

In confidence

Rail Regulation Workshop – Pre-reading

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Whāinga | Purpose: For discussion

The Rail Safety Regulation Workshop with the Board on 12 December 2023 will include discussion of the role of Waka Kotahi in regulating the rail system within an active co-regulatory framework and will support a conversation about the framework, opportunities, and next steps.

Take matua | Key points

- There is widespread misunderstanding of the intent of the Railways Act 2005 (the Act) and what is meant by a co-regulation.
- Waka Kotahi currently has limited regulatory levers available; effectively ‘all or nothing.’
- There are challenges but clear opportunities to improve safety through an effective regulatory framework, but this requires development.

He kōrero mō tēnei kaupapa | Background

The intent of the Act, and the creation of a co-regulatory framework for rail system regulation is not well understood and Waka Kotahi, as the regulator (the regulator) has, until very recently, operated passively and reactively. The Act is intent-based and is more closely aligned with Health, Safety & Wellbeing Act (HSWA) legislation than to the Land Transport Act. The regulatory levers are effectively limited to ‘robust’ enforcement action but incongruously lack effective investigation powers. The combination of co-regulation and a limited suite of regulatory tools creates an environment where regulatory enforcement action is rare but has very high impact. It also means that we are effectively ‘marking the homework’ of licence holders without having provided the syllabus. There are clear opportunities to improve the rail regulatory framework.

Kia mōhio mai koe | What you need to know

There are areas of risk within the rail system which are not regulated under the Railways Act.

This is because where are eight rail participant types stated in the Act, however only *access provider* and *railway operator* are required to hold a rail licence and be directly regulated by the regulator.

Rail activities in Aotearoa are managed under a co-regulatory framework. All rail participants are accountable for the risks inherent in their rail activities. Under the Act, they must reduce and manage their risks to a level demonstrated to be *so far as is reasonably practicable*. Rail licence holders must provide evidence of this to the regulator who will undertake assurance duties to ensure compliance with the Act and with the rail licence holder’s approved Safety Case. These roles and responsibilities describe the co-regulatory model but to function effectively, all actors must demonstrate maturity of leadership and safety culture. Whether or not this is well understood remains to be seen, but experience suggests it is not.

A change of regulatory approach is necessary. Traditionally, the regulator has been passive in its regulation, focusing on issuing licences, monitoring performance, and very rarely, undertaking enforcement action. The increasing complexity, capacity and rates of usage of the rail system, coupled with changing social expectations means that this regulatory approach is not fit for purpose and the regulator is taking steps to transform to achieve delivery excellence.

The New Zealand rail network is recovering from decades of inadequate investment, from *managed decline*, through to *resilient and reliable* however more recent language describes a system that is *safe and compliant* – this is a pull back from the previous setting. Regardless of language, there is unquantified risk held in the system that has had decades of inadequate investment and this will not be rectified in the short term – regulatory action including enforcement action must be expected.

The regulator has limited regulatory levers to pull which are largely related to imposing either permanent or temporary conditions on a licence, prohibiting an activity, or prosecution. The regulatory tools are blunt, and the regulator leans heavily on the *engagement* pillar of regulation. This generates an environment where enforcement action is rare but has significant impact.

A new regulatory monitoring assessment framework - Rail Regulatory Risk Framework (R3F) - has been introduced to identify the risk held by each rail licence holder, each sector, and the wider rail system. R3F was designed internally but uses methodology used by the UK Office of Road and Rail in their RM3 model and with consultation with Office of the National Rail Safety Regulator in Australia, Maritime NZ, and NZ Civil Aviation Authority.

The framework covers all 19 legal requirements of a licence holder and is transparent, repeatable, and objective. R3F was implemented in August 2023 and feedback so far is positive, with industry participants noting a more in-depth and comprehensive assessment of performance, and a better understanding of what is required of their safety management system. The ongoing success of R3F is predicated on the introduction of a suitable digital regulatory tool to exploit the data and create the intelligence.

That said, whilst the industry is adapting to **the regulator's improved regulatory approach**, it is **proving to be a challenge for some licence holders** who have long-established ways of operating and engaging with the regulator. This challenge is being met by the regulator with consistent positive culture and strong leadership, demonstrating transparency of regulatory activity which is grounded in Waka Kotahi core values and behaviours; Ngākau aroha, Kotahitanga, Kia māia and Mahia. It is likely that industry inertia for change is compounded by the lack of a clear regulatory framework.

There are **many opportunities for improvement in the system that we believe will give effect to rail safety**. These include the maturity of the R3F tool and exploitation of intelligence to identify and deploy to risk, and investing in a rail system regulatory framework that includes: a targeted legislation change including investigation powers enabled through the Regulatory Systems Transport Amendment Bill, and HSWA delegation; Safety Case reform and rail participant type inclusion; securing sustainable regulator funding; and the development and use of effective regulatory instruments as a foundation. Collectively, these work-streams maintain a focus on future requirements and support delivery excellence.

There are **excellent people in the Rail System** and a real desire by many for collaboration to improve the rail system and the safety of everyone who interacts with it – we need to harness this.

Ā muri ake nei | Next steps

The paper is presented to assist foundational knowledge regarding regulation of the rail system. The next steps are either to accept the current situation and the limited regulatory outcomes that can be achieved, or to advocate for, and drive the changes necessary to achieve optimal regulatory outcomes. The Board's continued support to drive change will be crucial.

Ngā whakapiringa | Attachments

Attachment 1

Rail Regulation at a glance – pre-reading pack

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