



RAIL SAFETY REGULATION REFORM

20th October 2005

RAIL SAFETY (REFORM) BILL

GENERAL INFORMATION

INTRODUCTION

This bulletin summarises major aspects of the proposed national Bill to improve rail safety performance in Australia. The model Bill sets out nationally consistent legal duties and operating requirements on all parties responsible for rail safety and will underpin future national regulations, compliance codes, standards and guidelines.

The reform aims to improve regulatory efficiency and effectiveness through the implementation of a number of regulatory best practices. It does not alter the fundamental approach to rail safety in Australia but rather builds on the existing co-regulatory structure.

The Bill has been developed by the National Transport Commission (NTC) in conjunction with the Rail Legislation Advisory Panel and in consultation with key stakeholders. The model Bill will be submitted to the Australian Transport Council (ATC) for approval in late 2005 following this round of consultation, and consideration of submissions from interested stakeholders.

BACKGROUND/CONTEXT

In all States and Territories, rail regulation is currently based on a co-regulatory model. Rail operators and infrastructure owners are subject to accreditation, based on the approval of their Safety Management Systems (SMS) by the relevant rail safety regulator in each jurisdiction. SMS document the existence of a systematic, management based approach to ensuring safe operational performance. This approach to regulation is known as “process regulation”, as it focuses on ensuring regulatory outcomes are achieved via the implementation of systemic management processes based on risk identification, assessment and control.

In January 2004 the Federal, State and Territory Ministers gave responsibility for progressing regulatory and operational reform in the rail industry to the National Transport Commission (NTC). In line with this function, the NTC has undertaken a review of the current regulatory framework for rail safety via an extensive consultative process involving all major stakeholders.

In reviewing the existing rail regulation framework, NTC has found little evidence to warrant major changes to the co-regulatory approach. However, the reform process has identified opportunities to mitigate against the risk of regulatory failure and to improve regulatory efficiency and effectiveness. The model Bill proposes a range of improvements to the overall regulatory model to capitalise on these opportunities. The potential benefits and costs of the changes to existing legislative arrangements are outlined in the attached regulatory impact statement.

OBJECTIVES

The primary objective of the proposed model Rail Safety (Reform) Bill is to improve rail safety performance in Australia by implementing best practice approaches to safety based regulation.

A secondary objective is to enhance the cost-effectiveness of the regulatory structure by facilitating regulatory harmonisation and thereby reducing a range of regulatory-related costs for rail organisations and government regulators.

KEY CHANGES

Key changes that the bill seeks to achieve include:

- rationalisation of the use of regulatory instruments such that general requirements are specified in legislation and matters of detail are prescribed in regulations. References to non-government documents (such as 4292.1) will be removed from Rail Safety Acts;
- creation of a head of power that enables the establishment of nationally consistent ‘compliance codes’, ‘standards’ and ‘guidelines’;
- establishment of duties that place an obligation on rail organisations to operate safely;
- definition of obligation of rail organisations as being to reduce rail safety risks to ‘So Far As Is Reasonably Practicable’;
- clarification of the purpose of accreditation. Purpose is to gain assurance, before operation, that the applicant has the capacity and competence to operate safely;
- limitation of requirement for accreditation to rail infrastructure managers (previously referred to as ‘owners’ or ‘track managers’) and rolling stock operators (previously referred to as ‘operators’ or ‘train operators’);
- provision of array of powers to regulators that would enable them to gain access to documentation, staff, infrastructure and equipment for the purpose of auditing compliance;
- provision of a hierarchy of enforcement and sanctions options which may be escalated as appropriate;
- obligations on rail safety regulators to consult with corresponding rail safety regulators when making decisions affecting rail organisations with operations in more than one jurisdiction;
- obligation on rail safety regulators to give due regard to nationally approved guidelines when undertaking certain actions and making certain decisions;
- obligation on rail safety regulators to provide statement of reasons when making certain decisions;
- provision of appropriate checks and balances on regulator decision making through accessible and workable appeal mechanisms;
- establishment of mandatory data reporting and publishing requirements, where appropriate;
- establishment of explicit requirement for interface coordination plans (otherwise referred to as ‘Safety Interface Agreements’); and
- establishment of requirement to involve rail safety workers, where practical, in the development of an organisation’s safety management system

MAJOR ELEMENTS OF THE BILL

Establishment of outcome standard applicable to rail safety in the form of a general duty

The model Bill creates general duties applicable to rail organisations to ensure that risks associated with rail infrastructure and rail operations are mitigated to a level ‘so far as is reasonably practicable’ (SFAIRP). The specification of this general duty is consistent with the approach taken in OHS legislation.

Setting out explicit duties will provide a stronger and clearer focus on the obligation to conduct railway operations safely, thereby improving the transparency as to what is required by the legislation for all stakeholders. Additionally, it aims to enhance consistency in approaches by rail organisations and regulators and to foster a culture of continuous safety improvements while

maintaining the flexibility for organisations to determine the most cost effective and practical means of compliance.

The general duties approach is expected to create an incentive for rail organisations to maintain vigilance with respect to safety in all contexts, rather than relying on formal compliance with the organisation's SMS.

Guidance material on the implementation of SFAIRP in practice is currently under development and is expected to be submitted for national endorsement as part of the process of implementation of the model Bill and model regulations.

Rationalisation of the use of regulatory instruments

The current range of regulatory and quasi-regulatory instruments, comprising Acts, regulations, Codes of Practice, Australian Standards and Rules and Procedures will continue to be employed. However, changes are proposed to the ways in which several of these instruments are used. The fundamental change is that key requirements in relation to the duties of rail organisations, the requirements for accreditation and the contents of Safety Management Systems are to be set out in the model Bill and in the associated model regulations. This contrasts with current arrangements in which some of these fundamentals are not explicitly addressed or are contained only in Codes and Standards.

These changes will improve transparency of regulatory requirements for stakeholders and the general public, increase accountability for regulatory decision-making, improve enforceability of regulatory requirements and provide appropriate government control over substantive regulatory requirements.

Creation of a head of power that enables establishment of 'compliance codes'

The model Bill provides a mechanism whereby Codes of Practice can be given 'Deemed to Comply' status, by being approved nationally as a Compliance Code.

The 'deemed to comply' mechanism is widely used in conjunction with performance based regulation to achieve certainty while retaining flexibility:

- A rail organisation that chooses to adopt and use a Compliance Code that relates to a particular regulatory obligation will have certainty that they have complied with those obligations; however
- A rail organisation can choose to adopt and use an alternative means of risk control to that embodied in the compliance code if it is believed (and able to be demonstrated) that the alternative is more safe and suitable given the scope and nature of the rail organisations intended operations

The model Bill makes this mechanism available for the first time in the rail safety context.

Clarification of the purpose of accreditation

This is an important specific example of the general move to make key decision criteria and requirements more explicit under the model legislation. The model Bill includes for the first time an explicit statement of the purpose of accreditation. This is to attest that the applicant has demonstrated, to the satisfaction of the regulator, the competency and capacity to safely carry out the railway operations for which the applicant is seeking accreditation.

In combination with the proposed inclusion of general duties in rail legislation, this statement of purpose will clarify the function of the system of accreditation by making it clear that gaining accreditation is a threshold requirement for railway organisations, a permission that is required before rail organisations are permitted to operate. The granting of accreditation is not a certification of a rail organisation as being safe, but rather, is an indication of the rail organisation's ability to be safe.

Limitation of accreditation requirements to rail infrastructure managers and rolling stock operators

There will be a clear limitation on the range of parties to be accredited. In many jurisdictions this is consistent with current practice, while it will represent a narrowing of the range of accredited parties in some other cases. The logic of the accreditation process essentially relates to the operation of whole systems, characterised by multiple, interacting risks that need to be managed in a systemic fashion. The policy position taken is that it is reasonable to expect rail infrastructure managers and rolling stock operators to be able to demonstrate how risk is managed in a systematic way (via their SMS) and to demonstrate that they have sufficient control over the implementation of their SMS (by rail safety workers, whether they are contractors or otherwise).

Extending the range of powers available to regulators

The range of powers currently available to regulators will be extended to enable them to better carry out compliance auditing, general investigation and enforcement duties. These expanded powers will enable regulators to gain access to documentation, staff, infrastructure and equipment, for the purpose of auditing compliance with conditions of accreditation and general duties. These additional powers should improve regulators' ability to ensure compliance and prosecute non-compliance and lead to better safety performance over time.

Creation of a hierarchy of enforcement and sanction options which may be escalated as appropriate

The current range of sanctions is to be substantially expanded to constitute a carefully graduated set that can be used sequentially in response to non-compliance of different degrees of seriousness and persistence. New sanctions will include both administrative and court based sanctions. They are likely to include improvement notices, prohibition notices, infringement notices and enforceable voluntary undertakings (all administrative sanctions and fines) commercial benefits penalties, supervisory intervention orders and exclusion orders (all court-based sanctions for serious offences).

These changes will enable regulators to react to non-compliance in ways that are appropriate and proportionate to the non-compliance and ensure that there are other sanctions options available to them in the event of continued non-compliance. The availability of a more extensive and appropriate range of sanctions is likely to improve actual enforcement effort and improve compliance levels over time.

Strengthening of regulators' powers of direction

Regulators are to be given greater powers to direct operators to undertake certain actions in order to mitigate immediate and substantial risks. This is intended to improve the effectiveness of regulators and is consistent with the expansion in investigatory powers and an expanded range of sanctions. This power may also be used to ensure that safety related regulatory requirements are not used as a barrier to provision of track access to potential competitors.

Checks and Balances on Regulator Decision Making

The increased powers conferred on regulators are to be balanced by the creation of more substantial checks and balances on the use of those powers. The circumstances where applications for variation on accreditation are required will be more clearly defined under the model Bill as will the demonstrations that need to be made by rail organisations when applying for accreditation or variations of accreditation. Regulators will be required to provide reasoning for their decision to grant or not to grant accreditation for all applications and in circumstances where accreditation or variations are refused, the model Bill provides rail organisations with access to "workable" appeal mechanisms such as internal review, mediation and administrative review.

Additionally, the model Bill will require regulators in each jurisdiction to consult with each other and to adhere to nationally approved guidelines. It is anticipated these provisions will promote consistency in decision making across jurisdictions and provide greater certainty and transparency of the regulatory requirements and the decision making process for all stakeholders.

Creation of explicit requirements for interface coordination plans

Risks arise due to interfaces between separate rail infrastructure managers, rolling stock operators, private siding operators, road authorities etc. In order to ensure that joint risks have been identified, assessed and controlled there needs to be a mutual obligation on parties with interfaces to have a coordination plan documenting how risks are to be managed. The model Bill will require all Safety Management Systems to include explicit Interface Co-ordination Plans wherever such interfaces exist between the operations of different railway operators.

Mandatory data reporting and publishing requirements

While mandatory data reporting requirements exist under current legislation, the model Bill includes new requirements that such data, reported to regulators by rail operators, must be published. This change aims to improve an enhanced basis for performance monitoring and remedial regulatory actions, on the one hand, and improve transparency for stakeholders and the general community, on the other.

More explicit requirements to involve railway personnel in the development of an organisation's SMS

The model Bill will make it an explicit requirement for approval of an SMS, as part of the accreditation process, that relevant rail safety workers have been involved in its development. This substantially codifies current practice and is consistent with a systemic, management based approach to risk management.

TRANSITIONAL ARRANGEMENTS

Subject to the approval of the model Bill and enactment of its provisions by jurisdictions, it is anticipated that the model bill will become effective in States and Territories towards the end of 2006. It is not required that existing operators reapply for accreditation under the new B.

iii. Accredited rail organisations will be deemed to have accreditation under the new regime, with the requirement that their SMS be reviewed for compliance with the new regulatory requirements during within a 2 year period for commercial rail organisations and a 3 year period for tourist and heritage rail organisations.

In the situation where a person is currently accredited for certain activities only, a process will be developed for deeming the applicable type of accreditation under the new regime. Persons accredited to undertake activities that fall within the new definition of a rail infrastructure manager or rolling stock operator will be deemed to be accredited as a rail infrastructure manager or a rolling stock operator respectively under in the new regime. Persons accredited to undertake activities that fall within both new definitions will be deemed to be accredited as both a rail infrastructure manager and a rolling stock operator.

During the respective transitional periods increases in the scope of accredited activities would, however, be subject to the new requirements for an application for variation and the determination of an application variation.

NEXT STEPS

The model Bill is the product of a lengthy policy development process that has included substantial consultation at all stages. The model Bill and its associated regulatory impact statement are now being circulated for further public comment. These responses will be considered and the appropriate amendments made before the final documents are submitted to the ATC in late 2005 for approval.

HOW TO MAKE COMMENTS

Submissions making comment on the proposed regulatory instruments are due on 18 November 2005.

Email Comments to: Paul Salter

psalter@ntc.gov.au

Telephone: (03) 9236 5043

Facsimile: (03) 9642 8922

Website: www.ntc.gov.au

Submissions by email are preferred; however responses may be mailed to the following addresses:

Mail Comments to: Mr Tony Wilson

Chief Executive

National Transport Commission

L15/628 Bourke Street

MELBOURNE VIC 3000