia.

If those safety measures are addressed and quantum improvements made which would lead to an “increased safety benefit”, then the RTBU would be prepared to conditionally support Option 2, Voluntary in-cab audio and video safety recordings in passenger trains and freight locomotives, on the following conditions:

- the proposed standards or code of practice be determined by the Responsible Ministers under the RSNL, **not** the Rail Industry Safety and Standards Board (RISSB), and must be **enforceable**.
- the proposed standards or code of practice specify that ICR devices can only record video, and not audio, in order to prevent electronic eavesdropping on private conversations; In more specific terms, that the ICR devices are required to be **incapable** of recording audio to remove temptation on the part of overly enthusiastic managers who may not be aware that they are in breach of various state laws in recording private conversations.
- that all data from ICR devices be under the legal ownership and control of the Australian Transport Safety Bureau (ATSB), **not** ONRSR. Operators shall not be able to access that data;
- data collected by ICR must not be used for disciplinary action against a rail worker;
- data from ICR must not be admissible as evidence in either criminal or civil proceedings; and

¹⁹ *Civil Aviation Act 1988* (Cth), s 32AP

- ONRSR commits to conducting research on the psychological impact of electronic monitoring of train crew, particularly in relation to stress, anxiety and fatigue.

Yours sincerely,

A handwritten signature in blue ink, consisting of a stylized 'M' followed by a long, sweeping horizontal line that ends in a small upward flick.

Mark Diamond
NATIONAL SECRETARY