

11 September, 2000

MINISTER OF LABOUR

REVIEW OF THE HEALTH AND SAFETY IN EMPLOYMENT ACT 1992: LEGISLATIVE COVERAGE OF RAIL WORKERS

Purpose

1. The purpose of this paper is to make recommendations regarding legislative and administrative coverage of the occupational health and safety of employees and contractors working with moving rail vehicles. This project is being undertaken as part of the Health and Safety in Employment Act Review Project (refer 00/004518).
2. The discussion in this paper has been informed by the conclusions and recommendations of the Tranz Rail Occupational Safety Inquiry (“the Inquiry”), established by the Ministers of Labour and Transport, which reported on 1 September 2000.

Problem Definition

3. There is an overlap between the Health and Safety in Employment Act 1992 (the HSE Act) and the Transport Services Licensing Act 1989 (the TSL Act) in relation to the safety¹ of employees and contractors working with moving rail vehicles. That overlap is currently addressed through section 6H of the TSL Act, which provides:

If a rail service operator or any other person complies with the provisions of this Act or of the operator’s approved safety system then, in respect of the matters governed by those provisions, such compliance shall be deemed to be compliance with the provisions of the Health and Safety in Employment Act 1992.

¹ The Inquiry report states that references to occupational or workplace “safety” include occupational health. Consequently, all references to “occupational safety” in this briefing paper also include occupational health, except where the context clearly means otherwise.

4. The effect of section 6H is such that, where a rail operator has complied with its approved safety system in relation to a particular safety issue covered by that system, it is deemed to have complied with the HSE Act. If the rail operator has not complied with its approved safety system, or the system is not relevant to the particular safety issue, the deeming provision does not apply.
5. The Inquiry concluded that existence of section 6H caused the following problems:
 - it restricts the application of the HSE Act to employees of rail operators;
 - it acts as an incentive to formulate the approved safety system in unduly wide and detailed terms;
 - the presence of the section acts as a deterrent to the enforcement of occupational safety provisions, whatever the enforcement agency;
 - the practical application of the section has proved quite unsatisfactory ... ;
 - the section promotes a culture of blaming employees for accidents so as to be able to involve the section.
6. Most significantly, the Inquiry also concluded:

the section is unnecessary because, if the employer is complying with an approved safety system, that compliance in itself would provide a ground for defence to a prosecution without the necessity to rely on the blunt instrument of the deeming provision contained within the section.

Recommendations of the Tranz Rail Occupational Safety Inquiry

7. One of the aims of the Inquiry was to inform the review of the HSE Act. This paper explores issues related to the Inquiry's recommendations for legislative and administrative change in relation to the interface between the HSE and TSL Acts. In particular:
 - Recommendation 7 – The provisions of the HSE Act that impose duties on employers should apply to Tranz Rail in relation to all its non-maritime employees at all times. Section 6H of the TSL Act should therefore be repealed.
 - Recommendation 9 – In consultation with the RMTU and Tranz Rail, the LTSA and OSH should develop protocols (to be approved by the Ministers of Labour and Transport and published) for working together in the prevention of and investigation of rail accidents.

Options

8. There are two options for implementing the Inquiry's Recommendation 7:
 - *Option 1:* simply repeal section 6H of the TSL Act, so the HSE Act applies without reservation to rail operators.
 - *Option 2:* repeal section 6H of the TSL Act, and make amendments to the HSE Act so that the provisions of that Act relating to public safety do not apply to rail operators.

9. There are also four other options for addressing the issues identified by the Inquiry:
- *Option 3:* repeal section 6H but appoint LTSA staff as HSE inspectors in relation to occupational safety in relation to moving rail vehicles.
 - *Option 4:* as option 3, but appoint LTSA staff as HSE Inspectors in relation to all occupational safety matters related to the operation of a rail service, not just the operation of moving rail vehicles.
 - *Option 5:* insert in the TSL Act provisions equivalent to Part II of the HSE Act relating to the safety of employees involving moving rail vehicles, and amend the HSE Act to provide that that Act does not apply to the safety of moving rail vehicles.
 - *Option 6:* as option 5, but extend the TSL Act to cover all occupational safety matters related to the operation of a rail service, not just the operation of moving rail vehicles.

Analysis of Options

10. The options listed above are analysed below against the following criteria:

- the potential of the various options to ensure that rail workers have – in both law and practice – protections equal to those of other workers; and
- the costs the various options may impose on the Government administering agencies (LTSA and OSH), rail service operators, their employees and contractors, and on society generally.

Option 1 – HSE Act applies without reservation to rail operators

11. Under this option, both the HSE Act and the TSL Act would apply to rail operators without reservation. The overlap would be handled administratively through the protocols recommended by the Inquiry.

12. This option is the simplest means of ensuring that rail workers have the same protections in law as other workers. It would provide incentives for rail service operators to ensure that their safety management systems and practices were fully in accord with the requirements of the HSE Act. Rail service operators would be able to be held accountable if they fail to provide for their employees the same occupational safety and health standards required of other employers and would not be able to escape liability through any legal technicality not available to other employers.

13. As well as Tranz Rail, this option would affect other rail service operators that have paid employees, including the Taieri Gorge Railway, the Wellington Cable Car, the Christchurch Tramway, 34 industrial railway operators, and any “heritage railways” which have paid employees. The HSE Act already applies to all of these organisations, subject to section 6H of the TSL Act in the case of moving rail service vehicles.

14. For most of the commercial rail service operators licensed under the TSL Act, the rail operations are a minor part of their business. Even Tranz Rail has substantial business interests outside the scope of the TSL Act. All those businesses would have (or should have) systems in place for complying with the HSE Act. It is therefore unlikely that this option would impose additional compliance costs on rail service operators. If there were any such costs, they are likely to be minor and would mainly be transitional costs that would be incurred in response to any change in the law (i.e., gaining an understanding of the law change).
15. Another 36 rail service operators licensed under the TSL Act are “heritage railways” which rely on volunteer workers. They have no employees and so are not covered by the HSE Act. They would not be affected by this option.
16. In the case of Tranz Rail, its submissions to the Inquiry did not indicate that the company would face any increased costs if section 6H was repealed. The company’s primary concern with this option was one of equity, as stated to the Inquiry:

“... section 6H is there because there is the potential for an aspect of an [approved safety system] to have been thought through carefully both by the rail service operator and the LTSA (and OSH depending on the degree of involvement it has taken), approved and implemented thoroughly and yet an accident happens due to some flaw, possibly minor, in what was provided. It is inequitable that when at least one possibly two departments of state have approved a safety measure that a rail service operator should later be prosecuted for doing what was approved.”
17. The Inquiry did not accept this argument, commenting that the Inquiry could see no reason in principle why Tranz Rail, in its capacity as an employer, should not be subject to the same occupational health and safety obligations as other employers while, in its capacity as a major transport operator being subject to the TSL Act licensing regime in order to ensure the safety of the travelling public.
18. The option would result in some increased costs for Government agencies, OSH and the LTSA. The possible costs are discussed below under the heading *Resource and Financial Implications*.

Option 2 – HSE Act applies to occupational safety but only TSL Act applies to public safety

19. This option is similar to option 1 but recognises that the TSL Act is primarily about public safety while the HSE Act is primarily about occupational safety and health. The TSL Act provisions relating to the safety of the public affected by moving rail vehicles overlap with provisions of the HSE Act relating to public safety, in particular:
 - the duty in section 15 of the HSE Act to ensure that the actions or inactions of employees at work do not harm members of the public; and
 - the duty in section 16(2) of the HSE Act to paying customers.²

² This may be affected if the HSE review results in amendments to section 16.

20. Under this option, the overlap in coverage created by the repeal of section 6H of the TSL Act would be minimised by adding a provision in the HSE Act to the effect that specific provisions of that Act relating to public safety did not apply in the case of public safety matters related to the operation of moving rail vehicles within the scope of the TSL Act.
21. In contrast, under option 1, the overlap would have to be dealt with administratively through the protocols recommended by the Inquiry.
22. Option 2 would provide the same benefits for employees and contractors of rail service operators as option 1. It has the added benefit of providing an explicit separation between the primary purposes of the separate legislation. It would make it clear, for example, that the HSE Act did not apply in relation to public safety at level crossings.
23. Some circumstances might arise where public safety matters, which overlap with the HSE Act's primary purpose of prevention of harm to employees, would otherwise have been able to be dealt with under the HSE Act, but would no longer be able to be so dealt with as a result of such an amendment.
24. The costs of this option to rail service operators are likely to be the same as in option 1. The one-off transitional costs of gaining an understanding of the law change may be lower than under option 1, in that the division between occupational and public safety issues would be clearer. As with that option, possible costs to OSH and LTSA are discussed under the heading *Resource and Financial Implications* below.

Option 3 – Appoint LTSA Staff as HSE inspectors, for Moving Rail Vehicles

25. Under this option, LTSA staff would be appointed as HSE inspectors, under section 29 of the HSE Act, using the provision in subsection (2) of that section to make the appointment subject to the condition that the appointment relates only to occupational safety in relation to moving rail vehicles. A corresponding condition would be placed on HSE inspectors employed by OSH that they were not able to exercise their powers in relation to moving rail vehicles.
26. OSH staff would continue to be involved in the administration of the HSE Act in relation to aspects of the operation of rail businesses other than the safety of moving rail vehicles.
27. There is precedent for the appointment as HSE inspectors of public servants employed by an organisation other than the Department of Labour. From 1 April 1993 until 30 June 1998, staff of the Mining Inspection Group (MIG) of the Ministry of Commerce were appointed as HSE inspectors and were responsible for the administration of the HSE Act in relation to mines, quarries, tunnels, and for petroleum and geothermal operations. From 1 July 1998, the MIG staff were transferred to the Department of Labour and became part of OSH.
28. A service level agreement would be required between the LTSA and OSH to ensure that, in practice, rail workers were delivered the same level of occupational safety as the work force generally and that there were no gaps in the application of the legislation. The service level agreement would define accountabilities and provide mechanisms for the Department of Labour to monitor the performance of the LTSA staff appointed as HSE inspectors.

29. A significant difference between the MIG and the LTSA is that, in the case of the MIG, administration of the HSE Act was about 90% of the work of its staff. If the model is adopted for LTSA, administration of the HSE Act is likely to be a much smaller part of the work of LTSA staff appointed as HSE inspectors.
30. LTSA staff do not currently have expertise in administering HSE Act provisions and would require additional training. If this option were to be pursued, further work would be required to determine the resource implications for the LTSA.

Option 4 – Appoint LTSA Staff as HSE inspectors, for All Rail Operations

31. This option is similar to option 3, but the appointment of LTSA staff as HSE inspectors would extend beyond matters covered by the TSL Act and cover all matters relating to the safety and health of staff in the rail industry (i.e. the appointment of LTSA staff as HSE inspectors would extend to occupational safety and health matters in relation to all people working in a rail operating environment, including track and vehicle maintenance).
32. OSH staff would not administer the HSE Act in the rail industry and a corresponding condition would be placed on HSE inspectors employed by OSH that they were not able to exercise their powers in relation to the rail industry.
33. This option avoids the problems of option 3 that OSH staff would continue to be involved in the administration of the HSE Act in relation to aspects of the operation of rail businesses other than the safety of moving rail vehicles, and for the occupational health of people working with moving rail vehicles.
34. The disadvantage of this option is that it that it would require LTSA to have even more additional staff and would require those staff to have even more training than in option 3.

Option 5 – HSE provisions inserted into the TSL Act for moving rail vehicles

35. This option would involve insertion into the TSL Act of provisions equivalent to Part II of the HSE Act, in relation to the occupational safety of employees and contractors working with moving rail vehicles. The HSE Act would be amended to exclude employees and contractors working with moving rail vehicles.
36. Under this option, the responsibility for administering HSE-equivalent provisions would clearly be the responsibility of the LTSA, since that agency is responsible for the administration of the TSL Act.
37. Under this option, section 6H of the TSL Act would be redundant and would be repealed.
38. This option is similar to that adopted with respect to safety of crew of ships. Part II of the Maritime Transport Act 1994, which is administered by the Maritime Safety Authority, is essentially the same as Part II of the HSE Act.
39. This approach has not, however, been recommended for the aviation sector. In that case, it is proposed to ensure coverage of air crew under the HSE Act and manage the interface with the Civil Aviation Act 1990 administratively.
40. This option has the same effect as options 1 and 2 of ensuring that rail workers have the same protections in law as other workers.

41. It has the further advantage that rail service operators would be subject to only one safety regime (the TSL Act) and only one regulator (the LTSA) in relation to the safety of moving rail vehicles. However, rail service operators would still be subject to the HSE Act and OSH in relation to other aspects of their business. (During the Inquiry, evidence was given that only about 25% of the employees of Tranz Rail work with moving rail vehicles, and for many of these then only for part of their work).
42. A further disadvantage with this option is it has the potential to fail to deliver to rail workers, in practice, the same protections as other workers. It would require ongoing liaison between the LTSA and OSH to ensure that the way in which the LTSA administered the HSE-equivalent provisions was consistent with OSH's administration of the HSE Act both generally and, in particular, in relation to other aspects of the operation of rail businesses.
43. LTSA would almost certainly need to employ additional staff to meet its additional responsibilities, and all LTSA staff responsible for rail worker safety would need to be trained in the administration of the HSE-equivalent provisions. Unless and until LTSA staff were fully trained, it is likely that OSH staff would need to provide support to the LTSA in specialist areas, including occupational health matters.

Option 6 – HSE provisions inserted into the TSL Act for all rail industry

44. This option is similar to option 5 but the HSE-equivalent provisions inserted into the TSL Act would not be limited to just the occupational safety of employees and contractors working with moving rail vehicles. Instead, those provisions would extend to all other matters related to the operation of a rail service, including track and vehicle maintenance. The HSE Act would be amended to exclude all employees and contractors carrying out work related to the operation of a rail service.
45. This option would provide a more comprehensive separation between the TSL and HSE Acts. The former would then provide a complete code for the rail industry. The HSE Act would still, however, apply to some rail industry workers (for example, office workers) and it would be difficult to achieve a clear and unambiguous separation which did not create a risk of creating a class of worker covered by neither Act.
46. As with option 5, this option has the potential to fail to deliver to rail workers, in practice, the same protections as other workers and there would need to be continuing liaison between OSH and LTSA to minimise the likelihood of that happening.
47. This option would have greater administrative implications for the LTSA than option 5. The number of additional staff needed to meet its additional responsibilities would be greater, and all LTSA staff responsible for rail worker safety would need additional training because of the wider coverage of the HSE-equivalent provisions. The transitional period while LTSA staff were trained and gained experience would be longer and more support would be required from OSH during that transitional period.

Administrative Issues

48. The Inquiry addressed the issue of which agency (OSH or the LTSA) should administer rail occupational safety, noting that there were arguments supporting both alternatives. On balance – and in view of its conclusion that the HSE Act should apply – the Inquiry concluded that OSH should have responsibility for occupational safety issues in all aspects of rail operations.

49. The reasons given by the Inquiry for this conclusion are:
- it is consistent with the ... approach of one Act administered by one Authority for occupational safety;
 - it recognises the experience and expertise of OSH (not shared by the LTSA) in enforcing the provisions of the HSE Act through inspections, investigations and (where appropriate) prosecutions; and
 - it avoids the difficult demarcation issues that necessarily arise if some rail occupational issues are within the jurisdiction of the LTSA and others are within the jurisdiction of OSH.
50. The proposal that OSH should administer rail occupational safety is consistent with the policy trend in recent years, as evidenced by:
- The transfer of the Mining Inspection Group from the Ministry of Commerce to OSH in July 1998;
 - The proposal in the *EnergySafe* Review that responsibility for electrical and gas workplace safety transfer from the Ministry of Economic Development to OSH;
 - The proposal also included in the current review of the HSE Act that the Act be extended to cover aircrew on board aircraft.³
51. The proposal would leave only seafarers' occupational safety and health while on board ships outside the administration of OSH. That matter is covered by HSE-equivalent duties in the Maritime Transport Act, administered by the Maritime Safety Authority. There is no apparent dissatisfaction with that arrangement by any party.
52. As noted in the Inquiry's Recommendation 9, it will be necessary for formal (and public) protocols to be agreed between OSH and the LTSA, in consultation with interested parties, to set out co-operative arrangements and avoid duplication.

Resource and Financial Implications

53. Under any of the options, there are likely to be some increased costs to either OSH, the LTSA, or both, in the form of additional staff and/or purchase of expertise on contract, and staff training. There will also be one-off costs in informing rail operators of the effect of any law change. It is unlikely, however, that the costs would differ greatly amongst the options. Further work is required to determine the extent of the additional workload under the various options for both agencies, and the best means of managing such workload. This further work will include discussions with the Ministry of Transport and the LTSA.

Conclusion

54. Under all of the options discussed above, section 6H of the TSL Act would be repealed.
55. For the reasons discussed above under the heading *Administrative Issues*, options 3 and 4 which provide for the LTSA to administer rail occupational safety are not favoured. This leaves either option 1 or option 2.

³ This is the subject of a separate paper as part of the HSE Act Review.

56. On balance, there is little difference between option 1 or option 2. Under either option, there will be demarcation and co-ordination issues which will need to be worked through in terms of the proposed protocols between the LTSA and OSH. Option 2 has the added risk of creating unintended gaps in the legislative regime. This favours option 1 as the simplest legislative option, with public safety boundary issues being defined administratively through the proposed protocols, with particular attention being paid to boundary issues.

Competitive Neutrality and Equality of Safety Between Road and Rail Transport

57. The Inquiry noted the submission by Tranz Rail that it should not be competitively disadvantaged by having greater responsibilities placed on it than its road transport competitors⁴. The Inquiry suggested that the Government consider whether the protective provisions of the HSE Act should be applied with equal strictness to truck operators. The Inquiry drew attention to the recommendations of the 1996 Transport Select Committee inquiry into truck crashes.

58. The HSE Act already applies to road transport. There is no legal restriction on its application, as is the current situation with rail transport under section 6H of the TSL. There are issues regarding the administration of the HSE Act and the interface between OSH, the LTSA and the Police in this area.

59. As a separate exercise, the Transport and Industrial Relations Select Committee has requested an update (by 22 September 2000) on progress in implementing its recommendations from 1996 referred to in paragraph 57 above. You will be briefed separately on this matter.

Consultation

60. The discussion in this paper has been informed by the views of interested parties – in particular Tranz Rail – as expressed to the Inquiry.

61. Some preliminary discussions have been held with the Ministry of Transport and the LTSA on the implications of the Inquiry's recommendations. Those discussions have indicated the need for further work on resource and financial implications, as referred to in paragraph 53 above.

62. The Ministry of Transport indicated that they are promoting an omnibus Land Transport Bill, for introduction later in 2001⁵, which would include a number of amendments to the TSL Act (amongst others). They expressed a preference for the proposed Land Transport Bill to include all amendments to the TSL Act, including any arising from the Tranz Rail Inquiry, rather than a piecemeal approach with some via the HSE Amendment Bill.

Recommendations

63. I recommend that you:

- a) **note** that the relationship between the HSE and TSL Acts is defined in section 6H of the TSL Act.

⁴ Tranz Rail has repeated these comments in public statements in response to the publication of the Inquiry report.

⁵ This proposed Bill is not on the Parliamentary timetable.

- b) note** that the Inquiry concluded that section 6H of the TSL Act was unnecessary and its existence created practical problems resulting in some rail workers having a lower level of occupational safety protection than the work force generally.
- c) agree** that section 6H of the TSL Act be repealed.
- d) agree** that OSH should continue to be responsible for administration of the HSE Act in relation to all matters.
- e) note** that protocols between OSH and the LTSA would be required to formalise how boundary issues are to be handled and co-operative arrangements.
- f) note** that further work is required to determine resource and financial implications.
- g) note** that further discussions will be held with the Ministry of Transport and the LTSA on legislative and administrative issues.
- h) note** that you will be briefed separately on the application of the HSE Act to the road transport sector.
- i) note** that we would welcome an opportunity to discuss this issue with you.

RJM Hill
for Secretary of Labour