



RTBU

**Submission to Productivity
Commission Inquiry into
national transport regulatory
reform**

June 2019

INTRODUCTION

The Rail Tram and Bus Union (RTBU) is an all grades industrial union comprising over 30,000 members in the rail, tram and bus industries Australia-wide. The RTBU was formed in 1993 following the amalgamation of three previous rail unions together with the tram and bus employees' union.

The RTBU is organised on national, state and divisional lines and is well unionised with over 85% of employees being a member of a trade union.

The RTBU thanks the Productivity Commission for the opportunity to make this submission.

For further information about any matter contained in this submission, please do not hesitate to contact the RTBU National Office.

EXECUTIVE SUMMARY

The RTBU welcomes the opportunity to make a submission to this inquiry.

The RTBU has always supported the principle of nationally consistent rail safety laws. A strong national regulatory framework delivers important safety benefits to rail workers and the general public, and improves the productivity of the rail industry. Indeed, in 2011, the NTC estimated the net benefit of the proposed Rail Safety National Law (RSNL) to be between \$28 and \$71 million.

However, we have long held concerns that the development of these laws was undermined by compromises on safety which could have a detrimental effect on the general public, as well as rail workers.

If the Commission forms the view that the economic benefits of the RSNL have not been realised, the solution should not be to further relax existing safety requirements. A more appropriate response is to examine the practical operation of the risk-based co-regulatory framework and critically assess why it has failed to achieve nationally consistent and harmonised outcomes. To that end, the RTBU is of the view that the primary inhibiting factor is the flawed relationship between the Office of the National Rail Safety Regulator (ONRSR), the Rail Industry Safety and Standards Board (RISSB) and rail operators.

In effect, the practical application of a risk-based co-regulatory framework has established a national process to bring about a regime of national inconsistency. Despite the best intentions, it has not resulted in increased collaboration within workplaces.

BACKGROUND

The Council of Australian Governments (COAG) resolved to establish a single national rail safety regulator in July 2009, citing that –

“These national arrangements will remove inefficiencies arising from inconsistent jurisdictional requirements, streamline the regulatory arrangements and thus reduce the compliance burden for business, and reduce transport costs more generally. Importantly, the efficiencies to be gained in moving to national transport safety regimes will not compromise safety. In fact, the better assessment of risk and more efficient allocation of resources through a national scheme will improve the safety of these key transport sectors.”¹

In December 2009, COAG outlined that the objectives of a body of uniform rail safety national law were to:

- Support a seamless national rail transport system;
- Not reduce existing levels of rail safety;
- Streamline regulatory arrangements and reduce the compliance burden for business; and
- Improve national productivity and reduce transport costs more generally.²

Specific benefits included:

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

¹ <https://ris.pmc.gov.au/sites/.../02-Rail-Safety-National-Law-Decision-RIS-version.doc>

² <https://www.pc.gov.au/inquiries/current/transport/issues/transport-issues.pdf>

- By reducing duplication in compliance tasks, freeing up resources of both rail transport operators and the Regulator to concentrate more on measures to improve safety.³

The NTC also noted that –

“Industry group representatives and operators highlighted both the administrative and cost burdens of having to be compliant for multiple jurisdictions. Elimination of unnecessary duplication in this area should allow rail operations management and staff to maintain a stronger focus on their primary role of ensuring there is continuous improvement in rail safety performance.”⁴

Have the benefits (economic and non-economic) of the RSNL and a single national rail regulator been realised? In our view, they have not.

The question then is, why is this the case? It is not good enough to simply identify areas of inconsistencies between jurisdictions and focus on those issues. A more sophisticated and holistic approach is to evaluate the process by which the RSNL was developed, the model that was adopted and whether it has actually worked in practice.

The RTBU supported the establishment of a single national rail regulator and engaged constructively throughout the process. We were, and remain, of the view that the RSNL and was an opportunity to support interoperability and achieve national consistency (and foster renewed investment in the rail industry), as well as to bring all jurisdictions up to the highest standards of safety.

However, the process was hampered by an underlying view that the only way to achieve a uniform body of national law was by taking a “lowest common denominator approach”. National regulations should be about applying the best possible outcomes, not just distilling to the point where all stakeholders can agree. Put simply, when it comes to safety, there are some matters that are simply non-negotiable.

Ultimately, a co-regulatory, risk-based approach was adopted. A national regulator – the Office of the National Rail Safety Regulator (ONRSR) – was established to monitor safety management and ensure compliance. According to the ONRSR -

“The overall success of this regulatory framework to address and mitigate risks to safety is predicated on individual operators and the broader industry fulfilling their respective roles in engaging the appropriate expertise and competence towards collaboratively identifying and assessing risks and developing, applying and maintaining standards and processes to manage safe railway operations.”⁵

³ [https://www.ntc.gov.au/Media/Reports/\(8A9C7950-C762-5162-E68F-B77C7EC8C624\).pdf](https://www.ntc.gov.au/Media/Reports/(8A9C7950-C762-5162-E68F-B77C7EC8C624).pdf)

⁴ Ibid.

⁵ https://www.onrsr.com.au/_data/assets/pdf_file/0014/20822/The-ONRSR-Way-web.pdf

The conditions upon which the framework's success is predicated have not been met. After seven years, the ONRSR, RISSB and operators have, with some exceptions, largely failed to overcome the historical lack of interoperability and harmonised standards across the industry. Standards have been developed, but they have not been adopted. This failure demonstrates that the only way to achieve harmonisation is through the introduction of more prescriptive outer-limit regulations, a significant reform of the ONRSR-RISSB-Operator relationship and the introduction of penalty-based incentives to drive change.

It is important to note that the RTBU does not support a total reliance on prescriptive rules. Rather, prescriptive rules are simply the building blocks for developing and maintaining a strong safety culture – specifically a safety culture that fosters positive and collaborative relationships between workers and their employers.

REFORMING CO-REGULATION

A key feature of the co-regulatory, risk-based model is the relationship between the RSNL, ONRSR, rail operators and the RISSB. For instance, the relationship between the ONRSR and RISSB is described as a –

“Co-operative and facilitative relationship that seeks to encourage a harmonised approach to rail safety management and influence improvements to industry or sector-wide safety practices.”⁶

For example –

“The ONRSR looks to endorse certain RISSB standards, particularly those that facilitate national consistency and interoperability, without inhibiting competitive advantage among respective operators.”⁷

However, the risk-based co-regulatory framework has not lived up to its promise. In many cases, RISSB has developed standards which, despite receiving the ONRSR's endorsement, are effectively ignored by operators. Fundamentally, all that has been established is a national process to bring about a regime of national inconsistency.

A prominent example of this situation is the failure to achieve national standardisation of safe working rules. The RTBU has been pursuing a standardisation across the rail network in this critical area. We have engaged with the RISSB-led processes, such as reviewing the Safety, Operations, and Interoperability development which covered:

- Australian Network Rules and Procedures (ANRP);
- National Standards;

⁶ Ibid.

⁷ https://www.onrsr.com.au/_data/assets/pdf_file/0009/9756/NSR2085-Annual-Report-Web_Version.pdf

- Codes of Practice; and
- Guidelines.

The RTBU has always recognised that delivering a national rules-based structure requires a significant volume of work and consultation. The union is very supportive of the position taken by industry with regard to interoperability wherever it exists, be it in codes of practice, standards or between components of the workforce.

However, despite the RISSB's work, considerable inconsistencies still exist, and in some instances are increasing. Inconsistencies across networks simply increase the risk of errors, compromising safety. Inconsistencies also impose costs on operators who are required to be compliant across multiple jurisdictions.

It is clear that the current system is not working when it comes to improving safety or achieving harmonisation – both of which are key to improving productivity in the industry. Therefore, the RTBU is of the view that a more prescriptive model is the only way to achieve the national consistency and harmonisation that was intended when COAG commenced the process of establishing a single national regulator.

FATIGUE MANAGEMENT

The RTBU has had longstanding reservations about the way in which the NTC-led addressed issues of fatigue management while developing the national regulatory model.

The RTBU's position on fatigue management has consistently been underpinned by an Evidence Based Review.⁸ It provides a powerful rebuttal of attempts to undermine a regime of maximum work hours and minimum rest periods. The evidence outlined in this review was provided to the NTC on numerous occasions. It has also been provided to the ONRSR. Neither have responded to the issues, evidence and concerns outlined in the review.

A stand out feature of the Evidence Based Review is the link established between fatigue, reduced performance and elevated risk of injury. The Evidence Based Review identified numerous studies capturing accident data spanning ample years/personnel/ accident reports revealing unequivocal increases in accident risk with increased shift duration.

Recent scientific evidence has shown there is a 30.4% increased risk of an occupational accident during the night shift and a clear exponential increase in accident risk beyond the 8th or 9th hour on shift.

The Evidence Based Review examines the international experiences in the rail industry and other sectors of the transport industry to determine what the international benchmark for

⁸ Clare Anderson, Shantha M.W.Rajartnam and Ron Grunstein, *Evidence Based Review of Shift Work Risk Factors for Fatigue and Accident/Injury Risk in the Rail Industry*. (Monash University and University of Sydney), March 2012.

addressing fatigue risks is. It concludes ***“The evidence demonstrates that hours of work and shift limits form part of fatigue risk management systems world-wide in rail and other transportation sectors”***.

Internationally, Australia is the odd country out with its purely risk-based, co-regulatory approach. The international evidence in the words of the US Federal Aviation Administration is that “hour of service limits should be the central part of **any** fatigue risk management system.”

The Evidence Based Review concluded:

“Based on current practice within other countries and occupational sectors and taking an evidenced based approach to risk from fatigue, this review supports that hours of service limits should be a central part of fatigue risk management within the rail industry, with additional fatigue risk management strategies incorporated within these limits.”

The Evidence Based Review makes a number of recommendations to translate this evidence into the design of working patterns that can be formulated to minimise fatigue.

These recommendations for future work include restricting consecutive night or early morning shifts, the allowing of adequate time off between shifts and establishing limits for maximum shift durations.

Furthermore, a “human factors” review conducted for the ARTC by Lloyds Register found that: *“when driving down long sections of track all day, every day, drivers don’t need distractions to lose concentration”*. It concluded that the threat of ‘micro-sleeps’ could occur at any time given long sections of repetitive “bland sections of track”.

That is not to mention research that has consistently concluded that forcing a worker to drive while fatigued is akin to forcing them to drive while under the influence of alcohol.

The RTBU has many reservations about a purely risk-based approach to fatigue management and any attempts to downgrade prescriptive hours of work regimes simply in the name of saving money. These include reservations about the lack of involvement of rail safety workers in risk assessment, and whether they have the requisite skills to comply with a combined approach to risk; reservations about the maturity of many accredited parties to understand and apply a risk-based approach; and reservations about regulators’ ability to pro-actively manage risk.

Prescriptive outer limits of work hours

Employers in the industry and their representatives routinely call for the removal of prescriptive outer limits of work hours that exist in NSW and Queensland. Fundamentally, this is based on two flawed arguments. First, employers claim prescriptive requirements are a cost

and regulatory burden. And second, they claim there is no evidence that such limits improve safety outcomes. Both claims are wrong and have the potential to reduce safety on our railways, with no productivity gain.

Firstly, there is no evidence that productivity in Queensland and NSW is adversely affected by prescribed outer limits of work hours.

Secondly, the RTBU strongly rejects employer claims that there is no conclusive evidence relating to the safety benefits of prescribed hours compared with full risk-based frameworks.

What is most disturbing about attempts to remove specific NSW and Queensland standards is that they seek to undo controls that were implemented following inquiries that took place following fatal rail accidents. Prescribed hours have not been developed arbitrarily. Rather, they came directly from commissions of inquiry which were charged with finding out what went wrong when innocent people lost their lives in the NSW rail disasters of Glenbrook and Waterfall.

Moreover, the ONRSR has acknowledged that there are difficulties in measuring fatigue.⁹ This means the cause of an incident may not be reported as ‘fatigue’, even though it was a causal or contributing factor. Applying the ONRSR’s own logic, it is highly likely that rail safety investigations underestimate the impact of fatigue.

The RTBU has consistently provided evidence to establish an unequivocal link between fatigue, reduced performance and elevated risk of injury, including the Evidence Based Review referred to in this submission. Our recommendations have always been informed by this evidence.

Our view remains that attempts to undermine prescribed outer limits of work hours and rests in a manner contrary to the conclusions of the evidence-based review are littered with assumptions and conclusions without presenting any corroborating evidence grounded in science or fact.

Based on current practice within other countries and occupations – and taking an evidence-based approach to risk from fatigue – hours of service limits are a central part of fatigue risk management within the rail industry, with additional fatigue risk management strategies incorporated within these limits. Specifically, the following should apply to all rail safety workers in general (noting the specific hours for traincrew in NSW and Queensland, which should apply across for traincrew across all Australian jurisdictions):

- Minimum time between shifts;
- Maximum shift duration ranging between 9-12 hours depending on the occupation;

⁹ https://www.onrsr.com.au/_data/assets/pdf_file/0018/22644/ONRSR-Fatigue-Risk-Management-Review-Consultation-Paper-updated.pdf

- Maximum number of shifts and hours which can be worked over any 14-day period;
and
- Minimum length of breaks during shifts.

Another common argument against hours of service limits is that they “could be misunderstood and create the risk of becoming the de facto ‘safe’ limit.” There is no reason this should be the case, especially given that operators are obligated under the RSNL to consult with rail safety workers, HSRs and unions, when developing their fatigue risk management programs.

DRUG AND ALCOHOL MANAGEMENT

The RTBU is firmly of the view that this is an extremely important safety issue for the rail industry, and for the women and men who work in it. The RTBU advocates its position with the knowledge that its members do not want to be at work with co-workers who may be impaired. It is those workers who bear the biggest brunt of an unsafe workplace, and while an impaired worker may cause inconvenience to an operator, they are putting the lives of other workers at risk.

The RTBU recognises, however, that any approach to drug and alcohol management must be practical and pragmatic if it is to be fully effective. It must also recognise the prevalence of drugs and alcohol in the broader community, and understand that rail workers are subject to the same environmental and cultural influences as everyone else.

That is why the RTBU has consistently argued that drug and alcohol testing regimes must always focus on genuine impairment, rather than punitive approaches that punish workers for simply for the presence of drugs and alcohol. A punitive approach is more likely to foster a sense of distrust between workers and management, which undermines any effort to build collaborative, partnership-based relationships in the workplace. There is significant evidence demonstrating the productivity benefits of collaborative workplace environments.

A strong safety framework that promotes productivity is designed to encourage workers to become more engaged in the safety process. In order for this to happen, workers need to believe the system is fair and works in their interests. This means that when it comes to drug and alcohol testing, the process must respect the privacy and dignity of employees. Taking saliva swabs is proven to be an effective way to test for drug and alcohol impairment. Not only are saliva swabs more effective than urine samples, they are also more dignified for workers than urine testing. Furthermore, independent research has consistently criticised urine testing as an unreliable and inaccurate method of determining an individual’s fitness for work; as an invalid method of detecting impairment; and for failing to address the legislative policy objectives of reducing drug related risk in the workplace.

The RTBU also argues the development of the national law for drug and alcohol management has been focused on a very narrow range of issues. Issues of importance for rail safety

workers have not been considered in detail. Although the national regulator acknowledges that drug use in the rail industry is extremely limited¹⁰, it has chosen to adopt a heavy-handed approach that almost exclusively focuses on testing and penalties. This is despite the fact there is a significant body of evidence highlighting that “while the relationship between the workplace and drug use is complex, workplace conditions (such as stressors, social controls and the workplace culture) were likely to influence the drug use of workers.”¹¹ Moreover, there is overwhelming consensus that the most effective drug management policies address the issue as a health issue, with an emphasis on rehabilitation. Not only are the safety benefits of the current heavy-handed and punitive approach debatable, there is undoubtedly an economic impact caused by the costs imposed.

A more appropriate approach – and one that promotes both safety and productivity – is to require operators to implement ONRSR-endorsed competency-based education and information courses. The RSNL should prescribe that a minimum percentage of an operators’ drug and alcohol management program (DAMP) should be spent on education. For instance, many drug experts argue that education should be at least 50 per cent of an operator’s DAMP.

THE CENTRAL ROLE OF WORKERS

In order for the Australian rail industry to have a safety culture that promotes greater productivity, it is imperative that decisions are made by the people best equipped to make them. In the case of the rail industry, these people are the workers at the coal-face, such as train drivers, guards, network controllers, customer-facing staff and track protection officers.

RTBU members understand the operational limits of Australia’s rail networks better than anyone. They need to be better involved in the decision-making processes, and they need to be better engaged in discussions about safety. Our members are concerned about the quality of management decisions around safety in the workplace. They feel they are not being adequately, or genuinely, consulted – with respect to workplace safety - and they therefore feel their safety is being put at risk.

To address this, it is essential that the RSNL includes minimum safety standards and a framework that empowers employees to determine the best way to meet those standards in the workplace. In turn, this will create more collaborative workplace cultures across the rail industry.

Numerous research studies have found that, in the right circumstances and with genuine commitment, partnership approaches can lead to mutually beneficial outcomes – including increased levels of trust between organisations and workers – that have major flow-on effects in the individual workplace and across the wider economy. Collaborative approaches are also

¹⁰ https://www.onrsr.com.au/_data/assets/pdf_file/0003/19749/Draft-Drug-and-Alcohol-consultation-paper-June-2017.pdf

¹¹ http://locoexpress.com.au/wp-content/uploads/2011/08/RTBU-Submission_National-Rail-Safety-Law.pdf

particularly useful for companies undergoing major change.¹² Given that the Australian transport industry is expected to undergo significant change with the introduction of new technologies, it is pertinent that we explore more collaborative models.

THE PERCEIVED “BLAME THE WORKER” MENTALITY

There is a perception among the workforce that the RSNL supports a culture of apportioning blame, or what our members refer to as a “blame the worker” mentality. This is a significant barrier to achieving a true safety culture, as well as addressing some key productivity constraints in the rail industry.

Above all else, a safety culture is a reporting culture, in which people are prepared to report errors, near-misses, unsafe conditions, inappropriate procedures and any other concerns they may have about safety. The issue is not whether the organisation has a reporting system. Rather it is whether, such things are reported as a matter of practice. This will only happen if people are on the lookout for things which need to be reported and alert to the ways in which things may be going wrong.

A reporting culture, in turn, depends on how the organisation handles blame and punishment. If blame is the routine response to error, then reports will not be forthcoming. If, on the other hand, blame is reserved for behaviour involving defiance, recklessness or malice, reporting in general will not be discouraged.

The RTBU is aware of instances where the perceived blame culture has led to Protection Officers handing in their certificates because the pressure they are under, with limited support, is too much for them. It is alarming that existing laws are giving workers no choice but to leave key work classifications or leave the industry entirely, especially in light of the skills shortages in parts of the rail industry. Labour shortages impact productivity. Therefore, this issue needs to be addressed urgently – and a key part of the solution is to develop a genuine safety culture.

CONCLUSION

It is critical that policy makers avoid falling into the trap of only looking at improving productivity through ad hoc and piecemeal changes that focus primarily on one or two regulations, rather than evaluating the practical and lived experience of risk-based co-regulation on a holistic level.

We are concerned that the Federal Government, in asking the Commission to conduct this review, is putting the “cart before the horse” when it comes to lifting productivity levels and

¹² L Yarrington, K Townsend & K Brown. Models of Engagement: Union management relations for the 21st century. Queensland University of Technology research paper.
http://eprints.qut.edu.au/9121/1/Models_of_Engagement.pdf

improving the economic performance of the rail industry. If this is the case, it will simply result in the watering down of vital safety regulations, thereby compromising the safety of rail safety workers and the wider community.

The primary reason why productivity-enhancing harmonisation has not been achieved is the lack of any prescriptive outer-limit regulations and/or penalty-based incentives in the RSNL. Importantly, the RTBU is not proposing a total reliance on prescriptive rules. Rather, prescriptive rules are simply the building blocks for developing and maintaining a strong safety culture, which in turn fosters greater collaboration within the workplace. Fundamentally, a significant overhaul of the ONRSR-RISRB-Operator relationship is essential if the benefits of a nationally consistent rail safety law are to be realised.