

LAND TRANSPORT RULE: WORK TIME IN LARGE PASSENGER SERVICE VEHICLES 2019

Proposal

1. This paper recommends that Cabinet authorise the submission to the Executive Council of the Land Transport Rule: Work Time in Large Passenger Service Vehicles 2019 (the Rule).

Executive summary

2. The Employment Relations Amendment Act 2018 (ERAA) comes into force on 6 May 2019. It entitles bus drivers to additional 10-minute paid rest breaks during the course of typical driving shifts.
3. Under the ERAA, drivers and bus service operators can agree when the rest breaks are to be taken, but in the absence of agreement they must be taken at times prescribed in the ERAA (for example in the middle of a shift between 2 to 4 hours) so far as is reasonable and practicable.
4. Councils and bus service operators have expressed concerns about the legal risk they may face if they schedule rest breaks at times other than in the middle of shifts. Some operators have advised that, without further direction from Government, they will schedule rest breaks in the middle of shifts. This would cause significant disruption to public transport services, and potential safety risks. Operators indicate this would also incur increased costs, as additional vehicles and drivers would be required to maintain service levels.
5. I recommend that Cabinet authorise making a land transport rule pursuant to section 152A of the Land Transport Act 1998 (LTA). 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.
6. I have worked closely with the industry to develop this solution. The rule is necessary to provide certainty to bus service operators that they are acting lawfully by scheduling breaks in a flexible manner. It will avoid potentially chaotic impacts on public transport services on and immediately after 6 May 2019.
7. My intention is that the rule is an interim step to resolve the specific set of challenges associated with providing 10-minute breaks for bus drivers in the short term. Over the coming months I expect the industry to review and revise the scheduling of services to provide rest breaks at optimal times for bus drivers, to the extent possible, without

causing disruption. I have entered into a Memorandum of Understanding with bus service operators, unions and councils to oversee progress towards that objective.

8. Subject to Cabinet's agreement to this proposal, the rule will come into effect on 6 May 2019, to coincide with the ERAA coming into force. I seek a waiver of the 28-day rule to enable this.

Background

9. The 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 paid rest breaks during the course of typical driving shifts.
10. 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 are 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.

The problem to be addressed

11. Public transport bus operators and councils have raised concerns about their ability to provide these 10-minute breaks safely without causing significant disruption to public transport services, at least in the short-term. These concerns relate to:
 - 11.1. the likely inability of operators to gain agreement from their employees to the timing of 10-minute rest breaks in the time available; and
 - 11.2. 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
12. 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 (for example, in the middle of a 2 to 4 hour shift), [REDACTED] Section 9(2)(ba)(i)
13. 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. It is also 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. Operators have also raised concerns that the timing of these breaks may mean buses have to be stopped in unsafe locations.
14. 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.

15. The Government also supports workers' rights and believes 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

16. I have considered several options to reduce the expected disruption to public transport services from the ERAA obligation to provide rest and meal breaks:
 - 16.1. a collaborative approach between operators, unions, and councils
 - 16.2. the issuance of guidance on how to provide rest and meal breaks under the ERAA
 - 16.3. a land transport rule.

Collaborative approach

17. I, along with my 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.
18. I had hoped that a collaborative tripartite approach – involving operators, unions and councils, could resolve the situation. However, it has become clear that despite our 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

19. I 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

20. The ERAA recognises that individual sectors may have different rest and meal break requirements to those prescribed, and allows other legislation to apply in such cases 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) and applies to employees and contractors. However, the Work Time Rule does not currently include a requirement for 10-minute rest breaks.
21. 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 drivers' 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. As with the Work Time Rule, the Rule would apply to employees and contractors.

Preferred option: a land transport rule

22. In my view, the only way to minimise disruption to bus services while maintaining bus drivers' entitlement to 10-minute breaks from 6 May onwards is to make the Rule.
23. I consider that the Rule is required to respond to the 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.
24. 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.
25. Under section 152A of the Land Transport Act 1998 (LTA), ordinary land transport rules may be made, amended or revoked by the Governor-General by Order in Council, on the recommendation of the Minister of Transport. I recommend that the Rule be made in this way in order to effect the change as quickly as possible.
26. My intention is that the Rule, as currently drafted, will only be an interim solution to resolve a specific set of challenges with providing 10-minute breaks for bus drivers. I am 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. This work programme includes investigating a living wage as a minimum standard for bus drivers.
27. I anticipate that as a result of this broader work programme the bus industry may not need the Rule in 12 month's time. However, it may still be necessary to retain the Rule in some form, or it may need to be applied to other transport services.
28. Alongside the Rule change, I have entered into a Memorandum of Understanding with councils, unions and bus service operators. This Memorandum will help to facilitate ongoing collaboration between operators, unions, and councils and will further alleviate concerns of the industry. The Memorandum sets out an agreed process prior to 6 May and over the next 12 months to resolve challenges arising from the provision of rest breaks to bus drivers and other systemic challenges facing the industry.

Timing and the 28-day rule

29. I am seeking a waiver of the 28-day rule to enable the Rule to come into force on 6 May 2019, contemporaneously with the commencement of the ERAA. My grounds for seeking Cabinet's agreement to this waiver are:
 - 29.1. under paragraph 7.97(a) of the Cabinet Manual "where a regulation has little or no effect on the public, or confers only benefits on the public", the public benefit being the minimisation of disruption to public transport services when the amendments to the ERA take effect
 - 29.2. under paragraph 7.97(b) of the Cabinet Manual "where the regulations are made in response to an emergency", the emergency being the disruption to public transport services that will be caused by bus operators providing rest breaks according to their interpretation of the ERAA from 6 May 2019 onwards.

Compliance

30. The Rule complies with:
 - 30.1. the principles of the Treaty of Waitangi;
 - 30.2. the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 or the Human Rights Act 1993;
 - 30.3. the principles and guidelines set out in the Privacy Act 1993 (if the regulations raise privacy issues, indicate whether the Privacy Commissioner agrees that they comply with all relevant principles);
 - 30.4. relevant international standards and obligations;
 - 30.5. the Legislation Guidelines (2018 edition), which are maintained by the Legislation Design and Advisory Committee.
31. Section 152A(2) of the LTA requires me to have regard to the criteria specified in section 164(2) of the LTA before making a recommendation that the Governor-General make a rule under section 152A(1). I can confirm that I have had regard to, and have given such weight as I considered appropriate to that criteria in recommending that the Governor-General make the Rule.

Regulations Review Committee

32. Under section 152A(6) of the LTA, ordinary rules are disallowable instruments for the purpose of the Legislation Act 2012 and, under section 41 of that Act, must be laid before the House of Representatives not later than the sixteenth sitting day after they are made.
33. I have not referred a draft of the Rule to the Regulations Review Committee (the Committee) under Standing Order 318(2).

Consultation

42. Land Transport Rules made by the Governor-General are not subject to the public notification, submission period, and consultation requirements, which apply to rules made by the Minister of Transport, in section 161(2) of the LTA.
43. In the course of the development of the Rule officials consulted with members of a Steering Group established to oversee the implementation of the Rule. This Steering Group included representatives from the Bus and Coach Association, the New Zealand Council of Trade Unions, and a regional council representative. To varying extents, Steering Group members have engaged with members of the organisations they represent. The NZ Transport Agency, the Ministry of Business, Innovation, and Employment, The Treasury and the Department of the Prime Minister and Cabinet were also consulted during the development of the Rule.
44. I, along with my colleague Hon Iain Lees-Galloway, have also entered into a Memorandum of Understanding with bus operators, unions, councils and representatives from government agencies to support the transition to the new rest breaks.
45. The Memorandum of Understanding has been signed by bus service operators, councils and unions.

Financial Implications

46. No additional funding is required for the proposal. The proposal moderates the costs that would otherwise be incurred by bus service operators if they do not schedule rest breaks with flexibility, meaning that will require additional buses and drivers to maintain service levels. The cost of the NZ transport Agency monitoring compliance with the rule is offset by the shift of the compliance burden from the Ministry of Business, Innovation and Employment, as the regulator of the ERA.

Human Rights

47. The proposal in this paper is not inconsistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.

Gender Implications

48. There are no gender implications from the proposal in this paper.

Disability Perspective

49. Urban bus services are critical for the mobility of New Zealanders. The proposal will mitigate the risk of cancelled or delayed bus services that are particularly important for some people with disabilities .

Publicity

50. The new Rule will be communicated directly to public transport bus operators, councils, and unions. The NZ Transport Agency will publish the Rule on its website and provide guidance on the application of the Rule for the bus industry.

Proactive release

51. I intend to proactively release this Paper and associated papers within 30 days of the Cabinet decision.

Recommendations

52. I recommend Cabinet:
 1. **note** that public transport bus operators and councils have raised concerns about their ability to provide the 10-minute breaks required by the Employment Relations Amendment Act from 6 May 2019 safely without causing significant disruption to public transport services
 2. **note** that under section 152A of the Land Transport Act 1998 ordinary land transport rules may be made, amended or revoked by the Governor-General by Order in Council, on the recommendation of the Minister of Transport
 3. **note** that 154A(2) of the Land Transport Act 1998 requires that the responsible Minister have regard to the criteria specified in section 164(2) of that Act before recommending the making of a Rule, by Order in Council, under section 152A(1)
 4. **note** the advice of the Minister of Transport that this requirement has been met
 5. **agree** the Land Transport Rule: Work Time in Large Passenger Service Vehicles 2019 is the appropriate regulatory response to the safety and significant disruption risks
 6. **authorise** the submission to the Executive Council of Land Transport Rule: Work Time in Large Passenger Service Vehicles 2019
 7. **note** that a waiver of the 28-day rule is sought:
 - 7.1 so that the Rule can come into force on 6 May 2019;
 - 7.2 on the grounds that the Rule responds to an emergency and confers only benefits on the public.
 8. **agree** to waive the 28-day rule so that the Rule can come into force on 6 May 2019
 9. **note** that the Minister of Transport and the Minister for Workplace Relations and Safety have also entered into a Memorandum of Understanding with bus operators, unions, and councils to support the transition to the new rest breaks

10. **note** that the Memorandum of Understanding, alongside the Rule, will help ensure an integrated, reliable, and responsive public transport system in the short to medium term while the impact of the rest breaks on staffing, vehicles and costs are being worked through by bus operators, unions, councils and government.

Hon Phil Twyford
Minister for Transport

Dated: _____