

Introduction

This submission is made on behalf of The Australian Industry Group (Ai Group) in response to the request for public comment on the draft Rail Safety National Law.

Ai Group is a peak industry association in Australia which along with its affiliates represents the interests of more than 60,000 businesses in an expanding range of sectors including: manufacturing; engineering; construction; automotive; food; transport; information technology; telecommunications; call centres; labour hire; printing; defence; mining equipment and supplies; airlines; and other industries. The businesses which we represent employ more than 1 million employees.

It is an organisation committed to helping Australian industry with a focus on building competitive and sustainable industries through global integration, skills development, productive and flexible workplace relations, infrastructure development and innovation.

The organisation provides practical information, advice and assistance to help members run their businesses more effectively. It ensures through policy leadership that members have a voice at all levels of government, by representing and promoting their interests on current and emerging issues.

This submission

We have sought feedback from Ai Group members who will be covered by these laws, and industry associations who represent various sectors of the rail related industries. Overall we received confirmation that the industry generally supports this latest move toward the adoption of a national law and national regulator for Rail Safety. This is particularly so in light of previous attempts to achieve a harmonised approach to rail safety laws.

As with any set of laws that are presented for consideration at public comment, specific areas of concern have been raised by industry participants, and recommendations are being made by the industry experts in relation to how these laws can be enhanced.

Ai Group is aware that many of these organisations will be making their own submissions to deal with this detail and we encourage the NTC to pay serious attention to the practical issues that are being raised by the industry.

Ai Group is a member of Safe Work Australia; as such we have played an integral part in the development of the National Work Health and Safety (WHS) Laws. It is crucial to our members who operate in the rail sector, and especially those who also operate in other sectors, that the Rail Safety Laws are aligned with the WHS laws wherever possible.

Ai Group's position has always been that there should be one principal WHS Act which is supplemented by appropriate regulations addressing the key requirements of specific industries. A practical example of how this can be achieved is through the inclusion of regulations for Major Hazard Facilities (MHFs) as part of the overall WHS package. We are disappointed that this has not been achieved with this package, but we are encouraged by the level of alignment that has been accomplished between the provisions of the WHS Bill and the draft Rail Safety National laws.

Our submission will be focusing on the similarities and variations between the laws, with a view to highlight discrepancies that could be addressed at this point in time.

Relationship between the Work Health and Safety Laws and the draft Rail Safety Laws.

Ai Group is pleased to see that Part 3 of the draft Rail Safety National Law establishes principles and obligations which are very similar to those in the National WHS Bill. Of particular note, and importance, is the alignment between the following provisions:

Description of provisions	Section in draft Rail Safety Law	Section in WHS Law
Management of risks	45	17
Meaning of reasonably practicable	46	18
Principles applying to [rail] safety duties	50	13 to 16
Safety duties [of rail transport operators / pcbus]	51	19
Duties of designers, manufacturers, suppliers etc.	53	22 to 26
Duty of officers to exercise due diligence	55	27

It is also pleasing to note the provisions in section 47 and 48 of the draft Rail Safety Law which detail the relationship between the WHS laws and commit to a principle of "no double jeopardy". In relation to the latter, it is not clear how this will be achieved and/or how the rail safety regulator and the relevant WHS regulator will work together to ensure consistent outcomes and approaches to enforcement of the corresponding provisions.

It would be helpful if this information could be provided as part of the implementation stage of the Rail Safety National laws.

Variations in duties

It is noted that the duties of rail safety workers do not completely align with those of workers generally.

Section 56(1) of the draft Rail Safety law matches the provisions in the WHS Bill, but is missing an obligation to “co-operate with any reasonable policy or procedure of the person conducting the business or undertaking relating to health or safety at the workplace that has been notified to the worker”. It is not clear why this has been omitted.

We understand the need for the additional requirements at 56(2) and (3) and support their inclusion. It is not clear why the qualifying statement at 56(4) has been included.

Variation in offences associated with discriminatory behaviour

The provisions related to discrimination in the WHS Bill are very different to those in the draft Rail Safety National law. It is not clear what the justification is for these variations.

Consistency of provisions and penalties

The draft RIS makes the following comment:

The issue of custodial penalties has not yet been addressed in the National Law. The Model Work Health and Safety Bill contains custodial penalties for a breach of a safety duty with reckless conduct (up to five years imprisonment) and assaulting, threatening or intimidating a health and safety inspector (up to two years imprisonment). The National Transport Commission welcomes comment on whether custodial penalties should be included in the National Law.

Ai Group notes the provision at s.47 of the draft Rail Safety National law that:

- (1) If a provision of the occupational [work] health and safety legislation applies to railway operations, that provision continues to apply, and must be observed, in addition to this Law
- (2) If a provision of this law is inconsistent with a provision of the occupational [work] health and safety legislation, the provision of the occupational [work] health and safety legislation prevails to the extent of any inconsistency

Further, s. 48 of the draft Rail Safety National laws states:

Where an act or omission constitutes an offence –

- (a) Under this Law; and
- (b) Under the occupational [work] health and safety legislation, the offence is not liable to be punished twice in respect of this offence.

With this specific linkage of the two pieces of legislation, it appears to be incongruous to have similar provisions in both pieces of legislation with variations that impact on obligations and/or different penalty levels. As most of the variations relate to lower penalties being applicable within the draft Rail Safety National law, it would be expected that serious breaches would be prosecuted under the WHS laws, rather than the Rail Safety National law. If this is the case, it would appear that the variations may lead to “rail” duty holders to underestimating the ultimate obligations and penalties that may apply to breaches of the WHS laws that apply.

It is Ai Group’s strong view that the final analysis of the Rail Safety National laws must include a direct comparison of similar obligations, duties and penalties within the WHS laws.

The justification for any decision to establish different obligations and/or penalties in the Rail Safety National laws must be documented as either part of the final RIS or in another appropriate document. This will aid clarity and also assist when decisions are being made about which is the most appropriate law to apply when there has been a breach of both sets of laws.

Structure of the draft Rail Safety National Law

The inclusion of the provisions for Accreditation, Registration and Safety Management Systems within the Bill, rather than the regulations, is inconsistent with the approach taken in the WHS laws.

It is our view that the relocation of these provisions to the Regulations, in a similar way to the treatment of MHF regulations in the WHS laws, would enable readers to more clearly identify the similarities between the WHS Bill and the draft Rail Safety National Bill. It would also enable the entire requirements for these provisions to be collocated in the regulations, rather than being split across the two statutory instruments.

Final Comments

Ai Group believes that the issues raised in this submission would be best addressed by taking the following actions:

- Adopting the Model WHS Bill as the primary legislation for implementing a national Rail Safety law that will be regulated by the national Rail regulator
- Developing a set of regulations, with appropriate supporting codes, which include all of the requirements that are specifically relevant to rail safety.

If this cannot be achieved in the short term, a review process should be agreed to enable further analysis of the interaction of the two sets of laws at the earliest possible time.