INTERNATIONAL RAIL SAFETY CONFERENCE 2011 MAXIMISING WORKERS PARTICIPATION UNDER RAIL SAFETY LAW

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Introduction[1]

Workplace Health and Safety law (WHS) and Rail Safety Law in Australia have been recently extensively reviewed.[2]The aim of the WHS review was to harmonise and establish a national model law to apply in a federated political structure whereas national rail safety law was reviewed to established national rail safety law to be applied by a newly established national rail safety regulator to commence from January 2013.

The review of the legislation enables an examination of the different approaches taken to worker participation, their history and evolution under each of the legislation. Australian health and safety law, since the 1970s together with many countries throughout the world has been heavily influenced by the Roben's committee inquiry[3]and the subsequent regulatory strategies adopted.

Two aspects of the Roben's recommendations have been highlighted by many inquiries and commentators; the commencement of the move away from prescriptive regulation towards self-regulation and the provision for workers participation in health and safety. This paper argues by comparison rail safety law in Australia is relatively recent with most jurisdictions law being in place for fifteen years and the impacts of the Robens reforms have been considerably less.

A core feature of this paper is to examine, compare and contrast the differences between the provisions and practices for workers participation under the different legislation. Additionally, reference will be made to international practices including the codification of workers participation in European Directives and ILO conventions and rail safety law and practices in a number of other countries.

The Paper will examine workers participation in health and safety in other industries in Australia, particularly the mining industry. A key issue for discussing workers participation is the changing world of work with the rapid spread of part time, casual and temporary forms of employment and the declining rates of unionisation being experienced in many countries and the impacts this may have on workers participation.

This paper will examine these trends in Australia by way of a case study which briefly examines the world of work in Australian railway infrastructure.

The paper concludes by outlining a number of steps that could be pursued to improve workers participation under rail safety law.

Workers participation - WHS law.

Australia, as in other countries,[4] has a variety of statutory systems of regulation that affects WHS. The principal acts are Commonwealth, State and Territory WHS Acts, unless their operations are excluded by specific legislative provisions. There are a wide range of other laws that also provide for WHS or WHS related provisions.

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[1] The views expressed in this paper are those of the author and do not necessarily represent the views of the RTBU.

[2]National Review into Model Occupational Health and Safety Laws, First Report to the Workplace Relations Ministerial Council ,October 2008.Second Report January 2009.Australian Government. NTC: Rail Safety National Law: Draft Regulatory Impact Statement, July 2011.

[3] Lord Robens, Report of the Committee on Safety and Health at Work, HMSO, London, 1972.

[4] National Review, Second Report op cit, p3.

In broad terms these statutes, other than WHS, may be administered in various portfolios and have been developed to address, health and safety in particular industries and/or particular hazards or risks.

Examples of separate laws which specifically provide for WHS include the mining industry[5], maritime industry, offshore petroleum facilities and separate provisions addressing particular safety hazards and risks are the production, distribution and use of energy; radiation, explosives and major hazard facilities.

The WHS Review said of the railway industry "*other industry focussed acts such as rail safety legislation, have WHS provisions and may operate alongside other transport safety laws that include public safety as a primary purpose and where the relevant laws co-exist with the principal OHS acts, the relationship may entail the principal OHS act and the separate act, both apply, but the principal OHS act prevails where there is any inconsistency e.g. rail safety act."*[6]

Although the WHS Review did not include as part of its terms of reference whether industry specific regimes should be incorporated into the one overarching legislation as suggested by the Robens review (too much law and too much fragmentation of administrative functions) it did examine four potential options.

The Review referred to an earlier Industry Commission Inquiry that found that separate industry specific regimes at the state or territory levels were not justified. In summarising the discussion it said"*we propose that the objective of a single OHS legislative system would be the touchstone for meaningful reform in the area"*[7]

WHS Review addresses changes to the world of work

A key term of reference for the review was to pay regard to a changing labour market. Significant changes in the nature of employment including the reduction of union density across Australia have occurred in recent decades.

The Review said "*we consider the OHS laws should continue to protect workers and others in two ways, firstly through the establishment of clear duties of care and secondly by providing workers and their representatives with a direct participative role at a workplace level."*[8] Academic research was referred to[9] indicting that

[5] Separate legal arrangements currently exist under state jurisdictions but may change; this will be discussed later in this Paper.

[6] The Model Bill Provides in Part 2 the following clauses: The relationship between OHS and rail safety law; Act adds to protection provided by OHS legislation, OHS legislation prevails in the case of any inconsistency , relationship between duties under this act and OHS legislation.

[7] National Review First report op cit p17. Recommendation 76: (a) in developing and periodically reviewing the model OHS act there should be a presumption that separate and specific OHS laws (including where they form part of an act that has other purposes) for particular hazards or high risk industries should only continue where they have been objectively justified and as far as possible the separate legislation should be consistent with the nationally harmonised OHS laws. The recommendation also indicated this approach should be extended to other legislation in different portfolios and be adopted by COAG.

[8] National Review Second Report op cit p384

[9] National Review Second Report ibid p385

- participatory mechanisms at jurisdictional, industry and workplace levels play a pivotal role in post Robens OHS legislation in Australia
- there existed a positive relationship between indictors of objective OHS performance and workplaces with joint arrangements or union involvement in worker representation or both.
- trade unions remained the single most powerful support for workers representation on health and safety.

At the international level the involvement of workers and their representatives is mandated by the ILO's Occupational Safety and Health Convention, 1981.

Consultation, participation, representation and protection.

Structure of the WHS Act:

The Review said "*we are strongly of the view that the structure of the model act is an important tool to assist all who must understand and comply with it or perform functions under it and can also demonstrate clearly to its readers the significance to be placed on specific elements …workplace participation is important for ensuring the effective management of health and safety in the workplace .The provisions relating to workplace participation accordingly support the duties of care and that part should immediately follow the duties of care."*[10]

Objects of the Act.

In an objects clause a parliament provides guidance on how the act concerned is intended to apply and operate. It aids interpretation and guides decision makers about what is to be taken into account when they exercise powers or perform functions under the Act. Six broad objects were identified and they included providing for workplace representation, consultation, cooperation and issue resolution, and the promotion of OHS advice, information, education and awareness.

The Review recognised and made detailed provision for consultation, access to information and obtaining the perspectives of workers. It provided that the act shall include a broad obligation for the person conducting the business or undertaking to consult, as far as is reasonable necessary, about matters affecting or likely to affect their health and safety. The Act is to include what consultation means and outline when it should be taken. A draft code of practice on consultation has been prepared by SafeWork Australia for discussion.

The review provided for mechanisms to enable effective worker participation and representation of workers and for them to collectively elect health and safety representatives (HSR's) in an undertaking.

The powers and functions of HSR's include inspecting the workplace, representing the work group in relation to WHS, investigating WHS complaints, issuing provisional improvement notices (PIN), and directing that work cease where there may be an immediate threat to health and safety.

A PIN can be applied if a HSR believes an employer is contravening a provision of the Act or that contravention will continue or be repeated. In these circumstances the HSR may issue a PIN

[10] National Review Second Report ibid p 28

requiring the person to remedy the contravention, prevent a like contravention from occurring or remedy the things or operations causing the contravention. For HSR's to perform their functions effectively five days paid leave is provided for. Training is seen as an obligation, not merely a right, of the HSR.

ISSUE RESOLUTION.

Currently there is a general consistency of approach across jurisdictions though the details may vary. Issues relate to whether or not hazards or risks arise from particular work, whether risks are adequately controlled or whether other risk controls may be required.

Other issues include the means by which workers may be consulted or participate in decisions relating to WHS. The matters addressed by the review included the definition of an "issue" for the purposes of issue resolution, the persons to be involved in the resolution of a WHS issue at a workplace including obtaining assistance through a representative and the appropriate procedures by which WHS issues are to be resolved.

Role of unions in securing compliance.

Currently the majority of OHS Acts confer powers on authorised representatives of unions to enter workplaces for WHS purposes. This has been a contentious issue between unions and employers with many employers opposing these provisions.

In supporting these provisions the review said "*considerable evidence exists which underscores the value of trade unions to enter workplaces , to assist in various ways , in securing improved WHS performance and effective outcomes particular with respect to the provision of support to HSR's"*[11](conditions were attached including authorisation, training requirements, union had to have members or persons eligible to be members in the areas of the workplace, and unions could only enter during working hours.)

Authorised union representatives have the capacity to investigate a suspected contravention of the Act or regulations.

Discrimination, Victimisation and Coercion in relation to OHS

The Review recommended a provision in the WHS law because *" to do so will directly support involvement in OHS activities and roles by making it clear that the proscribed conduct is unlawful and clearly subject to penalties and remedies."*[12]

Role of the regulator in securing compliance. The review recommended that the Model Act should clarify in the objects that education and training for duty holders, workers and the community are important elements of facilitating good health and safety. The regulator should have sufficient authority to promote and support such education, training and information.

Codes of practice

The Review adopted a view that a code is to be taken by a court to represent what is known about specific hazards, risks and risk controls. There is no requirement that codes of practice be complied

[11] National Review ,second Report ibid p378
[12] National Review, Second Report ibid p193

with. The Review indicated that "*codes should be developed through a tripartite process with expert involvement to ensure they are relevant, useful and accepted as practical guidance and that a duty holder may achieve and demonstrate compliance with relevant provisions of the act by ways other than the ways set out in an approved code of practice."*[13]

Worker participation under rail safety law

Unlike WHS law, for which the basic contours for workers participation has been based on broad principles developed and refined over a number of decades, their development under rail safety law has not occurred under a consistently applied set of principles. Rail safety law in many ways has been reactive to developments in the rail industry at both a structural level and following the results of inquiries into serious accidents. This process is one common to the international rail industry and a few examples will be referred to later in this paper.

The first piece of rail safety legislation was introduced into a single state, NSW in 1993 as a consequence of the introduction of open access, the creation of a new national rail freight company and the ending of the public sector rail monopoly. The Act was a minimalist document which provided a light handed touch to rail safety regulation and no provisions for workers participation was provided for.

In 1995 an Australian Standard on railway safety management was produced, AS4292.1. A number of state railway safety acts referenced this Australian Standard in their legislation. The participative role of workers and their representatives was not mentioned in any of the legislation or the AS standard.

In 1996 an intergovernmental agreement on rail safety provided a broad framework for the development of rail safety legislation which was applied in most state and territory jurisdictions over the next three years.

An accreditation authority's explanatory document in 2001[14] indicated "*rail safety management in Australia is based on a system of co-regulation. The main parties are the rail safety regulators (Accreditation authorities) the accredited track/ infrastructure owners and the accredited train operators…the IGA ,rail safety legislation and AS 4292 provides little in the way of direct or detailed explanation on what the roles of the main parties involved in rail safety management in Australia should be".*

The explanatory document indicated co-regulation meant a process by which track managers and operators assess the risks associated with their proposed railway and then establish a safety management system to ensure the identified risks are controlled in a manner which is based on the needs of their organisations and accountability to stakeholders. Generally AS 4292.1 was seen as the minimum advisory standard that described what procedures should be in a safety management system.

Rail safety management to this time had no links formal relationship with OHS law, industry was equated with employers and workers and their representatives were not directly included.

[13] National Review Second Report ibid p 443

[14] Rail Safety Co-Regulation: Roles and Accountabilities of Accreditation Authorities and accredited Railway Track Managers and Operators.

The system of rail safety regulation was shaken to its core by the Glenbrook and Waterfall train disasters NSW in 1999 and 2003. Two special commissions of inquiry made numerous recommendations for change. Roles and responsibilities of duty holders were redefined, the independence of the rail regulator was established in law, a separate and independent transport safety investigator was created and a significant increase in funding for the regulator was provided by the state government. An advisory body to the NSW Regulator the Rail Safety Strategic Forum (includes unions) was established, the only state to do so.

In 2006, AS Standard 4292.1 was updated. The preface to the standard noted that a number of important changes and upgrades had been incorporated. These included, a greater emphasis on the development of safety management systems which provided for the involvement of workers (the processes and details were not referred to); personnel issues such as competency, health and fitness, human factors and fatigue management were included (though not in the safety management system) and OHS issues that significantly impacted on rail safety.

National Model Rail Safety Legislation 2006

The next major phase in the evolution of rail safety law was the establishment by the National Transport Commission[15] in 2006 of a national rail safety reform package which was endorsed by Transport Ministers. It was established following extensive consultation through advisory structures which included governments, regulators, employers and union representatives.

It established a national framework for rail safety law. It was preceded by NTC discussion papers outlining the major issues and establishing the case for national model rail safety legislation. The NTC in a Regulatory Impact Statement indicated "*rail safety is co-regulatory which is a sophisticated form of regulation. It is neither prescriptive nor self-regulatory. It relies on regulatory discretion even more than other forms of regulation*"[16].

The RIS indicated there were eleven major regulatory changes in the national model legislation. They included a number taken from OHS: general safety duties on all parties who can affect safety, hierarchy of enforcement and sanctions options and involving rail personnel in the development of safety management systems (the actual wording referred to a rail operator before establishing a SMS must consult with rail safety workers, health and safety representatives and any union representing the rail safety workers. This was the first occasion HSR's and unions were directly referred to in rail safety legislation in Australia.

The national model legislation set out the relationship between WHS and rail safety law. It also provided for a health assessment standard for rail safety workers and provisions relating to discrimination against employees who have given information to a public agency or made a compliant about a breach of Australian rail safety law to the employer or a fellow employee, a union or a public agency.

[15] Originally the National Road Transport Commission, in 2004 it expanded to cover rail. Its role is to develop more consistent and effective land transport policies, laws and practices. I

[16] NTC Single, National Rail safety Regulatory and Investigation Framework Regulatory Impact Statement ,p8.2009

A number of areas including fatigue management, drugs and alcohol, and penalties were left to local variations when the model law was implemented in the various jurisdictions over the period 2007 to 2010. A latter amendment provided that the duties of rail transport operators extend to contractors.

Unions raised a number of issues concerning training during the consultations.

One concerned the linking of training and competencies to the wider national training frameworks established by governments and the other involved the training of rail safety workers and HSR's in their rights and responsibilities under the model rail safety legislation. The national framework for training was supported and included in the model legislation though there have been sharp differences between the parties for a number of years as to whether under a system of co-regulation such requirements should be mandated or left to employers to develop, even though this may be in conflict with wider government policy. The assessment of training provision was the lightning rod for wider discussions about the nature of the co-regulatory system.

The other training issue concerning the rights and responsibilities of rail safety workers and HSR's under rail safety law has had a far rockier path and remains unresolved even though there was widespread initial support.[17]

The Model Bill Explanatory Memorandum outlined in detail the nature of the co- regulatory approach to rail safety that had been adopted.

The memorandum indicates that the Bill was underpinned by a set of principles which included the principle of shared responsibility, which included rail safety workers and the principle of "*participation, consultation and involvement which provides that if people and organisations share responsibility for rail safety they should participate and be involved in the management of risks associated with rail operations*."

The principle is given effect by provisions such as those which require rail transport operators to consult with rail safety workers during the development, implementation and maintenance of their safety management systems.

National Rail Safety Law -2010-2011

The latest stage in the development of the national rail safety policy has or will be commented upon by other contributors to this conference.

The areas this Paper highlights are the attempts by the Union to expand workers participation in rail safety law and in particular the objects of the Act, consultation provisions, and training of rail safety workers in their rights and responsibilities.

In broad terms the RTBU argued that the National Model WHS legislation in these areas should be applied to rail safety legislation.

[17] See NTC: National Policy Statement for Transitional Arrangements for the Implementation of National Model Rail Safety Legislation: Policy Statement, November 2006.At p11 and 12 : *"the role (of TDT) is likely to include …the establishment of two new rail safety worker units of competency for the requirements of the new legislation, one at operational level and one at management level."(*Their development was taken to an advanced stage by the training body but was not finalised for a variety of reasons).

A Union position paper on these issues was not responded to. The Union was informed that the Project Board responsible for the project had decided that the Union views were rejected. The Union made political representations which resulted in the ministerial council providing flexibility for the three issues to be reconsidered. After discussions with the Project Office and Federal Departmental representatives some progress was made though the outcomes fall short of what the union believes needs to be done.

The objects of the national model rail safety law have been altered to included "*to provide through consultation and cooperation, for the effective involvement of relevant stakeholders in the provision of safe railway operations."* This compares to WHS Model Law which provides:

- 3(b) providing for fair and effective representation, consultation, co-operation and issue resolution in relation to work health and safety and
- (3) (c) encouraging unions and employer groups to take a constructive role in promoting improvements....

Representational and election arrangements for HSR's are exclusively covered by WHS law, a role for the Rail Safety Regulator in issue resolution was rejected and a direct reference to unions and employers in the rail safety law was opposed.

The objects clause of the rail safety legislation has in addition taken the following from the objects of the WHS national model law: a provision for continuous improvement and to promote the provision of advice, information, education and training for safe rail operations.

The latter in the Union view is an important issue as the Union argues that the understanding by rail safety workers about the rail safety law is negligible compared to WHS law for a number of reasons.

One is the meagre resources available to regulators in most jurisdictions has meant education of rail safety workers has not been a high priority and another is that the implementation of the 2006 national model bill has taken over three years to implement.

The RTBU argues this issue goes to the heart of what a modern regulator should be undertaking. Discussion has yet to occur on the process and issues to be addressed to give life to the effective involvement of all stakeholders as set out in the Objects Clause.

In addition to the objects clause the union has seen some modest improvements in the consultation provisions with the following clauses added

(b) provide the persons consulted with a reasonable opportunity to make submission on the proposed safety management system and

(c) advise those persons in a timely manner of the outcome of the consultation process.

The issue of training for rail safety workers and HSR's in their rights and responsibilities has been slow as has the subject of correspondence with the relevant Minister with the expectation it will be progressed with the industry training body.

Similarities and differences between rail safety and WHS legislation

This Paper argues that the similarities between WHS law and related safety law both within Australia and internationally, as far as workers participation is concerned outweigh the differences and in fact there is a convergence.

The discussion in Australia concerning the management of rail safety regulation through a system of co-regulation should include a broader discussion about the role of worker participation in managing rail safety in Australia.

For many at government and industry level the involvement of industry has equated with the involvement of employers to the detriment of both rail safety outcomes generally and rail safety workers interests.

A range of views about what co-regulation is and isn't

The NTC

The NTC in its RIS notes[18] that in regulatory literature the co regulation of rail safety by governments and industry is described as meta regulation where the regulator sets goals and the regulated entity determines how it will achieve those goals with regulated entities being best placed to look after the safety of their operations. In addition co regulation is generally thought of as a middle ground between highly prescriptive regulation which is less flexible for industry and government and self-regulation which reduces attention to public goods such as safety.

The RIS observes that among the regulators there were different interpretations of co regulation. The NTC *observes "based on the consultation process the NTC has observed that co-regulation is inconsistent across jurisdictions….*

Observations arising from consultation prior to the preparation of the draft RIS identified a number of factors about the current situation. Philosophical approaches to the idea of co-regulation vary across Governments and between governments and industry. These differences will always arise in the inherent tension between regulators and regulated, but the extent to which government's philosophies were different was noteworthy. Regulators levels of intervention vary. The Australasian Railway Association puts regulators on a spectrum of from most acceptable (least interventionist) in South Australia, through to least favoured (most interventionist and bordering on prescriptive) in NSW."[19]

The views of the NSW Regulator about co-regulation.[20]

The CEO argues that co-regulation is a shared responsibility between government and the rail industry and that it is not a shared responsibility between rail transport operators and rail safety regulators. In examining the philosophy behind, and the outcomes of, the Robens Committee the paper concluded "*sounds a lot like co- regulation*. " It further argued that co-regulation varies depending on the safety climate.

[18] NTC RIS op cit p14
[19] NTC RIS Ibid p139
[20] Len Neish, Chief Executive NSW Independent Transport Safety Regulator.: How tolerable is your risk? A presentation for RISSB Rail Safety March 2011

The views of an academic[21]

Professor Gunningham from the Australian National University in the introduction to his paper made a number of points including: that regulating rail safety and in particular achieving regulatory best practice is difficult; there were serious safety issues in the rail industry approach to rail safety and the regulator response to it (the article was written in 2004 before the implementation of reports and investigations that had been conducted by the Victorian and NSW Governments) and that effective measures had not been taken to recreate a safety culture following the severe structural change of the 1990s.

Gunningham characterised the rail safety challenge as involving three issues, what type of standards should be imposed upon rail enterprises, what role should the regulator take to the role of enforcement, and what roles should there be for workers and third parties.

Concerning standards he argued there was, until recently, two types of standards applied to safety issues, prescriptive and performance standards. He identifies a third phase of regulation beginning in the mid-1990s based on the development of safety management systems which involved the assessment and control of risks and the creation of an inbuilt maintenance and review mechanism. He argues such an approach is a direct application of the Roben's principles. He does emphasise that the different types of standards referred to are not mutually exclusive.

He discussed the reasons why risk management of the rail industry is closely scrutinised by governments and refers to this model as a form of meta risk management or meta regulation whereby government risk manages the risk management of the individual enterprises. Put differently government engages in independent risk assessment on the basis of information supplied by the companies.

Gunningham argues that in effect meta regulation is the approach that applies under the safety case regime instituted following the Cullen Inquiry[22] and involves a safety management system coupled with an in depth risk assessment through the mechanisms of a safety case. He refers to this approach being taken in the UK and EU with regard to major hazard facilities. The Safety Case approach was implemented in the UK rail industry by the Rail (Safety Case Regulations) 2000.

Gunningham discusses worker participation, when workers should be involved and the principles underpinning worker participation in systems based and safety case regimes. A number of examples are provided of how worker participation could be applied in a practical manner including participation in third party audits, workplace inspections and acting as a countervailing force to any tendency to co-option of the regulator by the regulated enterprise.

In his conclusion headed "*Towards best practice regulation*" Gunningham argues: "*meta regulation involves significant roles for workers and third parties, both in scrutinising the safety arrangements of the regulators, access to information, and in the case of workers, direct involvement in the*

[21] Neil Gunningham: Best practice Rail safety Regulation: Working Paper 31, December 2004.
[22] Gunningham ibid: in a case study involved examining the Cullen report. He indicates *"Cullen also called for the involvement of the workforce in the reconstruction of offshore safety. Without this essential ingredient it has been argued ail the remaining recommendations might be rendered ineffective" (*see UK Offshore Installation (Safety Representatives and Safety Committees) Regulations.

development and implementation of the safety management system and the safety case will be particularly important."[23]

Rail Industry International examples: OHS and rail industry safety regulation

New Zealand

Following a series of deaths the New Zealand Government in 2000 appointed an Inquiry.[24] The terms of reference in summary provided for the investigation of any factors arising out of the safety regulatory regime governing Tranz Rail activities.

That there was a safety problem in the company was not denied by any party. The safety system required the operator to be licensed and that the rail services were being operated according to an approved safety system. Approved system requirements were contained in the Act.

A key provision of the TSL act was a deeming provision that by complying with the provisions of the Act or the operators approved safety system then the operator was deemed to be compliant with the occupational health and safety legislation. The OHS of Tranz Rail was split between the HSE Act and the TSL act with responsibility for enforcement with the OHS Act but subject to the constraints of the TSL. Effectively this allowed rail employees to have a lower level of OHS protection than the workforce generally.

The Inquiry recommended that the deeming provisions should be repealed, that OHS responsibility of for all employees should be the responsibility of OHS and public safety would be regulated by the specialist regulator.

The advantages of this approach were seen to be that it was consistent with the Robens approach of one act administered by one authority; it recognised the experience and expertise of OSH and avoided the difficult demarcation issues that arise if some occupational health issues are split between two jurisdictions.

Discussion in the report referred to the NZ approved safety systems and its origins in the management of industrial installations also adopted by the offshore oil industry and the gas and rail industries. The NZ rail union, the RMTU, argued there was no requirement for the safety auditor to consult with employees during or after the audit process and there was the need to establish formal links with employees .This position was accepted by the Inquiry.

Canada

Following a series of serious accidents the Canadian Government reviewed the Railway Safety Act.[25]The Review was wide ranging and made many recommendations. Not unsurprisingly many of the issues discussed, given the background of deregulation and privatisation would be familiar to many attending this conference.

The review report supported the safety management system approach which was relatively new to the Canadian railway industry and whilst supporting the approach indicated there were

[23] Gunningham ibid p24.
[24] Ministerial Inquiry into Tranz Rail Occupational Safety and Health. Report to the Ministers of Labour and Transport, August 2000.
[25] Stronger Ties: A Shared Commitment to Railway Safety: Review of the Railway Safety Act, November 2007.

implementation challenges emphasising that companies must capitalise on employee knowledge about hazards and risk in the working environment.

The Canadian Act contains an objects sub clause very similar to the one discussed earlier in the Australian context: encourage the collaboration and participation of interested parties in improving rail safety. In a number of places in the Report the importance of consultation was discussed.

Recommendations of the Review included

- reviving the Railways Safety Consultative Committee(including unions)which should serve as the key forum discussion of future directions in rail safety, rulemaking and regulation, policy issues of concern to the regulator and the regulated community
- Safety management systems: the industry must take every appropriate measure to ensure the effectiveness of local occupation health and safety committees. Specifically, they should involve employees in identifying hazards, and assessing and mitigating risks as part of safety management.

United Kingdom

Following a series of accidents and a railway review in 2004 the responsibility for regulating rail health and safety matters transferred from the HSC to the Office of Rail Regulator in April 2006. (The rail safety function had moved to the HSC/E in 1990).

The Government indicated that the application of the Health and Safety at Work Act would continue as would effective consultation through the Railway Industry Advisory Committee with all stakeholders, including unions about the overall approach to regulation as well as any other proposals; and a governance structure that ensure independence.

An Australian Example- the Mining Industry

In 2006 the National Mine Safety Framework (NMSF) an initiative of a Ministerial Council was established. It is a tripartite body. It consisted of seven strategies, which included; a nationally consistent framework, competency support, consistent and reliable data collection and effective consultation mechanisms and a collaborative approach to research.[26]

The nationally consistent legislative framework includes as a key feature the adoption of a safety and health management system approach with the identification, mitigation and monitoring of hazards being the central element of such as system. It also incorporates the principles of ILO Convention176: Safety and Health in Mines.

The NMSF was conscious of the overlap with the broader WHS harmonisation process and focussed its attention on those issues specific to the mining industry which would not be addressed in general WHS legislation e.g. the requirement for, and content of, safe and health management systems for mining operations, the need for heads of power, fines and penalties, mines rescue, the establishment of safety and advisory councils and audit risk management processes.

[26] Submission to Safe Work Australia: Model OHS Act and the National Mine Safety Framework.(Check)

In July 2011 Safe Work Australia released a mining safety management systems document.[27]It referred extensively to consultation requirements including the general provisions of the WHS Act and the WHS regulations which have more specific duties in particular to develop a safety role for workers so they are involved in : implementing and reviewing the WHSMS; identifying principal mining hazards; assessing risks and considering any risk control measures required; preparing and reviewing emergency plans; developing and implementing strategies to manage risk relating to fatigue , alcohol and drugs; investigating incidents relating to mining hazards and testing risk controls.

Concerning reviews and audits a mine operator must review and if necessary revise the WHSMS in a number of circumstances including if a health and safety representative at the mine requests the review and should consider the concerns of stakeholders.

Information that should assist in the review could include the result of any internal or system audits, reports on work health and safety performance, incident reports and investigations, hazard identification and risk assessment activities, changes to WHS standards and changing community expectations. The document indicates an audit could be carried out by supervisors and workers and with a more complex WHSMS being undertaken by an independent auditor.

Changing labour markets, union density and the Australian rail industry: a case study

The involvement of workers and their representatives in WHS has been affected by wider economic and political issues.

These can include significant changes in the composition of the work force, the decline of permanent employment and the introduction of part time, casual, contract and labour hire arrangements; privatisation, contracting out, vertical separation and open access and policies implemented by conservative government to deregulate industrial relations ,undermine collective bargaining and promote individual contracts over collective bargaining.

The later policies were pursed for a number of years by a national conservative government which was defeated in 2007. The biggest contributing factor to this defeat was a union and community campaign under the banner *"Your rights at work- worth fighting for*"

The WHS review referred to earlier was required by the terms of reference to take into account the changing nature of work and employment arrangements. The reviews Report argues changes in the economy were challenging many of the principles underpinning the Robens model which had assumed relatively stable full time employment and permanent work arrangements.

The WHS Review indicated that 72% of the workforce worked full time; that the proportion of employed people who worked part time rose form 19% in 1986 to 28% in 2006/7 with 71% being women and was more prevalent among younger and older workers; casual employment, i.e. employees without paid leave entitlements rose as a proportion from 17% in 1992 to 20% in 1998 and the proportion had remained stable. Once again casual employees were more likely to be female, young and part time.

[27] SafeWork Australia: Work Health and Safety Management Systems in Mining: Draft Code of Practice ,July 2011

One issue which has changed significantly in recent years has been the decline in union density in a number of countries. In Australia trade union membership since the early 1980's has declined.

The Review noted that trade unions have an important role mandated by law in representing workers on WHS issues. It referred to a range of studies that have found that better OHS standards may be achieved in unionised workplaces compared to non-unionised ones and that effective participation of workers and their representatives in WHS issues is enhanced where worker representatives are supported by trade unions.

The Review noted Article 21 of the ILO Occupational Safety and Health convention recognises that cooperation between management and workers and /or their representatives is essential to ensuring health and safety at the workplace.

Case study- railway infrastructure

Structural factors impacting on the employment arrangements of infrastructure workers have included privatisation, contracting out, competitive tendering, vertical separation, new business models based on project management and alliance partnering, private companies going into receivership and wider deregulation of the labour market issues. Other factors have included historically high levels of infrastructure investment with a sizeable component related to strategies aimed at reducing the impact of the GFC. There are also labour market shortages in a number of areas of the infrastructure workforce.

Another major factor impacting on this sector has been the emergence of international companies seeking to establish themselves in the Australian market; some are general construction companies and others are specialist railway companies whilst others are international asset management companies.

The morphing of Australian construction companies into asset management companies across rail, road, electricity and water facilities and a multiplicity of small companies in a number of instances commenced by ex-railway employees are other features of the railway infrastructure market.

At one stage in 2008 the Union identified 48 separate infrastructure companies with only 15 having union collective agreements. The others were made up of non-union agreements whilst some had individual contracts known as Australian Workplace Agreements.

The Unions' journal encapsulated the restructuring as *"companies whose core business involves sweat and steel are marrying, divorcing and dropping offspring all over the countryside".*

The other major structural change has been renationalisation of railways in one jurisdiction, the taking back into the public sector of regional infrastructure maintenance in another and the reintegration back into the public sector as a vertically integrated metropolitan railway operation in yet another. Infrastructure maintenance is today a 50/50 split between the public and private sectors in Australia.

The point needs to be made that an infrastructure worker over the period of fifteen years can have experienced management changing on several occasions with the associated changes to depots, depot boundaries, industrial agreements, and new senior managers with different agendas.

For example, take a regional rail infrastructure worker in NSW. The state government announced a "*rail revolution*" in 1996 which saw the vertical separation of operations and track and the formation of a separate publicly owned infrastructure corporation.

Following several serious accidents and commissions of inquiry, the government was forced to reintegrate infrastructure operations in the metro area in 2004.In the same year the interstate track and Hunter valley coal network were leased to the federally owned rail infrastructure corporation and the country workforce was managed by them. The staff was made available on a four year arrangement though there was severe rationalising and an organisational shakeup. The track manager in 2008 then employed the work force directly, rationalised and reorganised again with employees working under a non-union collective agreement.

In 2009 the owner of the infrastructure, the NSW government, decided to competitively tender the maintenance of the network under a 10 year contract. The incumbent was unsuccessful and a new maintainer of the network with a new union collective agreement and some 10% of the workforce not retaining their jobs will take up in 2012.

The rapid fire structural changes in many countries has had an impact on union density and the ability of workers and their organisations to effectively participate in such areas as OHS. Within the rail industry in Australia the changes have seen a fundamental reorientation of unions. There is a greater emphasis on recruitment, the mapping of changes within companies, greater international union cooperation across national borders because capital is global and mobile and an emphasis on ensuring new employees to the sector are covered by union collective agreements.

Fifteen years ago there would have been six industrial agreements in Australia covering infrastructure workers whereas today there are over 70 of which 15 are under negotiation. The union density of this sector of rail operations is approximately 85%.The union estimates casual and labour hire constitute some 15% of the workforce.

The changes of the recent period have impacted on the scope and functioning of workers participatory structures. The Unions' NSW Branch will spend $200,000 on the training of OHS delegates including on rail safety which will lead to a reinvigoration of OHS committees in a number of companies. The Union has been active in producing OHS and related materials for delegates.

The RTBU together with several employers has been active in working through the Industry training body to develop new career pathways with underpinning national competency based qualifications for rail infrastructure employees.

Unions have expressed their concerns at the impact of changing structural arrangements involving contractors and labour hire have had on rail safety. The RTBU has been concerned at the over representation of contractors in rail accidents. Deaths of contractors/labour hire employees have occurred at Singleton in 2007, Hexham in 2009 and at Newbridge in 2009.

Further issues affecting workers participation under the proposed rail safety law

Advisory committee structures.

This paper has referred to many examples of consultative structures developed in railways under rail safety acts or OHS legislation in overseas countries and within Australia. However no such move is evident in the Australian rail industry.

The NTC Single RIS discussed advisory groups and indicated *"consideration could also be given to creating an advisory board, council or committee…. an effective regulator could accommodate an advisory board structure …. Neither of the ministerial forms of advisory bodies is thought to be appropriate for the national rail safety regulator.*[28]*"* Nothing has occurred since.

The only consultative body for rail safety involving rail safety workers and their representatives is one established in NSW as part of the response to the recommendations of a Special Commission of Inquiry. In 2005 a Rail Safety Strategic Forum was established to provide ITSR and representatives of the rail industry with the opportunity to exchange ideas and to discuss strategic rail safety issues. Its roles include: reviewing and commenting on legislative requirements and supporting guidance material and discussing compliance issues to provide input into ITSR's regulatory strategies.

The Rail Safety Regulators Panel which consists of a member of the regulators office from each jurisdiction has established a consultative forum which consults with industry formally through the Rail Safety Co Regulation Group which meets three times a year. Unions are not represented on this body.

Rail Safety Information.

The importance of data gathering and analysis and the provision of information on rail safety have been highlighted on a number of occasions in various reports over recent years. The Ministerial Council has approved a national strategy for rail safety data. None the less substantial progress has not been made. Nonetheless there has been progress with the publication by the NSW regulator of an annual safety report.

The national model rail safety law provides a rail transport operator must annually produce a safety performance report that must contain a description and assessment of the safety performance of the rto's railway operations, comments on any deficiencies in, and any irregularities in the railway operations that may be relevant to the safety of the railway, and a description of any safety initiatives in relation to the railway operations undertaken during the reporting period or proposed to be undertaken in the next reporting period.

The National Model Regulations provide that the safety performance report must be made available for public inspection.

[28] NTC op cit p127

The decision to include the current requirements in the national model regulations was made following a public consultation process and a regulatory impact statement conducted by the NTC in July 2006.The RIS said "*to promote transparency of safety performance, the model bill established an obligation to keep and make available for public inspection the current notice of accreditation and any other document prescribed by the regulations."*[29] Safety performance reports were prescribed by the regulations.

The National Model Regulations were endorsed by the Ministerial Council with all jurisdictions voting in support. All jurisdictions (excluding Victoria which passed their legislating prior to the finalization of the National Model Regulation processes) translated the National Model Regulations into their legislation without alteration.

The safety performance reports have been available in a number of jurisdictions for several years and any difficulties that may have arisen have not been brought to the attention of the various committees and working group that have considered rail safety legislation in recent years. No public reference, to our knowledge, has been made by any rail transport operator or regulator as to problems encountered by the current regulation.

However at a very late stage in the process of producing national rail safety law and even though it was not mentioned in the regulatory impact statement nor were several RTBU enquires about the future of the regulation responded to, a decision was made to reverse a previous policy position concerning the making available of safety performance reports.

The RTBU argues that in Australia, and increasingly evident in the rail industry since privatisation, is the development of a culture of minimising rail data under the veil of "*commercial in confidence*." These developments do not bode well for ensuring rail safety workers and their representatives have the tools to meaningfully participate in rail safety consultation.

Conclusion: future actions to decrease the gap

This Paper has examined the history of workers participation under Australian WHS and rail safety law together with international practices, codes and conventions and an examination of practices in other Australian industries such as mining.

The development of rail safety law has proceeded under a narrowly constructed co -regulation model and has been slow to include provisions supporting workers and their representative's involvement in rail safety law. For too long industry participation has been synonymous with employer participation.

The Paper outlines how the 2006 national model rail safety law made changes to a number of provisions and whilst there has been acceleration because of the review of WHS law which has been translated into a number of areas of national rail safety law there are many gaps which need to be addressed.

The Paper examined the issues of the changing world of work and union density and its impact on worker participation and the Unions response to structural change in the infrastructure area.

[29] NTC Draft Regulatory Impact Statement, Model Regulations, July 2006

The RTBU argues that a program to decease the gap could involve the development of training rights for rail safety workers and their representatives underpinned by units of competency and paid training leave; the development of a concrete program concerning the new object for the rail safety regulator in providing advice, education and information to rail safety workers; ensuring effective participation in establishing, varying or reviewing a rail transport operators safety management system; building the capacity of WHS committees and HSR's with a special emphasis on contractors and labour hire employees; the involvement of rail safety workers in in risk assessments and the development and testing of risk controls; their participation in audits and inspection; a charter of information rights relating to various investigation reports at both regulator and company level, access to rail safety data including safety performance and audit reports; a role for unions in in taking action for the non-observance of the law by an RTO or regulator; provision for issue resolution and the establishment of effective consultation mechanisms at both national and regional level.