



RTBU

15 January 2020

Australian Rail, Tram and Bus Industry Union (RTBU) response to Productivity Commission draft report, *National Transport Regulatory Reform*

Thank you for the opportunity to provide written submissions in response to the draft report, *National Transport Regulatory Reform*, which was released on 12 November 2019.

As noted in our original submission, 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 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.

The RTBU has reviewed the draft report, including its draft findings and recommendations, and makes the following comments.

The importance of a holistic approach – reforming the ONRSR-RISSB-Operator Relationship

The RTBU reiterates the importance of avoiding the trap of only examining ways to improve productivity through an ad hoc, piecemeal and narrow focus on jurisdictional derogations. Such an approach has the potential to hinder a proper and holistic evaluation of the practical and lived experience of risk-based co-regulation.

A holistic approach would examine structural barriers to achieving interoperability, standardisation and harmonisation across the industry. Indeed, Draft Finding 4.4 states –

“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.”

The RTBU’s view, formed by direct experience, is that the failure to achieve interoperability stems from the relationship between the RSNL, ONRSR, rail operators and RISSB. As noted in our original submission, the relationship between the ONRSR and RISSB is described as a –

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“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.”¹

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.”²

(As an aside, we note that ONRSR’s submission states it “does not specifically endorse RISSB standards” despite a previous Annual Report stating that it does.)³

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. Despite the RISSB’s work, considerable inconsistencies still exist, and in some instances are increasing. Inconsistencies across networks simply increase the risk of errors, thereby compromising safety and productivity.

In our original submission, the RTBU recommended 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 in order to achieve greater standardisation, interoperability and harmonisation. We note the Productivity Commission rejected prescriptive regulation and a penalty-based approach. We also note reference is made to a joint ONRSR-RISSB statement clarifying their roles and that the “Commission considers that no further action is required at this time.” The RTBU does not believe that a “joint statement” will address the underlying problems we have identified.

“Derogations”

The draft report refers to “derogations” to the RSNL, the majority of which are “considered by ONRSR and industry to not cause significant safety and productivity concerns.” However, according to the draft report, ONRSR and employers raised concerns about jurisdictional differences in the areas of fatigue management, drug and alcohol testing, data loggers, train communications, and mirror legislation in WA.

The draft report proposed a review into derogations (draft recommendation 4.1), and specifically recommends that COAG commissions “an independent review of the fatigue management laws...to examine the scope for further harmonisation” (draft recommendation 5.3). The RTBU is firmly of the view that any such review must be holistic, with an emphasis on improving workplace safety, not just reducing regulatory compliance for management in the name of productivity. In our experience, when the focus is on the latter, the outcome is a transfer of risk away from management to the worker.

¹ https://www.onrsr.com.au/_data/assets/pdf_file/0014/20822/The-ONRSR-Way-web.pdf

² https://www.onrsr.com.au/_data/assets/pdf_file/0009/9756/NSR2085-Annual-Report-Web_Version.pdf

³ See page 44 of the ONRSR Submission to Productivity Commission review and page 57 of the 2013/2014 ONRSR Annual Report

Ultimately, any short-term cost saving that may result from this risk transfer is undermined by the productivity losses arising from a perceived “blame the worker” mentality (which is discussed in further detail below) and compromised workplace safety.

The RTBU notes that a concerning pattern is emerging whereby the regulator’s and/or management’s response to any derogation/inconsistency that relates to workers (such as fatigue management) is to favour the lowest common denominator. By contrast, there appears to be very little effort to address inconsistencies and/or a lack of standardisation that exist when operators and/or network managers do not implement RISSB standards. Whether this imbalance is real or perceived is irrelevant from the point of view of rail safety workers – to paraphrase Lord Hewart CJ, “not only must regulation be done, it must also be seen to be done.”

The perceived “blame the worker” mentality

The RTBU’s original submission raised concerns about the impact of a perceived “blame the worker” mentality on workplace productivity. We note that the draft report does not make any recommendations in response to these concerns.

To reiterate, there is a perception among the workforce that the RSNL promotes a culture of apportioning blame. 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.

Building a genuinely collaborative safety culture

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, especially in terms of lifting productivity.

Collaborative approaches are also particularly useful for companies undergoing major change.⁴ 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.

For reasons outlined above and in our original submission, the RTBU does not accept that the operation of the RSNL has facilitated an environment that promotes collaboration and a genuine safety culture. Arguably, the operation of the RSNL has exacerbated mistrust between sections of the workforce, management and the national regulator.

A case in point is the draft report's commentary on data loggers. Data loggers are overwhelmingly supported by the rail workforce, especially given the installation and use of these devices were key recommendations from the Special Commission of Inquiry into the Waterfall Rail Accident. They are often described as the rail industry's equivalent of a "black box." However, the draft report (referencing ONRSR) states the derogation is "of concern to industry" as it affects "their operations from safety and productivity perspective." At the same time, rail operators (both passenger and freight) are attempting to install in-cab cameras and other recording devices in rollingstock. The RTBU and our members have repeatedly asked rail operators what safety and productivity benefits they expect to achieve from in-cab cameras that they cannot already achieve from the use of data loggers, and to date we have not received an answer. The primary difference is that in-cab cameras record individual workers, which is understandably seen by the workforce as invasive and a breach of basic privacy. Consequently, workers have formed the view that any proposal to remove data loggers (with what appears to be with the support of the national safety regulator) is an attempt to pave the way for the widespread installation of invasive in-cab cameras. It is very difficult to build better and more productive workplace cultures when concerns such as this are so pervasive.

ONRSR funding model

The RTBU is also concerned that ONRSR's funding model makes the regulator increasingly reliant on industry fees, which have increased from 33 per cent of total revenue in 2013-14 to 55 per cent in 2017-2018. This has the potential to create a conflict of interest (whether real or perceived) because the regulator is funded by those it is supposed to regulate.

Conclusion

The RTBU reiterates the concerns and recommendations raised in our original submission to the Productivity Commission.

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 improving the economic performance of the rail industry. If this is the case, it will simply result in the watering down

⁴ 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

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-RISSB-Operator relationship is essential if the benefits of a nationally consistent rail safety law are to be realised.

Moreover, it is essential that the Commission recognises that the operation of the RSNL has done very little, if anything, to improve collaboration in the workplace – an essential ingredient in building genuine safety cultures which are vital when it comes to improving productivity.