

Land Transport Rule: Work Time in Large Passenger Service Vehicles 2019

Reason for this briefing	<p>This briefing provides you with a Cabinet paper seeking Cabinet's authority to submit the Land Transport Rule: Work Time in Large Passenger Service Vehicles 2019 to the Executive Council.</p> <p>It sets out the matters that you must have regard to under section 152A of the Land Transport Act 1998 before recommending that the Governor-General make the Land Transport Rule: Work Time in Large Passenger Service Vehicles 2019 by Order in Council.</p>
Action required	<p>Sign the attached paper to Cabinet requesting that Cabinet authorise the submission of the Land Transport Rule: Work Time in Large Passenger Service Vehicles 2019 to the Executive Council.</p> <p>Sign the advice sheet recommending that Her Excellency the Governor-General sign the proposed rule.</p> <p>Lodge the attached Cabinet paper, together with the proposed Rule and advice sheet with Cabinet Office on Friday 26 April 2019.</p>
Deadline	Friday 26 April 2019
Reason for deadline	To lodge the paper with Cabinet Office in order to go straight to Cabinet on 29 April 2019.

Contact for telephone discussion (if required) Section 9(2)(a)

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MINISTER'S COMMENTS:

Date:	24 April 2019	Briefing number:	OC190341
Attention:	Hon Phil Twyford	Security level:	In confidence
This briefing contains legal advice and may be legally privileged. Information should not be released without consultation with the Chief Legal Adviser.			

Minister of Transport's office actions

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|--|--|---|
| <input type="checkbox"/> <i>Noted</i> | <input type="checkbox"/> <i>Seen</i> | <input type="checkbox"/> <i>Approved</i> |
| <input type="checkbox"/> <i>Needs change</i> | <input type="checkbox"/> <i>Referred to</i> | |
| <input type="checkbox"/> <i>Withdrawn</i> | <input type="checkbox"/> <i>Not seen by Minister</i> | <input type="checkbox"/> <i>Overtaken by events</i> |

Purpose of report

1. This briefing:
 - 1.1. provides you with a Cabinet paper seeking Cabinet's authority to submit the Land Transport Rule: Work Time in Large Passenger Service Vehicles 2019 (the Rule) to the Executive Council.
 - 1.2. sets out the matters that you must have regard to under section 152A of the Land Transport Act 1998 (the Act) before recommending that the Governor-General makes the Rule by Order in Council.

Bus service operators have raised concerns

2. The Employment Amendment Act 2018 (ERAA) comes into force on 6 May 2019. It reinstates workers' entitlements to rest and meal breaks under the Employment Relations Act 2000. From 6 May 2019, bus drivers will be entitled to additional 10-minute rest breaks during the course of typical driving shifts.
3. The ERAA provides flexibility for employers and employees to agree when rest and meal breaks should be taken. If they cannot agree when the breaks are to be taken, the ERAA requires that breaks be provided at times prescribed in the ERAA (for example, in the middle of a 2 to 4 hour shift), so far as is "reasonable and practicable".
4. As you are aware, there are concerns about public transport bus operators and councils' ability to provide these 10-minute breaks safely, and without causing significant disruption to public transport services, at least in the short-term. These concerns relate to:
 - 4.1. the likely inability of operators to gain agreement from their employees to the timing of 10-minute rest breaks in the time frame available; and
 - 4.2. in the absence of agreement, the requirement that these breaks are provided at times prescribed in the ERAA, so far as is reasonable and practicable
5. Operators are concerned they could face a legal challenge over the scope of what is "reasonable and practicable" should they schedule rest breaks in order to avoid disruption to services. As a result, operators have been planning to provide rest breaks at times close to those prescribed in the ERAA, [REDACTED]. Operators have also raised concerns that the timing of these breaks may mean buses have to be stopped in unsafe locations. **Section 9(2)(ba)(i)**
6. On this basis, operators have indicated that providing the rest breaks while maintaining existing public transport service levels will require additional buses and drivers, resulting in a substantial increase in cost.
7. We consider that it is unlikely that this could be implemented in a timely way, given the shortage of available drivers and the lead-time required to procure additional vehicles. As a result, there would be cancellation of services in the short-term, since in most cases the required vehicles and drivers would not be available on 6 May.
8. The Government is committed to growing public transport as a key part of its transport strategy and is investing significantly to support that objective. The cancellation of services projected by bus operators and councils would undermine this objective.

9. The Government also supports workers' rights and the principle that bus drivers, like all workers, deserve fair working conditions, including rest and meal breaks. I am mindful that any proposal to resolve this problem must not undermine the working conditions of bus drivers.

Options to address bus service operators' concerns

10. We have considered several options to reduce the expected disruption to public transport services from the ERAA rest and meal breaks:
- 10.1. a collaborative approach between operators, unions, and councils
 - 10.2. issuing guidance on how to provide rest and meal breaks under the ERAA
 - 10.3. a land transport rule.

Collaborative approach

11. You and your colleague, Hon Iain Lees-Galloway, have been working collaboratively with bus operators, councils and unions to try to minimise the impacts of these new rest breaks. However, it has become clear that despite your best endeavours, the industry is not prepared to apply the new legislation in a way that minimises service disruption and cost without further assurance. This is because a collaborative approach would not substantially reduce the legal risk to public transport bus operators should they schedule breaks with the objective of minimising service disruption.

Guidance on the ERAA rest and meal breaks

12. We have considered whether the government could issue guidance on how the rest and meal breaks should be provided. Such guidance could help bus operators to understand what is expected under the ERAA. However, guidance would have no legal standing should a bus operator be challenged on their scheduling of rest breaks, and therefore it would not substantially reduce their legal risk.

Land transport rule

13. The ERAA recognises that individual sectors may have different rest and meal break requirements to those prescribed. This is authorised by the ERAA, so long as the number and duration of breaks is not less than provided by the ERAA. Currently, the land transport sector has a specific requirement that commercial drivers, including public transport bus drivers, take 30-minute meal breaks. This requirement is in the Land Transport Rule: Work Time and Logbooks 2007 (the Work Time Rule). However, the Work Time Rule does not currently include a requirement for 10-minute rest breaks.
14. A land transport rule could be made to require bus operators to provide and require bus drivers to take 10-minute rest breaks in addition to the existing 30-minute meal breaks. This rule would maintain bus driver's entitlement to 10-minute breaks established by the ERAA, while providing greater certainty to bus operators that they can adjust the timing of these breaks to minimise service disruption. This requirement for 10-minute breaks would apply instead of the provisions in the ERAA.

Addressing impact on public transport bus services

15. Our view is that the preferred way to reduce the disruption to bus services from 6 May 2019 onwards is to make a land transport rule allowing increased flexibility for the operators around when they schedule the 10-minute breaks to be taken by public transport bus drivers.

This will provide operators with certainty that they can take a flexible approach to the timing of breaks, whilst acting lawfully.

16. We consider that this flexibility is required to respond to safety risks and to provide an integrated, reliable and responsive public transport system in the short to medium term, while the implementation of the ERAA requirements, and the impact of the rest breaks on staffing, vehicles and costs, are being worked through by the operators, councils and government.
17. The Land Transport Rule: Work Time for Drivers of Large Passenger Service Vehicles 2019 (the Rule) would establish an explicit framework for determining the timing of 10-minute rest breaks for drivers of bus public transport services. The rule would provide that the timing of the breaks can be determined by agreement between the operator and driver, but in the absence of agreement, bus service operators should schedule breaks as close as near as possible to prescribed times, but can schedule rest breaks in order to minimise their disruptive impact.
18. The Rule, as currently drafted, will only be an interim step to resolve a specific set of challenges with providing 10-minute breaks for bus drivers. You are progressing a broader work programme to address systemic issues in the bus industry, including workforce recruitment and retention, and wages and conditions for bus drivers. We anticipate that as a result of this broader work programme the bus industry may not need the Rule in 12 months time.

You have authority to recommend the Governor-General makes a land transport rule

19. The attached Cabinet paper seeks authorisation for a Rule to be submitted to the Executive Council.
20. The Ministry's Chief Legal Adviser considers that you have legal authority to recommend that the Governor-General makes the Rule, by way of Order in Council, and that it complies with the relevant requirements. The Order is certified by the Chief Legal Advisor as being in order for submission to the Executive Council.
21. The Rule would be made pursuant to:
 - 21.1. Section 152A, which provides that the Governor-General may, by Order in Council, on the recommendation of the Minister, make, amend, or revoke an ordinary rule for any of the purposes for which the Minister may make, amend, or revoke an ordinary rule
 - 21.2. Section 152, which sets out the Minister's general rule making powers, including the power to make rules for the purposes of assisting land transport safety and security, including (but not limited to) personal security, providing for the appropriate management of infrastructure, assisting economic development, improving access and mobility, and protecting and promoting public health
 - 21.3. Section 158(b)(vi)(A), which provides that rules can be made setting out the responsibilities and required behaviour of transport service operators, including the permissible driving hours of persons driving transport service vehicles, including the work time and rest time to be observed by drivers.
22. The Rule will allow operators to take a flexible approach to the timing of breaks, whilst still acting lawfully after 6 May 2019.

Relevant matters

23. In recommending the Rule, you must have regard to specific matters.
24. Section 152A(2) of the Act requires you to have regard, and give such weight, as you consider appropriate in each case, to the matters in section 164(2) when deciding to recommend that a rule is made by Order in Council.
25. We have set out our advice on these matters in the table below.

Matter to be considered	Comment
<p>Section 164(2)(a) The level of risk existing to land transport safety in each proposed activity or service</p>	<p>First, the need for rest breaks responds to the risk of mental and physical fatigue associated with urban bus driving.</p> <p>This is reflected in part in the Land Transport Rule: Worktime and Logbooks 2007, which requires meal breaks after a work period of 5.5 hours. In addition, most urban bus drivers have unplanned breaks between runs, which are typically built into bus service timetables.</p> <p>It is acknowledged that the flexibility for the bus operator provided by the Rule in scheduling the breaks may lead to timing that is less optimal than in the middle of a shift. However, the safety impact of this is considered minimal.</p> <p>Secondly, there is a concern that there could be safety risks to commuters and other road users from buses stopping in safe or unexpected places, should drivers stop to take breaks during a run.</p>
<p>Section 164(2)(b) The nature of the particular activity or service for which the rule is being established</p>	<p>Urban bus services are critical for the mobility of New Zealanders. They are a crucial element of our integrated safe and accessible public transport system.</p> <p>Without the proposed rule, we consider that there is a very high likelihood of greater service disruption (cancelled or delayed services) and a less reliable and responsive public transport system.</p>
<p>Section 164(2)(c) The level of risk existing to land transport safety in New Zealand in general</p>	<p>As noted above, there is a safety risk to commuters and other road users from buses stopping in safe or unexpected places.</p> <p>At a system level, travel by bus is the safest form of road transport. If cancelled or delayed services leads to less patronage, alternative and less safe modes of transport would be used.</p>
<p>Section 164(2)(d) The need to maintain and improve land transport safety and security, including (but not limited to) personal security</p>	<p>The impacts on safety are noted above.</p>
<p>Section 164(2)(da) The appropriate management of infrastructure, including (but not limited to)—</p>	<p>The proposed rule will provide flexibility for bus service operators to schedule rest breaks and enable more efficient scheduling. This will reduce the need for</p>

Matter to be considered	Comment
<p>(i) the impact of vehicles on infrastructure; and</p> <p>(ii) whether the costs of the use of the infrastructure are greater than the economic value generated by its use</p>	<p>operators to use additional buses, which are heavy vehicles that have a higher impact on road infrastructure.</p> <p>The proposed rule would also reduce the number of 'out of service' vehicle kilometres travelled by bus drivers, known as 'dead running', where they are shuttled to and from where buses are located.</p>
<p>Section 164(2)(e)(i) Whether the proposed rule assists economic development</p>	<p>The proposed rule is designed to mitigate the risk of cancelled or delayed services. This will reduce any adverse impact on travel times for workers and/or loss of productivity and economic output.</p> <p>More generally, a decrease in patronage, due to cancelled or delayed services, will in turn impact the ongoing viability of bus service operations.</p> <p>Inefficient scheduling of rest breaks for drivers will have cost impacts for bus service operators that will likely be met by councils and Government. This may impact local authority rates. There may also be implications for the National Land Transport Fund, which contributes the Government's share of public transport costs.</p>
<p>Section 164(2)(e)(ii) Whether the proposed rule improves access and mobility:</p>	<p>Urban bus services are critical for access to other services and the general mobility of New Zealanders, particularly commuters. They are a crucial element of our integrated safe and accessible public transport system.</p>
<p>Section 164(2)(e)(iii) Whether the proposed rule protects and promotes public health</p>	<p>Public transport users are generally more active than drivers of private vehicles. Public transport users walk to and from public transport connections (known as the first mile/last mile effect). Therefore, a decrease in public transport use, which is likely the more disruption there is to services, can be expected to have a negative impact on public health.</p>
<p>Section 164(2)(e)(iv) Whether the proposed rule ensures environmental sustainability</p>	<p>Overall, bus public transport contributes, per passenger, lower emissions than light vehicle transport. The proposed rule protects the integrity of public transport as a mode.</p>
<p>Section 164(2)(ea) The costs of implementing measures for which the rule is being proposed</p>	<p>The proposed rule will likely increase costs for bus service operators, local authorities that contract with bus service operators and the National Land Transport Fund, which contributes the Government's share of public transport costs. However, the genesis of these costs is the changes to the Employment Relations Act 2000 requiring additional rest breaks. The impact of the proposed rule is to moderate the <u>level</u> of increased costs arising due to the particular nature of the urban bus industry, for which scheduling work breaks is more challenging than other industries. The proposed rule moderates costs flowing from the need for additional drivers and buses. It also mitigates the potential loss of fare revenue from a decrease in patronage, due to</p>

Matter to be considered	Comment
	cancelled or delayed services and a loss of confidence in bus public transport.
Section 164(2)(eb) New Zealand's international obligations concerning land transport safety	We do not consider this to be a relevant consideration.
Section 164(2)(f) The international circumstances in respect of land transport safety	We do not consider this to be a relevant consideration.
Section 164(2)(g) Such other matters as you consider appropriate in the circumstances	There are systemic issues in the urban bus industry, including service efficiency, workforce recruitment and retention, driver wages and conditions, and workplace relations. Providing certainty for bus service operators around the scheduling of rest breaks is necessary to prevent disruption of services and to protect public confidence in the public transport system in the medium term while these systemic issues are addressed.

Consultation

26. The draft Rule was not publically notified nor public submissions sought. The requirement to do this under section 161(2) of the Act does not apply in the case of rules made by Order in Council.
27. In the course of the development of the Rule, we consulted with members of the Steering Group established to oversee the implementation of the Memorandum of Understanding you have entered into with industry participants. To varying extents, Steering Group members have engaged with members of the organisations they represent. The Steering Group includes representatives from:
- The Ministry of Transport
 - The NZ Transport Agency
 - Bus service operators
 - Unions
 - Local government
 - Your office.
28. You have worked with bus operators, unions, councils and representatives from government agencies to develop a Memorandum of Understanding to support the transition to the new rest breaks. The Memorandum of Understanding has been signed by stakeholders of bus service operators, councils and unions.

Timing and the 28-day rule

29. The rule (attached to this briefing) is drafted to come into force on 6 May 2019.

- 30. Section 161(3) of the Act requires notification of signed rules in the *New Zealand Gazette* before they come into force. Also applicable is the 28-day rule, which Cabinet decided should apply to transport rules.
- 31. Normally, a rule must be signed at least 28 days before it comes into force. In this instance, however, the Ministry requests that you recommend that the Governor-General, by way of Order-in-Council, submit the rule to Executive Council for approval, no later than 29 April 2019. This is to provide certainty for bus operators before the provisions of the ERAA come into force on 6 May 2019.
- 32. Your Cabinet paper seeks a waiver of the 28-day rule to enable the Rule to come into force on 6 May 2019. To achieve this it will need to be lodged by Friday 26 April 2019 for consideration by Cabinet on 29 April 2019.

Compliance

- 33. The Rule is not inconsistent with the principles of the Treaty of Waitangi. It complies with both the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993, the principles and guidelines set out in the Privacy Act 1993, and the relevant international standards. It is consistent with the LDAC guidelines, maintained by the Legislation Design and Advisory Committee.

Publicity

- 34. We will notify the making of the Rules in the *New Zealand Gazette*, as required by section 161(3) of the Act. The NZ Transport Agency will also publicise the Rules in its publications and on its website.

Section 9(2)(h)

Legal Advice: [REDACTED]

43. [REDACTED]

[REDACTED]

[REDACTED]

Recommendations

46. The recommendations are that you:

- (a) **sign** the attached Cabinet paper Yes/No
- (b) **sign** the attached advice sheet Yes/No
- (c) **lodge** the Cabinet paper, together with the proposed Rule and advice sheet on Friday 26 April 2019 in order to go straight to Cabinet on Monday 29 April 2019. Yes/No

Brent Johnston
**Manager,
Mobility and Safety**

MINISTER'S SIGNATURE:

DATE: