AUSTRALIAN LOGISTICS COUNCIL

17 October 2011

Ms Patricia Scott
Commissioner, COAG Reform Agenda Study
Productivity Commission
GPO Box 1428
Canberra ACT 2601

Productivity Commission's Report on the Impact of COAG Reforms

Dear Ms Scott

The Australian Logistics Council (ALC) is pleased to make a submission on the Productivity Commission's report on the *Impacts of COAG reforms – business regulation, and vocational education and training and transitions from school.*

The terms of reference and letter of direction to the Commission refers to a number of 'Seamless Economy' reforms upon which the Commission has been asked to focus. Of these, ALC has the most interest in rail safety.

Although there is notionally one national regulator for the proposed national rail safety scheme, both the proposed Rail Safety National Law and the Intergovernmental Agreement establishing the National Scheme (signed by COAG on 19 August 2011) anticipate that existing jurisdictional regulators will exercise a substantial number of powers pursuant to service level agreements. ALC has a concern that notwithstanding the clearest of guidelines, jurisdictional regulators will:

- develop their own cultures,
- interpret the provisions of the national law in perhaps novel ways (and may also develop internal guidelines that will effectively become the law as those guidelines are utilised in practice by junior officers), particularly as it relates to the interpretation of chain of responsibility issues; and
- develop their own enforcement priorities.

The net effect of this would be the national law would not be enforced uniformly. If this were the case, the benefits of a single national law identified in the Regulatory Impact Statement prepared to accompany the proposed national law could be lost.

ALC believes that the benefits of a national scheme would be best delivered if there is a single national regulator responsible for developing policy and delivering services.

ALC has similar views with respect to national schemes of regulation for heavy vehicles and maritime safety, subject areas for which intergovernmental agreements were also signed by members of COAG on 19 August 2011.

I attach for your information the ALC *Response to the Draft Rail Safety National Law and Accompanying Regulatory Impact Statement* provided to the National Transport Commission in August 2011, which discusses the issue raised in this letter in greater detail.

Yours sincerely

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Managing Director

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AUSTRALIAN LOGISTICS COUNCIL

SUBMISSION

RESPONSE TO THE DRAFT RAIL SAFETY NATIONAL LAW AND ACCOMPANYING REGULATORY IMPACT STATEMENT

AUGUST 2011

SUBMISSION

RESPONSE TO THE DRAFT RAIL SAFETY NATIONAL LAW AND ACCOMPANYING REGULATORY IMPACT STATEMENT

THIS SUBMISSION HAS BEEN PREPARED WITH THE ASSISTANCE OF KM CORKE AND ASSOCIATES, CANBERRA.

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Background on the Australian Logistics Council

The Australian Logistics Council is the peak national body representing the major and national companies participating in the Australian freight transport and logistics supply chain.

Vision

To be the lead advocacy organisation to all levels of Government and industry on freight transport and logistics supply chain regulation and infrastructure issues.

Mission

To influence national transport and infrastructure regulation and policy to ensure Australia has safe, secure, reliable, sustainable and internationally competitive supply chains.

2011 – 2013 Strategic Intent

To establish the Australian Logistics Council as the 'go to' organisation representing the major and national companies participating in the Australian freight transport and logistics supply chain.

Objectives:

1. Be the nationally recognised voice of Australia's freight transport and logistics supply chain.
2. Be the leading advocate of appropriate national regulation and infrastructure to ensure Australia enjoys the full benefits of freight transport and logistics policy development and reform.
3. Promote and encourage greater recognition by Government and the community of the importance of the freight transport and logistics industry's contribution to Australia's economy.

ALC Members are major and national companies participating in the Australian freight transport and logistics supply chain. ALC also has a number of Associate Members, which include associations, unions, organisations, government agencies and companies participating in the Australian freight transport and logistics supply chain.

Australia's freight task is estimated to triple by 2050 – from 503 billion tonne kilometres to 1,540 billion tonne kilometres, with local demand for total freight movements increasing by as much as 60% by 2020.

The Transport and Logistics Industry is a critical part of the Australian economy, generating 14.5% of Australia's GDP and providing more than 1 million jobs across 165,000 companies. ALC estimates that every 1% increase in efficiency will save Australia around $1.5 billion a year.

RESPONSE TO THE DRAFT RAIL SAFETY NATIONAL LAW AND ACCOMPANYING REGULATORY IMPACT STATEMENT

Table of Recommendations

Delegations

ALC recommends:

a. clause 44 of the Bill be amended so that a person should not be eligible to receive a delegation unless they have undergone suitable training provided by the ONRSR;

b. subclause 44(4) of the Bill should be removed so all delegations are made by the ONRSR and not by a delegate of the Regulator – that is, the power of sub-delegation is removed;

c. the Bill should be amended so it:

   i. ensures any agencies conferred with delegated responsibilities are prohibited from publishing guidelines or procedures on how the Bill is to be interpreted or implemented;

   ii. requires a delegate to have regard to any procedures of guidelines published by the ONRSR when making decisions;

   iii. requires that where a person seeks an 'internal review 'of a decision made by a delegate not an employee of ONRSR, the relevant internal review must be made by an ONRSR employee; and

   iv. requires the text of any service level agreement between the ONRSR and jurisdictional regulators to appear on the Regulator's website.

Regulation making power

ALC recommends:

a. the relevant ministerial council should be the designated body to make regulations for the purposes of the Bill; with

b. the Bill taken to have been disallowed nationally if a single jurisdiction has disallowed the instrument.

Codes of practice

ALC recommends subclauses 253(2) – (4) of the Bill be replaced by a provision similar to Clause 155 of the Model Bill so that compliance with a code is taken to be compliance with the duty or obligation imposed by the Bill for which the Code was prepared.

Network rules

ALC recommends Division 4 of Part 1 of the Regulations prescribing the establishment of 'network rules' be removed.

Train safety recordings

ALC recommends:

a. train safety recordings be treated as personal information regulated by National Privacy Principles contained in national privacy information.

b. At the very least the term 'or data' should be removed from the definition contained in clause 132 of the Bill.

Vicarious Liability

ALC believes that each of the offences created by the Bill should be analysed, with vicarious liability only imposed on those specific offences for which personal criminal liability for corporate fault can be demonstrated as being in the public interest.

Application of certain federal legislation

ALC seeks assurance legislation relating to archiving, freedom of information, the Ombudsman and privacy will be applied to the national rail safety body of law in a constitutionally effective manner.

Mandated review of legislation

ALC recommends that a review of the Bill and its regulations be conducted 3 years after the commencement of the legislative package.

RESPONSE TO THE DRAFT RAIL SAFETY NATIONAL LAW AND ACCOMPANYING REGULATORY IMPACT STATEMENT

Introduction

ALC welcomes the opportunity to comment on the Draft Rail Safety National Law (**the Bill**) and its accompanying regulatory impact statement (**RIS**).

ALC has a policy advocating the development of a single set of laws to regulate heavy vehicles, rail safety and maritime transport throughout Australia and therefore believes that the Bill is an important step in achieving this aim.

It has the following observations on the legislative package.

Delegations

The Bill establishes the Office of the National Rail Safety Regulator (**ONRSR**).

However, as made clear during:

a. the public consultation process; and

b. in documents such as those prepared to illustrate ONRSR Project Office sub-projects[1]

the delegation powers contained in clause 44 of the Bill will be used to make service level agreements with existing jurisdictional regulators to provide services such as (for example) the undertaking of breath tests.

ALC notes that in public consultation sessions members of the ONRSR Project Office were cognisant of the need for consistent cultures formed from the development of consistent procedures and processes and has drawn inspiration from the way the National Offshore Petroleum Safety Authority has developed as a single national OHS regulator for the petroleum industry.

ALC also recognises the large number of decisions that are subject to internal review contained in Part 7 of the Bill and acknowledges the importance of a thorough review system to ensure, as far as possible, appropriate final decisions are made in relation to potential legislative breaches.

Nevertheless, ALC is somewhat disappointed the ONRSR does not have the 'teeth' to fully discharge the safety responsibilities created by the Bill, for the following reasons.

1 http://210.247.132.180/alt-host/assets/pdf_file/0019/70642/ONRSRsubprojects-11July2011.pdf accessed 7 August 2011

Multiplicity of regulators

ALC's position on the most appropriate and effective regulatory model for rail safety is influenced, in part, by past experience and learnings in relation to the implementation of other national regulatory reforms and administration models.

In that regard, ALC wishes to recite one of the findings of a report titled *Towards a Truly National and Efficient Energy Market* which was undertaken by the COAG-commissioned 'Parer Committee'.

One of its major findings was that there were too many regulators. The report said:

> The multiplicity of regulators creates a barrier to competitive interstate trade and adds costs to the energy sector… Submissions to the Review indicated significant disquiet about the present regulatory burden on energy businesses from national and local regulators, in particular different compliance regimes and the need to develop separate customer management systems for each state and territory to address different regulatory requirements…[2]

Under a heading *Cooperative Approaches are not an Alternative to a National Regulator,* the Parer report indicated:

> Cooperative approaches, under which existing regulators work together to achieve consistency in regulation and avoidance of duplication would not achieve a satisfactory outcome… The Panel's assessment however is that such cooperative approaches are a suboptimal solution. It is in effect a status quo solution, with no drivers for national solutions. As Delta Electricity states:
>
> » Although the various state and federal regulators meet at regulators forums to share views, this does not ensure a consistent national approach to the regulation of the network businesses in the NEM.
>
> **There is little evidence that work on the harmonisation of regulatory requirements would progress as expeditiously as if under the leadership of one agency. Differences, or perceived differences, in the actual application of any 'template' arrangements would remain and there would be no clear way forward for rectifying that concern**. (Emphasis added)[3]

The Parer report recommended the creation of a single regulator to deal with what are called 'economic' regulatory issues. The Australian Energy Regulator (the AER) has now been established to perform these functions.

ALC had hoped the ONRSR would be similar to the AER, with the 'teeth' to ensure that the national law would operate in a uniform fashion nationally.

However, the ultimate concern is that, notwithstanding the clearest of guidelines, individual government entities will:

a. develop their own cultures;
b. interpret the provisions of the national law in perhaps novel ways (and may perhaps develop internal guidelines that will effectively become the law as those guidelines are utilised in practice by junior officers), particularly as it relates to the interpretation of chain of responsibility issues; and
c. develop their own enforcement priorities;

with the net effect that the national law will not be enforced uniformly – if so, the benefits of a single national law identified in the RIS could be lost.

2 Council of Australian Governments Energy Market Review Final Report *Towards a National and Efficient Energy Market*, pp.74-5, 2002

3 Ibid p.87

Administration models for other Seamless Economy national schemes

The consolidation of state-based registration and enforcement schemes into a single national scheme so as to facilitate a single national economy has been an important policy goal for Australian governments since the inception of national competition policy in the 1990's and the push to create a single national market.

There are two ways of implementing a scheme of national regulation and enforcement; which ALC has described below as the Health Professionals Model and the Specified Occupations Model.

The Health Professionals Model

The national registration and accreditation scheme for health professionals brings together the registration and investigation functions of eight different registration systems for nine different health professions, ranging from doctors to pharmacists, into one integrated system, in which one large national agency:

» performs the regulation function;

» receives complaints about practitioners and, after discussions with state based health regulators[4], undertakes in most jurisdictions[5] the investigation and disciplining of underperforming practitioners; and

» provides the support for the specialist committees that develop national standards for each of the regulated professions.

As the relevant decision RIS says:

> The aim of these changes is to reduce red tape, facilitate workforce mobility and enhance safety and quality in the provision of healthcare. The RIS discusses the potential costs and benefits for consumer, professional and government stakeholders of two options – the continuation of the status quo and the establishment of a new national scheme for health practitioner registration and accreditation.
>
> **Registration and accreditation is currently the responsibility of individual State and Territory Governments. This has resulted in variable standards and inconsistent approaches across the country, impeding the freedom of movement of practitioners. A primary objective of the national cross-profession approach to registration is to develop consistent and high-quality registration standards for each of the professions for the enhanced protection of the public. The proposed national Scheme will also develop an accreditation framework to bring about consistently high accreditation processes across professions…**
>
> Under the new Scheme, health practitioners will be registered nationally (entitling them to practice anywhere in the country) and they will pay only one annual registration fee. Conversely, under current arrangements they are required to register in each jurisdiction where they wish to practice, entailing the payment of multiple registration fees. **Another key benefit is the administrative efficiency and consistency to be gained through the move from a system where the registration function is performed by more than 70 State and Territory registration boards, to one where registration for each profession is handled under the auspices of a national agency with a single cross-professional office in each State and Territory**.[6]

In practice, this has meant that a number of public servants from different registration schemes have been transferred to work in the one national body, with one set of rules under one set of priorities.

This is the preferred ALC outcome.

4 In cases where a particular issue is more of a systemic problem, e.g. how a hospital operates, a decision may be made to allow a state based entity to deal with a complaint

5 NSW has retained its own investigation function.

6 AHMC *Regulatory Impact Statement for the Decision to Implement the Health Practitioner Regulation National Law*, 3 September 2009, p.76.

The Specified Occupations model

A separate occupational licensing scheme brings together the regulatory schemes for a further seven occupations, ranging from air conditioning and refrigeration mechanics to real estate agents, under one scheme.

In this case a National Occupational Licensing Authority supports specialist licensing committees in developing national standards, but preserves the responsibilities of registration and enforcement to jurisdictional regulators through a wide power to delegate the powers of the national agency – in this case the National Occupational Licensing Authority.[7]

It would appear the ONRSR largely follows the specified occupations model.

The regulatory impact statement for the specified occupations licensing scheme compared a single agency model of regulation with what the RIS called a 'National Delegated Agency' model.

It said:

> The National Single Agency model would require greater investment at the establishment stage due to the need to establish a separate physical presence for the national body and its agency branches.
>
> Substantial ongoing savings in operational costs could be expected, however, once standards and major policy processes had been agreed and established.
>
> Under the National Delegated Agency model, transition impacts and costs would be minimised and initial implementation costs reduced due to the use of existing infrastructure and staff. National consistency could be achieved through the use of appropriate delegation of administrative responsibilities to existing jurisdictional regulators, together with clear service agreements between the national body and those regulators.
>
> **The National Delegated Agency model still requires significant legislative and administrative change, however the use of existing sites and staff would minimise the external appearance of change. It is possible that reform gains could be affected by the reduced influence of the national body, the maintenance of existing administrative procedures and by the cultural affiliations natural to those continuing to operate within separate agencies.**
>
> While it is difficult at this stage of the development of the national licensing system to quantify costs, overall the costs of putting in place a national scheme, regardless of the model used, are expected to be outweighed by its aggregate benefits to business, governments and consumers. The new scheme is anticipated to increase the mobility of licensed labour, reduce red tape and enhance efficiency. This will arise from the use of best practice principles of licensing coupled with more uniform standards and increased transparency of information available to regulators, business and consumers on the status and training of licensees.[8]

In comparing the two possible models in tabular form, the RIS said in part[9]:

Feature
Single national legislation
Costs
Costs of introducing legislation and amending current legislation to ensure linkages to new system.
Benefits
Strong foundation for sustaining a unified system as it reduces the likelihood of jurisdictional divergence over time and promotes a basis for further convergence of regulatory approach, where this is desired by all parties.

In this case, it was decided that the system would commence with a National Delegated Agency model but that options should be retained for moving to a National Single Agency model over time.[10]

7 To create the national scheme, states and territories will apply the Victorian *Occupational Licensing National Law Act 2010* (Act 66, 2010).

8 *National Licensing System for Specified Occupations Decision Regulation Impact Statement,* April 2009, p.15 (emphasis added).

9 ibid. p.16

10 Ibid. p.20

ALC position

The foregoing review of literature prepared for other National Laws promulgated under the COAG Seamless Economy agenda, shows that a 'single agency' model is the best way to administer the scheme created by the relevant National Law.

ALC therefore believes the Bill should be administered by a single agency.

At best, a 'delegated agency' model of administration, conferring significant responsibilities on jurisdictional regulators, should be regarded as a transitional step towards a single rail safety administration operating to advance a Seamless Australian Economy.

ALC recommends:

a. clause 44 of the Bill be amended so that a person should not be eligible to receive a delegation unless they have undergone suitable training provided by the ONRSR;

b. subclause 44(4) of the Bill should be removed so all delegations are made by the ONRSR and not by a delegate of the Regulator – that is, the power of sub-delegation is removed; and

c. the Bill be amended so it:

- **i. ensures any agencies conferred with delegated responsibilities are prohibited from publishing guidelines or procedures on how the Bill is to be interpreted or implemented;**
- **ii. requires a delegate to have regard to any procedures of guidelines published by the ONRSR when making decisions;**
- **iii. requires that where a person seeks an 'internal review' of a decision made by a delegate not an employee of ONRSR, the relevant internal review must be made by an ONRSR employee; and**
- **iv. requires the text of any service level agreement between the ONRSR and jurisdictional regulators to appear on the Regulator's website.**

Regulation making power

Division 9 of Part 10 of the Bill creates the mechanism by which regulations will be made under the Bill over the somewhat extensive list of matters specified in Schedule 1.

The mechanism, which requires the South Australian Government to make regulations on the advice of both the South Australian Executive Council and the relevant Ministerial Council, is curious.

Part 5 of Chapter 14 of the Heavy Vehicle National Law permits the Ministerial Council to make regulations for the heavy vehicle national scheme.

Section 245 of the *Health Practitioner Regulation National Law Act 2009* (Qld) similarly allows the relevant ministerial council to make regulations for the national health registration scheme.

Leaving aside the fact the proposed mechanism creates the notional, but nevertheless present risk a regulation may fail to pass because the South Australian Executive Council (that is, the SA Government) will decline to advise the Governor to make a regulation otherwise agreed to by the Ministerial Council, the mechanism creates no capacity to disallow any rail safety regulations that are made.

As part of its consideration of the Health Practitioner Regulation (Administration Arrangements) National Law Bill 2008 (the forerunner to the national health law), the Queensland Scrutiny of Legislation Committee said:

> In *The Constitutional Systems of the Australian States and Territories*, Professor Gerard Carney provides a summary of concerns regarding the legislative scrutiny of national scheme legislation:
>
> A risk of many Commonwealth and State cooperative schemes is 'executive federalism'; that is, the executive branches formulate and manage these schemes to the exclusion of the legislatures. While many schemes require legislative approval, the opportunity for adequate legislative scrutiny is often lacking, with considerable executive pressure to merely ratify the scheme without question.

Thereafter, in an extreme case, the power to amend the scheme may even rest entirely with a joint executive authority. Other instances of concern include, for example, where a government lacks the authority to respond to or the capacity to distance itself from the actions of a joint Commonwealth and State regulatory authority. Public scrutiny is also hampered when the details of such schemes are not made publicly available. For these reasons, a recurring criticism, at least since the Report of the Coombs Royal Commission in 1977, is the tendency of cooperative arrangements to undermine the principle of responsible government. A further concern is the availability of judicial review in respect of the decisions and actions of these joint authorities.

Certainly, political responsibility must still be taken by each government for both joining and remaining in the cooperative scheme. Some blurring of accountability is an inevitable disadvantage of cooperation – a disadvantage usually outweighed by the advantages of entering this scheme. But greater scrutiny is possible by an enhanced and investigative role for all Commonwealth, State and Territory legislatures.[11]

A great deal of the National Law can be made by regulation.

A capacity to allow stakeholders to appeal to democratically elected parliaments to review regulatory instruments with significant impact on industries, made by an entity with only indirect political authority, be it the South Australian Governor acting on the advice, or alternatively the relevant ministerial council must:

a. be provided; and

b. be real and not illusory.

Put another way, the capacity to seek to have poor subordinate legislation disallowed needs to be preserved.

As illustrated by the national scheme of regulation for health practitioners, a national applied law can permit state legislatures to disallow poorly designed regulations.[12]

In the case of regulations made under the Bill a regulation should be taken to have been disallowed nationally if a single jurisdiction has disallowed the instrument.

ALC recommends:

a. the relevant ministerial council should be the designated body to make regulations for the purposes of the Bill; with

b. the Bill taken to have been disallowed nationally if a single jurisdiction has disallowed the instrument.

11 Queensland Parliament Scrutiny of Legislation Committee *Alert Digest* Issue 2/2008 (26 February 2008), pp.15-6.

12 See ss. 245-7 of the *Health Practitioner Regulation (National Law) Act 2009 (Qld).*

Alignment with WHS/OHS provisions – codes of practice

ALC notes the decision to generally align the provisions of the Bill with the Model Work Health and Safety Bill and generally agrees with the proposal, although it also notes Part 6.7 of the RIS indicates the benefits of the alignment are 'unable to be measured'.

It particularly applauds clause 48 of the Bill which makes clear there can be no 'double jeopardy': that is, a person cannot be punished twice for the same offence under rail safety specific and general OHS/WHS legislation.

There is one area that requires further discussion.

Division 5 of Part 10 of the Bill permits the relevant ministerial council to make an industry code of practice which can be used as 'evidence' as whether a duty or obligation imposed by the Bill has been complied with.

ALC notes this is a departure from the compliance codes capable of being made under the Model Bill – a matter not discussed in the RIS.

In particular, clause 155 of the Model Bill provided that compliance with the Code is taken to be compliance with the law in relation to the duty or obligation for which the Code has been made.

ALC has a general policy that compliance with a code of practice (conduct) should be taken as being a discharge of relevant safety duties created by safety legislation.

ALC's thinking has been influenced by views such as those expressed by Chris Maxwell, who said in his report into Victorian OHS legislation *Occupational Health and Safety Act Review* (March 2004):

1727. OHSA already provides (s.27) that compliance with regulations made under OHSA is deemed to constitute compliance with the applicable general duties. The opportunity to achieve compliance by adhering to the regulations arises whenever –

"the regulations make provision for or in relation to any duty, obligation, act, matter or thing"

to which Part III of the Act applies.

1728. In my view, a similar provision should be inserted regarding compliance with the Codes of Practice. Given that each Code must be approved by the Minister, the Codes are given significant status under the Act. Moreover, their stated purpose according to s.55(1) is to provide –

"practical guidance to employers, self-employed people, employees, occupiers, designers, manufacturers, importers, suppliers or any other person who may be placed under an obligation by or under this Act."

1729. The policy which underlies s.27 – that compliance with the regulations should be encouraged – applies with equal force to the Codes of Practice. Compliance with a relevant Code of Practice should, therefore, be deemed to constitute compliance with the relevant duty or obligation. This change would give legal effect to what the Authority already states in each Code of Practice.[13]

There is no reason why a T&L participant who has:

» satisfied the requirements of a rigorous industry code of practice; and

» followed the code in a particular case that is the subject of a prosecution;

should not gain the advantage of protection from prosecution if they have followed the relevant code.

It follows ALC recommends that subclauses 253(2) – (4) of the Bill be replaced by a provision similar to Clause 155 of the Model Bill so that compliance with a code is taken to be compliance with the duty or obligation imposed by the Bill for which the Code was prepared.

13 p.359.

Network rules

Division 4 of Part 1 of the draft regulations establish network safety rules.

The definition of 'network safety rules' captures the responsibilities of a rail operator contained in paragraphs 51(3)(c) and (4)(c) of the Bill.

This necessarily means this is a subject to be addressed in any conforming safety management scheme.

ALC therefore reflects industry observations questioning why the consultation/regulator approval mechanisms prescribed by the regulations are necessary, given:

a. the general duty to consult about the contents of safety management schemes contained in subclause 100(3) of the Bill; and
b. the modest safety outcome assumed in page 95 of the RIS

and believes the objective set out on page 94 of the RIS that:

> In addressing the identified problems, the proposal should seek to support the objectives of the national reform; that is, to streamline regulatory arrangements, improve productivity, reduce the compliance burden for business and support a seamless national rail transport system whilst not reducing existing levels of rail safety.

is not met, and questions the assumption made in the RIS (page 96) that the establishment of network safety rules would not impose a significant burden on operators

ALC therefore believes that Division 4 of Part 1 of the Regulations should be removed.

Train safety recordings

Division 10 of Part 3 of the Bill limits the capacity to use communication information, for privacy reasons.

ALC acknowledges the confined commercial use rail operators can use recordings conferred by regulation 29 of the draft regulations but nevertheless reflects the industry view that such communications should properly be regarded as business records, as much as any other piece of information generated as an ordinary part of operating a rail business.

ALC also notes the breadth of the definition of 'train safety recording' contained in clause 132, which reads:

> ***train safety recording*** means a recording consisting of (or mainly of) sounds or images **or data**, or any combination of sounds, images **or data**, produced by a device installed in a train, signal box, train control complex or other railway premises for the purpose of recording operational activities carried out by rail safety workers operating a train and other persons.

It may be one thing for use of 'sound or images' to be restricted for privacy reasons.

However, presuming the word carries its usual English meaning, it is another thing to preclude the use of 'data' produced by a rail network generally which very well record 'operational activities' carried out by rail safety workers in a manner that would make identification of a person extremely difficult and not in a 'readily ascertainable' way.

ALC also notes that Schedule 3 to the *Privacy Act 1988* establishes National Privacy Principles that govern how personal information should be handled.

This is the regulation that should govern this area of interest.

ALC is finally of the view the public interest is served if independent courts have full access to recordings for civil and criminal proceedings. Justice must not only be done but be seen to be done.

ALC recommends that train safety recordings be treated as personal information regulated by National Privacy Principles contained in national privacy information.[14]

At the very least the term 'or data' should be removed from the definition contained in clause 132 of the Bill.

14 Or in 'Australian Privacy Principles' contained in any legislation replacing the *Privacy Act 1988* (cth)

Vicarious Liability

Clause 224 of the ONRSR imposes a *prima facie* blanket liability on directors and senior managers of rail operators.

In the usual case, companies employ people. Unless it can be proved on the criminal onus that a company officer, through their own behaviour, contributed directly to the breach, then the mere fact that someone is a company officer should not mean that they are vicariously liable for offences committed by the corporation.

As a general proposition, a person should not be liable to prosecution for an offence merely because of a position held within a company, unless particular aggravating behaviour can be proved against the person.

To that extent, ALC notes that Principle 2 of the Principles for reform of Director's Liability Provisions[15] reads:

> Directors should not be liable for corporate fault as a matter of course or by blanket imposition of liability across an entire Act.

Consistent with this principle, ALC believes that each of the offences created by the Bill should be analysed, with vicarious liability only imposed on those specific offences for which personal criminal liability for corporate fault can be demonstrated as being in the public interest.

Application of certain federal legislation

Part 8 of the draft regulations applies the legislation on Commonwealth archives, freedom of information, the Ombudsman and privacy, to the national rail safety body of law.

Constitutionally, there must be legislation in place to ensure that a state law (such as the proposed National Law) appropriately confers power on Commonwealth entities, and that Commonwealth legislation properly accepts the investment of responsibilities conferred by a state law.[16]

The appropriate application of these types of federal governance laws to nominally state legislation has been an issue with the national regulation scheme for health professionals and is being addressed in the development of the heavy vehicle national law.

So that this scheme can be effectively introduced, ALC hopes these laws have been properly applied and that suitable enabling legislation will be passed by the Australian Parliament.

ALC therefore seeks assurance that the legislation relating to archiving, freedom of information, the Ombudsman and privacy will be applied to the national rail safety body of law in a constitutionally effective manner.

15 As contained in attachment to Chris Bowen MP media release *MINCO Agrees on Principles for Reform of Directors' Liability Provisions* (Minister for Financial Services, Superannuation and Corporate Law media release 36, 6 November 2009).

16 *Re Wakim; Ex P. McNally* 198 CLR 511*; R.v. Hughes* 202 CLR 535.

Mandated review of legislation

It is finally noted that many complex legislative suites contain provisions requiring a review of the statutory scheme, so that it remains up to date.

An example is section 35 of the *Health Identifiers Act 2010* (Cth)[17], which reads:

Review of operation of Act

1. The Minister must, after consulting the Ministerial Council, appoint an individual:
   a. to review the operation of this Act and the regulations; and
   b. to prepare a report on the review before 30 June 2013.

2. The Minister must:
   a. provide a copy of the report to the Ministerial Council; and
   b. table a copy of the report in each House of Parliament within 15 sitting days after the report is prepared.

Given the improvements of technology and the speed in which practices evolve within this industry, it is appropriate for the Bill to be subject to periodic review.

It is understood that a similar provision will now be included in the Heavy Vehicle National Law.

ALC recommends that a review of the Bill and its regulations be conducted 3 years after the commencement of the legislative package.

Australian Logistics Council
August 2011

17 Act 72, 2010

AUSTRALIAN LOGISTICS COUNCIL

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