

# Regulatory Impact Statement: Providing better investigation powers under the Railways Act 2005

## Coversheet

Purpose	
Decision Sought:	Approving this work so consultation on a proposal to introduce better reactive investigation powers under the Railways Act 2005 as part of wider consultation on the proposed Land Transport Regulatory Systems (Transport) Amendment Bill No. 2 (RSTA Bill) can occur.
Advising Agencies:	Ministry of Transport / Waka Kotahi NZ Transport Agency
Proposing Ministers:	Minister of Transport
Date:	February 2022
Problem Definition	
<p>There is currently inadequate assurance that safety risks in the rail industry are being identified and remediated quickly, meaning that the regulatory system is failing to meet its purpose. Given its significant and growing role in the transport system, the safety risks are unable to be identified and managed in an effective and efficient manner.</p>	
Executive Summary	
<p>The Railways Act 2005 (the Act) does not provide the rail safety regulator with adequate reactive investigation powers common in modern transport regulatory toolkits. In other transport safety regimes in New Zealand, the transport safety regulator has specific powers to investigate and to take actions to conduct those investigations. The Act currently includes no specific powers for the regulator to effectively investigate accidents, incidents or significant cases of non-compliance to fully gain this understanding</p> <p>This has meant that the rail safety regulator, Waka Kotahi NZ Transport Agency (Waka Kotahi) is constrained in how investigations can be carried out, following a notifiable incident or accident, of which there are, on average, 2,400 annually.</p> <p>The current legislation also constrains how Waka Kotahi can investigate safety trends, which could include remote control shunting operations, maintenance errors, embankment slips post-severe weather events, and general safety culture. This means that there is a limited ability to monitor rail participants' adherence with safety requirements.</p> <p>These constraints present the potential for the rail system to become unsafe and we are seeking amendments to the Act to provide the rail safety regulator with adequate investigation powers. These powers cannot be obtained without a change to primary legislation.</p> <p>External reviews of Waka Kotahi demonstrated that Waka Kotahi's previous rail safety role was too passive, focussed on the licensing function and was not aligned to best</p>	

practice in rail safety regulation. These proposed changes will address concerns that were raised

As Waka Kotahi already has rail safety investigatory functions and capacity, there should be no additional costs for the organisation. However, if the volume of investigations increases to a point where extra resources are required, industry could face higher industry charges or higher costs in cooperating with those investigations. If extra resources are required at a later stage, this would require a funding review to occur as this function is run on a cost-recovery basis.

The changes would affect all rail participants. While comprehensive public and stakeholder consultation has not occurred, industry participants have expressed the view that Waka Kotahi, as the rail safety regulator, should have adequate powers to investigate rail accidents, or into unsafe trends to prevent these evolving into accidents.

#### Limitations or Constraints on Analysis

Public and targeted stakeholder consultation has not yet occurred. Data and views on the impact of these proposals from affected parties and the public will be collected and taken into consideration prior to making any final policy decisions.

Nevertheless, industry views are known, as Waka Kotahi carried out extensive public consultation on a new fees and charges regime in 2019. The regulator's function to investigate accidents was a key discussion item during the consultation, and all submitters agreed that the regulator should investigate accidents – the key issue was who should pay for them, given the sector runs on a cost-recovery basis.

In addition, discussions with participants directly and through industry bodies indicate broad support that the regulator needs to understand the causes of accidents to enable it to be effective (and ensure outcomes are improved because of that understanding).

From a system stewardship perspective, criteria has been applied to the analysis to ensure that there is some level of consistency across maritime, aviation and land in relation to how regulators may investigate incidents or accidents.

#### Responsible Manager

s 9(2)(a)  
Manager  
Regulatory Policy  
Ministry of Transport

#### Quality Assurance (completed by QA panel)

Reviewing Agency/Agencies: Ministry of Transport

Panel Assessment & Comment: The RIA was reviewed by the Ministry's RIA Panel given a 'meets' rating under the quality assurance criteria as an interim RIA for the purpose of seeking approval to consult. Any gaps will likely be mitigated by public consultation.

# Section 1: Outlining the problem

## Context

### The extent and scale of the national rail system

The Railways Act 2005 (the Act) sets the overarching legislative framework for rail safety regulation. It establishes Waka Kotahi NZ Transport Agency (Waka Kotahi) as the rail safety regulator (the regulator). It provides the regulator with powers to licence rail operators, including those who manage access to rail track and unlicensed rail participants. The Act empowers the regulator to restrict or prohibit an unsafe rail operation, or require a licence holder to undertake safety improvements.

New Zealand’s rail network has around 4,500km of publicly owned rail track, referred to as the National Rail System (NRS). Separate to the NRS is an additional 500km of private rail track. Kiwirail is the NRS access provider (with few exceptions) and also maintains the track and associated track operation systems. All transit across the NRS is controlled by about 3,100 signals, travels over 1,600 railway bridges, across about 3,000 level crossings, and through 150 railway tunnels.

The NRS carries people and goods across the country, interrupted only by the Cook Strait, with freight and passengers being transferred to ferry operations. The extent of the NRS is shown in the following figure.



Figure 1: The NRS (note South Island Wingatui to Middlemarch and Kingston lines were formerly part of the NRS, but are now private track)

### Usage and value of the national rail system

Pre-COVID, the NRS carried around 36 million passengers annually, made up of:

- around 2 million tourist and heritage passengers
- 360,000 long distance (inter-city service) passengers and
- 33.5 million passengers carried on the Wellington and Auckland metropolitan services.

The NRS also carries around 17 million tonnes of freight annually (making up about 25 per cent of exports by freight tonnage). By 2052, freight tonnage in New Zealand is expected to increase by more than 40 per cent, with the rail network expected to play an important role in supporting this growth.

In addition to the above totals, it is estimated that rail contributes between \$1.7 and \$2.1 billion per year in wider economic benefits, derived from:

- reduced road congestion
- reduced road vehicle emissions
- reduced fuel use by road vehicles
- reduced road maintenance costs
- improved road safety outcomes<sup>1</sup>

Rail is a key part of New Zealand's multi-modal approach to transport and contributes to the overall resilience of the system. Its growing role in the system has been signalled in a range of Government policies to date, reflected in the current Government Policy on Land Transport. It also has an important role to play in assisting New Zealand transport reduce its carbon emissions due to its advantage in moving large quantities of freight and large numbers of passengers using a single locomotive. The carbon emitted is much less than petrol- or diesel-powered road vehicles moving the same quantities over the same distance.

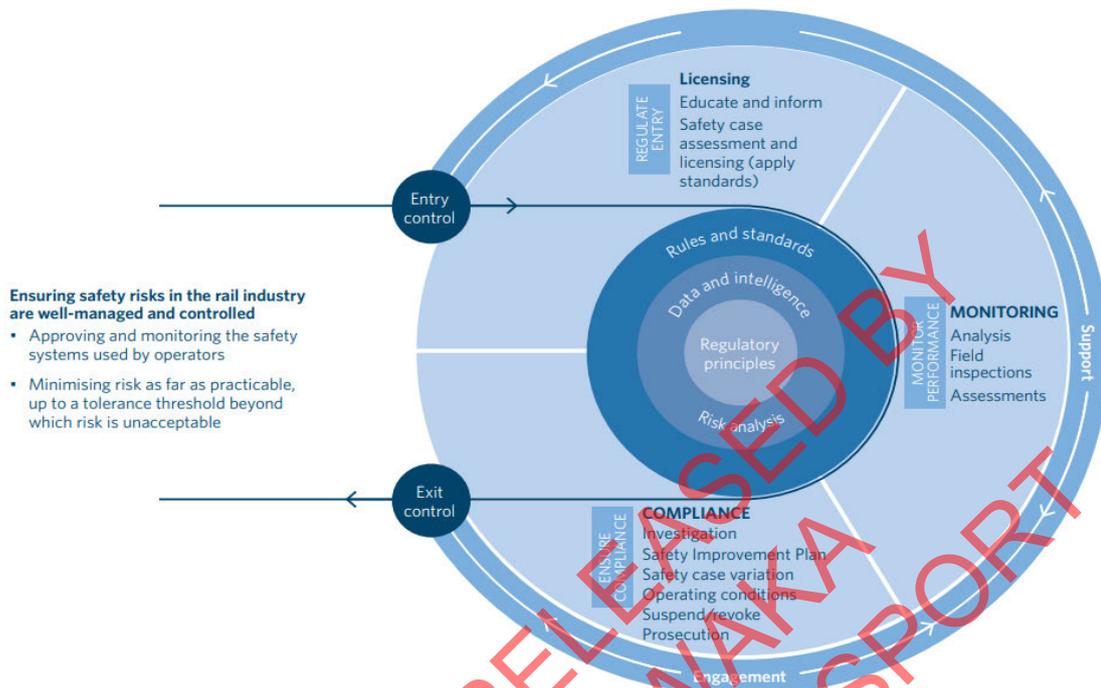
#### **Waka Kotahi regulates the system, including licensing**

The rail system is regulated by a national rail safety regulator, Waka Kotahi, which regulates the system under the Act and the Railways Regulations 2019. The Land Transport Act 1998 provides additional audit powers, including for a dangerous goods officers to inspect railway lines, premises, or any rail vehicle to ensure compliance with dangerous goods requirements. Additionally, the Director of Land Transport has specific powers, functions and responsibilities for the regulation of rail transport under the Act.

---

<sup>1</sup> [The value of Rail in New Zealand: report for the Ministry of Transport \(February 2021\)](#)

## RAIL SAFETY REGULATOR ACTIVITIES



Regulatory activities are undertaken for the purpose of:

- assuring public safety – the Transport Agency, as the independent regulator, acts in the public interest by assessing the safety performance of rail participants, identifying risk of harm, and proactively addressing these risk with the rail industry
- ensuring rail participants comply with relevant legislation, rules, regulations and standards and take responsibility for a high level of safety management and, where appropriate, holding operators to account for their safety performance
- encouraging continuous improvement for all rail participants to implement safety risk management practices that exceed the minimum requirements of the act.

Figure 2: the regulatory oversight over rail participants

The rail industry is a high-risk industry where complex safety systems are required to continually perform correctly to avoid the risk of catastrophic accidents. A single commuter train can carry 700 people. A catastrophic accident involving such a train could result in many deaths and an even greater number of serious injuries (for example, the 1977 Granville commuter train derailment in New South Wales resulted in 83 passenger deaths and 213 injuries).

As a result, the barriers to entry into the rail licencing system are high compared to other modes of transport, as are the requirements to remain licenced. Due to these high barriers and maintenance requirements, the rail transport licencing system is defined as a 'closed-system' in systems theory. This is contrasted with the road transport systems in which low barriers to entry and relatively easy to meet maintenance requirements mean that most of the working age population in New Zealand have access to a vehicle.

There are approximately 300 rail participants in the New Zealand rail sector. Rail participants are defined in the Act as infrastructure owners, rail vehicle owners, railway premises owners, access providers, rail operators, network controllers, maintenance providers, and railway premises managers.

Of these participants, around 80-90 hold rail licences under the Act, either as an access provider, rail operator (and two others are required by Regulations to hold a licence<sup>2</sup>). To be granted a licence, a safety case underpinned by a safety system must be presented and approved by Waka Kotahi.

### **Waka Kotahi currently focusses on licensing and proactive investigations**

The current rail safety regulatory system is intended to prevent major rail accidents and significant risks of harm to passengers, users and workers in the system. To enable this, an in-depth understanding of the precursors to incidents, and how these can be prevented is required. This a complex process as crashes are often characterised by having multiple factors that contribute to the accident/incident.

Currently, the Act requires a rail operator or access provider (rail licence holder) to notify Waka Kotahi of any accident or incident as soon as practicable after the accident or incident occurred. Waka Kotahi currently has the following options available after a rail accident or incident has been notified:

- Use of other powers in the Act to require the rail participant to enquire into possible systemic risks highlighted by the incident, and to address them
- Co-operative investigations with NZ Police using its powers
- Co-operative investigations with WorkSafe using its powers
- Building relationships with Transport Accident Investigation Commission (TAIC) to leverage their findings (noting that it is generally not possible to use any evidence TAIC gained through its investigations in a prosecution)<sup>3</sup>
- Use of Special Safety Assessment powers to seek information and implement interventions
- Voluntary investigations, where the licensee consents to and assists, or acting on tip-offs and whistleblowing
- Audit powers under the Land Transport Act 1998.<sup>4</sup>

Waka Kotahi has tended to focus on the rail licensing regime (e.g. requiring safety cases for new entrants to the industry), and an approach where identified risks are managed proactively e.g. through Ordinary Safety Assessments (OSAs) and SSAs.

However, external reviews of Waka Kotahi demonstrated that Waka Kotahi's previous rail safety role was too passive, focussed on the licensing function and was not aligned to best practice in rail safety regulation.<sup>5</sup> This led to an increase in rail funding over the period from 2019 to 2024 to increase the resourcing and operating budget for Waka Kotahi's rail safety function.

---

<sup>2</sup> Under clause 16(1) of the Railways Regulations 2019, Driving Creek Railway of Coromandel and the Whangaparaoa Narrow Gauge Railway of Auckland are required to hold licences.

<sup>3</sup> Under section 13(4) of the Railways Act 2005, Waka Kotahi is required to notify TAIC of any accident or notifiable incident (where a person has been, or could have been, placed at risk of death or serious injury or where property has been, or could have been, at risk of significant damage). Information provided to TAIC can be compelled, but is provided on a 'no faults basis', as TAIC does not prosecute those at fault.

<sup>4</sup> Waka Kotahi is currently in the process of being designated under the Health and Safety at Work 2015 as a designated agency. This would increase the options that Waka Kotahi can currently consider – this is reflected in the Option 1 counterfactual.

<sup>5</sup> Independent review of New Zealand Transport Agency Rail safety team (ATRS, 2013), Navigatus Report.

As part of providing assurance over this funding, Waka Kotahi will enhance its capability and long-term performance. In the 2019 to 2024 funding period, the regulator will apply improved approaches and additional resourcing to transition to a modern, proactive, intelligence-led, risk-based regulator. Activities have included the development of new investigation guidelines and a Regulatory Risk Management Framework, which will enable Waka Kotahi to accurately identify where the greatest risks are and then direct resources to address those risks.

Under current legislation, Waka Kotahi is the only regulator with a jurisdiction to prosecute safety failings in all parts of the rail system (WorkSafe and NZ Police have powers covering some rail activities, but not all). The lack of investigatory powers restricts the ability of Waka Kotahi to take action. It also creates a lack of coherence in the complimentary roles of Waka Kotahi and the other transport regulatory agencies (Maritime NZ and Civil Aviation Authority), which have extensive investigatory powers to ensure they can quickly carry out their investigative and prosecutorial responsibilities

### What is the policy problem or opportunity?

#### **There is little assurance that risks are being addressed quickly**

There is currently inadequate assurance that safety risks in the industry are being identified and remediated quickly, meaning that the regulatory system is failing to meet its purpose. Given its significant and growing role in the system, the risk profile of these issues is increasing.

The settings in the Act were premised on the rail regulator having a largely passive administration role, with OSAs and SSAs being conducted by approved third parties. The limitation of this model is that it limits the ability of the regulator to effectively manage safety risks, coupled with the lack of accountability on behalf of third party certifiers. The regulator is currently constrained in the information that can be gathered, as this is only provided on a voluntary basis by licence holders.

#### **The regulator has been provided limited powers under the current legislation**

In other transport safety regimes in New Zealand, the transport safety regulator has specific powers to investigate and to take actions to conduct those investigations.<sup>6</sup> The Act currently includes no specific powers for the regulator to effectively investigate accidents, incidents or significant cases of non-compliance to fully gain this understanding. For instance, there are no specific powers to:

- Issue non-disturbance notices
- Inspect non-licensed participants
- Enter premises of non-licensed participants
- Seize documents, interview persons, take statements (unless conducting an SSA)
- Apply for search warrants under the Search and Surveillance Act 2012.

Waka Kotahi is currently using these available options, through relying on other regulatory agencies such as NZ Police or TAIC. Most prominently, Waka Kotahi have no comparative coercive powers to compel information or powers to induce cooperation when conducting investigation. Currently the investigations rely on the voluntary cooperation of the licence holders. This leads to an inadequate information-gathering process to support an investigation or compel eventual improvements from a rail licence holder, as the team may

---

<sup>6</sup> See: Section 15A, 21, 24 Civil Aviation Act 1990 (soon to be replaced with Part 9 of the Civil Aviation Bill), Sections 54-60 Maritime Transport Act 1994.

be unable to carry out all the activities required for an effective accident investigation, including:

- preserving and collecting evidence at a crash scene
- accessing sites for inspection
- requesting materials for examination
- interviewing personnel involved in a safety occurrence (unless a special safety assessment is launched); and
- requiring identified failings to be remediated by the rail participant(s).

s 9(2)(g)(i)

### There are limitations on who can address concerns

Since 2005 when the current Act was passed, the rail safety regulator has been able to prosecute only two cases for breaches of requirements.<sup>7</sup> Those prosecutions relied heavily on voluntary cooperation by rail participants and conducting SSAs.

Under the current system, the regulator typically conducts 20 investigations per year. These investigations stem from the 2,400 notifiable incidents or accidents that occur per year on average. Following investigations being completed, it is typical for two to four special safety assessments to be carried annually.

Table 1: Examples of accidents and notifiable incidents

Incident type	2019	2020	2021
Trespassing – person on corridor	451	336	384
Near Collision Person	71	34	24
Collision Person	5	3	3
Signal Fault	188	117	130
Collision Illegal Obstruction	86	43	100
Damage by Light Road Vehicle	157	112	99
Near Collision Light Road Vehicle	149	90	98
Collision Light Road Vehicle	9	8	24
Derailment	147	101	99
Damage by Heavy Road Vehicle	71	71	81
Near Collision Heavy Road Vehicle	38	24	23
Collision Heavy Road Vehicle	3	4	4
Safe Working Irregularity	122	94	76

<sup>7</sup> The two cases referred to are:

- Waka Kotahi v Daily Freight (1994) Ltd (June 2019) – a shunting incident at Daily Freight’s Auckland rail yard.
- Waka Kotahi v KiwiRail Holdings Ltd and MBD Contracting Ltd (July 2020) - Incident near the 159km mark of the Midland line, on the West Coast. During a routine maintenance task, a person was struck by moving machinery and later had a leg amputated.

<b>Track Defects</b>	97	85	74
<b>Signal Passed at Danger – near collision of two trains</b>	33	27	23

As Waka Kotahi are notified of incidents or accidents, a 'level of risk' assessment is undertaken. This process considers 'credible worst outcome' and 'effectiveness of safety barriers' to rank the incident. As an example, an incident that had the potential for minor injury, and effective barriers would not be likely to warrant a full investigation. This is in comparison, where a derailment that could have resulted in multiple fatalities would indicate that an investigation is appropriate. Investigations are initiated to address identified risk trends, or emerging issues.

The regulator needs to be able to credibly investigate non-compliance to provide a stronger incentive for compliance, and where non-compliance is detected, deliver more effective consequences. Currently, non-compliance can largely only be addressed using the SSA process but Waka Kotahi has no ability to compel evidence from parties. Relying on the cooperative investigations limits the effectiveness of these investigations.

The lack of an investigatory power also poses risks to system coherence. The Act currently recognises the necessity for investigations by the rail safety regulator in other ways, e.g. allowing for prosecutions, requiring the regulator to have a memorandum of understanding with WorkSafe regarding investigations conducted and prosecutions taken under either the Act or the Health and Safety at Work Act 2015 (HSWA). The Land Transport Management Act 2003 also recognises investigation as a function of Waka Kotahi. Waka Kotahi is currently the only regulator with the jurisdiction to prosecute safety failings in all parts of the rail sector.

Relying on the cooperation of partner agencies (NZ Police and TAIC) is curtailed by the limited resources available from those agencies to support rail investigations in relation to their competing priorities. NZ Police and TAIC have very broad jurisdiction to investigate accidents and incidents and are not able to dedicate resource to thoroughly investigate every rail accident or incident.

The powers in the Policing Act 2008 and the Transport Accident Investigation Commission Act 1990 are also not suited to address the system-specific aspects of rail safety. The Policing Act establishes a legislative framework to prevent and investigate the commission of crimes, while the TAIC Act is premised on non-fault findings and not ascribing liability to individual operators or entities. It is generally not possible to use any evidence TAIC gained through its investigation in a prosecution. Further, neither piece of legislation is specific to the operation of rail transport.

A SSA is predominantly used as a reactive measure. If there is a pattern of similar incidents, the regulator may become sufficiently concerned to initiate a SSA to determine the extent of the issue in order to attempt to prevent a potential catastrophic event.

The SSA process often leads to weeks-long delays in gathering information, which impacts the recollection of events and the state of the site. Using SSAs in this manner also risks undermining the integrity of the assessment process, which is meant to be a systems-level proactive examination of issues, not a reactive investigation into a failure that has happened. The regulator having a proper investigatory power would provide clarity for all parties involved.

## What objectives are you seeking in relation to this policy problem or opportunity?

The problem and options are analysed against the background of regulatory stewardship, which recognises the role of the Ministry in ensuring that legislation is fit-for-purpose and provides regulators with necessary levers and tools to improve the safety of the system.

Regulatory stewardship includes activities that ensure that we treat the regulatory system like a core asset requiring assessment, maintenance and where appropriate replacement. This provides for a regulatory system that is integrated, safe, responsive and sustainable. These are the objectives set out for the transport system.<sup>8</sup>

The issue assessed in this Regulatory Impact Analysis, along with a package of other stewardship proposals, will form part of the RSTA Bill. This Bill will include moderate-impact improvements to primary transport legislation to clarify regulatory roles, responsibilities and requirements in the regulatory system; to maintain safety through responsive regulatory action; and address inconsistencies, improving system efficiencies and removing duplication.

These objectives have also influenced and guided the criteria that the options to treat the policy problems were assessed against. The criteria have been specifically developed to assess the options proposed below.

---

<sup>8</sup> [Transport regulatory stewardship | Ministry of Transport](#)

## Section 2: Option identification and impact analysis

### Options will be assessed against four criteria

These criteria support the overall objectives of the Bill but provide a more specific framework to measure individual options against. This will ensure that the options meet the objectives individually.

Criteria	What this means
<b>Effectiveness</b>	<p>This is the degree to which a policy intervention is successful in providing assurance that risks in the system can be identified and resolved quickly.</p> <p>If this is reached, from a regulatory stewardship perspective, ensuring that the system is coherent and consistent and utilises best practice from other transport regulators</p>
<b>Safety</b>	<p>This is the level of improvement and protection from harm for people, infrastructure and other interests. Safety is a core outcome/component of the transport system.</p> <p>For the rail transport system, safety means the ability for the intervention to be reasonably practical to prevent harm and to minimise risk of harm and damage.</p>
<b>Responsiveness</b>	<p>This is the level at which the intervention strikes the right balance between compliance (voluntary) and enforcement (coercive) of regulation. This criterion aims to assess the flexibility and appropriateness of regulatory powers and responsibilities.<sup>9</sup></p> <p>For the rail system, responsiveness means not curtailing the ability of the rail participants to identify, manage and treat their own risks; while retaining the powers of the rail safety regulator to intervene when required and appropriate.</p>
<b>Proportionality</b>	<p>This is the assessment of the impact/intensity of the intervention power and the size and scale of the policy problem. This criterion aims to assess the impact of a regulator power in terms of its necessity and reasonableness when responding to an action, and whether it is either excessive, inadequate or 'just right'.</p> <p>In the rail transport system, the proportionality of an intervention aims to strike the right balance in the interest of the risk presented by rail transport and the ability of operators and licence holders to reduce, treat and mitigate the risks, with the intervention powers that the regulator can/should exercise.</p>

<sup>9</sup> Generally, a regulator will help guide compliance through non-regulatory interventions (information and education, non-statutory warnings) but also needs to be equipped to take regulatory interventions (statutory warnings, license suspensions, prosecutions) when deemed necessary.

## What scope are you considering options within?

In the context of regulatory stewardship, consideration of options for this proposal focused on exploring different parameters for a new investigatory power by emulating the provisions in the Civil Aviation Bill, which aims for a modern, response and best-practice regulatory framework. The provisions in this Bill reflect modern best practice for regulators and ensure that the legislation is future focussed.

The powers in existing, older, legislation are generally products of their time and context, making them less applicable for rail.

For example, the investigation powers in the Transport Accident Commission Act 1990 are not suitable for replication as the TAIC does not have powers of sanction (e.g. prosecution), whereas Waka Kotahi does. This means TAIC's powers has almost no direct conflict with criminal process rights contained in the New Zealand Bill of Rights Act 1990 (BORA). This means that as TAIC investigations are not geared towards attributing blame, there is no risk of self-incrimination and hence, a person cannot reasonably refuse to co-operate in an investigation. In comparison, Waka Kotahi investigations are subject to BORA requirements and the justified limitations, so any new investigatory power needs to be consistent with these.

The Civil Aviation Bill, HSWA and the Rail Safety National Law (South Australia) Act 2012 provide more modern examples on which to base a new investigatory power. The preferred powers would include:

- Standard powers of investigation (e.g. requests for information, conducting interviews, accessing property, seizing records and evidence, and freezing a scene), while continuing to maintain the separation and hierarchy of TAIC powers; and
- The use of Remedial Actions and Safety Improvement Plans as direct responses to findings from investigations. These existing powers can currently be used in response to safety assessments and would need to accommodate findings from a new investigatory power.

This Regulatory Impact Statement serves as a preliminary analysis of the options to support Cabinet's decision to approve public consultation. Through public consultation and engagement with the proposals, the evidence base can be strengthened and broadened, the proposals can be refined to decrease the risk of unintended consequences, and the practice and aims of regulatory stewardship embedded more fully through the transport sector. The release of the consultation document will invite feedback on the proposals to consider the real-world implications, and lead to better outcomes for the transport sector.

A revised and updated Regulatory Impact Statement will be provided when Cabinet is invited to make final policy decisions, which will include the outcome and stakeholder views on the options.

Future work is also planned on the licensing regime to include a more responsive and risk-based approach to requiring licences to be held. More secondary legislation is also planned to add clarity to the requirements under the Act through Regulations that expand the coverage of the licensing regime.

## Describe and analyse the options

### Option 1A – Status quo

#### Description

This is the baseline option with no operational or legislative changes, and considers the current state. This current state would see Waka Kotahi continue operating without any further interventions, of either an operational or legislative nature, and continue regulating rail safety under the existing provisions of the Railways Act 2005 and existing tools and instruments as specified under its operational policies.

#### Analysis

This status quo poses risks to the system. By relying on regulatory powers under other legislation (such as TAIC Act, Policing Act, and the Land Transport Act), there is a system coherence issue, as while there is a gap that the Railways Act is responsible for, other regimes provided for in the TAIC Act, Policing Act and the Land Transport Act could fill these. However, this would not follow best regulatory practice to have the regulator rely on third parties and their relevant powers to carry out the identification of faults, improvements and regulatory responses.

The status quo would not deliver improvements in the effectiveness of the interventions. Waka Kotahi would continue to rely on its powers under the Railways Act 2005. These are limited to interventions under the licencing system as exercised through the OSA and SSA process.

There would be no costs to Waka Kotahi and no impacts to the wider rail participants under this option. However, there would be no additional benefits in terms of the effectiveness of the exercise of the powers under the Railways Act, the overall safety of the rail system to both passengers, freight and infrastructure, there would be no improvement in the responsive exercise of powers under the Railways Act (which is limited to monitoring compliance under the OSA and SSA, and making licencing decisions such as suspension, revocation and prosecutions).

As outlined, there are several current and latent risks to the system without an ability to investigate accidents and incidents. Accordingly, the status quo does not address the effectiveness and responsiveness that should be the basis of the powers and functions of a modern regulator.

### Option 1B - Counterfactual

#### Description

In addition to the status quo a counterfactual has been assessed. The counterfactual option makes no specific legislative changes, but assesses the future state. The future state would see Waka Kotahi being designated as the Health and Safety regulator under section 191(1) Health and Safety at Work Act 2015.<sup>10</sup> This work is currently being progressed.

As a designated agency – in this case: Waka Kotahi – performs the functions and can exercise the powers (subject to the scope of the designation) under the Health and Safety at Work Act 2015.

---

<sup>10</sup> The investigation into the HSWA designation was commissioned following the Cabinet decision on establishing the Director of Land Transport.

Under the Health and Safety at Work Act 2015, Waka Kotahi would have several tools that it could use:

- Directive advice: requiring certain directive steps to be followed, with these steps outlined verbally or in a letter. This directive advice is retained on record to assess future compliance of operators against.
- Issuing a range of notices, specifically:
  - *Improvement notices*: these require changes to be made to improve a risky situation, within a specified period of time.
  - *Infringement notices*: these require the responsible party to pay a fine for breaching specified health and safety obligations.
  - *Prohibition notices*: these require activities that pose a serious risk to people's health and safety to be stopped immediately, until the problem is resolved.
  - *Non-disturbance notices*: these require a worksite to remain undisturbed for a set amount of time, if a notifiable event has happened (e.g. if a worker has been killed or seriously injured).
  - Remedial actions: these require the responsible party to take remedial action to make a workplace safe where a prohibition notice has not been reasonably complied with.
  - Enforceable undertakings: these are an alternative to prosecutions. When Waka Kotahi agrees, a responsible party can voluntarily enter into a binding agreement to settle the alleged breach of health and safety law, and remedy the harm caused.
  - Prosecutions: Ultimately, Waka Kotahi could bring a prosecution for breaches of health and safety laws. Upon conviction, a court can order the responsible party to pay a fine, complete an order or impose a term of imprisonment.

#### *Progress on HSWA designation*

The Ministry of Transport is currently working with Waka Kotahi, WorkSafe and the Ministry of Business, Innovation and Employment on the proposed designation of powers under HSWA. At this time, it is intended that advice would be provided to Ministers by the end of June or early July

#### *Transfer of responsibilities to WorkSafe*

The counterfactual is also closely related to the option of transferring responsibility for rail safety to WorkSafe as a specialised agency. This option would see all investigation powers for rail safety transferred from Waka Kotahi to Work Safe. Work Safe would then function as the primary rail safety regulator instead of Waka Kotahi. Due to the identical nature of this option in practice, it has not been separately assessed, but forms part of the analysis of the counterfactual. The functions that WorkSafe would have under this option, as well as the ability to exercise its powers under the HSWA are near identical to the counterfactual.

This option would still have Waka Kotahi administer the functions under the Railways Act 2005 related to licensing and regulating participants under the existing provisions. Waka Kotahi's regulatory powers under the Railways Act 2005 are not as strong as those that WorkSafe has under the Health and Safety at Work Act 2015.

#### **Analysis**

The counterfactual would deliver a slightly improved outcome overall, by including investigation powers that Waka Kotahi can exercise more directly, when considered against the status quo.

However, there are limitations in how Waka Kotahi can exercise the powers. The powers under HSWA must be exercised in line with the purposes of the Act. The main purpose of the Act is to provide for a balanced framework to secure the health and safety of workers and

workplaces.<sup>11</sup> This forms an inherent limitation on how the powers within the Act can be exercised: the main purpose of the Health and Safety at Work Act is not specific to the risks and to the functions of the regulator within the rail system. The purpose of the Railways Act, by comparison, is to promote the safety of rail operations by stating the duty of rail participants to ensure safety.<sup>12</sup>

While the powers are an improvement over the status quo, they are limited in their effectiveness, as Waka Kotahi may not exercise the HSWA powers beyond the HSWA purposes. This would mean that safety related investigations and powers that do not affect workers or workplaces but relate to a significant risk to the management of the rail corridor or network, would not be able to be exercised under the designation. This limits the extent to which the powers achieve the purpose of safety under the Railways Act.

There are safety improvements between the counterfactual and the status quo. The ability of using the HSWA powers (even if limited to being exercised in line with the purpose of the Act) can increase overall safety. By being able to exercise powers to reactive investigation, Waka Kotahi can issue improvement notices under the HSWA to better achieve future outcomes. Incidents and accidents that are unrelated to the safety of workers and workplaces would not be subject to the regulatory regime of the HSWA notices. No regulatory action could be taken in relation to the licences of participants under the Railways Act if the investigation brought relevant facts to light.<sup>13</sup> This would curtail the rail-specific safety aspects of the designation powers under HSWA. Overall, the HSWA powers under a designation are not directly linked to the Railways Act and the functions that Waka Kotahi has as the rail safety regulator.

The powers that a regulator can exercise under a HSWA designation are a more responsive regulatory regime than the status quo. The HSWA uses a responsive framework of interventions that provide broad discretion to the regulator to respond to incidents of non-compliance. This responsive framework includes the use of enforceable undertakings and remedial notices instead of licence suspension, revocations, conditions or prosecutions as exercised currently by Waka Kotahi and/or Director under the current Railways Act. The key limitation to the effectiveness of this regime remains in the sense that the responsive interventions can only be exercised to fulfil the purposes of the HSWA.

In conclusion, the counterfactual option offers improvements when assessed against the status quo. However, there is a structural weakness to this proposed option, as it would equip Waka Kotahi with powers that could not be utilised for all Railways Act purposes.

#### **Option Two – introduce reactive investigation powers (preferred)**

##### **Description**

This option would introduce the core investigation powers, which would be modelled on those provided in the Civil Aviation Bill. This would see legislative changes to include the specific reactive powers to:

---

<sup>11</sup> Section 3(1) Health and Safety at Work Act 2015.

<sup>12</sup> Section 3(a), (b) Railways Act 2005.

<sup>13</sup> Waka Kotahi retains its ability to issue safety improvement plans under section 36 Railways Act 2005 if the Director has reason to believe that the rail participants has failed to take remedial action under sections 42 and 44 Railways Act 2005. However, the impact of notices under HSWA are not included in this assessment.

- issue non-disturbance notices
- inspect non-licensed participants
- enter premises of non-licensed participants
- seize documents, interview persons, take statements
- apply for search warrants.

The powers above would be drafted into the Railways Act 2005 and would align with similar powers that can be exercised under HSWA. The powers would be specific to the rail regulatory system, not exercised directly under HSWA as in Option One – counterfactual.

Under this option, when a rail accident or incident occurs, Waka Kotahi could intervene directly by using powers under the Railways Act to freeze a scene, inspect and interview participants to the accident or incident independently of whether they are licenced or not. The powers would extend to entering premises, seizing documents, and interviewing personnel. Should the investigation of the accident or incident require it, Waka Kotahi could apply for search warrants under the Search and Surveillance Act 2012.

Any evidence that Waka Kotahi uncovers during these investigations can be used for future regulatory interventions. This is the preferred option of the options analysed.

### Analysis

This option provides an effective response power to respond to accidents and incidents involving rail transport. Waka Kotahi would be able to rely on powers that they are equipped with directly under the Railways Act, rather than relying on health and safety legislation. The rail system relies on the safety regulator making licencing decisions based on risk and evidence. Under the current status quo, no evidence can be uncovered as the powers exercised to respond to an incident are not specific to rail safety regulation, but to prevent harm to the broader public. By providing Waka Kotahi with direct powers an effective exercise of its functions, powers and responsibilities can be achieved.

Equipping Waka Kotahi with specific powers under the Railways Act improves safety, albeit indirectly. The proposed powers would have a limited impact on *preventing* an accident or incident from occurring – the powers are reactive investigation powers and cannot be exercised proactively.<sup>14</sup> However, by providing Waka Kotahi with improved powers to support making licencing decisions and taking other regulatory actions to carry out thorough investigations and undertake more targeted actions, system safety can be improved by preventing recurrences of the same incidents or accidents. Both situations assessed under Option 1 (both counterfactual and the status quo) do not result in any evidence being uncovered that could be used in regulatory decisions made under the Railways Act.

Should an incident or accident reach a threshold that leads to the Transport Accident Investigation Commission (TAIC) leading an investigation, this is conducted on a no-fault basis.<sup>15</sup> Any evidence that TAIC sees and investigates is not directly used for regulatory decisions by the regulator. Accordingly, the powers under Option 2 would be complementary to the actions and investigations that TAIC takes. The specific powers proposed under Option 2 would enable Waka Kotahi to make regulatory decisions that improve system safety.

---

<sup>14</sup> Proactive powers are exercised through the Ordinary and Special Safety Assessments of licence holders under the Railways Act.

<sup>15</sup> The purpose of the Transport Accident Investigation Commission is to “determine the circumstances and causes of accidents and incidents with a view to avoiding similar occurrences in the future, rather than to ascribe blame to any person”, section 4 TAIC Act 1990.

The proposed powers under Option 2 would make responsive improvements to the regulatory tools that the safety regulator can use. Currently, under the status quo, Waka Kotahi can only take regulatory action in relation to licence holders. These powers include the provision of temporary conditions to the licence<sup>16</sup>, the suspension<sup>17</sup> or imposition of permanent conditions or revocation of the licence.<sup>18</sup> There is a risk under the status quo that the extreme nature of these options could mean that the regulator may take no action where these powers seem disproportionate to the issues identified, which reduces the opportunities for safety interventions. By introducing responsive interventions, such as the ability to issue improvement notices and remedial notices for investigated failings, these regulatory decisions are broadened to improve the levels of interventions that Waka Kotahi can take.

The interventions are broadened in the sense that other non-licenced participants can become subject to the improvement and remedial notices. The responsiveness of the interventions is improved in the sense that the regulator has additional scalable interventions that it can take to tailor the regulatory response to the investigated accident or incident.

Early engagement with KiwiRail and City Rail Link has indicated that it would welcome the inclusion of specific powers to reactively investigate accidents and incidents.<sup>19</sup> Currently any information and evidence provided is done so on a cooperative and collaborative basis, but uncertainty continues to exist about the extent of this cooperation and collaboration. Placing any investigation powers on a firm legislative footing provides clarity and transparency for both KiwiRail and Waka Kotahi, and other licence holders, as to the purpose, nature and extent of the investigation powers.

Finally, Option 2 improves the effectiveness and responsiveness of the regulator's role, through moving compliance activities away from being largely voluntary. Overall, the powers proposed under Option 2 are proportionally intrusive powers to meet the risks posed by the rail transport system. The rail transport licencing system is defined a closed system in systems theory. This is characterised in transport-specific terms as having high barriers of entry, stringent maintenance requirements of licence holders and clear exit requirements. This is contrasted with the road transport systems in which low barriers to entry and relatively easy to meet maintenance requirements mean that most working age New Zealanders have access to a vehicle. The risks inherent in rail transport are elevated and can be classed as catastrophic if they are realised. Consequently, regulatory interventions are more intrusive than in other regulated activities.

The threshold for exercising the powers will be reasonably high and concomitant to the risk that the accidents and incidents pose. The ability of the licence holder to investigate and assure improvements in its operations will be considered. In summary, Option 2 meets the criteria outlined and presents the preferred option.

---

<sup>16</sup> Section 23 Railways Act

<sup>17</sup> Section 23 Railways Act

<sup>18</sup> Section 24 Railways Act

<sup>19</sup> The Ministry of Transport and Waka Kotahi have engaged in targeted consultation on the proposal to include investigation powers in the Railways Act 2005 through the National Rail Industry Advisory Forum. Public consultation will allow a fuller and more comprehensive engagement with a broader range of industry participants to better understand the impacts and proposed benefits.

### Option three – designating Waka Kotahi’s safer rail investigators under a warrant

#### Description

This option would allow the Commissioner of Police to appoint a person under a warrant to be an enforcement officer under the Railways Act 2005.

The general enforcement powers under the Land Transport Act include, but are not limited to:

- Directing a person to give that person’s particulars (such as name, address, date of birth and contact information)
- Inspect, test and examine records (including land transport documents, logbooks, vehicle maintenance records)
- Giving directions prohibiting the driving of vehicles (by affixing a notice) until the vehicle has complied with all regulatory requirements
- Powers of entry (with or in certain circumstances without a search warrant), arrest of persons for alcohol or drug-related offences, and immobilisation of vehicles due an impairment of the driver.

These are general enforcement powers under the land transport system and are exercised by enforcement officers in uniform, in possession of a warrant. A warranted enforcement officer is a constable, an NZ Police employee, a person who is appointed as an enforcement officer under the Land Transport Act by the Police Commissioner or the Agency (or for, moving vehicle offences, Waka Kotahi can be an enforcement officer for issuing infringement notices).

Waka Kotahi uses warranted officers (who are largely, or all, warranted by Waka Kotahi and not the Police) to regulate Transport Service Licence holders such as truck freight companies and passenger services companies (taxis/ride share). Warranted officers can be used to issue infringement notices under the Road User Charges Act 2012, but these officers do not have extra investigation powers.

The drafting of the individual powers is very specific to road transport, so significant amendment would be required to make the wording applicable to the operation of rail transport.

#### Analysis

Appointing a warranted enforcement officer for the purposes of the Railways Act would have limited effectiveness operationally. Including broad but non-rail-specific powers from the Land Transport Act 1998 over the rail regulatory system is not as effective as the counterfactual. The individual powers of the enforcement officer are drafted specifically with road transport in mind meaning, significant re-drafting would be required to make the provisions and powers apply more neatly to rail operations. This may lead to confusion and inconsistencies across the powers under the Railways Act 2005 and the Land Transport Act 1998 powers that can be exercised under a warrant.

There are only limited improvements in terms of safety. The powers do not include specific remedial powers such as issuing improvement or remedial notices and are not aimed at making improvements to overall system safety. The lack of powers to issue specific improvement or remedial notices means that no ongoing or lasting safety improvements above the status quo. The general enforcement in the Land Transport Act are exercised against members of the public and are reasonably intrusive.

The full extent of safety improvements would be difficult to realise under this Option as the nature of the appointment under the warrant is limited to a subset of individuals and cannot be delegated further. This safeguards the integrity of the intrusive powers but makes the operation more difficult in the rail safety system.

The powers under Option 3 would be equally as responsive as the current state. The general enforcement powers exercised by warranted officers are coercive and do not make significant improvements to the responsiveness of interventions. Without specifying the powers under the Railways Act 2005, and the regulated parties' requirements to comply, licence holders and other participants do not have an ability to identify, manage or treat their own risks in the system beyond the current status quo. Using the warranting powers under Option 3 makes the exercise of the powers entirely coercive and brings them in line with policing powers, as opposed to responsive regulatory powers.

Finally warranting officers to enforce the Land Transport Act powers in the rail regulatory system, would include coercive powers that go beyond the proportional current state. This would not signify improvements to the areas at which these powers are levelled. The rail regulatory system is currently based on the safety case system through the licencing regime that allows the regulator to accept, monitor and seek amends to the safety cases through OSA and SSA.

PROACTIVELY RELEASED  
TE MANATŪ WAKA  
MINISTRY OF TRANSPORT

## Multi-Criteria Analysis

	Option 1A – Status Quo (no changes)	Option 1B – Counterfactual (HSWA designation)	Option 2 – Introduce reactive investigation powers	Option 3 – designate Waka Kotahi under a warrant
<b>Effectiveness - provides assurance that risks in the system can be identified and resolved quickly</b>	0 System risks would continue to only be addressed where participants are willing to engage.	0 Powers would be limited to those the impact workers or workplaces but corridor issues could not be addressed.	++ Provides comprehensive powers to Waka Kotahi to thoroughly investigate notifiable incidents or accidents, and to intervene against known safety trends.	0 Powers would be limited to how these can address wider network concerns, the regulator would be limited in their ability to seek improvements or remedies.
<b>Safety - the level of improvement and protection from harm for people, infrastructure and other interests</b>	0 System trends would be unable to be addressed in a proactive manner.	+ Would improve regulatory powers over workplace specific incidents	+ Would allow Waka Kotahi increased powers to intervene in relation to known safety issues in the wider rail system.	+ This would provide Waka Kotahi with some level of power over system participants to obtain information, which could be used to address concerns in relation to a specific participant.
<b>Responsiveness - flexibility and appropriateness of regulatory powers and responsibilities</b>	0 There would continue to be a gap in the regulatory regime between NZ Police, TAIC, Waka Kotahi and WorkSafe.	+ Provides a range of powers that can be used when safety concerns are raised, or trends are identified proactively. Would be restrictive as to when powers could be utilised.	++ Provides Waka Kotahi the ability to target response to risk or severity of incident.	0 Powers could be limited to those under the Land Transport Act, which would not allow for the different regulatory system that exists for rail.
<b>Proportionality - impact/intensity of the intervention power and the size</b>	0 Waka Kotahi would have limited ability to carry out regulatory actions to address known	0 This does not address how Waka Kotahi could act under the wider purposes of the Railways Act and	+ Recognises that there is a system gap and that it is appropriate for Waka Kotahi, as	- Would provide broad powers of entry and direction over individuals, but would be

<b>and scale of the policy problem</b>	system issues where a participant might be willingly non-compliant.	would not enable actions to occur for any wider concerns.	regulator, to be able to intervene.	limited when dealing with companies, which make up a large portion of the participants.
<b>Overall assessment</b>	0	+	++	0

## Conclusions

The preferred option is option 2. Providing the rail safety regulator with comprehensive, reactive investigative powers will ensure that these powers are modelled on modern, best practice enforcement powers similar to those provided in the Civil Aviation Bill.

### Example key for qualitative judgements:

- ++ much better than doing nothing/the status quo/counterfactual
- + better than doing nothing/the status quo/counterfactual
- 0 about the same as doing nothing/the status quo/counterfactual
- worse than doing nothing/the status quo/counterfactual
- much worse than doing nothing/the status quo/counterfactual

## Summarise the costs and benefits of your preferred option

Affected groups	Comment:	Impact
<b>Additional costs of the preferred option compared to taking no action</b>		
Regulated groups: Rail licence holders, sub-contractors, entities performing service in the rail system that have safety implications	Ongoing <i>Any additional costs may be reflected in future regulatory fees and charges<sup>20</sup></i>	Low
Regulator Waka Kotahi NZ Transport Agency (Safer Rail team)	Ongoing <i>Some costs in upskilling and building capability to exercise new powers.  Investigations will be met through baseline funding initially, but uncertainty about outyears</i>	Low
Other groups Rail passengers, freight and rail infrastructure owners		Low
<b>Total monetised costs</b>	NA	NA
<b>Non-monetised costs</b>	NA	Low
<b>Additional benefits of the preferred option compared to taking no action</b>		
Regulated groups Rail licence holders, sub-contractors, entities performing service in the rail system that have safety implications	Ongoing Clearer regulatory powers and capabilities in the rail safety regulator signify improvements for rail participants	High
Regulator Waka Kotahi NZ Transport Agency (Safer Rail team)	Ongoing	Medium
Other groups Rail passengers, freight and rail infrastructure owners	Ongoing <i>Benefit of improved safety through better investigation into incidents and accidents</i>	Medium
<b>Total monetised benefits</b>	NA	NA

<sup>20</sup> See: Railways Regulations 2019

<b>Non-monetised benefits</b>	NA	Medium
<b>Further comments</b>		
<p>Waka Kotahi have indicated that the preferred option would pose no additional costs in the short-term. At present, Waka Kotahi's Safer Rail team is already performing voluntary investigations, where the parties to the accident and/incident consent, and meeting the costs out of its baseline funding. This baseline funding is made up of the annual charges collected from all rail licence holders and about \$750,000 provided through the National Land Transport Fund per annum. Therefore, providing for the express powers in the preferred option, the exercise of these powers would be exercised more effectively without being more expensive in the short-term.</p> <p>Waka Kotahi would continue to monitor long-term impacts of the preferred option and whether there is a need for increased resources to meet investigatory requirements. Initial advice is that through using the refined Regulatory Risk Management Framework, developed by Waka Kotahi, trends can be identified and resources targeted accordingly.</p>		

### Section 3: Implementing the preferred option

#### How will it be implemented?

As a preliminary Regulatory Impact Statement, at this stage of the analysis no specific implementation and detailed implementation plans have been developed. Following further policy development based on the outcome of public consultation, more detailed implementation plans will be developed and subject to a final Regulatory Impact Statement when final policy decisions are sought.

Waka Kotahi already have a voluntary investigation function under the Railways Act 2005 in relation to assessing safety cases. The preferred option would require limited additional resources or expertise. Some upskilling across the staff performing investigations under the new powers and change management to socialise the changes would be required.

#### Monitoring, Evaluation, and Review

The proposed regulatory changes build and refine existing regulatory powers and systems, as a result, there is no need to design a specific monitoring and evaluation programme around the specific changes proposed. Further the moderate impact of the proposed amendments means a specific and detailed programme may not adequately measure the success.

We therefore consider it appropriate to include specific markers to assess the effectiveness of the changes within the existing monitoring, evaluation and review programme administered by Waka Kotahi. The changes and improvements to the systems and regimes administered by Waka Kotahi will form part of the review of the regulatory strategy Tū Ake - Tū Māia. The Ministry of Transport monitors the implementation and effect of the proposed changes as part of its wider stewardship of the legislation it administers.