

Policy

Application of Cost Benefit Analysis Requirement

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1. Purpose

The Office of the National Rail Safety Regulator (ONRSR) has been established under the Rail Safety National Law (RSNL) to administer a national system of rail safety regulation including the effective management of rail safety risks through a national scheme for accreditation of rail transport operators.

Under the RSNL, the Regulator is required to undertake a cost benefit analysis and consult with parties who might be affected by particular types of decisions or directions given by the Regulator. It is recognised that the policy intent of the cost benefit analysis provisions of the RSNL is to mitigate against the risk of the Regulator making a decision that may result in the imposition of unreasonable cost demands on a rail transport operator (or other person funding railway operations) when exercising the Regulator's powers to make decisions or give directions to a rail transport operator to undertake railway operations in a specific manner. The requirement arises where the decision or direction may result in a significant cost to a rail transport operator or other person (which in some cases could be the government of participating jurisdiction).

The purpose of this policy is to ensure an appropriate level of transparency with regard to the interpretation by the Regulator of what is meant by significant cost or expenses under the RSNL.

2. Scope

This policy has application in cases where a decision or direction of the Regulator has a resulting significant cost impact on a rail transport operator or other person.

The document is intended to be read in conjunction with the legislation and other relevant ONRSR policies. The decision-making of the Regulator in relation to the use of various powers under the RSNL is principally governed by the:

- > *ONRSR Accreditation policy*
- > *ONRSR Compliance and enforcement policy*

The policy itself imposes no legal duty and where actions or requirements are described as mandatory these reflect requirements in the RSNL or National Regulations. It is not intended to replace the legislation, or to limit or expand the scope of the legislation. In the event of an inconsistency between this policy and the legislation, the legislation will prevail.

3. Definitions

RSNL – means the *Rail Safety National Law* which has been enacted as a Schedule to the *Rail Safety National Law (South Australia) Act 2012 (SA)* as it applies in each state and territory. In Western Australia, 'RSNL' means the Rail Safety National Law which has been enacted as mirror legislation in the *Rail Safety National Law (WA) Act 2015*.

National Regulations – means the *Rail Safety National Law National Regulations 2012*; or the *Rail Safety National Law (WA) Regulations 2015* in Western Australia.

Where terms are not defined within the legislation or regulations the Macquarie Dictionary definition applies.

Use of the word 'should' indicates a recommendation of the ONRSR. However, the rail transport operator is free to follow a different course of action provided it complies with the legislation. Use of the word 'must' indicates a legal requirement where compliance is necessary.

4. Legislative framework

The RSNL imposes obligations on the Regulator to undertake a cost benefit analysis and to consult with the Premier or Chief Minister, the Treasurer and any Minister of a participating jurisdiction that is likely to be affected where the Regulator makes a decision or gives a direction as set out below and the imposition of the decision or direction is likely to result in a significant cost or expense to the rail transport operator in question or to any other person. The decisions and directions where this applies are:

- > under s67(2)(b) of the RSNL, a decision to impose a condition or restriction on the accreditation of an applicant;
- > under s72(1) of the RSNL, a decision to vary or revoke a condition or restriction imposed by the NRSR to which the accreditation of an accredited person is subject or to impose a new condition or restriction;
- > under s104(1) of the RSNL, a direction given to an accredited person to amend the person's safety management system;
- > a direction given to a person in an improvement notice that requires a person to take
- > specific action -
 - under s175(1)(a) or (b) of the RSNL, to remedy a contravention or prevent a likely contravention or remedy the things and operations causing a contravention or likely contravention; or
 - under s175(1)(c) of the RSNL by which railway or other operations are to be carried out so that safety is not threatened or likely to be threatened.
- > under s198(1) of the RSNL, a direction to a rail transport operator to install on or with respect to the infrastructure of the railway, or on or with respect to rolling stock, safety or protective systems, devices, equipment or appliances as a result of a report of a Coroner, the Australian Transport Safety Bureau or other investigation.

5. Determination of significant costs

The RSNL does not define a 'significant cost or expense' and it is acknowledged that to establish a definition in terms of a dollar amount is difficult given the range of rail transport operators that undertake railway operations in Australia.

In making a determination as to whether the decision or direction of the Regulator is likely to result in a significant cost or expense to the rail transport operator that is the subject of the decision or direction, the Regulator will give consideration to whether the costs or expenses:

- > are significant in comparison with the size, scope and nature of the rail operation;
- > are significant in respect of a rail transport operator's ability to fund;
- > are otherwise unreasonable to impose without a detailed justification; or

- > would require a significant increase to funding arrangements for the rail transport operator (including funding provided by the Government of a participating jurisdiction to a rail transport operator).

While the following must not be taken as exact threshold measures, as an indication of what the Regulator may consider a cost or expense to a person to be significant if, subject to case-by-case examination, the cost associated with the decision or direction:

- > exceeds 10% of the rail transport operator's total revenue from rail operations (or other publically available measure of the financial capacity of the operator);
- > in the case of government funding, would require a submission to Cabinet for further funding; or
- > exceeds \$1 million.

A cost will not be considered significant if it is in accordance with what would otherwise be incurred by a rail transport operator in applying a recognised or accepted industry standard or practice that is relevant to the scope and nature of railway operation being undertaken or is otherwise reasonable when considering a particular risk.

5.1 Imposing conditions or restrictions on an accreditation

Subject to the *ONRSR Accreditation policy*, the Regulator may impose conditions and restrictions on the manner in which it undertakes its railway operations. In some cases, conditions and restrictions may be used to reflect the rail transport operator's self-imposed limitations and restrictions with regard to the manner in which it proposes to conduct its railways operations, which may be specified in their accreditation application or in the safety management system.

The Regulator will not consider any cost or expense attributable to a particular risk control measure that is specified by the rail transport operator but incorporated into a condition or restriction of accreditation, in order to secure the use of this method of operation, as a significant cost or expense.

5.2 Issuing an improvement notice

The RSNL imposes an obligation on the Regulator to undertake a cost benefit analysis as a result of a rail safety officer intending to include a direction to take 'specified action' in an improvement notice issued to a person that, in the opinion of the Regulator, is likely to result in significant cost or expense to the person or any other person.

A direction to take a specified action is considered to be a direction contained in a notice concerning the action to be taken to:

- > remedy or prevent a contravention of the RSNL, as per section 176(2) of the RSNL; or
- > to enable railway (or other) operations to be carried out so that safety is not threatened or likely to be threatened, as per section 176(3) of the RSNL,

that does not provide any scope to the person to consider other means of preventing a contravention or to eliminate or mitigate a threat to the safety of railway operations. Where a person is afforded the scope to employ their own risk management processes to identify the means of addressing the subject of an improvement notice a specified action is not considered to have been made and any costs or expenses associated incurred by a rail transport operator are not considered to be a significant cost.

6. Consultation

6.1 With the Premier, Treasurer and Minister

When a significant cost is likely to result from a decision or direction of the Regulator, the Regulator must also consult with the Premier or Chief Minister, the Treasurer and any other Minister of a participating jurisdiction whose area of responsibility is likely to be affected by the imposition of the decision or direction.

The Regulator has consultation and communication protocols with the relevant departments of the Ministers of participating jurisdictions whose area of responsibility is the application of the RSNL in that jurisdiction.

The Regulator acknowledges and will accept that the Premier, Treasurer or Minister may delegate the consultation task to their respective department or other government agency or official.

6.2 With an affected rail transport operator

Consultation with the affected rail transport operator is not only triggered by the requirement to conduct a cost benefit analysis. Consultation with operators is likely to have already commenced in regard to the safety issue, accreditation or compliance matter that is the subject of the Regulator's decision or direction.

The Regulator may request information from the rail transport operator regarding cost and other impacts, acknowledging that the operator is generally in a better position to understand its operations and the impact of a decision or direction by the Regulator. The Regulator will give consideration to any information received in making a determination as to whether the decision or direction is likely to result in a significant cost or expense to the rail transport operator. When requesting a rail transport operator to provide information, the Regulator will afford the operator at least 28 days in which to provide the information.

6.3 With other persons affected

The RSNL imposes a requirement on the Regulator to undertake a cost benefit analysis as a result of a decision or direction as set out in this policy if the decision or direction is likely to result in a significant cost or expense to any other person.

In making a determination whether any other person is impacted by a decision or direction, the Regulator will not actively seek to consult with any other person (except the affected rail transport operator and as required under the RSNL), rather it will apply its own discretion in terms of determining the nature and range of impacts on other persons. The Regulator will, however, give consideration to any information provided by any other person who is likely to incur a significant cost or expense who has become aware of the intent of the Regulator to make a decision or direction.

7. Conduct of cost benefit analysis

It is acknowledged that the rail transport operator is well placed to undertake a cost benefit analysis with respect to implementing safety measures to ensure the safety of its railway operations. This is reflected by the duty for rail transport operators to ensure the safety of its railway operations, so far as is reasonably practicable. Therefore, in implementing the RSNL requirements to conduct cost benefit analyses the Regulator will use their best endeavors,

including consultation with the affected rail transport operator, to conduct the cost benefit analysis in a manner that aligns with the operations and circumstances of the operator, in accordance with the objectives of the RSNL.

8. Review of decision or direction following cost benefit analysis

The completion of a cost benefit analysis that indicates that the costs of the regulatory decision outweigh the benefits does not, of itself, affect the operation of the decision or prevent it from being implemented. Having undertaken a cost benefit analysis in accordance with this policy the Regulator may affirm, vary, set aside or withdraw the original decision, in accordance with the Regulator's powers under the RSNL.

It is acknowledged that such an analysis may be used by an affected person through the review processes associated with the decision, noting that the decisions and directions for which this policy relates are reviewable decisions under s215 of the RSNL.