AUSTRALASIAN RAILWAY ASSOCIATION

Association Number A03958 | ABN 64 217 302 489

AUSTRALASIAN RAILWAY ASSOCIATION SUBMISSION

To the

Productivity Commission

On the

National Transport Regulatory Reform

THE ARA

The Australasian Railway Association (**ARA**) is a not-for-profit member-based association that represents rail throughout Australia and New Zealand. Our members include rail operators, track owners and managers, manufacturers, construction companies and other firms contributing to the rail sector. We contribute to the development of industry and government policies in an effort to ensure Australia's passenger and freight transport systems are well represented and will continue to provide improved services for Australia's growing population.

The ARA welcomes the Productivity Commission's (the Commission) review into National Transport Regulatory Reform and appreciates the opportunity to provide this submission to the National *Transport Regulatory Reform Draft Report – November 2019*.

This submission has been developed in consultation with ARA members.

For further information regarding this submission, please contact Emma Woods, General Manager Passenger and Corporate Services via ewoods@ara.net.au or 02 6270 4507.

GENERAL COMMENTS

The ARA supports many of the recommendations put forward by the Commission and provides commentary against those that are relevant below.

The ARA agrees with the Commission that the choice of mode, whether road or rail freight, is a commercial decision. The ARA also agrees that road and rail are complementary but does not support the repeated view that much of the freight on major routes is not contestable and that road and rail freight cannot be substitutes. Rail can indeed be a substitute for road freight, particularly on longer distances. The modelling for the Inland Rail corridor and anticipated increase in rail freight is testament to both the contestability and substitutability for rail freight on this corridor over road. As an example, the ARTC forecasts that two million tonnes of agricultural freight will switch from road to rail with Inland Rail, with a total of 8.9 million tonnes of agricultural freight more efficiently diverted to Inland Rail.[i] A current example is the East – West Rail Corridor from the Eastern States of Australia to Perth where rail dominates the market share but heavy vehicles also provide service.

The ARA appreciates that it is 'difficult to estimate the degree of substitutability' between road and rail freight but this should not see it removed completely from consideration. With the forecast growth in population and therefore freight needs, a holistic view and consideration of Australia's freight task is essential. Recommendations should indeed consider the broader freight task and how to best support all freight modes to ensure a strong freight market in Australia that is flexible and able to meet the changing needs of the market. The ARA also believes that the social and environmental benefits rail provides are not adequately recognised.

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The Commission identifies that rail operators and infrastructure managers pay $39 million to cover ONRSR's regulation costs. In stark contrast, the Commission identifies that heavy vehicle operators pay just $5 million towards the NHVR's regulation costs. In addition, the Commission identifies the considerable Government funding provided to AMSA ($193 million) and the NHVR ($153 million), whilst highlighting that no similar Government funding is provided to ONRSR. As a result, rail operators and infrastructure managers are paying 100% of ONRSR's $39 million regulation costs whilst heavy vehicle operators pay just 3% of the NHVR's $158 million regulation costs.

The Government funding allocations alone are an example where the Government is creating an unfair advantage to road and maritime. How is rail to compete in the freight market when rail Operators and Infrastructure Managers fund $39 million for regulatory services and the Government provides the NHVR with a hand-out of $152 million to top up the $5 million paid by heavy vehicle operators? The ARA requests that the Commission explore this issue in further detail and recommends similar levels of support from the Commonwealth Government to assist ONRSR and the rail industry to continue to invest in rail safety improvements and provide a level playing field in Australia's freight market.

RAIL-RELATED RECOMMENDATIONS

Do we have nationally consistent regulatory regimes?

DRAFT FINDING 4.2: There are many derogations by jurisdictions to the national laws. There are over 70 derogations from the Heavy Vehicle National Law and over 80 derogations from the Rail Safety National Law. Some derogations create unnecessary costs and complexity for industry and regulators. These derogations are contrary to the objectives of the Council of Australian Government's harmonisation reforms.

DRAFT RECOMMENDATION 4.1: The Transport Infrastructure Council should request that the National Transport Commission undertake a review of significant derogations from the Heavy Vehicle National Law and the Rail Safety National Law, with the aim of reducing regulatory inconsistency.

The Council of Australian Governments should commit to altering or removing derogations, or altering the national laws, to achieve best practice regulation.

Support in full.

State-based derogations from the Rail Safety National Law (RSNL) add compliance costs, additional administrative and operational burdens and reduce the productivity of multi-state and national railway operations with no proven safety benefit.

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The RSNL should, as per its name, be national. Not 'almost-national' with more than 80 differences according to State Government preferences. The current derogations undermine the national regime and are not 'best practice regulation'. Further, one of the three guiding principles of the RSNL is "to assist rail transport operators to achieve productivity by the provision of a national scheme for rail safety". The current derogations from the RSNL mean the RSNL in its current form does not meet this guiding principle.

From a rail industry perspective, as noted by the Commission; the priority derogations and therefore reform opportunities are fatigue management, drug and alcohol management and mirror legislation. In addition, the ARA tables the reporting of Category A Notifiable Occurrences as another priority derogation requiring attention.

According to Office of the National Rail Safety Regulator (ONRSR) reports, the variation of drug and alcohol requirements in NSW affects 53 of Australia's 186 accredited operators whilst 44 operators are required to comply with two or three different fatigue management requirements for no proven safety benefit.

It must be noted that the ONRSR conducted detailed reviews into drug and alcohol management and fatigue between 2017 and 2019 without resolving the interjurisdictional variations. Industry was heavily engaged and supportive of both reviews, advocating for national consistency and a risk-based approach.

In its drug and alcohol review, ONRSR made the following six recommendations:

1. *ONRSR and operators should have access to all testing methods in the law and the flexibility to apply the most appropriate method of drug testing based on the organisation's identified risk.*
2. *The level of random testing conducted by rail transport operators should be determined using a risk based approach. ONRSR will issue guidance material outlining their expectations in relation to managing the risk of drug and alcohol use SFAIRP.*
3. *Rail transport operators should not be required under the RSNL to conduct drug and alcohol testing to evidentiary standards for use by the Regulator for prosecution purposes. Note the Regulator will increase their testing program.*
4. *(a) Drug and alcohol testing following a prescribed incident to be mandatory in legislation.*

   (b) Post incident drug and alcohol testing to be undertaken following those prescribed incidents listed in Table 10.

   (c) Rail transport operators to undertake drug and alcohol testing following a prescribed incident if this testing is not undertaken by police or ONRSR.

   (d) ONRSR to endeavour to undertake drug and alcohol testing to an evidentiary standard unless undertaken by police, recognising that there will be circumstances where it will not be possible for ONRSR to undertake testing.
5. *Include in the RSNL nationally consistent offence provisions for tampering or interfering with a sample.*
6. *Continue in researching the possibility of aligning drug and alcohol testing requirements under the national law, to be consistent across Australia.*

Industry provided its full support for each of the ONRSR recommendations and prepared a member brief that articulates reasons for support. See Appendix A. If these had been adopted, a nationally consistent framework to manage drug and alcohol testing in the rail industry would have been achieved. Unfortunately, this did not occur.

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The current ONRSR governance structure allows State Governments to 'veto' recommendations. As a result, although adoption of the six ONRSR recommendations would have driven national consistency in the management of drugs and alcohol throughout Australia's rail industry, reduced regulatory burden and ensured that drug and alcohol policies were based on targeting identified risk rather than meeting mandated targets, the NSW Government made the decision for no change against four elements within the six recommendations. As a result, operators must test 25% of their rail safety workers rather than testing according to risk, all drug test types cannot be used; a rail safety worker involved in an incident might be tested by ONRSR, the Police and the Operator; the Operator must still test to evidentiary standard even though ONRSR and the Police will test to evidentiary standard and the ONRSR identified in its review that the evidentiary standard had not been met and therefore to date (at the time) ONRSR had not been able to use tests for prosecution.

The Commission correctly acknowledges the effect varying fatigue provisions have on freight operators but long-distance passenger operators are also adversely affected by fatigue derogations. Thus, a review into the RSNL derogations should not be restricted to rail freight only but should cover the whole industry and explore impacts and solutions to each (more than 80 derogations).

In addition, changes to legislation from 1 July 2019 saw reporting of Category A Notifiable Occurrences and prescribed incidents move from the ATSB to ONRSR. Due to mirror law, this requirement has not yet been implemented in WA and due to the NSW Government's refusal to adopt all ONRSR recommendations in the drug and alcohol review, the requirement does not apply in NSW either. This means rail operators working in either of these jurisdictions and another need two separate systems to deal with prescribed incidents and the mandatory drug and alcohol testing. For NSW operations there are different prescribed incidents which must have mandatory testing within three hours to an evidentiary standard. Whereas in QLD, VIC, SA and NT, the new prescribed incidents (different to NSW) have mandatory drug and alcohol testing.

It is worth highlighting that the ONRSR drug and alcohol review confirmed that the use of drugs and alcohol within the rail industry is extremely low; less than one per cent of all tests were positive (almost 200,000 tests were conducted in 2015-16)[ii]. Similarly, the ONRSR fatigue review found 'limited evidence of systemic issues relating to the management of fatigue in rail in Australia'.[iii] And yet the heavy vehicle industry, where drivers have much greater flexibility on where they travel, is not held to the same level of drug and alcohol testing or fatigue management levels. In addition to seeking to remove derogations from the NHVL and RSNL, the ARA recommends that the review does not take an industry-specific siloed approach but also conducts comparisons and considerations between the two industries to ensure a level playing field is achieved.

Due to previous efforts to address some derogations, which have been resource intensive for industry and ONRSR alike with limited benefits, it would be essential that a review by the National Transport Commission (NTC) is granted adequate authority and funding to ensure any recommendations for national consistency are not politicised.

Safety decisions and enforcement should not be influenced by politics. In this vein, the ARA notes the importance of the independence of ONRSR from government but stresses the need for ONRSR to be able to make rail safety recommendations that will be adopted nationally and cannot then be vetoed according to State Government preferences. If the current approach continues, we will move further and further away from the national rail safety regulator COAG agreed to establish.

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DRAFT FINDING 4.4: Despite having one national safety law and one national safety regulator, rail operators face differing standards, operating codes and procedures, set by rail network owners. Differences across networks create costs and delays for above-rail operators.

No recommendation currently made.

Compliance with an array of standards, operating codes and procedures is a burden for passenger and freight operators travelling through multiple networks, increasing costs, particularly in comparison with road. The Rail Industry established the Rail Industry Safety and Standards Board (RISSB) as its standards, codes and guidelines development body in 2003. Industry and the Commonwealth Government co-fund RISSB and industry subject-matter experts are engaged to collectively develop RISSB standards. More recently, the NSW Government established its own standards development body; Asset Standards Authority and many large rail entities outside the NSW Government draw on RISSB and overseas standards, codes and procedures to produce their own products.

From a contractor perspective, one of the biggest hurdles they must overcome are the differences that network owners apply to railway operations conducted on their network. For each project, detailed consultation must be conducted between a contractor and the Rail Infrastructure Manager to determine whose accreditation and Safety Management System (SMS) will apply to which parts of the respective railway operations. ONRSR has identified Contractor Management as one its National Priorities for 2020.

The ARA notes that the Transport and Infrastructure Council (TIC) has recently endorsed the Rail Action Plan and therefore this issue may be addressed through the NTC. However, it is still early days and no budget has been allocated to this process.

The ARA acknowledges that Industry has a role to play but suggests that this issue could benefit from a similar review as proposed at draft recommendation 4.1. As well as recommending how to best achieve national consistency, an important consideration would be how to support technology and innovation to ensure state-based or network-specific standards, operating codes and procedures are not restricting growth in this space. In addition, the ARA would caution against a mandating or introducing a prescriptive approach which could hinder and restrict innovation.

Has harmonisation of transport regulation improved safety?

Draft Recommendation 5.3: The Council of Australian Governments should commission an independent review of the fatigue management laws applying in the rail sector to examine the scope for further harmonisation. This could be included in the broader review into derogations proposed by this inquiry (draft recommendation 4.1).

Support an independent review of fatigue risk management in rail separate to the broader review of derogations but recommend this is expanded to incorporate heavy vehicles.

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An independent review of fatigue management in the rail industry would give the issue the dedicated attention it requires. ARA members would willingly engage in an independent review of fatigue that seeks to establish a nationally consistent risk-based approach to manage fatigue.

The ARA recommends that in addition to striving to achieve national consistency for rail fatigue management, it would be beneficial for an independent review to explore fatigue management for both the heavy vehicle and rail industries.

In recommendation 5.2, the Commission puts forward that the NHVR should have 'greater scope to provide concessions from prescribed aspects of fatigue management regulation, where the NHVR is satisfied that more effective systems of fatigue management are in place, such as technology-enabled management systems, and/or accredited management systems.' However, current heavy vehicle fatigue laws are much less stringent than those imposed on rail yet rail operates in a segregated and dedicated corridor (except for level crossings) and is a single plane operation (drivers can only stop or start a train, they are not required to steer a train left or right). By conducting a review that examines both sectors' approaches to fatigue, the differences in how fatigue is managed will be more apparent and could lead to better outcomes nationally.

The ARA is aware that the NTC has a review into heavy vehicle fatigue underway with a paper *Effective Fatigue Management* released in May 2019. Two separate reviews will miss the opportunity to consider the broader freight industry context, provide recommendations for both sectors and identify potential alignment between the two to achieve greater consistency between the modes.

For additional context, please see response to 4.1.

Information request 5.1: The Commission is seeking additional information about the operation and effectiveness of the Rail Safety National Law in relation to interface agreements, including:

- **the extent to which interface agreements are contributing to better safety outcomes**
- **options that could improve the negotiation process, and the extent to which risks are appropriately shared between road managers and rail operators.**

Interface co-ordination plans were first introduced within rail as a simple tool to manage the risks at road and rail and between rail organisation interfaces. Now a legislated requirement, the simple approach of managing risks at any identified interface can, in practice, be replaced by lengthy legal or commercial documents that move away from what was intended.

If used correctly, an interface agreement should be a useful tool in determining what controls need to be assigned and by whom to address risks at a certain interface. In practice, Interface Agreements can be resource-intensive and timely to establish and require active management of these through regular meetings and risk reviews to ensure the agreements remain current. ARA members experience difficulty and a lack of engagement establishing interface agreements with road authorities where public roads cross railways and whilst the RSNL suggests road managers should investigate risks with rail operators, it is the rail operator or infrastructure manager that ultimately owns the risk and therefore has the desire to resolve these interface issues.

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ONRSR recently wrote to Councils regarding their legal obligations for interface agreements. This resulted in the signing of many more interface agreements, an outcome welcomed by ARA members. However, interface agreements, are largely viewed as a regulatory compliance requirement rather than a significant contributor to enhanced safety of the network. Whilst the ONRSR letter has helped, rail network owners continue to find Interface Agreements are a significant issue as many road managers, especially local councils, continue to evade their responsibilities to enter into interface agreements for road/rail crossings. Despite the changes to legislation in 2019 giving ONRSR power over road managers, ONRSR also appears reluctant to apply that power to its full extent.

Interface agreements are another example where rail carries the burden over heavy vehicles. Road managers do not seem to be aware of the need to inform rail operators that heavy vehicle access arrangements may have changed at an interface. This imbalance in the degree to which safety critical hazards are managed and regulated across sectors has the effect of placing a relatively higher burden on rail. This can impact on the efficiency of modal competition and ultimately the efficiency of the freight transport. In addition, this can create significant risks for rail operators as different heavy vehicles present different threats to the safe operation of the railway and maintenance of rail infrastructure. As an example, level crossing boom gates may not be appropriately timed to enable safe passage for certain classes or lengths of heavy vehicles.

Interface Agreements could be improved by making the focus on providing assurance to the other party or parties within the agreement that each party is meeting their prescribed obligations. Further improvements could be made by placing more emphasis on:

- A national approach to risk assessment of road/rail interfaces – one standard way
- A checklist of items to be considered as part of the risk assessment
- A time limitation on parties to respond to proposed interface agreements
- A simple, rapid escalation to ONRSR where no response is provided, and
- Power given to rail operators to close road/rail interfaces where the road manager refuses to enter into an interface agreement

Information request 5.3: The Commission is seeking additional information about the situations where greater clarity is required between the operational jurisdiction of national transport regulators and workplace health and safety regulators and overlaps in their responsibilities. What options for rectification would be desirable?

Differences in interpretation of legislation can lead to noncompliance with one or the other set of legislation. Legislation should be without inconsistencies and it is more pertinent to signpost to WHS legislation for due diligence requirements rather than replicating within the RSNL. An area where WHS and Rail Safety legislation overlap is in the provisions of Duty. Eliminating duplication in duties of officers could provide clarity. Specifically:

- Duties of Officers is replicated in both the WHS and RSNL.
- Duties of Designers, Manufacturers and Suppliers is replicated in both the WHS and RSNL.

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The legislative requirements within the WHS legislation should be referred to but not replicated in the RSNL. For consistency, a standard set of Due Diligence Requirements could be developed that is applicable across all jurisdictions and across all relevant sets of legislation RSNL, WHS, HVNR etc. Supporting this with education and education materials would assist.

Have the COAG reforms raised productivity?

DRAFT FINDING 6.6: Data on the compliance costs for businesses for the three national regulators are not routinely collected, monitored and published.

DRAFT RECOMMENDATION 6.5: The National Heavy Vehicle Regulator, the Office of the National Rail Safety Regulator and the Australian Maritime Safety Authority should monitor the compliance and administrative costs created by the national regimes and report on the level and change in these costs in periodic (say 3 yearly) reporting. The first report should be published in 2020 to establish benchmark costs.

DRAFT FINDING 6.7: There is little evidence at this stage that compliance costs for businesses have fallen. Each regulator is pursuing changes that should help reduce costs in the future.

Support.

To ensure comparability between the sectors and their reports, the ARA recommends a framework and consistent data sets are identified and agreed between the three regulators to ensure the data collected and reported will be comparable between the sectors. This will facilitate real comparisons and identify potential learnings and information sharing opportunities.

In determining the data sets required, the ARA recommends that consideration is given to the three industries and any potential burden to report additional metrics to their respective Regulator.

In addition, from a rail perspective, the ARA recommends that the report on compliance costs included costs associated with state-based derogations and differing state standards, codes and procedures. As both issues are removed or improved, the reports will assist in tracking the financial benefits to industry.

Transport technology and data

DRAFT Recommendation 8.1: The Australian Government should amend the Australian Design Rules and in-service vehicle standards to allow for new transport technologies, including automated technologies, with proven productivity or safety benefits. The Australian Government should aim for national and international consistency of laws and standards where practicable, and accept safety devices adopted in other leading economies. The Council of Australian Governments should investigate whether a 'deemed to comply' approach would be practical for some technologies.

Support.

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Rather than reinvent the wheel, we should strive to adopt national and international laws and standards where appropriate to ensure new technologies with proven productivity and safety benefits are supported. Consideration for the Australian context must of course, first occur.

DRAFT RECOMMENDATION 8.2: The Australian Government should co-operate with stakeholders including Transport Certification Australia when developing the National Freight Data Hub. The Hub should include a regulatory framework for the collection, storage, analysis and access of transport data, including telematics data. This framework should specify the data access powers of regulators, enforcement agencies and accident investigation bodies, and should enable these bodies sufficient access to undertake their respective tasks, while protecting privacy and confidentiality.

Support.

The ARA fully supports the establishment of a National Freight Data Hub (NFDH) as per the National Freight and Supply Chain Strategy. It will be critical that the Commonwealth Department engages all relevant stakeholders in the two-year design process to ensure the needs of all stakeholders are met. The ARA notes that the NSW Government launched its own Freight Data Hub on 16 December 2019 and stresses the need to ensure integration with the NFDH to avoid duplication of effort by Government and industry alike.

The ARA notes that Transport Certification Australia currently covers all modes except rail.

From a rail safety data perspective, it is worth noting that ONRSR and the ARA are co-chairing a project to overhaul rail safety data. Current safety data reported to ONRSR is an amalgamation of the reporting systems of the previous state-based regulators. In September 2018, the ARA and ONRSR released the National Rail Safety Data Strategy (NRSDS) to 'wipe the slate clean' and establish a new set of rail safety data that meets the needs of all stakeholders. The project will establish a single source of reliable national rail safety data to support risk-based regulation and rail safety decision making. Industry representatives, ONRSR, ARA and RISSB are on the project Steering Committee. A proposed data set with new reporting timeframes has been developed, with input from many key stakeholders on their data requirements. The project is on track for industry consultation early 2020. Therefore, whilst the development of the NFDH is supported, its development should be coordinated with the NRSDS to ensure there is no duplication of effort.

INFORMATION REQUEST 9.1: The Commission is interested in further information regarding the safety implications of commercial contracts in the industries covered by the Heavy Vehicle National Law (HVNL), Rail Safety National Law (RSNL), and the Marine Safety (Domestic Commercial Vessels) National Law (MSNL). In this regard, the Commission would be interested in understanding the effectiveness of safety duties applying to various businesses through the supply chain (for example, Chain of Responsibility, Workplace Health and Safety).

This issue can be considered from the perspective of the commercial contracts that underpin Rail's access framework and also from that of the relationship between Rail Infrastructure Managers (RIM) and contractors.

In respect of the safety implications of commercial contracts under rail's access framework, ARA notes that the access agreements which underpin these frameworks allocate responsibility (and respective rights) between

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network managers and users for safety related incidents via specific clauses. Given the ARA has membership on both sides of these agreements, ARA believes any further response on this issue is best left to individual member submissions.

In respect of the RIM-Contractor relationship, this has a number of impacts from both a safety and procurement perspective. Significantly, as Rail must contract for deliveries for goods by road, RIMs are covered by the Chain of Responsibility (CoR) requirements that exist under NHVL. This guarantees that RIMs must ensure they can control and influence all that is reasonably practical regarding the receival and or delivery of goods within the supply chain. This introduces issues related predominantly to fatigue where the RIM carries responsibility for any heavy vehicles who may enter / and or leave their site (but with substantially different fatigue laws). This responsibility cannot be contracted out of.

The contracting out of safety duties is also expressly prohibited within RSNL and unless you are a client with no experience, largely prohibited under WHS legislation. The areas where most businesses struggle to provide effective management and control are where there are multiple sub-contracts and/or employment agencies involved. Whilst there is a shared responsibility for safety, in reality there is very little the client can do to enforce their requirements through the contractual chain without implementing direct supervision, which is not efficient or cost effective. This is also true of the HVNL and the requirements over COR

Therefore, whilst safety duties are often assigned in contract terms of WHS laws, too often the client fails to understand their responsibilities under RSNL, let alone HVNL where all parties are captured under CoR requirements and obligations cannot be contracted out of. This creates inefficiencies and increases the cost of projects.

DRAFT FINDING 9.1: While some of the potential benefits of logistics data are specific to the individual operator, there are larger, broader benefits from the collection and integration of data across many operators. These broader benefits risk being underprovided if data generation and sharing are not facilitated.

The ARA agrees with the draft finding and recognises the benefit in sharing de-identified data for the purpose of identifying industry trends. As noted in response to recommendations 8.2 and 9.1, this is an outcome sought through the rail safety data strategy. However, the ARA highlights the potential burden on industry for greater reporting requirements and the need to manage this.

DRAFT RECOMMENDATION 9.1: Governments (and their agencies) and industry should consider how best to harness logistics and telematics data to improve incentive-based safety regulation, with the aim of influencing behaviours that increase safety and productivity.

Governments and regulators should aim to facilitate the adoption of technologies by operators to generate and share data by:

- **providing legal assurances about the acceptable use of such data**
- **clarifying the value proposition to individual operators of their participation in data sharing regimes.**

Support.

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The ARA supports the improved use of data for incentive-based safety regulation and increasing safety and productivity and notes alignment with the rail safety data strategy underway as mentioned in response to recommendation 8.2.

The rail industry recognises the value of sharing rail safety data and is embarking on this through the rail safety data strategy. The strategy being co-chaired by the ONRSR and ARA seeks to improve rail safety data reported to the regulator. Currently operators report rail safety data to a variety of stakeholders, which is a burden for industry but also results in inconsistencies in the data. The rail safety data aims to establish a single source of data that can be used many times by different stakeholders. The use of technology to better analyse and identify trends within the rail safety data reported is a key outcome being sought through the project. In addition, a key output being sought by the rail industry in this project is how to best share rail safety trends and insights back to industry.

This recommendation should also feed into the National Freight Data Hub.

DRAFT RECOMMENDATION 9.3: The Australian and State and Territory Governments should:

- **formalise the role of the Australian Transport Safety Bureau to investigate all serious incidents involving domestic commercial vessels, and agree a funding model to support this role**
- **agree to a funding model to enable the Australian Transport Safety Bureau to adequately carry out its established role in the investigation of rail safety incidents.**

Support but caution that significant funding will likely be required.

As outlined in the June 2019 ARA submission to the Commission, no blame investigations have a significant safety role to play. However, the current time taken for ATSB reports to be published diminishes their value to industry. Generally, by the time a report is published by the ATSB, the rail entities involved have long completed their own investigations and moved on. At times, ONRSR has also completed its own investigation and moved on. The ATSB adds a third investigation process to some incidents, an obvious impost on industry and impact on people involved in an incident being interviewed three times. According to the ATSB's 2018-19 corporate plan, complex investigation reports average almost two years (23 months) to complete and release. This is unsatisfactory. The corporate plan indicates a target completion timeframe of 21 months. This too would be unsatisfactory for the rail industry. Also according to the ATSB's 2018-19 corporate plan, in 2017–18 the ATSB 'commenced 25 complex investigations and one short investigation from 378 accidents and serious incidents reported to the ATSB as immediately reportable matters'[iv]. No reference is made to completed complex or short investigations.

As a comparison, the Rail Accident Investigation Branch (RAIB) in the UK also conducts no blame investigations. According to its 2018 Annual Report, in 2018 the RAIB completed 20 full investigation reports and on average, these were completed and published within 9.2 months.[v] A similar timeframe in Australia would ensure the outputs of the ATSB were of greater value to the rail industry. Therefore, if the ATSB is going to retain its responsibility, it needs to be appropriately resourced to turn the reports around in a much shorter time frame if they are going to be of any real value.

Whilst the ARA supports 'a funding model' to better resource the ATSB, the ARA is of the view that significant ongoing government investments would be required for the ATSB to obtain the necessary expertise, resources

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and improved efficiencies to provide reports in a timely manner that contribute to continuous improvement in the safety space. In addition, noting the Commissions' recommendation 5.4 for the ATSB to 'conduct investigations and publish research on safety incidents and accidents among domestic commercial vessels'; recommendation 9.2 to 'trial incident investigations for heavy vehicles' and recmomendation 9.4 for the ATSB's remit to be 'extended to include any incident where autonomous technologies at or above SAE level 3 autonomy may have been involved', the ARA is concerned that although additional funding might be forthcoming, the ATSB's significant remit expansion could further exacerbate current rail industry concerns, absorb any additional funding and see the status quo in output and value maintained.

A reform agenda for transport productivity

DRAFT Finding 10.2: There are different approaches to cost recovery in each of the three modes, from near full cost recovery in rail, to very limited cost recovery in heavy vehicles and maritime. The amount of government funding received by each national regulator reflects these arrangements.

The ARA seeks support from the Commonwealth Government and recommends the ONRSR be given appropriate Government funding similar to the Government contributions made to AMSA and the NHVR.

When COAG agreed to establish national road, rail and maritime regulators, it stipulated that costs couldn't exceed regulatory costs at that time, regulatory fees could only increase by CPI each year and 100% of fees would be paid for by the respective industry (100% cost recovery).

For rail at the time, industry funding in different States varied from 9% to 100%. Today, SA, Qld and WA are at 100% cost recovery while others are in transition. To avoid a price shock to Industry, Ministers agreed to annual incremental increases of cost recovery by industry and reducing government contributions by 5% per year.

The Commission notes that government regulation for different modes should be neutral. However, on page 90 the Commission states:

> *In 2017-18, AMSA raised $13 million in revenue, while the NHVR raised $5 million and ONRSR raised $39 million (chapter 10, table 10.1). Governments provided $193 million to AMSA, $153 million to the NHVR, and no funding to ONRSR.*

In addition, the ARA is aware that the NHVR has received a variety of grants from the Commonwealth and State Governments, the Civil Aviation Safety Authority receives an annual appropriation from Treasury valued at approximately $40 million and in December 2017, the Australian Marine Safety Authority (AMSA) was granted a $102.4 million package to assist it with its transition to a national funding model for domestic commercial vessels.

The ARA supports the Commission's view that government regulation for different modes should be neutral and argues that this should extend to financial investments in the different modes.

The rail industry has actively implemented a regime to move to 100% cost recovery with the industry increasingly absorbing regulatory costs as directed by COAG when the establishment of a national regulator was announced. If the Commission's summary quoted above is correct, the considerable funding by Governments to the NHVR is

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another example where rail and road are not treated equally. For rail freight operators trying to compete with road freight, this is a cost rail is currently absorbing, and, as noted by the Commission, is a cost that operators will factor into their pricing structures for customers, reducing their competitiveness.

Most recently, Transport Ministers directed ONRSR to develop a cost recovery model based on 'risk and regulatory effort'. ONRSR has been actively pursuing the development of this model that will move away from the current fixed accreditation fee plus train and track kilometre fees. This process has identified that the current structure for Tourist and Heritage Operators that each pay a $2,000 accreditation plus train and track kilometre fees, does not cover the actual cost to regulate Tourist and Heritage Operators. As a result, commercial rail operators have been effectively subsidising Tourist and Heritage regulatory costs since ONRSR was established. A key principle of cost recovery is to ensure no cross-subsidisation and therefore the ARA argues that the rail industry should not be expected to continue propping up ONRSR's regulation costs of Tourist and Heritage Operators. Rather, ONRSR should seek to recover the costs of regulating Tourist and Heritage Operators through State, Territory and Federal Governments, noting the benefits these operations generate for their local community, Finally, according to the NTC's *Registration charges for heavy vehicles*, heavy vehicle charges 'aim to recover heavy vehicle related expenditure on roads from heavy vehicle operators' and 'the regulatory component of the registration charge is passed onto the NHVR'.[vi] This appears to disagree with the Commission's summary above. The ARA seeks confirmation as to how the NHVR is indeed funded.

The ARA seeks a level playing field with other modes of transport and recommends that State and Federal Governments fund ONRSR as it does AMSA and the NHVR.

DRAFT Recommendation 10.2: The national regulators (particularly the National Heavy Vehicle Regulator and the Australian Maritime Safety Authority) should move towards cost recovery arrangements in line with the Australian Government Cost Recovery Guidelines. Consistent arrangements across the three transport regulators will eliminate the risk of distorting intermodal choices.

Support in full.

The ARA supports this recommendation but, noting that this was already a directive from COAG in 2009, the ARA questions how the Commission recommends an actual outcome will be achieved in this space?

Further, the ARA seeks a level playing field and recommends ONRSR receives Government contributions consistent with those provided to AMSA and the NHVR.

Information request 10.1: What productivity-related issues could be better progressed in rail freight? What institutional arrangement would be valuable in driving the productivity agenda in rail, and if such changes involve the Office of the National Rail Safety Regulator, what would its role be?

With the National Heavy Vehicle Regulator actively pursuing numerous safety, efficiency and productivity initiatives each year on behalf of Australia's trucking industry (including via the Performance-Based Standards scheme), it is understandable that the rail freight sector is seeking similar support for productivity and efficiency gains.

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The ARA and its rail freight and port members are of the view that an independent review into rail freight productivity and efficiency is warranted.

SELECT HEAVY VEHICLE RECOMMENDATIONS

DRAFT FINDING 6.1: Constraints around local government investment capacity and engineering expertise are limiting the effectiveness of the heavy vehicle reforms by preventing adequate assessment and upgrading of bridge and road infrastructure.

DRAFT RECOMMENDATION 6.1: Local governments should share engineering expertise and agree to consistent access arrangements for shared roads. The Australian Government should work with States and Territories to encourage this collaboration. States and Territories should report to the Council of Australian Governments in early 2020 on the status of this work.

Whilst there is a prima facia that increased consistency between Local Governments are beneficial, rushed and poorly resourced processes will lead to sub optimal outcomes, namely that access may be approved for routes that are unsuitable from a safety, amenity and maintenance perspective.

Councils should be properly resourced by the Commonwealth and States to undertake such robust change processes that can have significant flow-on implications within communities.

Bridge and road infrastructure engineering is a function of heavy vehicle usage noted by the Commission. Noting the Commission's summary that heavy vehicles contribute only $5m to the NHVR, the ARA would argue that heavy vehicles are not paying their share of engineering costs borne by local governments but rather, road infrastructure costs are being shifted onto local communities By contrast, rail pays its $39 million costs of regulation, plus track access fees and infrastructure upgrade costs whereas the heavy vehicle industry shifts the costs of their operations onto others.

DRAFT RECOMMENDATION 6.2: The Australian Government should seek simpler heavy vehicle classifications through the National Transport Commission's review of the Heavy Vehicle National Law for the purposes of access decisions. Additionally, the National Heavy Vehicle Regulator should provide more detailed and effective guidelines to road managers.

Oppose.

Little evidence has been provided to support the recommendation that there are too many classifications.

As a matter of principle, heavy vehicle classifications should be relevant to the objective differences in characteristics of specific heavy vehicles that are relevant to access decision making.

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The ARA does not support simplifying classifications simply in order to increase the number of approvals and therefore trucks on our roads. More trucks on our roads leads to more transport-related emissions, increased road maintenance costs, increased road accident costs and so on.

DRAFT Recommendation 6.4: The Council of Australian Governments should direct road managers (including the state road authorities) to work with the National Heavy Vehicle Regulator to rapidly expand key freight routes covered by notices and allowing as-of-right access for larger vehicle types. The focus of this work should include:

- **expanding the networks available for heavy vehicles with performance characteristics equivalent to B-doubles (including Performance-Based Standards (PBS) level 2A and 2B B-doubles) and type 1 and 2 road trains (including PBS equivalents)**
- **where there are classes of vehicles for which permit applications are almost universally approved, developing notices covering these vehicles**
- **meeting infrastructure requirements such as truck stops and logistics centres near major urban centres, allowing larger vehicles to be broken down into smaller units where required by urban road network constraints.**

Oppose.

Road Managers have an important role to play in assessing the suitability of heavy vehicles accessing public roads. As well as a robust cost-of-infrastructure recovery model, a range of factors are relevant and must be considered, including adverse effects on the road toll, community amenity health and welfare of workers (truck drivers) as well as productivity.

Road capacity is a given at any point in time. Promoting greater capacity of heavy vehicles by expanding the networks available will produce increased road congestion and road maintenance, the cost for which is not recovered.

Failure to appropriately price and regulate heavy vehicle access will result in excessive consumption of the increased capacity offered which will in turn lead to demand for the need for Governments to fund greater road investment. In short, experience has proven that investing in more roads only leads to greater road congestion and is not a long-term solution.

A holistic view must be taken that considers the whole freight and supply chain. The ARA contends that it is not always appropriate to improve access for heavy vehicles when other transport modes may offer an equal or better services. Customers must be able to select the mode that best suits their needs, not one skewed by subsidies and unfair regulatory variance.

As noted at the outset, the ARA contends that the assumption embedded throughout the Commission's report that road and rail are complements and not substitutes is incorrect and as a result creates a siloed view of the sectors. At a time of increasing infrastructure demand and call on government resources, denial of road and rail substitutability is a major oversight and will see more of the status quo.

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This and many other heavy vehicle related recommendations strive to achieve greater productivity benefits for the heavy vehicle sector. No recommendations that relate to rail strive to provide similar productivity benefits. As a result, the Commission is proposing changes that may provide heavy vehicles with an unfair advantage.

Finally, the ARA opposes recommendations that public funding be expended to facilitate logistics centres for truck reconfiguration. The heavy vehicle industry should pay to access these facilities as their modal competitors do.

DRAFT FINDING 10.1: Some local governments are struggling to deliver timely heavy vehicle access assessments. While resourcing is important, more resources alone will not guarantee greater efficiency. Other factors including access to data and appropriate technical skills, and economies of scale in permit applications also contribute to greater efficiency.

DRAFT RECOMMENDATION 10.1: The Council of Australian Governments should provide support to ensure local government has the financial and technical capacity to deliver its role as asset manager for local roads. Transparency and accountability of performance should accompany any additional support, particularly with respect to processing times for access permits and the use of notices to gazette heavy vehicle routes.

This should be pursued in the context of broader changes under the Heavy Vehicle Road Reform agenda.

Support.

The ARA suggests that this should be led either by the NHVR or another agency that can coordinate with local councils. This could be couched in terms of a single agency with responsibility for controlling access to the road network over which heavy vehicles either currently, or in the future, may wish to operate.

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i https://inlandrail.artc.com.au/13251/documents/31860/download

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

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

iv https://www.atsb.gov.au/media/5774882/atsb_corporateplan-2018-19.pdf

v https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/798651/AR2018_190430.pdf

vi www.ntc.gov.au/laws-and-regulations/registration-charges-heavy-vehicles

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APPENDIX A

AUSTRALASIAN RAILWAY ASSOCIATION

Association Number A03958 | ABN 64 217 302 489

ONRSR DRUG & ALCOHOL REVIEW

ARA Member Brief

2018

STATEMENT OF SUPPORT

The Australian Rail Industry strongly advocates for Ministerial Council to vote in support of each of the six recommendations made by the Office of the National Rail Safety Regulator (ONRSR) to achieve a nationally consistent framework to manage the risk of drug and alcohol use in Australia's rail industry.

A nationally consistent approach to drug and alcohol management in the rail industry will reduce regulatory burden and ensure that drug and alcohol management policies and procedures are structured to address identified risks rather than mandated targets.

The current variation of drug and alcohol requirements in NSW affects 53 of Australia's 186 accredited operators. This imposes regulatory burden on industry through increased cost, compliance and productivity impacts whilst also limiting the flexibility for rail transport operators to select the most appropriate testing means to mitigate their drug and alcohol risks.

Drug and alcohol management in the industry is a shared responsibility between operators and rail safety workers. Industry advocates for a risk-based approach to drug and alcohol management that provides industry with the flexibility to select its testing type based on the situation and the risk being managed, not according to a predetermined requirement.

Australia's Rail Industry employs in excess of 100,000 rail safety workers. Some operators test 100% of their rail safety workers yet positive detection rates of drugs and alcohol for Australia's whole rail industry are well below one percent. Rail continues to demonstrate its commitment to safety and the management of drug and alcohol. This should be recognised when Ministerial Council meets in May voting in support of the six recommendations put forward by ONRSR.

BACKGROUND

On 7 December 2009, COAG agreed to establish a National Rail Safety Regulator (NRSR). The ONRSR was established to deliver the Rail Safety National Law (RSNL) that the Regulator would operate under. This law was passed in the South Australian Parliament on 1 May 2012 with three key areas deferred for later decision. Namely:

1. Drug and alcohol management
2. Fatigue management
3. Cost recovery

ONRSR has since been tasked by Ministerial Council to review these and provide recommendations on how to achieve the best legislative framework for the rail industry to nationally manage drug and alcohol, the risk of fatigue and establish a national cost recovery model based on risk and regulatory effort.

ONRSR has prepared a *Drug and Alcohol Management Review* paper that identifies six recommendations for a nationally consistent approach to drug and alcohol management in the rail industry. Industry supports each of ONRSR's six recommendations for a nationally consistent approach to drug and alcohol management.

A copy of ONRSR's paper is available here: www.onrsr.com.au/__data/assets/pdf_file/0003/19749/Draft-Drug-and-Alcohol-consultation-paper-June-2017.pdf

DRUG AND ALCOHOL MANAGEMENT

Rail Transport Operators are obligated under the RSNL to ensure, so far as is reasonably practicable (SFAIRP), that rail safety workers are not on duty or performing rail safety work while impaired by alcohol or a drug.

Rail Transport Operators are required to prepare and implement risk-based a Drug and Alcohol Management Plan (DAMP). DAMPs include the operator's drug and alcohol policies and procedures, provision of information and education to rail safety workers and details of drug and alcohol testing regimes.

The rail industry uses drug and alcohol testing to mitigate the risk of rail safety workers undertaking rail safety work whilst under the influence of alcohol or drugs. ONRSR uses drug and alcohol testing to check for compliance with the RSNL. Industry and the Regulator conduct random testing throughout industry as a deterrent of drug and alcohol use and impairment on the rail network.

Detection rates in drug and alcohol tests across the whole rail industry are well below one percent, confirming Industry's commitment to safety and the management of drug and alcohol use.

The rail industry strongly supports a consistent, national approach to the management of drugs and alcohol use in the rail industry. A national approach will provide safety benefits and reduce regulatory burden on the industry.

The Industry is committed to working with ONRSR to achieve national consistency in drug and alcohol management within rail.

CURRENT INCONSISTENCIES

In November 2016, Ministerial Council was formally advised of more than 80 derogations to the RSNL (a derogation is an exemption from or relaxation of the law). At this time, the Rail Industry reported drug and alcohol management as one of the top four derogations with the most significant safety and productivity impacts.

Currently, a New South Wales (NSW) version of the law means two different sets of drug and alcohol requirements exist. According to ONRSR, there are 186 accredited rail operators in Australia. Of those, 53 are currently required to comply with the two different sets of drug and alcohol requirements. This has cost, compliance and productivity impacts for the industry and limits the flexibility for rail transport operators to manage their drug and alcohol risks according to the scenario being addressed.

Subregulation 28 (2) of the RSNL requires rail transport operations in or through NSW to implement additional elements in their DAMP for rail safety workers conducting rail safety work in NSW. In brief, these are;

- random preliminary breath or urine testing of not less than 25% of all rail safety workers;
- drug and alcohol testing a rail safety worker involved in, or reasonably suspected to have been involved in, within three hours of a prescribed incident; and

- that the testing outlined above must be completed to an evidentiary standard by an authorised person engaged by the operator (testing to an evidentiary standard enables the Regulator to use the results to prosecute).

Given the remoteness of some parts of the NSW rail network, implementation of the NSW provisions are not always reasonable or practicable. Removing the additional elements currently prescribed in NSW and establishing a nationally consistent risk-based approach to drug and alcohol management will generate efficiency and cost benefits for the industry, allow operators working within NSW to conduct drug and alcohol testing to target identified risks rather than to meet targets and provide clarity around expectations and the approach to drug and alcohol management for rail safety workers.

TESTING TYPES

Drug and alcohol management in the industry is a shared responsibility between operators and rail safety workers.

Rail transport operators have developed robust drug and alcohol testing regimes with significant investments in random and post-incident testing. Education and health programs ensure drug and alcohol management in the industry is a shared responsibility between operators and rail safety workers.

The RSNL requires operators to develop and implement a DAMP but does not prescribe testing methods, enabling operators to choose the most appropriate drug or alcohol test type according to the risk they are managing in a co-regulatory approach. As outlined above, NSW has specific obligations. Operators in all other jurisdictions can select their method of testing depending on circumstances. The rail industry most commonly uses oral fluid and urine testing to test for drugs. Breath tests / analysis is used to test for alcohol.

Currently ONRSR can only use oral fluid or blood to test for drugs and due to NSW legislation can also use urine testing in NSW.

Different drug test types; urine, blood and swab (oral fluid) have benefits and limitations in their ability to detect the presence of drugs or alcohol. For these reasons, providing both industry and ONRSR with the flexibility to choose their method of drug testing depending on the risk being managed is paramount.

DRUG TESTING TYPE COMPARISON		
	Urine Testing	**Oral Fluid (Swab) Testing**
Time since potential drug use	Presence indicates past use. Can identify long term drug use May not detect recent use of some drugs (some take 4-8 hours to be detected in urine)	Detects recent drug use only (usually within 3 hours)
Impairment indicator	Presence of a drug requires further indicia (e.g. observations of behaviour) to prove impairment	Presence of a drug indicates recent use and is therefore used as proof of impairment
Offence under the RSNL	Presence of a prescribed drug in urine testing is not an offence under the RSNL (due to the need for further indicia)	Presence of a prescribed drug via oral fluid (and blood) testing is an offence under the RSNL
Number of identifiable drugs	Detects a wider range of drugs than oral fluid testing	Detects less drugs than urine testing (typically only 6 drug types)

Privacy impact	More invasive	Less invasive
Cost	Less expensive	More expensive
Facilities to test	Private facilities required	Can be conducted on site at any location

The key differences between urine and oral fluid (swab) drug testing, highlights the advantages and disadvantages of both test types. Neither is more effective than the other. Both have their strengths depending on circumstances. While a positive swab test can be used as evidence for an offence under the RSNL, swab tests detect a smaller range of drugs than urine drug testing and only detect recent drug use. Urine drug testing can identify long term drug use and has the ability to detect a wider range of drugs but may not detect recent drug use.

The Rail Tram and Bus Union (RTBU) advocates for mandated swab testing and questions the efficiency of urine testing. The strengths and limitations of each test type highlights the need for Industry and ONRSR to be able to use all types of drug testing devices depending on the risk being managed and availability of appropriate facilities.

The following three drugs are prescribed in the RSNL:

- Delta-9-tetrahydrocannabinol (Cannabis)
- Methylamphetamine (Methamphetamine)
- 3,4-Methylenedioxymethylamphetamine (MDMA/ecstasy)

Under the RSNL, to undertake rail safety work with the presence of the above three drugs is an offence. However, noting the different capabilities between urine and swab testing, and aligning with the Road Safety Rules, ONRSR can only prosecute for the presence of these drugs from a swab test. Presence of these drugs in a urine test does not automatically allow for prosecution for presence. A urine positive drug test cannot be used by ONRSR to prosecute for presence but can be used with other evidence to support prosecution for impairment. ONRSR is not seeking changes to this arrangement.

The Regulator has the power to prosecute rail safety workers for breaching requirements in the RSNL. The presence of a drug, particularly evidence of long-term drug use as is identifiable through urine drug testing, can cause impairment over time. The Rail Tram and Bus Union (RTBU) "*believes that any disciplinary action for safety breaches must turn on the issue of impairment, rather than presence*". Disciplinary action, penalties and dismissal for safety breaches are usually identified within operator DAMPs and contained in Rail Transport Operator HR policies.

RECOMMENDATIONS

Industry supports each of the six recommendations made in ONRSR's *Drug and Alcohol Management Review* paper.

The RTBU states that it has "*consistently provided in-principle support for a national approach to drug and alcohol-management*".

Recommendation 1: ONRSR and operators should have access to all testing methods in the law and the flexibility to apply the most appropriate method of drug testing based on the organisation's identified risk.

The Rail Industry supports this recommendation. The RTBU does not support this recommendation.

Providing ONRSR and the rail industry with the flexibility to select the type of drug test based on the situation, location and risk being managed will provide a more robust drug testing program for Australia's rail industry.

The strengths and limitations of urine and swab drug testing is outlined in the table above and demonstrates the need for industry and ONRSR to have the flexibility to choose the type of drug testing device based on each scenario. Some drugs take four to eight hours to be detected in urine, relying solely on urine drug testing would mean drug use may not be detected if a rail safety worker is urine drug tested before this timeframe. On the other hand, oral fluid drug tests will detect drug use within a shorter timeframe but after three hours, drug use may go undetected. Urine drug tests can also identify a greater number of drugs than oral fluid drug tests. In addition, testing in remote locations may require oral sampling to overcome privacy issues.

Providing industry and ONRSR with the opportunity to select the drug testing methods based on the operator's identified risk profile will allow the selection of the most suitable drug testing method for the situation. Restricting industry and ONRSR to only certain types of drug tests will limit the ability to detect potential drug use in the industry. Although less than one percent of tests nationally are positive, the rail industry and ONRSR must have access to all testing methods under the law to be able to adequately test rail safety workers and ensure that the operator can satisfy its obligation to ensure rail safety workers are not on duty or performing rail safety work when they have prescribed drugs, or alcohol, over the thresholds, in their system.

Recommendation 2: The level of random testing conducted by rail transport operators should be determined using a risk based approach. ONRSR will issue guidance material outlining their expectations in relation to managing the risk of drug and alcohol use SFAIRP.

The Rail Industry supports this recommendation. The RTBU agrees with this recommendation in principle.

Removing the minimum level of prescribed testing in NSW will ensure that random drug and alcohol testing is completed to manage risks rather than compliance with a mandated target or percentage of rail safety workers. This will provide industry with the flexibility to focus testing according to risk rather than achieving a pre-determined target.

Some operators conduct drug and alcohol testing of 100% of their rail safety workers. Mandating a target (such as the 25% in NSW) can detract from conducting drug and alcohol testing to a risk-based approach. Rather than mandate a target, the rail industry should be consistently required to conduct random drug and alcohol testing based on identified risks within their operation. With no testing targets included in the RSNL, operators would have the ability to include their own targets, according to the risks they are managing in their DAMPs. ONRSR has the responsibility to ensure that these are sufficient to manage the risk.

Industry notes and welcomes ONRSRs proposal to develop guidance materials to support the industry to meet their obligations under RSNL and outline the expectations of how Industry should manage the risk of drug and alcohol use.

Recommendation 3: Rail transport operators should not be required under the RSNL to conduct drug and alcohol testing to evidentiary standards for use by the Regulator for prosecution purposes. Note the Regulator will increase their testing program.

The Rail Industry supports this recommendation. The RTBU agrees with this recommendation in principle.

No other industry in Australia is required to collect evidence on their employees on behalf of their Regulators for potential prosecution. Industry advocates the ONRSR position that Industry should not be required to test to an evidentiary standard. Removing the need for NSW accredited operators (53 of 186 accredited operators in Australia) to conduct drug and alcohol testing to evidentiary standards will remove regulatory burden and provide productivity benefits and cost savings for industry.

Evidentiary testing is completed by an authorised person in a manner that ensures it is admissible as evidence in a court of law. ONRSR has the power under the RSNL to undertake drug and alcohol testing to an evidentiary standard, allowing the Regulator to use drug and/or alcohol test results to prosecute.

Drug and alcohol testing in NSW must currently be completed to evidentiary standard. However, the Regulator has been unable to progress a number of NSW test results to prosecution due to the operator's authorised person not reasonably complying with the required evidentiary testing process. The evidentiary testing requirement was introduced by the NSW Regulator that no longer exists. Industry supports the recommendation that rail transport operators are no longer required to conduct testing to an evidentiary standard.

As the NSW Regulator no longer exists, the Regulator has the sole responsibility to prosecute and ONRSR has dedicated funding for evidentiary drug and alcohol testing, Industry supports the proposal that only ONRSR is able to test to an evidentiary standard. Removing the need for operators to test to an evidentiary standard will increase the likelihood that evidentiary testing is conducted as required and will be available to the Regulator to prosecute if needed. As well as achieving national consistency, this aligns with a co-regulatory approach, will remove an unnecessary regulatory burden for NSW operators and provide cost savings and productivity benefits. Rail operators will continue to undertake testing as per their DAMP.

Recommendation 4

4 (a) Drug and alcohol testing following a prescribed incident to be mandatory in legislation.

The Rail Industry and RTBU support this recommendation.

Mandated testing following prescribed incidents will ensure that testing is undertaken following incidents where rail safety worker action or inaction may have contributed to the incident. Clarification of post-incident testing requirements will assist in achieving national consistency in the industry's approach to post-incident testing, ensure testing is undertaken after incidents where the likelihood of a rail safety worker's action or inaction is high and providing clarity for industry and rail safety workers.

Currently, with the exception of NSW, the RSNL does not mandate post-incident testing following certain incidents. Most operators include post-incident drug and alcohol testing after certain incidents in their DAMP to identify whether the presence of a drug or alcohol was a cause or contributing factor to the incident.

Testing will be undertaken where possible by police or ONRSR however if this is not possible, legislation will require the operator to undertake this testing to ensure testing of the rail safety worker following a prescribed incident occurs. As test results are shared with the operator, this will remove the need for duplicate testing of rail safety workers which currently occurs in some jurisdictions.

Industry and ONRSR must still agree about the protocols and systems to be established in terms of how they will work together to facilitate ONRSR or police drug and alcohol testing post incident, and what protocols will be used to inform an operator that they must undertake testing. These protocols and systems will need to account for the safety of the network, suitable testing timeframes, etc and may need to be arranged at a local operator interface level.

4 (b) Post incident drug and alcohol testing to be undertaken following those prescribed incidents listed in Table 10.

The Rail Industry supports this recommendation. The RTBU notes this recommendation.

An agreed list of prescribed incidents that require post incident drug and alcohol testing will establish national consistency and provide clarity for industry and rail safety workers as to when post-incident testing should occur.

Industry notes the proposed prescribed incidents that will require drug and alcohol testing are as follows:

- Running Line Collisions between rolling stock
- Level crossing collisions
- Running line derailments
- Fatalities (other than suspected self-harm)
- Serious injury (other than slips, trips and falls)
- Serious breach of network rules (further breakdown of this is currently being undertaken by ONRSR)
- SPADS (A1, A3, B4)

Post-incident testing is mandated in the Australian aviation industry but not in heavy vehicle or marine legislation. Industry welcomes the recommendation to mandate post-incident testing as per the incidents outlined above but notes that Industry and ONRSR must still agree about the extent and nature of testing. For example, in a running line collision, rolling stock drivers are obvious however clarity will be required as to whether the signaller, train controller, potentially a guard or conductor on the train etc. should also be tested.

4 (c) Rail transport operators to undertake drug and alcohol testing following a prescribed incident if this testing is not undertaken by police or ONRSR.

The Rail Industry and RTBU support this recommendation.

If ONRSR or Police are unable to conduct post-incident testing following a prescribed incident (as identified in 4 b), Industry is willing to adopt this recommendation, noting that this aligns to a co-regulatory approach.

As per recommendation 3, industry advocates that operators are not required to conduct testing to evidentiary standard as this would be a significant regulatory burden and cost to industry.

4 (d) ONRSR to endeavour to undertake drug and alcohol testing to an evidentiary standard unless undertaken by police, recognising that there will be circumstances where it will not be possible for ONRSR to undertake testing.

The Rail Industry supports this recommendation. The RTBU notes the recommendation.

ONRSR undertaking drug and alcohol testing to an evidentiary standard unless undertaken by Police will reduce the regulatory burden on industry, make it clear where the initial testing responsibility lies and that ONRSR testing will be done to an evidentiary standard.

Noting the challenges outlined in recommendation 3, providing ONRSR with the ability to conduct evidentiary testing, where possible, will reduce the regulatory burden on industry and reduce the number of tests that are unable to progress to prosecution due to the evidentiary standard process being inaccurately followed.

Recommendation 5: Include in the RSNL nationally consistent offence provisions for tampering or interfering with a sample.

The Rail Industry supports this recommendation. The RTBU notes the recommendation.

This recommendation would make it a national offence consistent under the RSNL for an individual to obstruct drug or alcohol testing or tamper with a sample. Industry strongly supports this recommendation and the inclusion in the RSNL.

Recommendation 6: Continue in researching the possibility of aligning drug and alcohol testing requirements under the national law, to be consistent across Australia.

The Rail Industry supports this recommendation. The RTBU notes the recommendation.

Currently ONRSR's drug and alcohol testing program mirrors state-based Police road-side testing laws. This has allowed Police to conduct ONRSR testing without changes to their current processes but has proven inefficient for ONRSR testing, inconsistent between jurisdictions (including jurisdictional differences of evidentiary testing), costly and complicated to implement.

The Industry recognises that additional work is required in relation to this recommendation but that it aims to provide legal provisions for third party testing on behalf of ONRSR as well as consistent legal parameters for Police testing of rail safety workers. Continued progress in this space will achieve a more efficient and effective national ONRSR drug and alcohol testing program.

ONRSR has stated that it would be unlikely for rail safety workers to be subjected to duplicated Police and ONRSR testing, a clear benefit for rail safety workers and therefore industry. As noted in recommendation 1, industry advocates the ability to choose between oral and urine testing as part of a risk-based approach according to their DAMP and that the specific type of testing is not prescribed in the National Regulations.

Industry advocates a nationally consistent approach to drug and alcohol management that would see authorised persons on behalf of ONRSR use the "same devices, advices, notices, certificates, testing methods and processes; and the same evidentiary periods" nationally and thus is supportive of this recommendation.

CONCLUSION

The Rail Industry, strongly supports each of the six recommendations made by ONRSR to establish a framework that best supports the management of the risk of drug and alcohol in the rail industry nationally.

Consistent, national adoption of the six ONRSR recommendations will drive national consistency in the management of drugs and alcohol in Australia's rail industry, reduce regulatory burden and ensure that drug and alcohol policies are based on targeting identified risk rather than meeting mandated targets.

The rail industry will work closely with ONRSR in the development of guidance material to support this legislative change and ensure an optimal outcome for the industry and its rail safety workers.

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