

**Department of Transport and Regional Development
Federal Office of Road Safety**

Rail (Dangerous Goods) Legislative Review

**Peter Rozen
Legal Consultant**

**Australian Government Publishing Service
Canberra**

© Commonwealth of Australia 1997

ISBN 0 644 39802 7

This work is copyright. Apart from any use as permitted under the *Copyright Act 1968*, no part may be reproduced by any process without prior written permission from the Australian Government Publishing Service. Requests and inquiries concerning reproduction rights should be directed to the Manager, Commonwealth Information Services, Australian Government Publishing Service, GPO Box 84, Canberra ACT 2601.

Produced by the Australian Government Publishing Service

DEPARTMENT OF TRANSPORT
FEDERAL OFFICE OF ROAD SAFETY
DOCUMENT RETRIEVAL INFORMATION

Report No.	Date	Pages	ISBN	ISSN
CR 170	May 1997	78	0 642 25542 3	0810 - 770X

Title and Subtitle

Rail (Dangerous Goods) Legislative Review

Authors

Peter Rozen

Performing Organisation

Peter Rozen
Legal Consultant

Sponsored by / Available from

Federal Office of Road Safety
GPO Box 594
CANBERRA ACT 2601

Project Officer: Dominic Zaal

Abstract

A review of existing Commonwealth, State and Territory legislation relating to the transport of dangerous goods by rail, was undertaken. The review provides an overview of the status, coverage and adequacy of existing rail dangerous goods transport legislation. The review also examines options for the development of a nationally uniform regulatory regime for rail dangerous goods transport operations. Issues relating to inter-modal harmony with the road transport sector, and legislative options to achieve uniformity are also discussed. The review concludes that a nationally uniform rail dangerous goods regulatory regime, harmonised with the road transport sector, should be given a high priority due to safety, transport efficiency and economic reasons.

Keywords

dangerous goods transport, rail safety, legislation, inter-modal harmony

NOTES:

- (1) FORS Research reports are disseminated in the interests of information exchange.
- (2) The views expressed are those of the author(s) and do not necessarily represent those of the Commonwealth Government.
- (3) The Federal Office of Road Safety publishes four series of research report
 - (a) reports generated as a result of research done within the FORS are published in the OR series;
 - (b) reports of research conducted by other organisations on behalf of the FORS are published in the CR series.
 - (c) reports based on analyses of FORS' statistical data bases are published in the SR series.
 - (d) minor reports of research conducted by other organisations on behalf of FORS are published in the MR series.

TABLE OF CONTENTS

EXECUTIVE SUMMARY.....	iv
------------------------	----

Chapter 1

Introduction and Conduct of the Review

1.1 OBJECTIVES OF THE REVIEW.....	1
1.2 THE IMPORTANCE OF INTER-MODAL HARMONY.....	2
1.3 METHODOLOGY.....	3
1.4 ACKNOWLEDGMENTS.....	4

Chapter 2

Background Issues

2.1 DANGEROUS GOODS TRANSPORT LAW.....	5
2.1.1 The National Road Transport Commission.....	5
2.1.2 The NRTC and Dangerous Goods.....	6
2.1.3 The Impact of the NRTC on Rail: A Regulatory Gap.....	8
2.1.4 The Rail (Dangerous Goods) Rules: A Solution?.....	10
2.2 REFORMS IN THE RAIL SECTOR GENERALLY.....	13
2.2.1 The Hilmer Competition Reform Process.....	13
2.2.2 The Inter-Governmental Agreement on Rail Safety.....	15

Chapter 3

The Current and Proposed Regulatory Environment

3.1 WESTERN AUSTRALIA.....	19
3.1.1 Dangerous Goods Regulation.....	19
3.1.2 Regulation of Railways.....	21
3.1.3 Competent Authority for Rail.....	22
3.1.4 Future Intentions: The ADG Code (6th Edition).....	22
3.1.5 Summary.....	22
3.2 VICTORIA.....	23
3.2.1 Dangerous Goods Regulation.....	23
3.2.2 Competent Authority for Rail.....	23
3.2.3 Rail Safety Legislation.....	23

3.2.4	Future Intentions: The ADG Code (6th Edition).....	24
3.2.5	Summary.....	24
3.3	SOUTH AUSTRALIA.....	25
3.3.1	Dangerous Goods Regulation.....	25
3.3.2	Competent Authority for Rail.....	26
3.3.3	Rail Safety Legislation.....	26
3.3.4	Future Intentions: The ADG Code (6th Edition).....	27
3.3.5	Summary.....	27
3.4	THE COMMONWEALTH.....	28
3.4.1	Australian National Railways Commission.....	28
3.4.1.1	Track Access.....	28
3.4.2	Competent Authority for Rail.....	29
3.4.3	National Rail Corporation Ltd.....	30
3.4.4	Commonwealth Occupational Health and Safety Laws.....	31
3.4.5	Future Intentions: The ADG Code (6th Edition).....	32
3.4.6	Summary.....	32
3.5	QUEENSLAND.....	33
3.5.1	Dangerous Goods Regulation.....	33
3.5.2	Competent Authority for Rail.....	34
3.5.3	Rail Safety Legislation.....	34
3.5.4	Future Intentions: The ADG Code (6th Edition).....	35
3.5.5	Summary.....	35
3.6	NEW SOUTH WALES.....	35
3.6.1	Dangerous Goods Regulation.....	35
3.6.2	Competent Authority for Rail.....	36
3.6.3	Rail Safety Legislation.....	37
3.6.4	Future Intentions: The ADG Code (6th Edition).....	37
3.6.5	Summary.....	37
3.7	TASMANIA.....	38
3.7.1	Dangerous Goods Regulation.....	38
3.7.2	Competent Authority for Rail.....	38
3.7.3	Future Intentions: The ADG Code (6th Edition).....	38
3.7.4	Summary.....	38
3.8	AUSTRALIAN CAPITAL TERRITORY.....	39
3.8.1	Dangerous Goods Regulation.....	39
3.8.2	Competent Authority for Rail.....	39
3.8.3	Future Intentions: The ADG Code (6th Edition).....	39
3.8.4	Summary.....	40

3.9	NORTHERN TERRITORY.....	40
3.9.1	Dangerous Goods Regulation.....	40
3.9.2	Competent Authority for Rail.....	41
3.9.3	Future Intentions: The ADG Code (6th Edition).....	41
3.9.4	Summary.....	41
3.10	SUMMARY OF CURRENT AND PROPOSED LAWS.....	41

Chapter 4

Future Options for National Uniformity

4.1	INTRODUCTION.....	43
4.2	LEGISLATIVE OPTIONS FOR IMPLEMENTATION.....	44
4.2.1	Option 1 - Implementation with the NRTC Package.....	44
4.2.2	Option 2 - Implementation under General Dangerous Goods Laws.	46
4.2.3	Option 3 - A New Act for the Transport of Dangerous Goods by Rail	46
4.2.4	Option 4 - Implementation Under Rail Safety Legislation.....	47
4.3	SUMMARY AND CONCLUSION.....	48

Chapter 5

Conclusion

5.1	AN OPPORTUNITY TO FILL THE 'REGULATORY GAP'.....	49
5.2	A WAY FORWARD: AN INTER-GOVERNMENTAL.....	50

Appendices

APPENDIX 1	RESEARCH PROJECT SPECIFICATION
APPENDIX 2	SELECTED REVIEW CORRESPONDENCE
APPENDIX 3	DRAFT REPORT CONSULTATIONS
APPENDIX 4	WORKSHOP ATTENDANCE
APPENDIX 5	WESTERN AUSTRALIAN MEMORANDUM OF UNDERSTANDING

EXECUTIVE SUMMARY

This report^{*} contains the findings of a Review conducted by Peter Rozen, legal consultant, for the Federal Office of Road Safety (FORS). The Review concerns the regulation of the transport of dangerous goods by rail. It was conducted between July 1996 and April 1997.

Chapter 1 of this report commences with a description of the Objectives of the Review and explains the methodology employed to meet those objectives and produce this report.

The Project Specification for the Review highlighted several developments which were considered to be relevant to the subject matter of the Review. These included the development of nationally uniform road transport law in relation to dangerous goods by the National Road Transport Commission (NRTC), the national competition principles which have resulted from the Hilmer report of 1993 and the Inter-governmental Agreement on Rail Safety. These developments are analysed in chapter 2 and their implications for the regulation of the rail transport of dangerous goods are assessed.

Chapter 3 contains a detailed evaluation of the approaches being adopted by each State and Territory in relation to the implementation of both road and rail dangerous goods laws. The issue of the Commonwealth's regulatory role is also considered. The description which was in chapter 4 of the draft report (November 1996) has been expanded to reflect recent legislative developments and the outcomes of a series of workshops held in March 1997. Having regard to the Objectives of the Review, the current situation may be summarised as follows:

- in five jurisdictions (South Australia, Tasmania, New South Wales, Queensland and the A.C.T.) there is some doubt about the identity of the rail Competent Authority;
- all jurisdictions are in the process of determining the means by which they will implement the NRTC regulatory package and the Rail Rules;
- it seems likely that there will not be a nationally uniform approach to the regulation of the rail transport of dangerous goods; and
- the future regulatory role of the Commonwealth is uncertain at the present time.

^{*}A draft report was distributed by the Federal Office of Road Safety for comment in November of 1996. Readers should note that the arrangement of this final report differs from that in the draft. In particular, chapter 2 of the draft report has been combined with chapter 1. Accordingly, this final report contains only five chapters.

The Review concludes that key officers in all jurisdictions recognise the issues and problems discussed in this report and are currently exploring legislative and administrative options for their resolution. The commitment to national uniformity in this area in November 1996 by the Australian Transport Council (ATC) is noted. However, there remains the serious risk that, in the absence of the necessary legislative action by relevant governments, Australia will have nationally uniform laws relating to the *road* transport of dangerous goods and a patchwork of different laws relating to the *rail* transport of dangerous goods. This would be a most undesirable outcome given the strong safety, economic and administrative arguments in favour of regulatory uniformity between the two land transport sectors.

In chapter 4, four options are considered for the development of a nationally uniform approach to the regulation of the rail transport of dangerous goods. In each case, advantages and disadvantages of the approaches are identified. The Review notes that most jurisdictions appear to be favouring options 1 or 2.

The Review concludes in chapter 5 with the firm observation that the only way to achieve inter-modal harmony between the road and rail regulatory regimes for dangerous goods in a manner which is nationally uniform, is for all jurisdictions to reach and implement a formal Inter-governmental Agreement. Such an Agreement would commit the parties to the development of a uniform legislative approach which would ensure the adequate regulation of the rail transport industry in a manner which is consistent with:

- the laws being developed by the NRTC;
- the competition reform principles outlined in chapter 2; and
- the Inter-governmental Agreement on rail safety.

The agreement by ATC in November 1996 on the desirability of these outcomes is a clear indication of the political commitment of all governments. It is noted that a great deal of the work which is required to produce a nationally uniform regulatory framework for the rail transport of dangerous goods has already been completed by the NRTC and FORS in the legislation, regulations, Rail (Dangerous Goods) Rules and the revised Dangerous Goods Code which have been developed in recent years.

The findings and recommendations of a draft of this report were discussed with relevant government and industry representatives at a series of workshops held in several State and Territory capital cities in March 1997. The draft report was amended in light of the comments made at the workshops. This final report and the consultation process which was followed in its preparation are intended to inform the jurisdictions' decision-making processes in relation to the important regulatory issues about the transport of dangerous goods by rail.

Chapter 1

Introduction And Conduct Of The Review

In July 1996, the Federal Office of Road Safety (FORS) commissioned Peter Rozen to conduct a Review of existing and proposed Commonwealth, State and Territory legislation relating to the transport of dangerous goods by rail. This report presents the findings of that Review. A draft report was released by FORS for comment in November 1996. This final report is a revised version of that draft after comments have been taken into account.

1.1 OBJECTIVES OF THE REVIEW

The broad objectives of the Review are.

- "1. to determine the status, coverage and adequacy of existing rail dangerous goods transport legislation in relation to the adoption of the new ADG Code and Rail Rules.
2. If current arrangements are considered inadequate:
 - a. to document and evaluate State/Commonwealth mechanisms (proposed or already implemented) to adopt the new ADG Code into appropriate rail transport legislation.
 - b. to broadly examine future possible options for rectifying the rail regulatory situation.
3. to identify who is (or will be), according to the relevant legislation, the rail Competent Authority in each jurisdiction and the extent of their regulatory powers.
4. to examine the potential impact and role that the new national 'Track Australia' body will have on existing and future regulatory regimes for the transport of dangerous goods by rail."¹

¹The complete Research Project Specification for the Review is attached at Appendix 1.

The report responds to these specific objectives in the following way.

Objectives 1, 2(a) and 3 require descriptions of current or proposed legislation. These issues are discussed in chapter 3 of the report which examines the legislation of each jurisdiction in turn.

It is concluded that existing or proposed legislation is inadequate firstly in terms of its ability to meet the regulatory challenges which are emerging as part of relevant economic and legislative reforms and secondly in its failure to achieve consistency or uniformity across the nation.

Objective 2(b) requires a consideration of possible future options which may remedy these inadequacies. In chapter 4, a range of options is identified and the relative merits and problems associated with each option are discussed. It is concluded that the most appropriate way to resolve the issues raised by this Review is by an Inter-governmental Agreement between all of the relevant jurisdictions. Such an Agreement should lay the groundwork for a nationally uniform or consistent approach to the development of legislation promoting the safe transport of dangerous goods by rail.

The matters raised by objective 4 are addressed in the discussion of Commonwealth legislation in chapter 3.

1.2 THE IMPORTANCE OF INTER-MODAL HARMONY

According to the Project Specification for this Review, "an inadequate regulatory regime [for the rail transport of dangerous goods] would not only jeopardise land transport safety but would also reduce the high level of inter-modal consistency which presently exists, between the rail and road transport sectors ...".

This inter-modal consistency is evidenced by the existence in Australia for a number of years of a single Code governing the transport of dangerous goods by road *and* rail.² A number of benefits flow from this inter-modal harmony. First, the overwhelming majority of dangerous goods which are transported by rail are also transported by road before and after the rail journey. It is therefore highly desirable for requirements regarding packing, labelling, etc to be identical for both modes. Secondly, consistent laws simplify compliance and therefore promote safety. Finally,

²*The Australian Code for the Transport of Dangerous Goods by Road and Rail* (FORS, 5th ed., 1992).

the task of administering and enforcing the laws is made more efficient for administrators and regulators who only need to enforce one set of requirements.³

1.3 METHODOLOGY

This Review was conducted between July 1996 and April of 1997. This period was chosen to ensure adequate consideration of the issues during the development of the new edition of the Australian Code for the Transport of Dangerous Goods by Road and Rail which is expected to be finalised by mid-1997.⁴

The methodology which was used for the preparation of the draft report consisted of four aspects.

(1) A review of relevant legislation was conducted. This involved a detailed examination of Commonwealth, State and Territory legislation (Acts, regulations and other relevant subordinate instruments) relating to dangerous goods and the regulation of rail transport. In some cases it was necessary to examine other legislation such as that regulating occupational health and safety.

(2) A letter was sent to all of those regulatory officers identified as Rail Competent Authorities in the draft 6th edition of the ADG Code. The letter sought information relevant to the terms of reference of the Review. Responses were received from all jurisdictions except Queensland. The information provided by the respondents is gratefully acknowledged.⁵

(3) Informal consultations with a range of relevant government and industry personnel were conducted between August and September 1996 in all jurisdictions during visits to Adelaide, Brisbane, Canberra, Melbourne and Sydney.⁶ Full details of those consulted are included at Appendix 3.

³It is noted that one of the objects of both the proposed Road Transport Reform (Dangerous Goods) Regulations and the Rail (Dangerous Goods) Rules is "to promote consistency between the standards, requirements and procedures applying to the transport of dangerous goods by [road and rail] and by other modes of transport" - Regulation/Rule 1.3(c).

⁴See further 2.1.2 below.

⁵A copy of the letter which was sent is attached at Appendix 2.

⁶A visit to Western Australia was proposed but was not considered necessary, at this stage, by the relevant Western Australian authorities.

(4) Formal presentations about the aims of the Review, and its progress to date, were made to:

- the Drafting Sub-Committee of the Advisory Committee on the Transport of Dangerous Goods (15/8/96); and
- the Rail Safety Inter-governmental Agreement Working Group (22/8/96).

In accordance with the terms of reference of the Review, a draft report was circulated to relevant parties in all jurisdictions for comment. In particular, feedback was sought on the accuracy of the overview of current legislation and the range of options presented to regulate the transport of dangerous goods by rail in a manner which is both adequate and nationally consistent.

In order to obtain this feedback, workshops were held in Adelaide, Brisbane, Canberra, Melbourne and Sydney. These workshops were attended by a total of 79 people representing dangerous goods regulators, rail operators and regulators, dangerous goods consignors and others. A full list of those who attended the workshops is included at Appendix 4.

The draft report was revised in light of these comments and other relevant developments. A final report is now presented to FORS.

1.4 ACKNOWLEDGMENTS

The participation of the individuals and organisations who were consulted during the preparation of this report is acknowledged. In particular, the comments and support of Dominic Zaal of the Federal Office of Road Safety and the suggestions and comments of those who attended the workshops in March 1997, were invaluable.

Chapter 2

Background Issues

The Project Specification for this Review notes that major developments in several areas are having a significant effect on the regulation of the transport of dangerous goods by rail. Accordingly, this Review commences with a consideration of these developments. It is important to understand the changing legislative environment affecting both the transport of dangerous goods on the one hand, and rail transport generally on the other, before one can make the important policy decisions which are now needed in this area. The recent and proposed legislative and administrative changes to these two areas are considered in turn.

2.1 DANGEROUS GOODS TRANSPORT LAW

The most significant development in this area in recent years was the enactment by the Commonwealth parliament of the *National Road Transport Commission Act* 1991. The principal purposes of that Act are to give effect to two inter governmental agreements, the "Heavy Vehicles Agreement" and the "Light Vehicles Agreement".⁷ These Agreements committed their signatory governments to "establishing and implementing a co-operative scheme" for the development and maintenance of "uniform or consistent road transport legislation throughout Australia".⁸

2.1.1 THE NATIONAL ROAD TRANSPORT COMMISSION

The Act established the National Road Transport Commission (NRTC) as the body which would recommend the proposed nationally uniform or consistent road transport law to a Ministerial Council for Road Transport established by Part VI of the *Heavy Vehicles Agreement*. Under the scheme, if such recommendations are "not disapproved" by the Ministerial Council, the Commonwealth government is required to introduce one or more Bills into the Commonwealth parliament for the enactment of road transport law for the Australian Capital Territory.⁹ In accordance with the

⁷The Commonwealth and all States and Territories signed the agreements which are reproduced at Schedules 1 and 2 to the Act respectively - see s 3.

⁸See *Heavy Vehicles Agreement*, Recital D and *Light Vehicles Agreement*, Recital C.

⁹*Heavy Vehicles Agreement*, Recital G.

Agreements, the States and the Northern Territory are to enact legislation in their respective jurisdictions adopting the template A.C.T. legislation as their own law.¹⁰

2.1.2 THE NRTC AND DANGEROUS GOODS

The law regulating the road transport of dangerous goods is identified as a priority area for the work of the NRTC.¹¹ The Commission has approached its task in this area in two stages. The first stage (1992-4) involved the development of a piece of primary legislation which would provide a framework for the regulatory scheme governing the road transport of dangerous goods. The result of this stage was the *Road Transport Reform (Dangerous Goods) Act 1995 (Cth)*.¹² This Commonwealth Act came into force in the A.C.T. on 11 April 1996 and the other jurisdictions have either implemented it,¹³ or are currently in the process of implementing it.¹⁴

The main features of the Act include:

- empowering the making of delegated legislation in the form of regulations;¹⁵
- establishing and empowering an administration and enforcement "inspectorate" under a "Competent Authority";¹⁶
- granting Competent Authorities the power to exempt people from the regulations;¹⁷ and
- creating offences and providing for penalties.¹⁸

The second stage of the NRTC's development of dangerous goods road transport law is ongoing. In this stage, the detailed legal obligations (in the form of regulations) and

¹⁰At the same time, those jurisdictions will repeal, amend or modify their own laws "to the extent necessary to avoid any conflict with [the template legislation]" - *Heavy Vehicles Agreement*, cl 8(1)(a); *Light Vehicles Agreement*, cl 8(1)(a).

¹¹*Light Vehicles Agreement*, clause 17(2)(a)(vi).

¹²The *Road Transport Reform (Dangerous Goods) Amendment Act 1997 (Cth)* effects amendments which are largely technical in nature and are not of any significance for this Review.

¹³E.g. Victoria enacted the *Road Transport (Dangerous Goods) Act 1995 (Vic.)*.

¹⁴It is likely that some jurisdictions will amend their existing law rather than enacting an entirely new piece of legislation. This question is explored further in chapter 4 below.

¹⁵*Road Transport Reform (Dangerous Goods) Act 1995 (Cth)*, Part 2.

¹⁶*Road Transport Reform (Dangerous Goods) Act 1995 (Cth)*, Part 3.

¹⁷*Road Transport Reform (Dangerous Goods) Act 1995 (Cth)*, Part 4.

¹⁸*Road Transport Reform (Dangerous Goods) Act 1995 (Cth)*, Part 5.

a complementary Code (containing the technical requirements) have been prepared. These subordinate instruments "flesh out" the framework provided by the Act. Their development involves the drafting of:

- regulations to be made under the *Road Transport Reform (Dangerous Goods) Act*; and
- the sixth edition of the Australian Dangerous Goods Code ('ADG Code').¹⁹

The draft regulations and draft ADG Code were submitted to the Ministerial Council for Road Transport for its approval on 26 March 1997. If they are approved, it is anticipated that the regulations and the new edition of the Code will become part of the law of the A.C.T. in June 1997.²⁰ Two key principles have guided the development of the regulations and the Code:

(1) the identification of duty holders and the imposition of duties on those parties are to be spelt out in the regulations; and

(2) the provision of detailed guidance to those duty holders on the standards with which they should comply is to be in the Code.

In addition, the regulations outline a range of 'regulatory' matters such as licensing, the granting of approvals and exemptions and the availability of criminal sanctions and infringement notices.

It is intended that the three components of the proposed law (the Act, the regulations and the Code) will be a complete legislative package so far as the *road* transport of dangerous goods is concerned. Although the new regulations and Code will apply only in the A.C.T. when they are made, it is intended that the new regulatory scheme will come into force nationally on the one day.²¹ However, for this to occur, the States and the Northern Territory must first implement the legislative template in accordance with the Agreements referred to above.

¹⁹The *Australian Code for the Transport of Dangerous Goods by Road and Rail*; the development of the first five editions of this document occurred prior to the establishment of the NRTC.

²⁰It is likely that the regulations will not commence in the A.C.T. until they have been implemented in other jurisdictions - see further 3.8.3 below.

²¹Currently estimated to be in the first half of 1997, but subject to slippage depending on the legislative timetables of the jurisdictions.

One final issue is worthy of mention as it was raised by participants in several of the workshops held in March 1997. The issue is the limited scope of the road regulatory package developed by the NRTC. In particular, the coverage of classes of dangerous goods under the Road Regulations does not extend to dangerous goods of class 1 (explosives), class 6.2 (infectious substances) or class 7 (radioactive substances). Workshop participants strongly urged the incorporation of class 1 dangerous goods into the regulatory scheme and consideration of incorporating classes 6.2 and 7. While these matters are strictly beyond the terms of reference of this Review, they are matters which FORS may wish to raise with the NRTC.

2.1.3 THE IMPACT OF THE NRTC ON RAIL: A REGULATORY GAP.

Prior to the establishment of the NRTC, each of the jurisdictions incorporated the 5th edition of the ADG Code into its own law.²² The effect of this incorporation was to make it mandatory, in most jurisdictions, for the obligations and requirements in the ADG Code to be observed in relation to both road and rail transport.²³ The resultant inter-modal regulatory harmony is generally considered to be highly desirable.²⁴

However, the NRTC is only responsible for the development of National *Road* Transport Law. Under the NRTC's new regulatory framework, the proposed regulations will therefore be restricted in their scope by the Act under which they will be made: the transport *by road* of dangerous goods.²⁵ The proposed 6th edition of the ADG Code on the other hand has been jointly prepared by FORS and the NRTC to apply to the transport of dangerous goods *by road and rail*.

One important outcome of this approach is that the Code will become solely a technical document with all of the duty-imposing provisions removed and included (as far as road transport is concerned) in the road regulations. As such, the Code will no longer represent a complete set of obligations and technical provisions for the safe transport of dangerous goods. It will lack those provisions which identify duty holders and impose duties. It will also lack a range of administrative powers relating to the

²²The precise method used to accomplish this end varied between the jurisdictions and this is discussed in Chapter 4 below.

²³This was the same approach which had been traditionally taken to giving legal effect to the road aspects of the ADG Code. It was concerns about the legal enforceability of such an approach which led, in part, to the approach of the NRTC described above.

²⁴See 1.2 above.

²⁵*Road Transport Reform (Dangerous Goods) Act 1995* (Cth), s 3(1).

granting of approvals and exemptions, and the operation of mutual recognition.²⁶ These are presently located in various laws of the States and Territories which will be repealed and replaced by the new road transport Act and regulations.

Only by implementing the Act, the regulations and the ADG Code will the law of the jurisdictions contain a complete set of obligations and technical provisions for the safe transport of dangerous goods by *road*. However, the same framework does not apply to rail transport. Although the technical provisions relevant to *rail* transport will remain in the ADG Code, there will be no corresponding (rail) Act, nor will there be any (rail) regulations.

The difficulty that this will cause is that the duty-imposing provisions relevant to rail transport which are presently in the 5th edition of the ADG Code will not be reproduced in the 6th edition. In other words, the NRTC redraft of the ADG Code into a road specific Act and regulations, and a technical Code covering both road and rail, will leave a significant 'regulatory gap' in relation to rail. The duty-imposing provisions will no longer exist for the rail dangerous goods transport sector.

The potential problems of the NRTC's work in relation to the regulation of dangerous goods transport by rail were identified in the regulatory impact statement prepared by the NRTC for the *Road Transport Reform (Dangerous Goods) Bill*:

"The (5th edition of the) ADG Code covers road and rail transport, but the proposed *Road Transport Reform (Dangerous Goods) Bill* covers only road transport. The (6th edition of the) ADG Code will be redrafted in a way which preserves rail-specific requirements. Legislation in the States and Territories *may be needed* to ensure that these requirements are maintained".²⁷

This reference acknowledged the previously mentioned 'regulatory gap' caused in relation to rail transport by the work of the NRTC. As a result, it became necessary for action to be taken to ensure that the technical provisions in the Code applicable to rail were supported by legislative provisions which:

- identified the 'key players' in the rail dangerous goods transport industry;
- allocated legally binding responsibilities to those parties;

²⁶See Parts 15-19 of the proposed *Road Transport Reform (Dangerous Goods) Regulations*.

²⁷National Road Transport Commission, *Regulatory Impact Statement: Road Transport Reform (Dangerous Goods) Bill*, (NRTC, Melbourne, 1994), pp 7-8, emphasis added.

- imposed penalties for a failure to comply with those legal duties;
- established an enforcement agency with the legal powers to investigate suspected offences and take enforcement action in appropriate cases; and
- empowered that enforcement agency to take administrative action in relation to approvals, exemptions, and determinations which will enable the practical operation of the regulatory scheme.

For the purposes of preserving inter-modal harmony between the road and rail sectors, these issues must be addressed in a way which is consistent with the regulatory approach being established by the NRTC for the road transport sector.

2.1.4 THE RAIL (DANGEROUS GOODS) RULES: A SOLUTION?

When the *Road Transport Reform (Dangerous Goods) Bill* was introduced into the Commonwealth parliament, the Commonwealth Transport Minister recognised the potential problem caused by the development of road specific dangerous goods laws and undertook to address it. In particular, he made the following commitment:

"A feature of the present regulatory framework, centred as it is on the requirements of the dangerous goods and explosives code (sic.), is that there is a common set of requirements applying to both road and rail transport of dangerous goods. The Commonwealth recognises the concern which has been expressed by rail authorities and rail operators that creation of a uniform scheme for the transport of dangerous goods by road should not come at the expense of the inter-modal harmony which presently exists between road and rail. My department has given a commitment to ensure that the provisions of the present codes relating to rail are revised in harmony with the road provisions so that the essential seamlessness between the two modes is maintained".²⁸

The Minister's undertaking has been partially fulfilled by the development of the *Rail (Dangerous Goods) Rules* ('the Rail Rules'). However, the development of the Rail

²⁸Parliamentary Debates, 28 March 1995, *Hansard*, p 2281 (similar concerns were expressed by the then shadow Minister, and now Minister, at p 2284).

Rules is considered by this Review to be, at best, a partial and short term solution to the problems identified above.

In particular, the Rules fail to address several of the matters identified in 2.1.3 above as necessary to provide a proper basis for the regulation of the transport of dangerous goods by rail. As a result, the legislative basis for the enforcement of duties relating to rail transport may not withstand legal challenge. Unless further action is taken to address these matters, public confidence concerning safety in this important area may be compromised.

With two crucial differences, the Rail Rules essentially mirror the *Road Transport Reform (Dangerous Goods) Regulations* with amendments to take into account the specific features of rail transport.²⁹ They largely achieve their stated purpose of ensuring that the rail transport sector will be covered by a single document which both identifies duty holders and provides them with technical guidance. This is the effect of the current 5th edition of the ADG Code.

The first crucial difference is that whereas the Road Regulations are being developed under a framework established by an Act of Parliament which delegates certain legislative powers, the Rail Rules have no statutory basis whatsoever. The Rail Rules are contained in a stand alone document, the legal effect of which will be determined entirely by whatever legislation is used by the States and Territories to implement it. The available legislative options are considered in chapter 4 below.

The second significant difference between the Rail Rules and the Road Regulations is that the former contain a number of provisions which are derived not from the Road Regulations but from the Road Act under which those regulations are being developed.

For example, the appointment and empowerment of the regulatory authority (referred to as the "Competent Authority") for the legislative scheme for road transport is provided for by Part 3 of the *Road Transport Reform (Dangerous Goods) Act*. This is consistent with the conventional legislative approach of addressing such important matters in primary rather than subordinate legislation. By contrast, the draft Rail Rules³⁰ purport to empower the Competent Authority³¹ to perform a range of

²⁹For example, duties which are imposed on "prime contractors" under the Road Regulations are imposed on "rail operators" under the Rail Rules.

³⁰References in this Report are to the "ACTDG draft" dated January 1997.

functions including the appointment of authorised officers (rule 1.24), the determination of whether goods are dangerous goods (rule 1.16(b)) and the granting of exemptions (rule 16.1). It is to be noted that rule 1.27 of the Rail Rules acknowledges that such provisions will "only have effect to the extent permitted under State and Territory Legislation".

It is intended that the Rail Rules will be published as a Schedule to the ADG Code thus enabling jurisdictions to give effect to both the duty-imposing provisions in the Rail Rules and the technical provisions in the Code in relation to rail transport. The Rail Rules are intended to fill the regulatory gap caused by the removal from the Code of the duty-imposing provisions in relation to rail.³² They have been developed in conjunction with a range of interested parties and, together with the technical aspects covered in the Code, are intended as a complete set of provisions for the regulation of the safe transport of dangerous goods by rail.³³ Accordingly, the Rail Rules could be adapted as regulations made under appropriate primary legislation with relative ease. Ideally, this would occur in a nationally uniform manner so as to parallel developments in the area of road transport. This issue is explored further below.

An evaluation of the efficacy of this approach is not a matter identified as an objective of this Review. However, it would be remiss of the Review not to note that the desired effect will only be successfully achieved if the legislation of the States and Territories which gives legal effect to the Code makes it clear that the provisions of the Rail Rules are intended to be mandatory and to create criminal offences. In addition, the scope of the relevant regulation-making powers in that legislation will have to be broad enough to encompass the wide range of matters addressed in the Rail Rules. Finally, that legislation will need to address each of the matters identified at 2.1.3 above such as penalty levels and administrative and enforcement powers. It is only then that the regulatory scheme for the transport of dangerous goods by rail will be complete.

In chapter 3, the current or intended legislative approaches to these issues in the various jurisdictions are examined and evaluated. It will be seen that each jurisdiction is approaching the issues differently and there are doubts about the legal and regulatory adequacy of several of these approaches. In chapter 4, some options for a nationally uniform, or at least consistent, approach are discussed. However, it is first

³¹"Competent Authority" is defined as "a Competent Authority appointed for this jurisdiction under appropriate State and territory legislation". This matter is explored further in chapters 3 and 4 below.

³²Described above at 2.1.3.

³³Assuming that they are implemented under appropriate legislation.

necessary to examine other relevant legislative and administrative reforms, which are of particular relevance to the issue of the identification of the most appropriate Competent Authority (or regulator) for any regulatory scheme for the transport of dangerous goods by rail.³⁴

2.2 REFORMS IN THE RAIL SECTOR GENERALLY

Another area of significant change which impacts on the matters under consideration by this Review, concerns the reforms which have been implemented in the rail transport sector generally in recent years. There have been two separate but related reform processes, both of which are ongoing. The first involves the implementation of the so-called Hilmer reforms on National Competition Policy. The second is the implementation of the principles outlined in the Inter-governmental Agreement on Rail Safety. Each is considered in turn.

2.2.1 THE HILMER COMPETITION REFORM PROCESS

The National Competition Policy reform process is largely the result of the 'Hilmer report' of 1993.³⁵ The Hilmer report identified several factors as crucial to improving the competitiveness of the national economy. These included the need for reform of infrastructure and regulatory systems as well as the need to expose to market competition certain areas of the economy which had traditionally been sheltered from it.³⁶ The rail transport sector is one area where significant 'Hilmer' reforms have been taking place.³⁷ The former Industry Commission identified six aspects of this reform process which are relevant to rail:

- extending Part IV of the Trade Practices Act to State rail authorities;
- establishing a legal right to negotiate access to rail infrastructure on commercial terms, where an effective access regime is not in place;

³⁴See objective 3 of the Review.

³⁵Hilmer F, Raynor M and Taperell G (The Independent Committee of Inquiry), *National Competition Policy*, (AGPS, Canberra, 1993) (hereafter 'Hilmer 1993').

³⁶Hilmer 1993: pp xvii-xviii.

³⁷For a detailed discussion of the impact of the Hilmer reform process on the rail sector, see Industry Commission, *The Growth and Revenue Implications of Hilmer and Related Reforms* (Industry Commission, Canberra, 1995): 189-222 ('Industry Commission 1995'); see also Productivity Commission, *Stocktake of Progress in Microeconomic Reform* (Productivity Commission, Canberra, 1996): 190-194.

- applying the Prices Surveillance Act to those State rail authorities not subject to effective price oversight arrangements;
- applying competitive neutrality arrangements that seek to equalise net competitive advantages of government rail authorities arising from their public ownership;
- removing statutory monopolies with respect to the transport of some commodities; and
- establishing the appropriate structure for a rail authority before that rail authority is exposed to competition from the private sector or before it is privatised, *and removing any regulatory functions from the rail authority before it is exposed to competition.*³⁸

In the present context, the last issue is of the utmost importance. As will be seen below, government rail authorities, operating as statutory monopolies, have traditionally regulated the transport of dangerous goods by rail. As a result of the implementation of the above principles, these same rail authorities are currently, or may be in the near future, competing with private rail operators in the transport of freight, including dangerous goods.³⁹ The implementation of the Hilmer reform process seriously calls into question the appropriateness of any arrangements under which a government rail authority exercises regulatory powers in such circumstances.⁴⁰

Examples abound of the problems which such an approach could cause to the regulation of the rail transport of dangerous goods. For instance, the highly prescriptive nature of dangerous goods law means that it is often necessary for those bound by the laws to seek temporary exemptions from the strict requirements to facilitate commercial undertakings.⁴¹ Generally speaking, the regulator must be satisfied that safety will not be compromised before granting such an exemption. In the context of rail transport, it would be most inappropriate for a government rail authority to sit in judgement on an application for an exemption by a private operator with which it was competing. Further, who would determine whether the government

³⁸Industry Commission 1995: 189-190, emphasis added.

³⁹Several representatives of private rail operators attended the workshops in March 1997.

⁴⁰A point which was generally strongly endorsed by workshop participants.

⁴¹See, for example, s 32 of the *Road Transport Reform (Dangerous Goods) Act 1995* (Cth).

rail authority itself was granted an exemption? Clearly a competitive rail transport sector requires an independent regulator to determine such matters.

These concerns were recognised by a number of rail operators and dangerous goods regulators who attended the workshops. They indicated that a government rail authority, particularly one operating on a commercial basis, could not exercise regulatory powers due to the clear conflict of interest which could arise in situations such as those described in the previous paragraph. Further, concerns were expressed about the possible public perception of reduced safety levels in relation to dangerous goods in such circumstances, particularly given the likely increase in the number of private rail operators which may transport dangerous goods in future.⁴²

2.2.2 THE INTER-GOVERNMENTAL AGREEMENT ON RAIL SAFETY

In 1995, the Commonwealth government entered into an Inter-governmental Agreement on rail safety ("the IGA") with all of the mainland State governments. The IGA came into effect on 1 July 1996. Under the IGA, each Party agrees to legislate or take "appropriate administrative action" to enable rail operators and owners to be accredited in relation to safe operating procedures.⁴³

Four governments - New South Wales, Queensland, Victoria and South Australia - have enacted such legislation.⁴⁴ Western Australia does not expect to have rail safety legislation in place for some time.⁴⁵ Although the existing Acts differ somewhat, they each address the same broad themes, in accordance with the IGA. Using the South Australian Act as a typical example of these Acts,⁴⁶ their main themes may be described as:

⁴²See, for example, the suggestion that there may soon be a new private interstate rail transporter - *Australian Financial Review* 18/3/97, p 6

⁴³See the IGA, clause 4.

⁴⁴*Rail Safety Act* 1993 (NSW), which pre-dated the IGA; *Transport Infrastructure Amendment (Rail) Act* 1995 (Qld); *Transport (Rail Safety) Act* 1996 (Vic.) and *Rail Safety Act* 1996 (S.A.) respectively.

⁴⁵On 22 August 1996, at the meeting of the IGA Working Group, Mr Martin Baggot, General Manager Business Development, Westrail, explained the likely implementation schedule of the IGA in W.A.

⁴⁶Unlike the NRTC process described above, the IGA does not require *template* adoption. This may account for the remarkably short time that it has taken for the IGA to be implemented. Accordingly, there are some differences between the Acts which have been passed to give effect to the IGA. However, these differences are not crucial for the purposes of this Review.

- requiring railway owners and operators to be accredited by an Administering Authority;⁴⁷
- empowering such an Authority to determine applications for such accreditation by having regard to matters including the applicant's capacity to meet the requirements of the *Australian Railway Safety Standard*;⁴⁸
- making it an offence for an accredited owner or operator to fail to comply with the Standard or the safety management plan submitted with their application;⁴⁹
- empowering the Administering Authority to inspect, or cause to be inspected, the operations of an accredited owner or operator⁵⁰ and to delegate any of its functions or powers;⁵¹ and
- providing for the reporting of, and investigation into, certain railway incidents.

The Acts also provide for regulations to be made to "fill out" their operation.⁵² Such regulations may incorporate codes or standards prepared or published by "prescribed bodies".⁵³

There is minimal mention of the transport of dangerous goods in either the rail safety legislation or the Standard. However, railway incidents which "could result in explosion, fire or pollution caused by dangerous goods" are matters which a railway operator must notify to the regulatory authority which may in turn cause such incidents to be investigated.⁵⁴

The combined effect of the implementation of the Hilmer reforms and the enactment, or proposed enactment, of rail safety legislation, means that a nationally consistent, but state-based, regulatory regime for the safe operation of railways is in the process

⁴⁷*Rail Safety Act 1996* (S.A.), s 6. It is important to note that this Administering Authority is quite distinct from the dangerous goods "Competent Authority" which is the regulator under dangerous goods legislation.

⁴⁸*Rail Safety Act 1996* (S.A.), Part 2; the Standard is referenced in the IGA (e.g., clause 5(a)). Its full title is the *Railway Safety Management Standard*, (AS 4292.1-1995), published by the Standards Association of Australia.

⁴⁹*Rail Safety Act 1996* (S.A.), ss 25-26.

⁵⁰*Rail Safety Act 1996* (S.A.), Part 4.

⁵¹*Rail Safety Act 1996* (S.A.), s 52.

⁵²*Rail Safety Act 1996* (S.A.), s 63 and Schedule 2.

⁵³*Rail Safety Act 1996* (S.A.), s 63(2)(a).

⁵⁴*Rail Safety Act 1996* (S.A.), s 37 and Schedule 1, clause 12 (see also clauses 15 and 16).

of being established in most of mainland Australia. This scheme includes the empowerment of a regulatory authority in each jurisdiction to oversee and regulate the scheme's operation. These regulatory authorities are located within transport departments and are quite distinct from the government (and private) entities which operate railways. Further, they are quite distinct from the dangerous goods regulatory authorities.

Finally, regardless of the results of the Review, these rail safety regulatory authorities will exercise some regulatory powers in relation to the transport of dangerous goods by rail, even if that role is limited to receiving reports of dangerous goods incidents and causing those incidents to be investigated in appropriate cases.⁵⁵

⁵⁵In practice, this role is likely to be much greater as an operator's ability to demonstrate compliance with the Dangerous Goods Code will be a consideration in the accreditation process where relevant.

Chapter 3

The Current And Proposed Regulatory Environment

In this Chapter the present and proposed legislative provisions relating to the regulation of the transport of dangerous goods by rail are examined. Each of the jurisdictions is considered in turn. In accordance with the Review's terms of reference and the preceding discussion, the following matters have been taken into account:

- the legislative arrangements giving effect to the current (5th) edition of the ADG Code;
- the identification of the rail Competent Authority;
- the legislative basis of the operation of government railways and, where applicable, rail safety legislation; and
- the intended legislative arrangements for giving effect to the 6th edition of the ADG Code and the identification of the proposed rail Competent Authority.

3.1 WESTERN AUSTRALIA

3.1.1 DANGEROUS GOODS REGULATION

The regulation of the transport of dangerous goods occurs under the *Explosives and Dangerous Goods Act* 1961 (W.A.).⁵⁶ Regulations have been made under that Act in relation to the transport of dangerous goods.⁵⁷ Regulation 6.1 provides that the transport of dangerous goods in Western Australia is to be carried out in accordance with the ADG Code. However, sub-regulation (1) qualifies this general statement by stating that "...nothing in these regulations applies to the transport of dangerous goods by rail...".

This is consistent with s 63(f) of the Act which provides as follows:

⁵⁶See particularly Part IV, Division 2A.

⁵⁷*Dangerous Goods Regulations* 1992.

"63. Nothing in this Act shall apply -

...

- (f) to the conveyance of explosives or dangerous goods by the Commissioner of Railways on any railway under this control and management pursuant to the provisions of the *Government Railways Act* 1904, where the Chief Inspector [of Dangerous Goods]⁵⁸ has approved that manner of conveyance and is satisfied that adequate safety measures are being taken."

Prior to 1995, this limitation on the operation of Western Australian dangerous goods law was reflected in the exercise of rail Competent Authority powers by the Secretary for Railways.⁵⁹ In 1995, the Chief Inspector of Explosives and Dangerous Goods entered into a Memorandum of Understanding ('MOU') with the Western Australian Government Railways Commission.⁶⁰ The purpose of the MOU is outlined in its Preface:

"This Agreement *clarifies the arrangements* for giving effect to Section 63(f) of the Explosives and Dangerous Goods Act 1961 ...".⁶¹

The substantive parts of the MOU relevantly provide that:

"The Chief Inspector of Explosives and Dangerous Goods (Chief Inspector) will be the designated Competent Authority for dangerous goods in Western Australia in accordance with Section 1.2 of the [ADG Code].

Where the Commission consigns or undertakes with a consignor to be responsible for the transport of dangerous goods then the legal obligations "Consignor" and "Prime Contractor" as expressed in the ADG Code apply to the Commission.⁶²

⁵⁸Appointed under Part 2 of the *Explosives and Dangerous Goods Act* 1961.

⁵⁹See ADG Code, 5th ed, p 6 (it is not clear that this "appointment" was pursuant to any particular statute).

⁶⁰Attached as Appendix 5.

⁶¹Emphasis added. In fact the MOU appears to go beyond clarification and seeks to alter the effect of s 63(f). This is clearly only a matter for the W.A. parliament.

⁶²This aspect of the MOU appears to be inconsistent with Regulation 6.1(1) of the regulations referred to above.

The Chief Inspector will enforce the obligations of those persons identified in the Act as "Consignor", "Importer", "person who packs dangerous goods for transport", "Prime Contractor", and "Owner(in relation to bulk container)" wherever those persons arrange for the transport of dangerous goods by railway."

3.1.2 REGULATION OF RAILWAYS

The Western Australian railways are administered under the *Government Railways Act* 1904 (W.A.). Section 8 of that Act establishes the Western Australian Government Railways Commission (known as Westrail) as a statutory authority with responsibility to maintain, manage and control government railways in that State.⁶³ Westrail was 'corporatised' in 1992 and operates in a competitive environment.⁶⁴

Section 34 of the same Act imposes certain obligations on consignors and others of "dangerous goods" in relation to the marking of packaging. Under s 23 of the Act, the Commission may make By-laws in relation to a wide range of matters. By-laws in relation to dangerous goods have been made. For example, By-law 54 provides that "persons employed on or about Government railways" must follow the "Book of rules" set out in a Schedule to the By-law. A "General Appendix" to the "Book of Rules" includes a section on the Transport of Dangerous Goods which includes the following:

"1 Regulations for the handling and transport of Dangerous Goods are contained in the Railways of Australia Code of Practices and Conditions for the Carriage of Dangerous Goods.

The Code is prepared by the Standing National Advisory Committee on the Transport of Dangerous Goods and is based on the recommendations prepared by the United Nations Committee of Experts on the Transport of Dangerous Goods.

These instructions should be read in conjunction with the relevant Sections of the Code."

⁶³See *Government Railways Act* 1904 (W.A.), Part III, and particularly, s 13.

⁶⁴See further Industry Commission 1995: 197-198.

A number of detailed rules in relation to the transport of dangerous goods are then outlined.

3.1.3 COMPETENT AUTHORITY FOR RAIL

The definition of "Competent Authority" for the purposes of the Rail Rules is "a Competent Authority appointed for this jurisdiction under appropriate State and Territory legislation".⁶⁵ It is unclear that the purported designation under the MOU of the Chief Inspector as the *rail* Competent Authority will satisfy this definition. This lack of legal certainty and clarity is of particular concern when one recognises the central role of the Competent Authority in the proposed regulatory scheme.

This somewhat uncertain situation in relation to the identification of the *rail* Competent Authority is be contrasted with the designation of the *road* Competent Authority under s 13 of the *Road Transport Reform (Dangerous Goods) Act* 1995 (Cth). As noted in chapter 2, this Act is intended to be applied in Western Australia as the law of that jurisdiction.

3.1.4 FUTURE INTENTIONS: THE ADG CODE (6th EDITION)

This Review was advised in July 1996 by the Western Australian Chief Inspector that "[t]he matter of legislation for the 6th Edition of the ADG Code and its associated legislation [was at that time] before Cabinet".⁶⁶ This apparently remains the case at the time of writing this final report.

3.1.5 SUMMARY

In summary, it will be necessary for Western Australia to reconsider the question of the designation of the Competent Authority for rail when it implements the 6th edition of the ADG Code. It will also be necessary to ensure that each of the matters listed in 2.1.3 above is addressed in relation to rail transport. Finally, Western Australia should clarify the status of the MOU to the extent that it appears to be inconsistent with the Act and regulations as noted above.

⁶⁵See 2.1.4 above for a discussion of the Rail Rules.

⁶⁶Letter dated 18 July 1996.

3.2 VICTORIA

3.2.1 DANGEROUS GOODS REGULATION

The safety of dangerous goods in Victoria is regulated under both a general enactment, the *Dangerous Goods Act* 1985, and one specific to road transport, the *Road Transport (Dangerous Goods) Act* 1995.⁶⁷ One of the stated purposes of the Dangerous Goods Act 1985 is "to provide for the implementation of the [ADG] Code".⁶⁸ The *Dangerous Goods (Transport) Regulations* 1987 are the means by which the ADG Code is given legal effect in relation to both road and rail transport. Regulation 300(1) provides:

"The Provisions of the [ADG] Code must be observed in relation to the transport of dangerous goods".

3.2.2 COMPETENT AUTHORITY FOR RAIL

Section 10(2) of the *Dangerous Goods Act* 1985 provides that any reference to the "competent authority" in the ADG Code "shall be construed as a reference to the [Victorian WorkCover] Authority".

3.2.3 RAIL SAFETY LEGISLATION

Victoria is in the process of implementing the IGA on rail safety. In 1996, Victoria enacted the *Transport (Rail Safety) Act* which establishes the Public Safety Transport Directorate (an administrative unit in the Department of Infrastructure) as the accreditation agency for rail operators in that State.

⁶⁷Victoria is the only jurisdiction to date to have given effect to the template legislation produced under the NRTC process. In its public Discussion Paper on the *Dangerous Goods Act* 1985 (September 1996), the Victorian Workcover Authority indicated that there may be some future consolidation of the two Acts (see Victorian Workcover Authority, *Public Discussion Paper on the Dangerous Goods Act 1985*: pp 6-7).

⁶⁸See s 4(f); see also s 10(1) which provides for the adoption of the ADG Code in regulations under the Act.

3.2.4 FUTURE INTENTIONS: THE ADG CODE (6th EDITION)

By letter dated 30 July 1996, the Victorian WorkCover Authority (VWA) advised this Review as follows in relation to the intended adoption of the 6th edition of the ADG Code:

" If the Rail (Dangerous Goods) Rules are to be part of the 6th Edition they will be called up by virtue of the Code being called up. In the absence of a decision on how rail ought to be regulated once the new Road Transport (DG) Act 1995 takes effect the DG Act 1985 and the DG (Transport) Regulations 1987 will continue to apply to rail".

At the Melbourne workshop held on 27/3/97, a representative of the VWA confirmed that the review of the *Dangerous Goods Act* 1985 is ongoing. The *Road Transport (Dangerous Goods) Act* 1995 has not yet commenced and will only come into effect when the *Road Transport Reform (Dangerous Goods) Regulations* have been made.⁶⁹ It is likely therefore that when that Act is proclaimed, rail transport will continue to be regulated under the 1987 regulations. However, these regulations will cease to operate in November of 1997 by virtue of the 'sunset' provisions in the *Subordinate Legislation Act* 1994 (Vic.).⁷⁰ As a result, Victoria is presently considering all available options.

3.2.5 SUMMARY

Victoria has successfully separated the rail Competent Authority role from that of the government rail operator (the Public Transport Corporation). Instead the role has been bestowed on the VWA which regulates most other aspects of dangerous goods transport in that State. However, a final decision has not yet been made on the inter-relationship between the two principal pieces of Victorian dangerous goods legislation. At the time of writing, the government has engaged in public consultations on these and other relevant issues and is considering its options. However, there is clearly no intention to transfer rail Competent Authority status to the authority which administers the rail accreditation regulatory scheme.

⁶⁹See 2.1.2 above.

⁷⁰A 12 month extension on their life is possible.

3.3 SOUTH AUSTRALIA

The situation in South Australia is complicated by the involvement of the Commonwealth government as the owner of the Australian National Railways Commission (ANRC). The 5th edition of the ADG Code identifies ANRC as the rail Competent Authority in South Australia and Tasmania.⁷¹ As ANRC's operations extend beyond South Australia, these issues are addressed separately in 3.4 below as part of the consideration of the Commonwealth as a jurisdiction.

3.3.1 DANGEROUS GOODS REGULATION

Leaving aside for the moment the issues relating to the Commonwealth's involvement in South Australia,⁷² it is necessary to examine the operation of the *Dangerous Substances Act* 1979 (S.A.). This Act applies to, amongst other things, the "conveyance" of "dangerous substances"⁷³ The term "conveyance" is defined in s 5 so as to include transport by rail.

Regulation 10(1) of the *Dangerous Substances Regulations* 1981 provides for the implementation of the ADG Code in South Australia:

"No person shall convey dangerous substances by road or rail in the course of trade, commerce or industry unless he complies with the requirements of the [ADG Code]...".

As a result, any transport of dangerous goods by rail by a private operator, or by a government agency, other than one established under Commonwealth legislation, is subject to the provisions of the ADG Code. For example, the rail transport of dangerous goods through South Australia by a private operator such as T.N.T. would attract the operation of the *Dangerous Substances Act* 1979 and therefore the Code.

⁷¹ANRC was also identified as the Competent Authority for the Northern Territory in the 5th edition. This has now changed - see 3.9 below.

⁷²See 3.4 below.

⁷³"Dangerous substances" are identified in regulation 10(2) of the *Dangerous Substances Regulations* 1981. For present purposes, the expression may be considered to be essentially synonymous with "dangerous goods".

3.3.2 COMPETENT AUTHORITY FOR RAIL

As far as the identification of the South Australian Competent Authority for rail is concerned, this is also a matter under consideration by the government. The identification of the Australian National Railways Commission as the South Australian Competent Authority for all purposes is clearly inaccurate. There appears to be no statutory basis for this and even if there was, the ANRC could have no jurisdiction over other transporters in South Australia such as the National Rail Corporation, T.N.T. and other private operators. In relation to these operators, the "Director" of the relevant Department which administers the Act appears to be the Competent Authority for the purposes of the ADG Code in relation to such operations.⁷⁴

3.3.3 RAIL SAFETY LEGISLATION

As noted above, South Australia has recently enacted legislation in accordance with its obligations under the Inter-governmental Agreement on rail safety. The key provisions of the *Rail Safety Act* 1996 were outlined in 2.2.2 above. It is worth noting at this point that the coverage of that Act is broader than that of the *Dangerous Substances Act* 1979, in relation to its application to the Commonwealth. Section 5 of the *Rail Safety Act* provides as follows:

"(1) This Act binds the Crown in right of [South Australia] and also, so far as the legislative powers of the State extend, in all its other capacities.

(2) In particular, this Act, insofar as it applies to the safe construction, maintenance and operation of railways, applies to any such construction, maintenance and operation carried out by the Australian National Railways Commission, the National Rail Corporation Limited, TransAdelaide or other government agency or instrumentality, or otherwise carried on by the State, the Commonwealth or another State."

⁷⁴It is unfortunate that the South Australian Act does not contain a provision which explicitly provides for this such as s 10(2) of the *Dangerous Goods Act* 1985 (Vic.). A failure to make explicit provision for such a significant matter can only lead to uncertainty as to the location of important regulatory powers. The consultations with the South Australian Authorities did in fact highlight a lack of certainty about the effect of State laws on the operations of private rail operators.

This approach may be contrasted with that taken in s 6 of the *Dangerous Substances Act* 1979 which appears only to extend the operation of that Act to the Crown in right of South Australia and apparently does not regulate the Crown in right of the Commonwealth.⁷⁵

3.3.4 FUTURE INTENTIONS: THE ADG CODE (6th EDITION)

The Review is unable to report with certainty on South Australia's intentions in relation to the adoption of the 6th edition of the ADG Code as it is a matter under government consideration at the present time. The government is also presently considering how to give effect to the *Road Transport Reform (Dangerous Goods) Act* 1995 and the proposed regulations which are currently being developed by the NRTC. A representative of the Department for Industrial Affairs explained to the Adelaide workshop held on 18/3/97 that the government is examining all available options.

3.3.5 SUMMARY

The uncertainty surrounding the future of ANRC,⁷⁶ coupled with the emergence in South Australia of private rail operators transporting dangerous goods, necessitates a fundamental reconsideration of regulatory arrangements for rail in that State. Government representatives who attended the workshop on 18/3/97 clearly indicated that this was recognised.

Whereas it was previously assumed that ANRC would effectively self-regulate, it is now clear that the S.A. government has an important role in regulating those operators whose businesses are covered by the scope of the *Dangerous Substances Act* and the *Rail Safety Act*. At present there is a degree of uncertainty as to the identity of the rail Competent Authority in South Australia but this will be resolved as part of the implementation of the road regulatory framework and the resolution of the rail issues described in this Review.

⁷⁵The reference in s 6 to "the Crown" would generally be understood to be a reference to the Crown in right of the legislating jurisdiction, in this case, South Australia. However, note the effect of s 20(5)(a) of the *Acts Interpretation Act* 1915 (S.A.).

⁷⁶See 3.4.1.

3.4 THE COMMONWEALTH

While the regulation of the transport of dangerous goods is generally a matter for the States and Territories, there are several Commonwealth enactments which are relevant to the subject matter of this legislative Review.⁷⁷ The first two statutes apply to the two organisations involved in rail transport in which the Commonwealth has an interest.⁷⁸ The third applies to the protection of the health and safety of Commonwealth employees.

3.4.1 AUSTRALIAN NATIONAL RAILWAYS COMMISSION

The *Australian National Railways Commission Act* 1983 (Cth) establishes the Australian National Railways Commission (ANRC).⁷⁹ The functions of ANRC are to provide railway services as prescribed under the Act.⁸⁰ Since the establishment of the National Rail Corporation in 1992,⁸¹ ANRC has been primarily involved in the operation of passenger services. It transports minimal quantities of dangerous goods.⁸²

3.4.1.1 *Track Access*

In addition to the operation of passenger services, ANRC also has an "independent business unit" known as "Track Access".⁸³ According to an official publication of ANRC, Track Access is "an independent business unit of [ANRC which was] formed in response to a commitment by the Federal Government to accelerate competition reform in the rail industry". Its role is to "independently manage access to the mainline interstate rail network controlled by the Commonwealth".

The Review of Australian National Railways Commission and National Rail Corporation ('the Brew report') recommended that Track Access be replaced with the

⁷⁷The review does not consider the Commonwealth *Explosives Act* 1961 and *Explosives Regulations* 1991 (Cth) which apply to class 1 dangerous goods.

⁷⁸It is noted that, as a result of the Commonwealth government's response to the recommendations contained in the *Review of Australian National Railways Commission and National Rail Corporation* by J.R. Brew, September 1996, ('the Brew Report'), the Commonwealth's involvement in rail transport may alter significantly in the foreseeable future.

⁷⁹See *Australian National Railways Commission Act* 1983, s 4.

⁸⁰See *Australian National Railways Commission Act* 1983, s 5.

⁸¹Discussed immediately below at 3.4.2.

⁸²Information provided on 25/7/96 by Mr Ross Gill, Development Manager, Track Access, ANRC.

⁸³This is the body referred to in objective 4 of this Review as "Track Australia" - see 1.1 above.

establishment of "...a national track access and infrastructure body in conjunction with the appropriate States [to be]... the owner of all mainland interstate rail network and associated infrastructure including terminals".⁸⁴ This is consistent with government policy. In September of 1996, it was reported that "[f]unds needed to fulfil the [government's] election undertaking to set up a national authority to manage track access and infrastructure have been withheld until 1997-8 [and that such a body]...is unlikely to get underway until October [1997]".⁸⁵

Objective 4 of this Review is to examine the potential impact of the establishment of such a body on the regulation of the transport of dangerous goods by rail.⁸⁶ It is difficult to make this assessment in the absence of any indication of the precise form and role that such a body may have. As detailed below, the New South Wales rail authorities were contemplating that that State's Rail Access Corporation will perform the rail Competent Authority role.⁸⁷ However, it seems most unlikely that a *Commonwealth* body charged with the task of management of the interstate track network would be prepared or equipped to exercise such a role.⁸⁸

3.4.2 COMPETENT AUTHORITY FOR RAIL

The final matter which must be considered in relation to ANRC is its identification as the rail Competent Authority for South Australia and Tasmania in the current (5th) edition of the ADG Code.⁸⁹ It has not been possible in this Review to determine what, if any, statutory basis exists for this identification. It seems that there has in fact be no statutory basis for this designation. Further, the statutory functions of ANRC, as outlined in s 5 of the Act under which it is established, do not appear to extend to ANRC performing such a regulatory function. This was acknowledged by a letter from ANRC to the Review

".. [ANRC's] competent authority status has not been conferred by any legislation. [ANRC's] investigations in the area indicate that the only conferral of competent authority status on [ANRC] is via the Code".⁹⁰

⁸⁴Brew Report, recommendation 1(a).

⁸⁵*Australian Financial Review*, 20 September 1996, p 20.

⁸⁶The Review's objectives are outlined at 1.1 above.

⁸⁷See 3.6 below.

⁸⁸This assessment is partly based on the expressed unwillingness of ANRC (including "Track Access") to perform such a role currently - see below.

⁸⁹In the 5th edition, it is also identified as the Competent Authority for the Northern Territory.

⁹⁰Letter dated 5 August 1996 from Laurel Black, Corporate Business Manager, ANRC.

This Review considers that ANRC being the rail Competent Authority is quite inconsistent both with its role as a rail operator,⁹¹ and the role of Comcare under the *Occupational Health and Safety (Commonwealth Employment) Act 1991 (Cth)*.⁹² Further, ANRC's unwillingness to fulfil this role was indicated in its letter to this Review in which it noted that it has:

"...responsibilities which are more appropriately those of freight transporters who operate across track in South Australia".

It advised that this is a matter which it "will be taking up with the Commonwealth Government".⁹³ Finally, representatives of ANRC who attended the workshops generally concurred with these views.

3.4.3 NATIONAL RAIL CORPORATION LIMITED

In 1992, the Commonwealth parliament enacted the *National Rail Corporation Agreement Act* which was the means by which the Commonwealth gave legal effect to an agreement it had reached with the governments of New South Wales, Victoria and Western Australia on 30 July 1991.⁹⁴ National Rail Corporation Ltd (NRC Ltd) is a company incorporated in the Australian Capital Territory under the Corporations Law. According to Para. A of the Agreement, NRC Ltd's role is "amongst other things, [to] conduct rail freight operations in Australia on a commercial basis".

NRC Ltd operates as a transporter of interstate freight (including considerable quantities of dangerous goods) in all of the mainland states.⁹⁵ Its operations are subject to the laws of each of the state jurisdictions in which it operates as well as that of the Commonwealth under the *Occupational Health and Safety (Commonwealth Employment) Act 1991*.⁹⁶

⁹¹For the same reasons as outlined in 2.2.1 above in relation to all rail operators.

⁹²Discussed below at 3.4.4. The complex question of the extent to which the operations of a Commonwealth authority such as ANRC is subject to the laws of the States is beyond the terms of reference of this Review.

⁹³This question does not seem to have been considered in the Brew report into ANRC.

⁹⁴See *National Rail Corporation Agreement Act 1992 (Cth)*, s 5. The 'National Rail Corporation Agreement' is scheduled to that Act.

⁹⁵For more details on the operations of NRC Ltd, see Industry Commission 1995: 199-202. The future of NRC Ltd was the subject of several recommendations in the Brew report aimed at ensuring consistency between its operations and structure on the one hand, and the Hilmer-reform process (discussed in 2.2.1 above) on the other.

⁹⁶Discussed in 3.4.4 below.

It has been widely reported in the press that the Commonwealth government wishes to sell its 72.3% stake in NRC.⁹⁷ The major impact of such a development for the matters under consideration by this Review would be that NRC would no longer be a Commonwealth GBE and thus no longer subject to Commonwealth occupational health and safety laws.⁹⁸

3.4.4 COMMONWEALTH OCCUPATIONAL HEALTH AND SAFETY LAWS

The other important piece of Commonwealth legislation for the purposes of this Review is the *Occupational Health and Safety (Commonwealth Employment) Act* 1991 (Cth). This Act regulates the health and safety of Commonwealth employees, i.e. employees of the Commonwealth and its Authorities and Government Business Enterprises.⁹⁹ Both ANRC and the NRC are identified as Government Business Enterprises in Schedule 1 to the *Occupational Health and Safety (Commonwealth Employment) Act*.¹⁰⁰ Accordingly they may be prosecuted¹⁰¹ for failing to meet their duties of care to their employees¹⁰² and to members of the public.¹⁰³

The Minister responsible for the *Occupational Health and Safety (Commonwealth Employment) Act* may approve "Codes of Practice" under s 70 of the Act. An approved Code of Practice may incorporate another code or document and is able to be used as evidence in any proceedings under the Act.¹⁰⁴ The 5th edition of the ADG Code was approved as a Code of Practice under the *Occupational Health and Safety (Commonwealth Employment) Act* in 1993. Accordingly, the ADG Code currently has legal status under that Act by virtue of s 71 and may be used by Comcare as part of its enforcement of the Act's general duties. On one view, this in effect makes Comcare the Competent Authority for rail (and road) for the purposes of the ADG Code¹⁰⁵ in

⁹⁷See, for example, *Australian Financial Review* 13/3/97, p 7.

⁹⁸See 3.4.4 below.

⁹⁹See sections 3 & 9 and the definitions of "Commonwealth authority" and "Government Business Enterprise" in s 5.

¹⁰⁰This is despite s 8(d) of the *National Rail Corporation Agreement Act* 1992 (Cth) which provides that "neither [NRC Ltd] nor any of its subsidiaries ... is a public authority for any purpose...".

¹⁰¹Prosecutions for breaches of the Act may be instituted by Comcare or an investigator appointed under the Act - see ss 11 and 77.

¹⁰²See s 16.

¹⁰³See s 17.

¹⁰⁴See ss 70(2) and (3) and 71.

¹⁰⁵It is noted that the ability to prosecute is only one aspect of the dangerous goods Competent Authority role. The legal power to grant exemptions and approvals is also important. If these are the determinants of the identification of the Commonwealth Competent Authority, then Comcare does not have this role as it has no such powers under its constitutive legislation - the *Safety*,

relation to those Commonwealth instrumentalities (such as ANRC and NRC) whose activities are regulated by the *Occupational Health and Safety (Commonwealth Employment) Act*.¹⁰⁶ In addition, ANRC and NRC are subject to the laws of the States and Territories.

3.4.5 FUTURE INTENTIONS: THE ADG CODE (6th EDITION)

Representatives of Comcare advised the Adelaide, Canberra and Melbourne workshops that the question of the likely status (if any) of the proposed *Road Transport Reform (Dangerous Goods) Regulations* and the 6th edition of the ADG Code under the *Occupational Health and Safety (Commonwealth Employment) Act* 1991 remains under consideration by the Commonwealth at the time of writing. Similarly, the Commonwealth is considering how it should address the regulation of the transport of dangerous goods by rail.

3.4.6 SUMMARY

The future role for Commonwealth legislative involvement in the regulation of the transport of dangerous goods by rail (and road) is unclear. If the end result of the processes described in this Review is the enactment of adequate and nationally uniform State and Territory laws regulating the transport of dangerous goods by rail, it is not entirely clear that there is even a need for a Commonwealth regulatory role. This view is somewhat strengthened by the Commonwealth's intentions in relation to ANRC and NRC. State and Territory dangerous goods transport laws could apply to the Commonwealth by virtue of s 4 of the *Occupational Health and Safety (Commonwealth Employment) Act* 1991.¹⁰⁷

Rehabilitation and Compensation Act 1988 (Cth) and the *Occupational Health and Safety (Commonwealth Employment) Act* 1991 (Cth).

¹⁰⁶As noted above, NRC Ltd's operations, and possibly those of ANRC, are also subject to regulation by State competent authorities.

¹⁰⁷Section 4 preserves the operation of State and Territory laws which promote occupational health and safety - see further Brooks, A, *Occupational Health and Safety Law in Australia* (4th ed., CCH, Sydney): pp 361-2.

The future of ANRC is most uncertain at the time of writing.¹⁰⁸ Further, the identification of NRC as a Government Business Enterprise for the purposes of Commonwealth OH&S laws seems inconsistent with its private sector characterisation under the Corporations law.

The Commonwealth should consider what, if anything, its role should be in relation to the regulation of the transport of dangerous goods by rail. Any such consideration will clearly need to involve Commonwealth road and rail transporters as well as relevant agencies such as Comcare and the Department of Transport.

3.5 QUEENSLAND

3.5.1 DANGEROUS GOODS REGULATION

Prior to the development by the NRTC of national dangerous goods road transport law, Queensland was the only jurisdiction which regulated the road transport of dangerous goods under a single enactment.¹⁰⁹ Regulations made under the *Carriage of Dangerous Goods by Road Act* 1984 (Qld) require those involved in *road* transport to comply with relevant parts of the ADG Code.¹¹⁰ However, it is beyond the scope of the Act for the 1989 regulations to mandate compliance with the ADG Code in relation to *rail* transport.

To some extent compliance with those aspects of the ADG Code which regulate rail is required by s 138 of the *Transport Infrastructure Act* 1994 (Qld), sub-section (3) of which provides that:

"(3) A person must not send dangerous goods ... by railway unless the goods are packed, marked and labelled as required by the [ADG] Code".¹¹¹

This provision identifies the responsibilities of consignors of dangerous goods but does not address rail operator or driver responsibilities. There does not appear to be

¹⁰⁸The Commonwealth government has indicated its desire to sell ANRC's assets to the private sector prior to 30/6/97.

¹⁰⁹As noted above, Victoria and the A.C.T. have joined Queensland in taking this approach and it is anticipated that other jurisdictions may follow.

¹¹⁰See Part III, *Carriage of Dangerous Goods by Road Regulations* 1989 (Qld).

¹¹¹See also s 4, *Transport Infrastructure (Rail) Regulation* 1996.

any other legislation in Queensland which gives legal effect to these aspects of the ADG Code in relation to rail.

3.5.2 COMPETENT AUTHORITY FOR RAIL

There is no Queensland Act which appoints, or provides for the appointment of, a rail Competent Authority. The 5th edition of the ADG Code identifies the Chief Executive of Queensland Rail as the Competent Authority for rail, but, apart from this designation, the legislative basis for the exercise of relevant Competent Authority powers is unclear.

Even if there was no doubt about the statutory basis for this appointment, it would still represent a fundamental departure from the principles which form the foundation of the Competition reforms. This is because there is a failure to separate regulatory responsibilities in relation to dangerous goods from operational functions. For the reasons outlined at 2.2.1 above concerning the possible conflicts of interest which may arise in these circumstances, such an allocation of regulatory functions is considered inappropriate by this Review. During the course of the workshop in Brisbane, representatives of Queensland Rail expressed concern that the Review was unable to indicate an alternative Competent Authority. However, this is clearly a matter for Queensland policy makers.

3.5.3 RAIL SAFETY LEGISLATION

Queensland has given effect to its obligations under the Inter-governmental Agreement on rail safety by inserting a new Part, Part 6, into the *Transport Infrastructure Act* 1994 (Qld). For present purposes, the provisions in this Part are largely similar to the *Rail Safety Act* 1996 (S.A.), described in 2.2.2 above. The provisions require rail operators to be accredited by the Chief Executive of the Department of Transport before they may operate lawfully and also require the reporting of railway incidents (including those involving dangerous goods) to the Chief Executive, who is empowered to investigate such incidents.¹¹² The requirement to be accredited will extend to Queensland Rail.

¹¹²*Transport Infrastructure Act* 1994 (Qld), ss 101-109.

3.5.4 FUTURE INTENTIONS: THE ADG CODE (6th EDITION)

A letter was sent to the Chief Executive of Queensland Rail seeking information about the statutory basis of the appointment as Competent Authority and about the Queensland government's intentions in relation to both the implementation of the 6th edition of the ADG Code and the Competent Authority issue.¹¹³ However, no response had been received at the time of writing. A representative of the Department of Transport advised the Brisbane workshop on 25/3/97 that these matters are under consideration along with the Queensland government's intentions in relation to the *Road Transport Reform (Dangerous Goods) Act 1995*.

3.5.5 SUMMARY

The issues of the identification, appointment and empowerment of the rail Competent Authority in Queensland need to be resolved as part of that State's implementation of the new edition of the ADG Code. While current arrangements may have worked satisfactorily until now, the reforms to the operation of railways ushered in by the Competition reforms and the IGA on Rail Safety mean that they are quite inadequate to serve as the proper basis for regulation in this area in the future.

3.6 NEW SOUTH WALES

3.6.1 DANGEROUS GOODS REGULATION

New South Wales regulates most aspects of the dangerous goods industry under the *Dangerous Goods Act 1975*. In particular, the "conveyance"¹¹⁴ of dangerous goods is the subject of a general requirement to convey safely in s 12 of the Act and specific regulation in Part 6 of the *Dangerous Goods Regulation 1978* (N.S.W.). Regulation 176 requires compliance with most of section 8 of the ADG Code.¹¹⁵

Further, the *Transport Administration (Dangerous Goods - State Rail Authority) Regulation 1989* gives legal effect to the 5th edition of the ADG Code in relation to rail transport. Finally, clause 9 of the *Transport Administration (General) Regulation*

¹¹³ A copy of the letter sent is attached at Appendix 2.

¹¹⁴ "Convey" is defined broadly enough to include rail transport in s 4 of the Act.

¹¹⁵ Section 8 of the ADG Code is where the bulk of the duty-imposing provisions of the Code are located.

1995 requires the "State Rail Authority"¹¹⁶ to comply with the ADG Code. Despite this, concerns were expressed by those consulted in New South Wales, that other rail operators were not directly bound by the ADG Code under N.S.W. law. However, it is important to note that these operators may still be indirectly bound by the ADG Code to the extent that compliance with the Code is a condition of their accreditation under the *Rail Safety Act* 1993.¹¹⁷

3.6.2 COMPETENT AUTHORITY FOR RAIL

In relation to the question of identifying the rail Competent Authority in New South Wales, it is noted that the 5th edition of the ADG Code identifies the Secretary of the State Rail Authority (S.R.A.) of New South Wales. The Review has been unable to determine the statutory basis for this designation.

A letter was written on 12 July 1996 to the Secretary seeking information about the statutory basis of this appointment and intentions in relation to the 6th edition of the Code.¹¹⁸ A response signed by the Managing Director of the Freight Rail Corporation and dated 26 July 1996 explained that the S.R.A. had been re-structured into "four new business entities". One of these, the Rail Access Corporation, is the "owner of the N.S.W. rail infrastructure with the responsibility for managing access to the network". Further, the letter stated that "[t]he task of co-ordinating the dangerous goods regulatory requirements are undertaken by RAC". However, the accuracy of this statement was questioned by representatives of the E.P.A. and of the WorkCover Authority of N.S.W. during the course of the Sydney workshop on 20/3/97.

The Review finds that the issue of designating the rail Competent Authority in N.S.W. is under government consideration at the present time.

¹¹⁶Now restructured - see below.

¹¹⁷See further 2.2.2 on the role of the ADG Code under such accreditations.

¹¹⁸See Appendix 2. A further letter dated 9 August 1996 was sent to the Transport Safety Bureau on the suggestion of its Executive Director (see Appendix 2). However, no response has been received to that letter to date.

3.6.3 RAIL SAFETY LEGISLATION

As noted in the discussion of the Inter-governmental Agreement on rail safety in 2.2.2 above, New South Wales was the first jurisdiction to implement relevant legislation, in the form of the *Rail Safety Act* 1993.

Under the *Rail Safety Act* 1993, the Director-General of the Department of Transport is empowered to accredit owners and operators of railways to operate in New South Wales.¹¹⁹ In other respects, the New South Wales law is largely consistent with that of South Australia described in 2.2.2 above.

3.6.4 FUTURE INTENTIONS: THE ADG CODE (6th EDITION)

The Review was advised that New South Wales is presently considering the means by which it will give legal effect to the next edition of the ADG Code. Further, the approach to incorporating the NRTC legislative reform package into N.S.W. law is also yet to be resolved. However, all relevant agencies are actively exploring the available options.

3.6.5 SUMMARY

In the initial stages of this Review, New South Wales appeared to be in a somewhat similar position to Queensland in that it was contemplating combining the role of rail Competent Authority with that of rail operator. However, the difficulties associated with this approach appear to have been recognised and N.S.W. officers are presently exploring alternative approaches.

On the basis of consultations during the course of preparing this report, a degree of concern was expressed about the adequacy and reach of the current N.S.W. arrangements for the regulation of the transport of dangerous goods by rail. At the workshop on 20/3/97, officers of the N.S.W. Department of Transport acknowledged shortcomings in the present legislative and administrative arrangements.

¹¹⁹See *Rail Safety Act* 1993, Part 2.

3.7 TASMANIA

3.7.1 DANGEROUS GOODS REGULATION

The *Dangerous Goods Regulations* 1994 were made under the *Dangerous Goods Act* 1976 (Tas.). Part 6 of these Regulations applies to the handling and conveyance of dangerous goods. Regulation 43(1) provides that:

"(1) A person must not convey dangerous goods by road or rail other than in accordance with the ADG Code ...".

3.7.2 COMPETENT AUTHORITY FOR RAIL

The 5th edition of the ADG Code identifies the Managing Director of the Australian National Railways Commission as the rail Competent Authority for Tasmania. The discussion of this issue in 3.3.3 and 3.4.2 above is equally applicable to Tasmania and it is considered inappropriate for this designation to continue.

3.7.3 FUTURE INTENTIONS: THE ADG CODE (6th EDITION)

The Review understands that Tasmania is presently considering the means by which it will adopt the NRTC legislative package in relation to the road transport of dangerous goods.

3.7.4 SUMMARY

The uncertain future of ANRC (see 3.4.1) complicates the questions which arise from this Review in relation to Tasmania. However, it is clear that regardless of ANRC's future, it should not remain the Competent Authority for rail in that State. Tasmania will need to examine its future regulatory arrangements for the rail transport of dangerous goods. In particular, consideration will need to be given to the identification and empowerment of a rail Competent Authority. It is also noted that Tasmania is not a signatory to the IGA on rail safety.

3.8 AUSTRALIAN CAPITAL TERRITORY

3.8.1 DANGEROUS GOODS REGULATION

The New South Wales *Dangerous Goods Act* 1975 and *Dangerous Goods Regulation* 1978 (discussed in 3.6.1 above) is applied in the A.C.T. as modified by s 10 of the *Dangerous Goods Act* 1984 (A.C.T.). In addition, the Commonwealth *Road Transport Reform (Dangerous Goods) Act* 1995 has been in operation in the A.C.T. since April 1996.¹²⁰ In the event of any conflict between the two, the Commonwealth Act prevails.¹²¹

Accordingly, the discussion in 3.6 about the relevant legislation in N.S.W., as well as the discussion about the NRTC in 2.2.1, are equally applicable to the A.C.T.

3.8.2 COMPETENT AUTHORITY FOR RAIL

The 5th edition of the ADG Code identifies the Secretary of the State Rail Authority (SRA) of new South Wales as the rail Competent Authority in the A.C.T. As noted at 3.6.2 above, the identification of this regulator is currently under review in N.S.W. in response to the restructuring of the SRA. For the reasons discussed at 3.6.2, the issue should also be reconsidered in the A.C.T. At the workshop in Canberra on 21/3/97, a representative of the A.C.T. government advised that the issue was being considered.

3.8.3 FUTURE INTENTIONS: THE ADG CODE (6th EDITION)

As noted in 2.1.2 above, the legislation which established the NRTC envisaged that the template legislation would be made by the Commonwealth for operation in the A.C.T. in the first instance. The first aspect of the NRTC's dangerous goods reforms, the *Road Transport Reform (Dangerous Goods) Act* 1995 has been in effect in the A.C.T. since April 1996. The Regulations and the next edition of the ADG Code (including the Rail Rules - see 2.1.4) are expected to be in effect in the A.C.T. in 1997. However, unless the A.C.T. acts to ensure that an appropriate regulatory structure is in place for rail which parallels that being prepared for road, the 'regulatory gap' described in 2.1.3 may arise in that jurisdiction. This will partly

¹²⁰See 2.1.2 above.

¹²¹See s 10 of the Commonwealth Act noting the effect of s 10(3).

depend on what current A.C.T dangerous goods laws are repealed at the time that new laws become fully operational.¹²²

In particular, the A.C.T. must review its previous policy of adopting the N.S.W *Dangerous Goods Act* 1975 into its own law in light of whatever decisions are made in N.S.W. about adoption of the NRTC road reform legislation. These issues were explored briefly in the Canberra workshop but will need further careful consideration.

3.8.4 SUMMARY

The A.C.T. is unique among the jurisdictions examined in this Review as it does not retain any independent authority in relation to its laws regarding the road transport of dangerous goods under the NRTC process. As discussed in 2.1.3, this process has a significant effect on laws regarding *rail* transport and the A.C.T. must ensure that a 'regulatory gap' does not arise in its laws with the coming into effect of the *Road Transport Reform (Dangerous Goods) Regulations*. Further, the relationship with N.S.W. law must be reviewed.

3.9 NORTHERN TERRITORY

3.9.1 DANGEROUS GOODS REGULATION

Section 17 of the *Dangerous Goods Act* 1980 (N.T.)¹²³ and Division 6 of Part 1 of the *Dangerous Goods Regulation* 1985 (N.T.) regulate the conveyance of dangerous goods.¹²⁴

In particular, regulation 54 provides:

"Dangerous goods ... being conveyed by road or rail, shall be conveyed in accordance with these regulations and the [ADG] Code".

¹²²It will be recalled that under the Agreements which led to the creation of the NRTC, jurisdictions undertook to repeal or amend their own laws to the extent that they were inconsistent with the template developed by the NRTC and enacted by the Commonwealth - see 2.1.1.

¹²³The Northern Territory is presently reviewing the operation of the 1980 Act. A public discussion paper was released in late 1995.

¹²⁴The definition of "convey" in s 5 of the Act includes rail transport.

3.9.2 COMPETENT AUTHORITY FOR RAIL

In the 5th edition of the ADG Code, the Managing Director of the Australian National Railways Commission was identified as the rail Competent Authority for the N.T. The draft 6th edition identifies the Chief Inspector appointed under s 8 of the *Dangerous Goods Act* 1980 as the Competent Authority.¹²⁵

3.9.3 FUTURE INTENTIONS: THE ADG CODE (6th EDITION)

In a letter to the Review dated 31 July 1996, the Executive Director of Policy and Planning within the N.T. Work Health Authority advised that it is the N.T. government's intention to give legal effect to the 6th edition of the ADG Code under the *Dangerous Goods Regulations*.

3.9.4 SUMMARY

The Northern Territory, like Victoria and Western Australia, appears to have separated the rail Competent Authority role from that of rail operations. The precise form of legislation which implements the NRTC reform package is still being determined.

3.10 SUMMARY OF CURRENT AND PROPOSED LAWS

On the basis of the discussion in this chapter, the following observations may be made about the present and proposed methods by which the jurisdictions are intending to fill the 'regulatory gap' described in chapter 2 in relation to the rail transport of dangerous goods:

- in five jurisdictions (South Australia, Tasmania, New South Wales, Queensland and the A.C.T.) there is some doubt about the identity of the rail Competent Authority;

¹²⁵Letter dated 31 July 1996 signed by the Executive Director, Policy and Planning, Work Health Authority (N.T.).

- all jurisdictions are in the process of determining the means by which they will implement the NRTC regulatory package and the Rail Rules;
- it seems likely that there will not be a nationally uniform approach to the regulation of the rail transport of dangerous goods; and
- the future regulatory role of the Commonwealth is uncertain at the present time but is under active consideration.

Chapter 4

Future Options For National Uniformity

4.1 INTRODUCTION

In chapter 3, the proposed methods for giving effect to the 6th edition of the ADG Code were discussed. It may be observed that there appears to be a degree of uncertainty in most jurisdictions as to the likely method of this adoption. In addition, the related question of the identification of the rail Competent Authority remains unresolved in most jurisdictions.

This uncertainty is in part a reflection of the significant changes occurring in all jurisdictions as a result of the processes discussed in chapter 2. The administrative and legislative environments in which these decisions are being made are dynamic and rapidly changing. It is important that regulatory arrangements keep pace with these economic and social changes to ensure continued public confidence in the regulation of dangerous goods by rail.

Two major issues have become clear during the course of this Review. Firstly, the approach taken by the NRTC to the production of a uniform and complete regulatory scheme in relation to the road transport of dangerous goods has unintentionally reduced the pre-existing inter-modal regulatory harmony between the two land transport sectors - road and rail. The end result of the NRTC process will be nationally uniform laws and technical requirements relating to road transport. However, in relation to rail, only the technical requirements will be uniform. As a result, a 'regulatory gap' will exist in relation to rail.

Secondly, the current and proposed methods of filling this gap by giving legal effect to the rail aspects of the 6th edition of the ADG Code, including the Rail Rules, differ widely amongst the jurisdictions.

Unless a nationally uniform approach is developed, the situation which is likely to exist in relation to *rail* when the new Code is adopted by States and Territories, will, in many respects, be similar to that which applied in relation to dangerous goods *road* transport law prior to the establishment of the NRTC. As noted earlier, this involved uniformity so far as the *technical* provisions were concerned, but different approaches

in relation to *regulatory* matters such as enforcement powers, penalties, licensing requirements, etc.

As a consequence, the implementation by the jurisdictions of the NRTC regulatory package, which is likely to occur during 1997, will result in a lack of inter-modal harmony between the road and rail sectors. This is because the regulatory structures for the two sectors will differ significantly.

In this chapter, the options available to the jurisdictions for the implementation of the rail aspects of the ADG Code (6th edition) are outlined together with a consideration of their advantages and disadvantages. This is a somewhat speculative exercise at this time as only Victoria has given effect to the legislative template produced by the NRTC. Accordingly, the Review assumes, in Options 1 and 2 below, that the jurisdictions may not all follow the Victorian lead.

The Review concludes that, in the absence of a clear agreement by relevant governments about the way forward, Australia will have nationally uniform laws relating to the *road* transport of dangerous goods and a patchwork of different laws relating to the *rail* transport of dangerous goods. This would be a most undesirable outcome given the strong safety, economic and administrative arguments in favour of regulatory uniformity between the two land transport sectors.¹²⁶

4.2 LEGISLATIVE OPTIONS FOR IMPLEMENTATION

4.2.1: OPTION 1 - IMPLEMENTATION WITH THE NRTC PACKAGE

Perhaps the most obvious way of giving effect to the Rail Rules and those parts of the ADG Code which apply to rail is to use the same legislative structure as that which is in place or proposed for implementation of the *Road Transport Reform (Dangerous Goods) Act* 1995 (Cth) and its proposed regulations. As noted above, only the A.C.T and Victoria have legislation in place which gives effect to these laws. The other jurisdictions are presently considering how to incorporate these laws into their own law. By adopting this approach, each jurisdiction will have an identical, or at least consistent, law regulating the *land* transport of dangerous goods.

¹²⁶Discussed in 1.2 above.

Advantages

A major benefit of adopting such an approach is that it would require only relatively minor amendments to the adopting legislation to ensure that its scope was broad enough to extend to rail transport. At present the legislation which has been enacted only extends to road transport.¹²⁷ Further, the Rail Rules form the basis for such regulations as are necessary to enable the technical provisions in the Code in relation to rail to be operational. Another benefit of this approach would be to place all aspects of the regulation of dangerous goods transport by land under the one piece of legislation.

Disadvantages

Two of the disadvantages associated with this approach are:

(1) in jurisdictions such as New South Wales, South Australia, Western Australia and the Northern Territory which have a single enactment covering the regulation of dangerous goods generally (including all modes of transport, storage and handling), this approach may involve the removal of an aspect of dangerous goods management (rail transport) from that single enactment;¹²⁸ and

(2) in jurisdictions which have implemented rail safety legislation (New South Wales, Queensland, South Australia and Victoria), it will mean that the regulation of the transport of dangerous goods by rail may occur under both that rail safety legislation and the legislation which implements the ADG Code.¹²⁹

¹²⁷ See, for example, the *Road Transport (Dangerous Goods) Act 1995* (Vic.).

¹²⁸ In response, one may observe that each of these jurisdictions made this decision in 1991-2 when they provided the NRTC with its mandate in relation to dangerous goods road laws.

¹²⁹ It may be observed in relation to this issue that regardless of how the ADG Code is implemented, other safety-related laws will continue to apply to the rail transport of dangerous goods, e.g. occupational health and safety and environment protection laws.

4.2.2: OPTION 2 - IMPLEMENTATION UNDER GENERAL DANGEROUS LAWS

As noted above, most jurisdictions presently have an enactment in force under which a range of dangerous goods-related activities is regulated.¹³⁰ It is possible that some jurisdictions will use this legislation to implement the NRTC regulatory package, rather than enacting a new law such as has occurred in Victoria. It would be relatively straightforward to incorporate the Rail Rules and the rail aspects of the ADG Code in the same way.

Advantages

Option 1 may overlap with this approach depending on how the jurisdictions choose to adopt the new road transport laws. Accordingly, implementation of the Rail Rules under general dangerous goods law shares some of the advantages of option 1 such as relative ease of implementation once the road package has been implemented. It would also maintain the policy of regulating a wide range of dangerous goods activities under one Act in those jurisdictions where this presently occurs.

Disadvantages

As with option 1, in jurisdictions which have implemented rail safety legislation (New South Wales, Queensland, South Australia and Victoria), this approach will mean that the regulation of the transport of dangerous goods by rail may occur under both the rail safety legislation and the legislation which implements the ADG Code.

4.2.3: OPTION 3 - A NEW ACT FOR THE TRANSPORT OF DANGEROUS GOODS BY RAIL

A further option which is available to jurisdictions is the enactment of a specific piece of legislation to implement the Rail Rules and the ADG Code so far as it applies to rail. Such an Act could be modelled on the *Road Transport Reform (Dangerous*

¹³⁰The exceptions are (1) Queensland which regulates the road transport of dangerous goods under a single enactment (the *Carriage of Dangerous Goods by Road Act 1984*), rail transport under another (the *Transport Infrastructure Act 1994*) and storage and handling under a third (the *Workplace Health and Safety Act 1995*); and (2) Victoria, which regulates the road transport of dangerous goods under the *Road Transport (Dangerous Goods) Act 1995* and most other dangerous goods activity under the *Dangerous Goods Act 1985*.

Goods) Act 1995 in the same way as the Rail Rules have been modelled on the Road Transport Reform (Dangerous Goods) Regulations.

Advantages

This approach would ensure that the implementing piece of legislation addressed all of the relevant issues necessary to give full effect to the regulatory scheme, thus providing inter-modal harmony.¹³¹ In particular it would ensure that the regulation-making powers in the Act are sufficiently broad to cover the range of matters addressed in the Rail Rules. The Rules could then be introduced as regulations under the new Act. Of all the options, this one is the most likely to produce a uniform outcome as it is unaffected by existing legislative arrangements in relation to either dangerous goods or rail safety.

Disadvantages

This approach is the most complex for the jurisdictions in the sense that it requires a new piece of legislation to be drafted. It also adds to the proliferation of enactments regulating dangerous goods and potentially splits the regulation of rail safety between two enactments in those jurisdictions which have enacted rail safety legislation. Finally, it ensures that the road and rail aspects of the transport of dangerous goods are regulated under separate enactments thus compromising inter-modal harmony.

4.2.4: OPTION 4 - IMPLEMENTATION UNDER RAIL SAFETY LEGISLATION

It was noted above that four jurisdictions have enacted rail safety legislation. It would be possible for those jurisdictions to incorporate the Rail Rules and the ADG Code, so far as it relates to rail, under this legislation. Subject to the issue of scope which is discussed below, the Rules could be made as regulations and the Code could be incorporated by reference in those regulations.

Advantages

The main advantage of such an approach is that it consolidates under one Act all aspects of the safe operation of railways. Further, it recognises that the accreditation

¹³¹These are listed above in 2.1.3 above.

of railway operators under rail safety legislation will already involve an assessment of their capacity to transport dangerous goods in accordance with the Rail Rules and the ADG Code.¹³² Thirdly, it would ensure a uniform approach to the implementation of the Rail Rules in those jurisdictions which have enacted relevant legislation.

Disadvantages

The main disadvantage of this approach is that four jurisdictions (Tasmania, Western Australia, Northern Territory and the A.C.T) have not enacted rail safety legislation.¹³³ Another difficulty is that the scope of the rail safety Acts is limited to the owners and operators of railways. It does not extend to parties such as consignors and packers of dangerous goods whose activities are regulated under the Rail Rules and the ADG Code. Thirdly, some of those consulted in the course of this Review, have expressed doubts about whether rail safety accrediting authorities would have the expertise to regulate dangerous goods.¹³⁴ Finally, this approach would share, with options 1 and 3, the problem of increasing the number of enactments under which dangerous goods activities are regulated.

4.3 SUMMARY AND CONCLUSION

All of the available options for the implementation of the Rail Rules and the rail aspects of the ADG Code have advantages and disadvantages. They have been discussed to inform the important policy decisions which now face the jurisdictions. As noted, options 1 and 2 are speculative in the sense that it remains unclear how the jurisdictions will give effect to the *road* transport reforms now being developed by the NRTC.

A clear outcome of the workshops held in March 1997 was that jurisdictions are focussing on options 1 and 2 as the likely means by which rail will be regulated once the new regulatory framework for road is in place. It is noted that the A.C.T. faces a major difficulty in this regard as it may be unable to add to the Commonwealth road legislation and may have to legislate separately for rail. This may mean that option 3 is the only feasible way forward in that jurisdiction.

¹³² See the discussion above at 2.2.2.

¹³³ Of the four, only Western Australia is a signatory to the IGA on rail safety.

¹³⁴ This could presumably be overcome by administrative arrangements.

Chapter 5

Conclusion

5.1 AN OPPORTUNITY TO FILL THE 'REGULATORY GAP'

The regulation of the land transport of dangerous goods is of the utmost importance for protecting the health and safety of both those involved in the industry as well as that of the general public, and protecting the quality of the environment. It has long been recognised that it is desirable for there to be consistent requirements imposed on both modes of land transport: road and rail. This led in the early 1980's to the development of the ADG Code, the 6th edition of which is currently being finalised.

More recently, governments have recognised that differences between regulatory requirements, such as licensing and approvals, can add to the cost of regulation and complicate its administration and enforcement with little if any improvement in safety outcomes. This led, in part, to the Inter-governmental Agreements which established the NRTC and charged it with the task of developing nationally uniform laws in relation to the road transport of dangerous goods. These laws were to ensure that not only the technical requirements (in the ADG Code) would be uniform across the country, but also the entire regulatory framework would not differ across State and Territory borders.

The regulation of the rail transport of dangerous goods is beyond the statutory role of the NRTC. However, it has been recognised that its reform of dangerous goods road law has the potential to undermine the previously existing inter-modal harmony between the road and rail sectors. It was those concerns on the part of the Federal Office of Road Safety which led to the establishment of this Review.

It is anticipated that the regulatory framework being developed by the NRTC will, if approved by the Ministerial Council for Road Transport, be in place in the A.C.T and ready for adoption by the States and the N.T. in mid-1997. In addition, competition reforms and policy decisions about rail by the Commonwealth government mean that the number of new private sector rail operators is likely to increase in future.

Accordingly, now is the time for Governments to be considering the likely effects of these developments on the regulation of the rail transport of dangerous goods. The

NRTC reforms which are producing a national approach to the road transport sector provide those governments with an opportunity to effect similar reforms to the rail sector thus producing a nationally uniform approach to the regulation of the land transport of dangerous goods.

This Review is intended as a contribution to the decisions which must now be made by the State, Territory and Commonwealth governments about the implementation of the laws which are being developed by the NRTC. If those governments approach the task of implementation cognisant of the need to accommodate the rail concerns described in this Review, inter-modal harmony can be strengthened beyond the current situation which only ensures harmony of technical requirements.

In addition, governments must be aware of the impact of developments in related areas such as competition reform and rail safety. These reforms are most significant for matters such as the identification of the rail Competent Authority. At present, there is a degree of confusion and uncertainty about this issue in most jurisdictions, although the consultation process which has occurred during the conduct of this Review has focussed the attention of key regulators in each jurisdiction.

5.2 A WAY FORWARD: AN INTER-GOVERNMENTAL AGREEMENT

State and Territory regulators and industry representatives have made an enormous contribution to the development, with the NRTC, of a nationally uniform legislative framework for the regulation of the road transport of dangerous goods. However, this process has had unforeseen and unintended consequences for the previously existing inter-modal harmony which existed between road and rail. At present each of the States and Territories is determining how best to fill the 'regulatory gap' which will be left by these developments. It seems clear that without some co-ordination of these efforts, the jurisdictions will arrive at different answers thus compromising the significant moves towards national uniformity which have already occurred.

In light of the experience of the two regulatory areas which have been considered in this Review - dangerous goods road transport and rail safety - it appears that the most appropriate and effective way for the matter of uniform and adequate rail dangerous goods legislation to be progressed is under an Inter-governmental Agreement signed by all relevant governments. As discussed in chapter 2, these agreements have

successfully laid the groundwork for the development of legislation which will provide a nationally uniform regulatory environment.

A significant step in this direction was taken on 15 November 1996 when the Australian Transport Council agreed on:

"...the need to develop a uniform national dangerous goods regulatory regime for the rail transport sector. This regulatory regime would need to be aligned with the road transport dangerous goods regulations in order to promote inter-modal harmony. These would implement the provisions of the Australian Dangerous Goods Code to road and rail (sic.) which has been revised to adopt the latest international provisions."¹³⁵

The purpose of an Agreement on dangerous goods rail transport laws would be to build on this commitment and ensure the development of a regulatory framework for rail which is consistent with that which has been developed for road. Such a framework would consist in the first place of legislative provisions establishing the broad outline of the scheme such as the appointment and empowerment of the rail Competent Authority, the power to make regulations, etc. These provisions could be modelled closely on the *Road Transport Reform (Dangerous Goods) Act 1995* (Cth). In addition, regulations outlining the duties of parties involved in rail transport would be necessary. A great deal of the relevant work has been done in the form of the Rail Rules which could be transformed into regulations with relative ease.

The precise content and form of such an Agreement is of course a matter which requires further consideration by the respective governments. For example, it may not be necessary for the Agreements to require the jurisdictions to implement the legislation by way of a template.

¹³⁵ Australian Transport Council, *Communique* 15 November 1996, p 3.

APPENDIX 1 - RESEARCH PROJECT SPECIFICATION

DEPARTMENT OF TRANSPORT AND REGIONAL DEVELOPMENT

RESEARCH PROJECT SPECIFICATION

RAIL (DANGEROUS GOODS) LEGISLATIVE REVIEW

INTRODUCTION

The Department of Transport and Regional Development has engaged a legal consultant, Mr Peter Rozen, to examine existing Commonwealth, State and Territory legislation relating to the transport of dangerous goods by rail. The intended outcome of the consultancy is to provide an overview of the status and coverage of existing rail transport legislation and to present options for achieving a nationally consistent dangerous goods regulatory regime for the rail transport sector.

The need to undertake this consultancy stems from recent events in both the road and rail transport sectors. In particular, the establishment of the National Road Transport Commission (NRTC), increased commercialisation of the rail transport sector and Inter-Government Agreement on Rail Safety, have high-lighted a number of potential inconsistencies in existing regulatory regimes for the rail transport of dangerous goods. The Department is concerned that these inconsistencies may have a detrimental impact on land transport safety and may reduce the high level of inter-modal consistency which presently exists between the rail and road transport sectors.

BACKGROUND

The NRTC was established in 1991 to develop national uniform road transport legislation. Their responsibilities include the development of a national uniform regulatory regime for the road transport of dangerous goods. In order to achieve this objective, the NRTC has focused their efforts on redrafting the current, nationally accepted, Australian Dangerous Goods (ADG) Code into a new regulatory format.

However, the ADG Code presently covers both the road and rail transport sectors and the NRTC 'road transport' focus has created a number of problems for rail regulators. In particular, the development of the road specific transport Act (Road Transport Reform (Dangerous Goods) Act 1995) and corresponding regulations resulted in the removal of all of the obligatory requirements from the ADG Code. This in turn, created a large regulatory 'gap' for the rail transport sector which relies on the ADG Code for these obligatory requirements.

In order to rectify this situation, the Department has been developing a set of Rail (Dangerous Goods) Rules, which are based upon and closely aligned with the NRTC's new road regulations. These 'rail rules' are intended to form a schedule to the new ADG Code and, as such, will allow rail regulators to pick up both the obligatory and technical requirements in relevant rail dangerous goods legislation by direct reference to the new ADG Code.

However, the adequacy of the 'rail rules', as a means of regulating the rail transport of dangerous goods, has been questioned. The road regulations are being made under specially prepared legislation which contains associated provisions for key areas such as penalties, Competent Authorities and authorised officers (Road Transport Reform (Dangerous Goods) Act 1995). If existing rail dangerous goods legislation does not contain similar provisions then the rail rules may prove to be inadequate in terms of their regulatory coverage.

Another issue which has complicated the rail dangerous goods transport situation is the adoption, in the rail sector, of the 'Hilmer Reforms'. Over the last few years, these reforms have resulted in the introduction of new competition policies and increased commercialisation of the rail transport sector. As a result, most State and Commonwealth rail authorities have either privatised or commercialised (Government Business Enterprises) their freight operations and are now in direct competition with other private rail operators.

The potential problem with this situation is that a number of these rail authorities are still nominated as the State / Commonwealth Competent Authority for the transport of dangerous goods by rail. As a result of this situation, a number of jurisdictions and private operators have questioned whether or not it is appropriate for a State / Territory commercial operator to also be a regulator with Competent Authority status and associated powers.

The inter-government agreement on rail safety also has the potential to impact on the transport of dangerous goods by rail. This agreement has led to the development, in each State and Territory, of new rail safety legislation. This new legislation, linked to rail operator accreditation, will promote and maintain high safety standards in the rail transport sector. Given that safety is the principal objective of all dangerous goods transport operations, the new rail safety legislation may play an important role in any new national dangerous goods legislative regime for the rail transport sector.

In keeping with competition policy objectives, the Department has also been developing proposals for a national access regime on the interstate rail network. This has involved assessing the viability of establishing a new national body 'Track Australia' to control and manage the network. This manner in which 'Track Australia' will operate and the services it will provide may also have an impact on existing and future regulatory regimes for the transport of dangerous goods by rail.

OBJECTIVES

The Department is concerned about the adequacy of the 'rail (dangerous goods) rules' in relation to State and Commonwealth adopting legislation and the level of regulatory coverage that they provide for the rail transport sector. An inadequate regulatory regime would not only jeopardise land transport safety but would also reduce the high level of inter-modal consistency which presently exists, between the rail and road transport sectors, for the transport of dangerous goods.

As such, a crucial component of the consultancy has been to determine the status, coverage and adequacy of existing rail dangerous goods transport legislation in relation to the adoption of the new ADG Code and rail rules. As part of this process, the consultancy has been examining State and Commonwealth mechanisms (proposed or already implemented) to adopt the new ADG Code into an appropriate rail transport legislative regime.

The consultancy has identified a number of potential legislative inconsistencies in the manner with which the transport of dangerous goods is presently regulated in the rail sector. In response to these problems, a major objective of the consultancy has been to examine future possible options for rectifying the rail dangerous goods transport situation. Options which have been identified include:

- the incorporation of rail dangerous goods requirements into the new NRTC Road Transport Reform (Dangerous Goods) legislative / regulatory package;
- the development of a parallel national uniform regulatory regime, similar to that for road, for the rail transport sector;
- the incorporation of rail dangerous goods requirements into any existing State / Territory dangerous goods legislation; or
- the incorporation of rail dangerous goods requirements into the new State and Territory rail safety legislation.

The increased privatisation and commercialisation of the rail transport sector will also have an impact on any regulatory regime for the transport of dangerous goods by rail. Although the appointment of a rail regulator is a State, Territory or Commonwealth issue, the Department has also asked that the consultancy identify who is (or will be), according to relevant legislation, the rail Competent Authority in each jurisdiction and the extent of their regulatory powers.

Finally, the consultancy will also examine the potential impact and role that the new national 'Track Australia' body will have on existing and future regulatory regimes for the transport of dangerous goods by rail.

The broad objectives of the rail (dangerous goods) legislative review are, therefore:

1. to determine the status, coverage and adequacy of existing rail dangerous goods transport legislation in relation to the adoption of the new ADG Code and rail rules.
2. If current arrangements are considered inadequate:
 - a. to document and evaluate State / Commonwealth mechanisms (proposed or already implemented) to adopt the new ADG Code into appropriate rail transport legislation.
 - b. to examine a range of future possible options for rectifying the rail regulatory situation.
3. to identify who is (or will be), according to the relevant legislation, the rail Competent Authority in each jurisdiction and the extent of their regulatory powers.
4. to examine the potential impact and role that the new national 'Track Australia' body will have on existing and future regulatory regimes for the transport of dangerous goods by rail.

RATIONALE

The information generated by the rail (dangerous goods) legislative review will contribute to the formation of State and Commonwealth rail safety policy. More specifically, it will provide rail transport policy makers with information to assist in:

- determining the adequacy of existing regulatory regimes for dangerous goods;
- identifying options for improving these regulatory regimes, if appropriate;
- developing a framework for the possible establishment of a national uniform regulatory regime for the transport of dangerous goods;
- determining the most appropriate bodies to regulate the transport of dangerous goods; and
- identifying the impact of new competition policies on the regulation of dangerous goods.

It is important to note that the aim of the consultancy is to provide a range of possible options for developing a national dangerous goods transport legislative regime. These options are intended to facilitate and form the basis for any future decisions in relation the regulation of the rail dangerous goods transport sector. As such, the consultancy is not intended to provide any recommendations but, rather, is intended to be used as a decision making tool for Australian rail transport legislators and policy makers.

APPENDIX 2 - SELECTED CORRESPONDENCE

PETER ROZEN
LLB(Hons) BA
LEGAL CONSULTANT

12 July 1996

The Secretary
State Rail Authority of New South Wales
Level 8, MSB Building
201-207 Kent Street
SYDNEY NSW 2000

By facsimile No. (02) 224 4711

Dear Sir

DANGEROUS GOODS COMPETENT AUTHORITY FOR RAIL

I have been engaged by the Federal Office of Road Safety to conduct a review of Commonwealth, State and Territory legislation applicable to the regulation of the carriage of dangerous goods by rail. The review coincides with the impending introduction of the *Rail (Dangerous Goods) Rules* and the new edition of the *Australian Dangerous Goods Code*.

You are listed as the intended "Competent Authority for rail transport" in the draft *Australian Code for the Transport of Dangerous Goods by Road and Rail* (6th ed.). The draft Code states that you have been "appointed by the Minister in [New South Wales] under applicable [New South Wales] legislation".

I would appreciate it if you could advise me of the New South Wales legislation (Act, regulation, etc) under which you have been appointed as Competent Authority for rail. If that appointment has not yet occurred, could you advise of the legislation under which the appointment will occur and the intended date of the appointment.

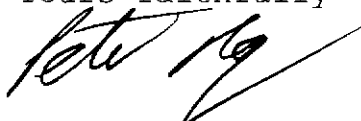
Could you please advise of the New South Wales legislation which calls up the current *Australian Dangerous Goods Code* (5th ed.). Will the proposed *Rail (Dangerous Goods) Rules* and the 6th edition of the Code be called up under the same legislation?

Finally, could you advise of any New South Wales railways by-laws, Orders or other subordinate instruments which

are relevant to the regulation in New South Wales of the transport of dangerous goods by rail?

I would appreciate it if you could provide your response to the above questions prior to Friday 2 August 1996. Please contact me on (03) 9510 1512 if you wish to discuss any aspect of this request.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Peter Rozen', with a long horizontal flourish extending to the right.

PETER ROZEN
Consultant

PETER ROZEN
LLB(Hons) BA
LEGAL CONSULTANT

9 August 1996

Mr William Casley
Executive Director
Transport Safety Bureau
Department of Transport
GPO Box 1260
Sydney 2001

Fax No. (02) 9268 2925 (4 pages including this one)

Dear Mr Casley

NSW Competent Authority for Dangerous Goods transport by Rail

Thank-you for arranging our meeting yesterday. It was most helpful to me in considering options for the regulatory structure of the transport of dangerous goods by rail.

As I mentioned yesterday, it would greatly assist me to receive a formal response from the NSW government as to the present legal position regarding rail competent authority status.

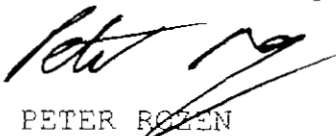
I enclose copies of:

- a letter dated 12/7/96 that I sent to the currently nominated Competent Authority; and
- a response I received dated 26/7/96.

These letters are self-explanatory and the response from Freight Rail appears to be at odds with the situation you described to me yesterday. Can you please clarify the present position.

Please do not hesitate to contact me if you wish to discuss the above request.

Yours faithfully



PETER ROZEN

APPENDIX 3 - DRAFT REPORT CONSULTATIONS

ORGANISATIONS AND PEOPLE CONSULTED

MELBOURNE

22/7/96

Bryan Williams, Australasian Railway Association Inc.

1/8/96

Bryan Bourke, Queensland Rail

ADELAIDE

25/7/96

Michael Mcfarlane, Gerry Gheradin, Comcare Australia

Barry Wheeler, Barry Apsey, Department for Industrial Affairs (S.A.)

Wally Zenkteler, Department of Transport (S.A.)

Ross Gill, Australian National Railways Commission

BRISBANE

7/8/96

Helen Stebhens, Brian Hollins, Transport Co-ordination Division, Queensland Transport

Bruce Couch, Rail Safety Accreditation Unit, Queensland Transport

Michael Walker, Dangerous Goods, Queensland Transport

SYDNEY

8/8/96

Terry Hatton (Rail Access Corporation)

Bill Casley (Transport Safety Bureau)

Colin Bruce (State Rail Authority)

CANBERRA

8/8/96

Jon Bailey, Dominic Zaal, Jill Chorazy, Department of Transport (Cth).

APPENDIX 4 - WORKSHOP ATTENDANCE

ATTENDANCE LIST

RAIL WORKSHOP held March 18th

NAME	AGENCY	TELEPHONE
Emergency Services		
Gavin Dougherty	SAMFS	8204 3714
David Cant	SA CFS	8204 3302
Wayne Atkins	8388 6565
Rail Operators		
John Borig	National Rail	03 9320 2361
Alen Poole	National Rail	8348 3118
Mick O'Neil	National Rail	8366 5276
Graeme Jaensch	Trailerail (Nat/Rail)	8340 1452
Graham Brown	Australian National	8343 5451
Peter Dawson	Australian National	86418129
Ross Gill	Track Access (AN)	8217 4718
Bernard Niemiec	Railfleet (AN)	8343 5506
Robert Maurmo	Australian National	8343 7750
Chris Hockey	AN Railfleet	8343 5506
Des Hobbs	Silverton Tramway	0880 875293
Joe Harris	TransAdelaide -Rail	8218 2473
Freight Forwarders		
Jim Duncan	Boral Energy	8645 9235
Andrew Wysocki	8343 0527
John Usher	United Transport	8262 4517
David Walczak	SA Gas Distributors	8343 0599
Peter Nader	Sadleirs Transport	8352 2444
Derek Hutchins	Toll Express	8229 5333
Bill Jordan	TNT	8447 5011
Union		
Rex Phillips	Public Transport Union	8212 1010
Government		
Graham Stephens	DIA Norwood	8362 9911
Susan Churchman	DOT	8343 2288
Mark McCabe	Comcare	06 2750034

**SYDNEY 20/3/97 (CO-ORDINATOR - CAROLYN BODEN,
DEPARTMENT OF TRANSPORT)**

John Bishop	Standards Australia
Kevin Davis	Sydney Ports Corporation
John Borig	National Rail Corporation
Alan Ritchie	Environment Protection Authority
Nigel Winterbottom	British Oxygen Gases
Kushy Athureliya	Australian Chamber of Shipping
Garry Camp	Patrick Stevedore
Colin Bruce	State Rail Authority
Norm Thompson	Department of Transport (Transport Safety Bureau)
Carolyn Boden	Department of Transport (Transport Safety Bureau)
Peter Murray	Department of Transport
Phil Butt	WorkCover

**CANBERRA 21/3/97 (CO-ORDINATOR - DOMINIC ZAAL,
DEPARTMENT OF TRANSPORT)**

Dominic Zaal	Department of Transport (Cth)
John Borig	National Rail Corporation
Bill McTernan	Department of Urban Services (ACT)
Felicity Keach	Attorney General's Department (ACT)
Vince Sharma	Comcare Australia
Diana Newcombe	Comcare Australia
Jill Chorazy	Department of Transport (Cth)

**BRISBANE 25/3/97 (CO-ORDINATOR - MICHAEL WALKER,
QUEENSLAND TRANSPORT)**

Michael Walker	Queensland Transport
Spencer Nightingale	Queensland Transport
Helen Stebhens	Queensland Transport
Stephen Hart	Queensland Transport
Martin Hawthorne	Queensland Transport
Bruce Couch	Queensland Transport
Ron Palmer	Consultant
Bryan Bourke	Queensland Rail
Tony Ambrose	Queensland Rail
John Borig	National Rail Corporation
Kevin Rhodes	National Rail Corporation

**MELBOURNE 27/3/97 (CO-ORDINATOR - CATH DUANE,
VICTORIAN WORKCOVER AUTHORITY)**

Cath Duane	Victorian WorkCover Authority
Louise Richardson	Victorian WorkCover Authority
Mark Anderson	Victorian WorkCover Authority
John Donkers	Falcon Engineering (ACTDG)
Trevor Perkins	Metropolitan Fire Brigade (ACTDG)
John O'Regan	Vic Roads
Mark Towler	Victorian Trades Hall Council
Ian Wright	Consultant
John Borig	National Rail Corporation
David Edwards	National Rail Corporation
Stephen Martin	National Rail Corporation
Shaun Green	National Road Transport Commission
Lawrie Tooher	Department of Infrastructure
Daryl Byrne	Department of Infrastructure
Ralph Williams	Public Transport Corporation
Catherine Clerehan	Comcare Australia

APPENDIX 5 - MEMORANDUM OF UNDERSTANDING

**MEMORANDUM OF UNDERSTANDING
BETWEEN THE WESTERN AUSTRALIAN GOVERNMENT
RAILWAYS COMMISSION ("COMMISSION") AND
THE CHIEF INSPECTOR OF EXPLOSIVES AND
DANGEROUS GOODS**

PREFACE

This Agreement clarifies the arrangements for giving effect to Section 63(f) of the Explosives and Dangerous Goods Act 1961 (the Act) where the manner of conveyance of explosives and dangerous goods on railways under the control of the Commission pursuant to the Government Railways Act 1904 requires the approval of the Chief Inspector of Explosives and Dangerous Goods.

OBJECTIVES

The objectives of this agreement are to:

- agree the manner of conveyance of dangerous goods on railways under the control of the Commission;
- provide for consistent harmonious requirements for the safe land transport of dangerous goods in Western Australia;
- assign responsibility for ensuring compliance with different parts of the ADG Code according to the obligations identified in Western Australian legislation, Codes of Practice and Standards used by both parties; and
- strengthen co-operation between the agencies in the management of dangerous goods in transport.

PROCEDURAL ARRANGEMENTS

The Chief Inspector of Explosives and Dangerous Goods (Chief Inspector) will be the designated Competent Authority for dangerous goods in Western Australia in accordance with Section 1.2 of the Australian Code for the Transport of Dangerous Goods by Road and Rail (ADG Code).

The Commission will have in place such systems and procedures to apply the requirements of the ADG Code to dangerous goods being transported by rail in his capacity to provide the actual means of transport.

Where the Commission consigns or undertakes with a consignor to be responsible for the transport of dangerous goods then the legal obligations "Consignor" and "Prime Contractor" as expressed in the ADG Code apply to the Commission.

The Chief Inspector will enforce the obligations of those persons identified in the Act as "Consignor", "Importer", "Person who packs dangerous goods for transport", "Prime Contractor", and "Owner (in relation to a bulk container)" wherever those persons arrange for the transport of dangerous goods by railway.

The Chief Inspector may, from time to time, inspect and examine dangerous goods intended to be transported or being transported on railways to ensure that the provisions of agreement and the requirements of the Act are being complied with.

SCHEDULE

In recognition of this agreement,

The Commission will:

- ♦ apply of the provisions of the ADG Code to the transport of dangerous goods by rail;
- ♦ ensure that the Commission's operations are conducted in accordance with sound international railway practices and in accordance with the Railways of Australia Manuals and Practices;
- ♦ ensure that any privately owned and operated rail service given right of access on the Commission's system will have a legally binding contract to operate under the same terms and conditions as this agreement;
- ♦ ensure that the Commission has emergency management procedures and practices consistent with the recommendations of the Western Australian Hazardous Materials Emergency Management Scheme (WAHMEMS) and participates in the operation of that scheme; and
- ♦ ensure that the Commission provides adequate training to its staff to ensure that the transport of dangerous goods is as safe as reasonably practicable.

The Chief Inspector will:

- consult with the Commission on all matters concerning the transport of dangerous goods by rail;
- ♦ provide advice on the development of policy to ensure the transport of dangerous goods by rail is as safe as reasonably practicable;
- empower Inspectors of dangerous goods to enforce the requirements the subject of this agreement; and

The Common Seal of the
Western Australian Government
Railways Commission was
hereunto affixed in the presence of

SECRETARY

Aburley