



Independent Transport Safety and  
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28 May 2007

**Re: Model Rail Safety (Reform) Legislation**

Dear Sir / Madam,

The Institute of Public Works Engineering Australia (IPWEA) is a not for profit membership based professional organisation representing engineers and others involved in the provision of public works and services predominantly in the local government sphere.

This submission has been prepared by the Institute's NSW Division, IPWEA (NSW), on behalf of its members working in the 152 local councils in this State.

**Context**

Local Government in NSW has management responsibility for around 80% of the total road network. Councils maintain a total of 141,959 km of regional and local roads having a replacement value of \$30.8 billion.<sup>1</sup>

Specific data is not held on the proportion of road / rail intersections, but it is assumed that a similar proportion (80%) involve roads where a Local Government Authority is the Road Authority. The Level Crossing Strategy Council<sup>2</sup> estimates that *Local government is responsible for managing the roads at 90% of NSW public road/public railway crossings.*

As a consequence of road ownership at Rail / Road interfaces, this proposed legislation will mostly affect Local Government across Australia. The majority of the 700 Councils across the country will be involved in at least one road and rail interface agreement.

In the past, councils in NSW have generally been responsible for maintaining road signs, road markings, and road pavements on the approaches to road / rail intersections. Councils have also undertaken pruning to maintain good sight distances at level crossings. Councils have also been requested to contribute one third of the cost of capital improvements at level crossings. Where finances have permitted, councils have met this contribution.

IPWEA (NSW) takes the view that any proposal which has as its main purpose the improvement of public safety by better managing risk should be supported. However, IPWEA

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<sup>1</sup> IPWEA (NSW) Roads & Transport Directorate *Road Asset Benchmarking Project* September 2006

<sup>2</sup> <http://www.levelcrossings.nsw.gov.au/localgovt.htm> accessed 28th May 2007.

(NSW) is concerned that such improvements in public safety may result from an increase in liability to Local Government combined with cost shifting to individual councils.

## **Issues**

In the brief time available to assess the proposed legislation IPWEA (NSW) has identified a number of issues of concern to Local Government. These concerns are summarised under the headings:

- Legislative Provisions
- Dispute Resolution
- Infrastructure Ownership
- Risk Shedding
- Cost Shifting
- Available Skills and Experience

These issues are dealt with in detail in the following sections.

## **Legislative Provisions**

Without the benefit of legal advice, the draft legislation appears to be written for the benefit of the rail infrastructure manager with councils being compelled to enter into interface agreements. While the proposed Clause 61C allows a road manager to identify risks and seek to enter into an interface agreement with the rail infrastructure manager, this is unlikely to happen for the reasons discussed in the following sections.

In the absence of any detailed explanation, it is difficult to understand why the definition of *Australian Road Rules* is “.. the Road Rules – Victoria published in the Government Gazette (periodical Gazette No.2) on 28 October 1999, as those Rules have effect for the purposes of regulation 201(1) of the Road Safety (Road Rules) Regulations 1999; [*Local variations*]”. It is assumed that each State would include its own variations as appropriate. This approach does not lend itself to providing a uniform system for dealing with road / rail interface agreements across Australia. Amendment of Australian Road Rules legislation would seem to be a more practical approach.

From the information available it appears that pedestrian / rail, road / light rail and road / monorail interfaces are covered by this legislation.

## **Dispute Resolution**

The draft defines “**appointed person**” as being a Rail Safety person appointed by the Minister. This gives the impression of favoring the rail infrastructure operator. Since the legislation is aimed at achieving an equitable outcome for all parties, the appointment of a totally independent referee or creation of a reference group having representation from all parties would be more appropriate.

## **Infrastructure Ownership**

Local Government in NSW has been concerned in recent times with determining the owner of various infrastructure assets. It is not unusual for a council to have to deal with a rail transport operator and a rail infrastructure manager in addition to a rail over road bridge asset owner.

Several councils have raised the problem of ballast from rail tracks being launched from rail bridges onto vehicles below. Attempts by councils to have the rail infrastructure operator erect safety fencing have been unsuccessful since the bridge asset is owned by a third party.

Again, without the benefit of legal advice, it is assumed that the proposed legislation will ensure that all parties having an interest in the road / rail interface will be required to be parties to an appropriate interface agreement.

A further issue was raised into the status of Crown Roads which are owned by the Crown but managed by Local Government. It is unclear how the proposed legislation will apply in this situation.

## **Risk Shedding**

On first reading of the proposed legislation, the overwhelming impression from the road manager's point of view is that the legislation will result in road managers assuming a higher level of risk. This impression was reinforced at the consultation session when it was confirmed that prosecutions under the proposed Rail Safety Act would be "similar to WorkCover" in that they would be dealt with in the Industrial Magistrates Court, with appeals being dealt with by the District Court. This is a much higher level of liability being placed on councils as a result of the legislation.

There is a note at the end of the proposed Section 61C which states: "*Subject to local provisions (if any) that provide protection from civil liability for road managers – eg NSW Civil Liability Act 2002 s. 45.*" It is unclear from the information provided how this will work and what the ultimate outcome will be in NSW since the note is not part of the legislation as drafted.

The question of liability of Council Traffic Committees and their members has also been raised. Since traffic facilities on local roads are authorised by Traffic Committees under delegation from the RTA, this legislation will also increase the liability of Traffic Committee Members in relation to safety at road / rail interfaces. This liability will be shared by the NSW Police, the RTA, Council and the Local State Member.

IPWEA (NSW) supports any initiative which will improve public safety but will not support a proposal which will require councils and / or individual employees to be subject to an increased level of liability.

## **Cost Shifting**

The second impression of the proposed legislation is that it will result in a shifting of costs from the rail infrastructure owner to local government. This cost shifting may be an increase in direct cost allocation to council or indirectly by forcing councils to change their priorities.

The allocation of costs is an item that will be negotiated and included in each interface agreement. The two extreme positions in relation to negotiating interface agreements are: if there was no rail corridor there would be no risk to road users; or if there was no road there would be no risk to rail users. Cost allocation will be somewhere between these two extremes. What happens if there is no agreement on the appropriate allocation of costs? The *appointed person* will make a decision. Is this appropriate? As stated earlier, IPWEA (NSW) would like to see such arbitration undertaken through an independent process.

The extent of direct cost shifting will not become apparent until the first interface agreements are negotiated. However, issues such as council carrying out pavement works within the rail corridor and rail infrastructure managers requiring major changes to vertical and horizontal road alignments are of immediate concern to councils. The apprehension is that these decisions will be dictated to councils through the provisions of the draft legislation.

The other costing concern is that there is no mechanism available to recognise an individual council's risk management priorities. A situation where a rail infrastructure manager identifies a risk and requires the road manager to enter into an interface agreement. The agreement requires significant expenditure. The rail infrastructure manager views the work as a high priority while the council sees it as low priority because it has a considerable number of other (non rail) risk issues of higher priority. How will this be dealt with equitably?

IPWEA (NSW) is concerned at the possible cost shifting outcomes which may occur as a result of enacting this legislation. The limited consultation involving Local Government has not allowed these concerns to be adequately explored.

## **Available Skills and Experience**

Member Councils have expressed concern at the need to employ yet another set of skills as a result of this legislation. It is unlikely that any engineer employed in Local Government in NSW will possess the skills necessary to assess the risks existing at each road / rail interface. Likewise it is likely that few rail engineers will have the skills necessary to adequately assess the same risks. It will therefore be necessary to either train individuals to carry out this function or to employ suitably skilled consultants. Either approach will result in additional costs being incurred by both the road and rail managers.

This is a particular concern to regional councils that are currently bearing the brunt of the technical skills shortage and are having difficulty in raising sufficient revenue to fund existing tasks.

## **Implementation**

The proposed legislation if implemented will incur costs for each of the parties involved. Councils will need to allocate additional resources to this task which are currently not included in the annual budget.

There has been no discussion to date on how this process might be funded. These comments have been based on the assumption that councils will incur additional expenditure to implement the legislation and that no additional funding will be available to fund the actions identified in the Interface Agreements.

There will also be costs involved in drawing up interface agreements. At the very least, most councils will want to obtain legal advice before executing such an agreement.

IPWEA (NSW) requests that the cost implications to all parties in implementing these agreements be recognised and a source of funding identified prior to a final decision being made.

IPWEA (NSW) suggests that implementation costs could be minimised if a standard process is developed together with a standard form of interface agreement. This outcome could be facilitated by using the expertise of the existing Level Crossing Strategy Council and other interested bodies to develop a uniform assessment process based on the existing Standard *AS1742.7 Manual of uniform traffic control devices 1993*. The implementation process should also include the development of a standard form of interface agreement. IPWEA (NSW) would welcome the opportunity to make its skills and expertise available to assist in developing a standard assessment process, including a standard interface agreement, for use in NSW.

## **Conclusion**

IPWEA (NSW) supports the actions being taken by the National Transport Commission to better manage the risks associated with road / rail interfaces and requests that the following issues be taken into consideration in making the final decision:

1. The definition of Australian Road Rules as they will apply in NSW be clarified;
2. Application of the proposed legislation to pedestrian / rail, road / light rail and road / monorail interfaces be clarified;
3. Dispute resolution being administered by a totally independent referee or the creation of a reference group having representation from all parties;
4. Provisions of the NSW Civil Liability Act 2002 being incorporated into any legislation applying in NSW;
5. The function of Local Traffic Committees and their members in relation to the proposed legislation should be clearly defined;
6. An undertaking being given that implementation of the proposed legislation will not result in costs being shifted to Local Government;

7. Assistance will need to be given to Local Government to provide the additional skills necessary to adequately develop road / rail interface agreements;
8. The cost implications to all parties in implementing these agreements be recognised and a source of funding identified prior to a final decision being made;
9. Implementation of any adopted legislation be through standardised agreements developed by IPWEA (NSW) and the Local Government and Shires Associations in conjunction with the Level Crossing Strategy Council and other appropriate organisations.

IPWEA (NSW) would like to thank ITSRR for the opportunity to comment on the Draft Rail Safety Legislation. I reiterate that IPWEA (NSW) would welcome the opportunity to make its skills and expertise available to assist in developing a standard assessment process, including a standard interface agreement, for use in NSW.

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For further information in relation to the submission please do not hesitate to contact either Mick or myself

Yours faithfully



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