

# Guideline

## Effective control and management of railway operations

---

**Document reference number:** A335912

Version No.	Approved by	Publication date
1.0	Executive Director, National Operations	20 January 2013
1.1	Format review	5 July 2016

### **Guideline changes to version 1.1**

- > Format review

### **Copyright information**

© Office of the National Rail Safety Regulator 2016

This material may be reproduced in whole or in part, provided the meaning is unchanged and the source is acknowledged.

Level 1, 75 Hindmarsh Square, ADELAIDE SA 5000

PO Box 3461, Rundle Mall, ADELAIDE SA 5000

Phone: 08 8406 1500

Fax: 08 8406 1501

E: [contact@onrsr.com.au](mailto:contact@onrsr.com.au)

W: [www.onrsr.com.au](http://www.onrsr.com.au)

## Table of contents

<b>1. Purpose</b>	<b>4</b>
<b>2. Who is a ‘Rail transport operator’?</b>	<b>4</b>
<b>3. Key requirements of the Rail Safety National Law</b>	<b>5</b>
3.1 General duties of rail transport operators and contractors	5
3.2 Meaning of ‘so far as is reasonably practicable’	6
3.3 Meaning of ‘railway operations’	7
3.4 Prohibition on ‘contracting out’ legal obligations	7
3.5 Other key requirements	8
<b>4. Accreditation requirements</b>	<b>8</b>
<b>5. Determining who has effective control and management</b>	<b>8</b>
5.1 The ability to influence or direct	9
5.2 The significance of ownership	9
5.3 Can more than one party to an arrangement be accredited?	10
5.4 Practical considerations in determining who has effective control and management	11
<b>6. Contracting arrangements and obligations</b>	<b>13</b>
6.1 Meeting the accreditation requirements	13
6.2 Identifying the scope and nature of railway operations	13
6.3 Establishing who has effective control and management	13
6.4 Documenting which party is to be accredited	14
<b>7. Contractor compliance with the rail transport operator’s safety management system</b>	<b>14</b>
7.1 How a contractor’s systems may be incorporated into the rail transport operator’s safety management system	15
7.2 How the rail transport operator’s existing safety management system may be applied to a contractor	15
7.3 Documenting arrangements for complying with the requirements for a safety management system	16
7.4 Achieving good practice in contract management	16
<b>8. Acknowledgements</b>	<b>17</b>
<b>Appendix A: Checklist for good practice in contract management</b>	<b>18</b>

## 1. Purpose

The Office of the National Rail Safety Regulator (ONRSR) has been established under the Rail Safety National Law (RSNL) to administer a national system of rail safety regulation.

The RSNL makes all persons carrying out railway operations accountable for rail safety through a general duty to ensure, so far as is reasonably practicable, the safety of those railway operations. The RSNL does not however apply if the person is excluded from its coverage by s7 of the RSNL or regulation 7 of the National Regulations.

The RSNL also requires rail transport operators to be accredited, or exempt from accreditation, and have a safety management system with which contractors carrying out railway operations are required to comply.

“Effective control and management” of the relevant railway infrastructure, or of the operation or movement of rolling stock, is the determinant of whether a person is a rail transport operator. The concept of effective control and management of railway infrastructure is therefore fundamental to the RSNL as it determines whether a person is entitled to, and required to, seek and obtain accreditation.

This document provides a framework for an approach to identifying who has effective control and management of railway infrastructure and/or the operation or movement of rolling stock, including in contracting arrangements.

The purpose of this document is to provide guidance on:

- > the general duties of rail transport operators, and other persons carrying out railway operations (such as contractors)
- > identifying who may be accredited to undertake certain railway operations and the requirement to seek accreditation before commencing railway operations
- > contractor compliance and good practice in contract management

This guidance is intended to be read in conjunction with the RSNL and National Regulations. This guidance is intended to be a guide only. It is not intended to replace the legislation, or to limit or expand the scope of the legislation. In the event of an inconsistency between this guidance and the legislation, the legislation will prevail. It is recommended that you obtain your own, independent legal advice about the legislation.

The guidance also refers to and complements the following guidelines that relate to the safe management of railway operations:

- > ONRSR Guideline: Preparation of a Rail Safety Management System;
- > ONRSR Guideline: Meaning of duty to ensure safety so far as is reasonably practicable.

The guidance does not cover the obligations an operator may have under occupational health and safety legislation. It is recommended that you obtain your own, independent legal advice about occupational health and safety legislation.

## 2. Who is a ‘Rail transport operator’?

- > A rail transport operator is a person who is a rail infrastructure manager or a rolling stock operator, or both.
- > A rail infrastructure manager means a person with effective control and management of the rail infrastructure of a railway (RSNL s4).
- > A rolling stock operator means a person with effective control and management of the operation or movement of rolling stock (RSNL s4). It does not include a person by reason only that the person drives the rolling stock or controls the network or the network signals.

- > A “person” can mean any legal entity, for example, an individual or a body corporate.
- > A “body corporate” is anybody that has been incorporated and includes a private company, a public company, an incorporated association and a body deemed by statute to be a body corporate.

### 3. Key requirements of the Rail Safety National Law

#### 3.1 General duties of rail transport operators and contractors

The duty on rail transport operators to ensure safety so far as is reasonably practicable is underpinned by a requirement that the person eliminate risks to safety so far as is reasonably practicable and if this is not reasonably practicable, to minimise those risks so far as is reasonably practicable (RSNL s46).

Rail transport operators have a general duty to ensure, so far as is reasonably practicable, the safety of their railway operations (RSNL s52). The general duty of rail transport operators extends to other persons who carry out railway operations (RSNL s52 (5)) unless they are rail safety workers or employees.

The general duty requires all rail transport operators to, so far as is reasonably practicable:

- > have safe systems for their railway operations;
- > ensure their rail safety workers are:
  - of sufficient good health and fitness to work safely,
  - competent to undertake relevant rail safety work,
  - not carrying out rail safety work or on duty while impaired by alcohol or a drug, and
  - not carrying out rail safety work while impaired by fatigue;
- > provide adequate facilities for the safety of people at railway premises they control or manage;
- > provide rail safety workers with the information, instruction, training and supervision necessary to enable them to do their work safely; and
- > provide information to rail transport operators and other persons on the railway premises so that those persons can be safe.

In addition:

- > if a rail transport operator is a rail infrastructure manager, that is a person with effective control and management of rail infrastructure, the general duty also includes the obligation to, so far as is reasonably practicable:
  - provide or maintain rail infrastructure that is safe;
  - ensure that any design, construction, commissioning, use, installation, modification, maintenance, repair, cleaning or decommissioning of rail infrastructure is carried out in a way that ensures the safety of railway operations;
  - establish systems and procedures for scheduling, control and monitoring of railway operations, to ensure the safety of the railway operations;
  - establish and maintain communication systems to ensure the safety of the rail infrastructure manager’s railway operations.

- > if a rail transport operator is a rolling stock operator, that is a person with effective control and management of the operation or movement of rolling stock, the general duty also includes the obligation to, so far as is reasonably practicable:
  - provide or maintain rolling stock that is safe;
  - ensure that design, construction, commissioning, use, modification, maintenance, repairs, or decommissioning of rolling stock is carried out in a way that ensures safety;
  - comply with the rail infrastructure manager’s rules and procedures for scheduling, control and monitoring of rolling stock;
  - have equipment, procedures and systems to minimise risks to the safety of the railway operations;
  - have arrangements to ensure safety in connection with the use, operation and maintenance of rolling stock; and
  - establish and maintain communication systems to ensure the safety of the rolling stock operator’s railway operations.

The following persons also have general safety duties under the RSNL:

- > Designers, manufacturers and suppliers (RSNL s53);
- > Persons loading or unloading freight (RSNL s54); and
- > Rail safety workers (RSNL s56).

An officer of a person who has a safety duty must exercise due diligence in complying with that person’s safety obligations (RSNL s55). This due diligence includes taking reasonable steps to:

- > acquire and keep up-to-date knowledge of rail safety matters; and
- > gain an understanding of the nature of the railway operations of the person and, generally, of the risks associated with those operations; and
- > ensure that the person has available for use, and uses, appropriate resources and processes to eliminate or minimise risks to safety from the railway operations of the person; and
- > ensure that the person has appropriate processes for receiving and considering information regarding incidents and risks and responding in a timely way to that information; and
- > ensure that the person has, and implements, processes for complying with any duty or obligation of the person under the RSNL; and
- > verify the provision and use of the resources and processes referred to in paragraphs (c) to (e).

### **3.2 Meaning of ‘so far as is reasonably practicable’**

The following matters must be considered in determining what is reasonably practicable in relation to ensuring safety:

- > the likelihood of the risk concerned eventuating;
- > the degree of harm that would result if the risk eventuated;
- > what the person concerned knows or ought reasonably to know, about the risk and any ways of eliminating or reducing the risk;
- > the availability and suitability of ways to eliminate or reduce the risk; and

- > the cost of eliminating or reducing the risk, including whether the cost is grossly disproportionate to the risk (RSNL s47).

What is reasonably practicable is always a judgment based on all the relevant facts of each case. In general unless the likelihood and degree of harm is disproportionately low compared to the costs and likely benefit of the measure, the National Rail Safety Regulator (NRSR) will expect rail transport operators to implement appropriate safety measures.

The term “so far as is reasonably practicable” is explained in detail in the *ONRSR Guideline: Meaning of duty to ensure safety so far as is reasonably practicable*.

### **3.3 Meaning of ‘railway operations’**

Under the RSNL, railway operations means:

- > the construction of a railway, railway tracks and associated track structures or rolling stock;
- > the construction of rolling stock
- > the management, commissioning, maintenance, repair, modification, installation, operation or decommissioning of rail infrastructure;
- > the commissioning, maintenance, repair, modification, or decommissioning of rolling stock;
- > the operation or movement (or causing the operation or movement) by any means, of rolling stock on a railway (including for the purposes of construction or restoration of rail infrastructure);
- > the movement, or causing the movement, of rolling stock for the purposes of operating a railway service;
- > the scheduling, control and monitoring of rolling stock being operated or moved on rail infrastructure (RSNL s4).

### **3.4 Prohibition on ‘contracting out’ legal obligations**

A contract may include a term known as an ‘exclusion clause’. There are three main types of exclusion clauses:

- > clauses which operate to exclude a person’s rights and obligations which that person would otherwise possess under the legislation;
- > clauses which operate to limit (or restrict) the rights and obligations which that person would otherwise possess under the legislation; and
- > clauses which operate to modify (or qualify) the rights and obligations which that person would otherwise possess under the legislation.

The practice of excluding, limiting or modifying a legal right or obligation by way of contract is generally referred to as ‘contracting out’ legal obligations. The RSNL imposes a prohibition on contracting out legal obligations and the use of exclusion clauses in regards to the provisions of the legislation (RSNL s262).

Therefore, any person (including a rail transport operator) who has an obligation under the RSNL cannot ‘contract out’ their obligations under the RSNL. This is different from contracting out railway operations, which is permissible.

The key result of the prohibition on contracting out legal obligations is that persons subject to the requirements of the RSNL remain bound to those exact requirements. This is the case irrespective of any express or implied contractual provision which provides otherwise. Accordingly, rail transport operators, and others with duties under the RSNL, cannot use exclusion clauses as a

defence to any contravention of the RSNL. It may be possible however for the rail transport operator to recover compensation from a contractor it has engaged to complete work required to comply with the RSNL if that work does not satisfy the contract requirements or is performed negligently. Rail transport operators would need to obtain their own legal advice about such matters.

For example, a rail transport operator may wish to include and then rely on a term in a contract restricting the operator's duty to establish a safety management system for railway operations which the other party to the contract will carry out on the operator's behalf. In this case the prohibition on contracting out would render that particular term void and ineffectual.

Rail transport operators consequently remain responsible for the safety of their railway operations and their other obligations under the RSNL. These responsibilities (and their inherent risks) cannot be limited or transferred to other parties by contractual terms, either expressly or implied.

It is important to note that the prohibition will operate in all cases. That is, there can be no conditions or exceptions. Accordingly, a person may not be able to argue that a contractual exclusion of, or limitation on, a provision of the legislation was fair and reasonable, or otherwise acceptable, in the circumstances.

### **3.5 Other key requirements**

In addition to general duties, the legislation imposes other obligations on rail transport operators and contractors. These include requirements for:

- > rail transport operators to be accredited (RSNL s62) unless they are -
  - registered as a rail infrastructure manager for a private siding (RSNL s82) (as appropriate); or
  - exempt under the RSNL from accreditation (RSNL s62);
  - persons other than rail transport operators (i.e. contractors) carrying out railway operations to only carry out those operations if they are doing so “for and on behalf of” a rail transport operator that is accredited in relation to those operations or exempt from accreditation (RSNL s62);
- > rail transport operators to have an SMS which includes systems and procedures in relation to contract management (RSNL s99(1)(b));
- > contractors to comply with the safety management system of the rail transport operator to the extent that it applies to the railway operations carried out by the contractor (RSNL s119).

## **4. Accreditation requirements**

The purpose of accreditation is to attest that the rail transport operator has demonstrated to the NRSR the competence and capacity to manage risks to safety associated with its railway operations (RSNL s61). The RSNL requires railway operations to be carried out by or on behalf of a rail transport operator who is accredited or exempt from accreditation (RSNL s62).

In order to determine whether a person is a rail transport operator it is critical to identify whether the person has effective control and management of railway infrastructure or the operation or movement of rolling stock.

## **5. Determining who has effective control and management**

Which party has the effective control and management is a question of fact, to be considered on a case by case basis. In most common operational situations on the railway, it will be evident who has effective control and management of the relevant railway infrastructure, or the operation or



movement of rolling stock. However, in some situations it may be more difficult to determine who has effective control and management.

In cases where the same person owns, operates, maintains and manages rail infrastructure, then it will be clear that that person is the one who has effective control and management of the rail infrastructure. Similarly, where one person operates rolling stock, it will be clear that that person has the effective control and management of the operation or movement of the rolling stock.

However, more complex ownership and operating structures for rail infrastructure and rolling stock exist. In these circumstances it may be less clear who has effective control and management and, in these more complex cases, more than one person may have effective control and management. Ownership and fiscal accountabilities do not always point to effective control and management in every case.

Different considerations may apply depending on whether the effective control and management relates to the operation or movement of rolling stock, or to the management of rail infrastructure.

The following sections outline some principles which may assist in determining who has effective control and management of rail infrastructure and/or the operation or movement of rolling stock.

## 5.1 The ability to influence or direct

Generally the RSNL will look to the party that has the greatest ability to “*influence or direct*” the particular activity at the operational level.

In the case of a rail infrastructure manager, the party with effective control and management will be the party that has the ability to *influence or direct* railway operations relating to the state or condition of the rail infrastructure.

In the case of a rolling stock operator, the party with effective control and management will be the party that has the ability to *influence or direct* the operation or movement of rolling stock.

The capacity to “influence or direct” a particular activity (whether the operation or movement of rolling stock, or the management of rail infrastructure) may in some circumstances rest with the owner of the relevant asset or in other cases be transferred to another contracted party. Also, the nature of the contract should determine whether or not the contracted party influences or directs the relevant railway operation or whether this remains with the principal.

## 5.2 The significance of ownership

The RSNL contemplates that the person who has effective control and management of rail infrastructure (and therefore is the rail infrastructure manager) may not be the owner of the rail infrastructure. Two examples are included here.

### ***Example: Rail infrastructure is leased to another party***

Rail infrastructure is leased by an owner to another party and the lessee has “effective control and management” over the rail infrastructure. In this circumstance, it may be necessary for the NRSR to look beyond the general nature of the relationship between the parties and look to the precise terms of the lease to determine the extent to which (if at all) the owner of the infrastructure reserves for itself some residual right to direct or control railway operations involving or relating to the rail infrastructure. For example, it is possible that the lease may reserve for the owner a right to audit the decisions and/or activities of the lessee from time to time and to direct remedial action by the lessee where, in the owner’s opinion, the audit reveals some deficiency. It is likely that the NRSR would need to consider the precise implications of the arrangement. If, in these circumstances, the owner can direct the precise remedial action required (which may include behavioural change) by the lessee, or if there is the possibility of direct intervention by the owner, this may be considered to be limited “effective control and management”.

***Example: Operations and maintenance are contracted to another party***

The owner of rail infrastructure contracts out operation and maintenance of the rail infrastructure to a service provider – in some cases through traditional principal and agent structures and in others through an ‘alliance’ contract model. A comparison of agent/ principal and alliance contract models is discussed in section 5.3.

It is possible that both the owner and the contractor will exert some degree of effective control and management, depending on:

- > The precise arrangements between the parties in these relationships;
- > The degree of autonomy given to the lessee, contractor or alliance contractor;
- > Involvement of the owner or principal in the day to day running of the railway operations;
- > The ability of the owner or principal to take over, step-in or direct the way in which railway operations are carried out;
- > Governance arrangements, including veto rights of the owner or principal; and
- > Other factors.

**5.3 Can more than one party to an arrangement be accredited?**

In practice, situations will arise where it is not factually possible to distinguish, between two or more parties, who has effective control and management for the purposes of the RSNL.

In determining who has the effective control and management, the basic principle is that it is a question of fact and always depends on the circumstances of a particular accreditation assessment.

In some situations, the NRSR may determine that more than one party to the arrangement must be accredited, albeit for different railway operations for the same rail infrastructure or rolling stock.

***Alliance arrangements***

An alliance is one example of an arrangement where more than one party to the arrangement may need to be accredited.

In a traditional principal-contractor relationship, the principal does not retain a right of control over the way in which the contractor works. That is, although the contractor is entrusted with the task of procuring a particular result, the means by which that result is to be realised are left to the judgment of the contractor. The principal does not generally interfere with the process whereby any necessary works are carried out.

Conversely, in an alliance, the person who engages the contractor may assume a significant degree of control over the way in which the contractor carries out the works and procures the intended outcome. Often, the essence of the relationship is that the parties assume a level of responsibility which may be a joint or proportional level of control.

In an alliance, although the principal may not actually exercise day-to-day control over operations, the NRSR will need to consider whether the principal reserves for itself the right to do so (for example, by way of step-in rights which may be personally exercised by a principal in the event of a contractor’s default).

The NRSR may consider more than one party to the alliance to be the rail infrastructure manager and require all parties who are considered rail infrastructure managers under the arrangement to be accredited.

## 5.4 Practical considerations in determining who has effective control and management

Determining who has effective control and management is a question of fact and always depends on the circumstances of a particular arrangement. As discussed in section 5.1, the NRSR will be guided by a consideration of which party has the greatest ability to influence and direct the relevant railway operation (ie the management of rail infrastructure, or the operation or movement of rolling stock).

The capacity to influence or direct the relevant railway operations is most prevalent in the person who prescribes or defines:

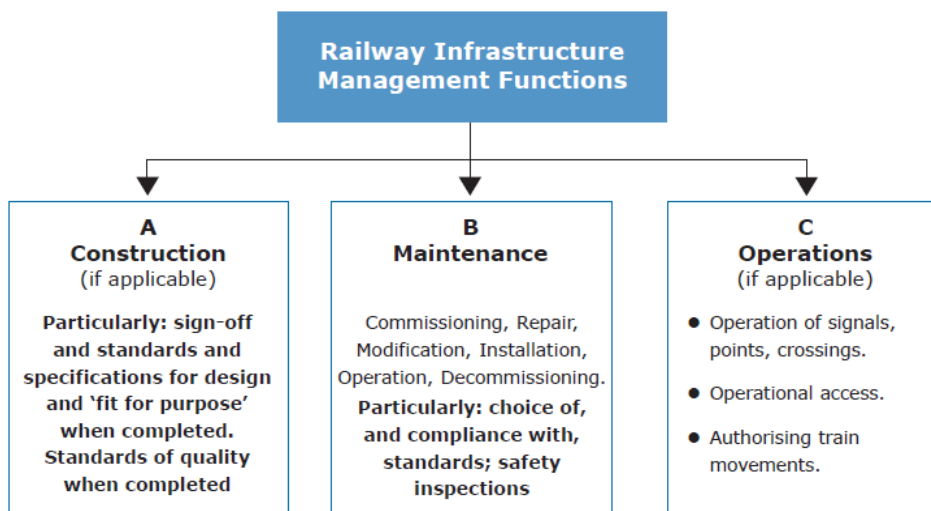
- > the standards to be applied to the relevant railway operation;
- > the specifications for the performance of the relevant railway operations;
- > the quality that will be accepted for the railway operations.

These specific matters are considered in more detail in the diagrams below in the context of a rail infrastructure manager and rolling stock operator.

The considerations in some common scenarios illustrated in the boxes below should assist the NRSR to consider who has effective control and management of railway infrastructure or the operation or movement of rolling stock.

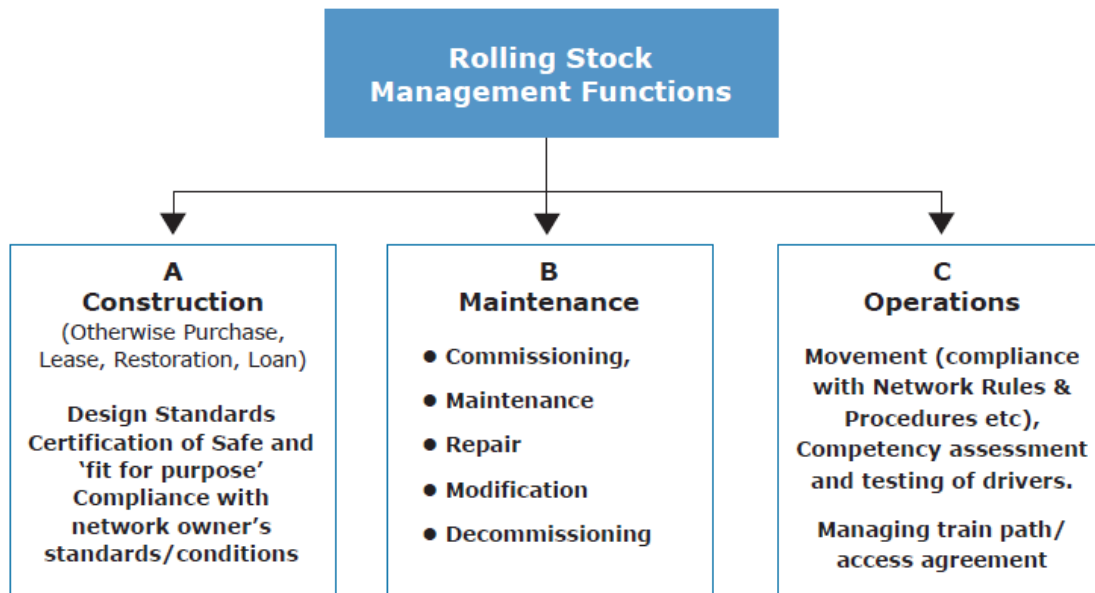
### **Key considerations in determining who has effective control and management of railway infrastructure**

- > Effective control and management normally means that there will only be one rail infrastructure manager for a railway, although in some circumstances there may be more than one (such as an alliance scenario).
- > The owner is normally the rail infrastructure manager, unless the rail infrastructure management functions are contracted out.
- > If A, B and C in the diagram below are contracted out to another party the owner is probably not the rail infrastructure manager.
- > If one or more of A, B and C is/are not contracted out to another party, then either
  - the owner remains the rail infrastructure manager; or
  - more often than not, the party who exercises the operations functions in C is the rail infrastructure manager.



**Key considerations in determining who has effective control and management of rolling stock**

- > Effective control and management implies that there can only be one rolling stock operator for the operation or movement of rolling stock.
- > The rolling stock operator may be the person who has the access agreement with the relevant rail infrastructure manager or under whose safety management system the operation or movement of rolling stock is carried out. Other factors to consider include which party books the train path, and which party employs or hires the train crew.
- > In the diagram below it is the activities in C, and who carries out those activities, that will be the relevant factor in determining whether or not the person is a rolling stock operator. More often than not, the party who exercises the operations functions in C is the rolling stock operator and will require accreditation.
- > If one or more of the activities in A or B involve the incidental operation or movement of rolling stock (for example for testing purposes) then the person having the capacity to direct and influence these operations will also require accreditation in their own right.



## 6. Contracting arrangements and obligations

### 6.1 Meeting the accreditation requirements

To avoid breaching the legislative requirements relating to accreditation, it is recommended that the principal – that is, the party tendering the contract - and the prospective contractor actively consider, before entering into the contract, which party will be the rail transport operator in relation to the relevant railway operations.

In considering accreditation requirements, it is recommended that the following matters are taken into account:

- > the scope of railway operations which will need to be undertaken to carry out the contract;
- > which party is carrying out, causing or permitting to be carried out those railway operations;
- > in relation to those railway operations, which party has “effective control and management” of the rail infrastructure or rolling stock operations; and
- > whether any parties to the contract are already accredited or exempt in relation to those railway operations.

The rail transport operator must be accredited or exempt from accreditation in respect of the relevant railway operations before carrying out those railway operations. Where an accredited rail transport operator proposes to undertake new or altered railway operations which are not covered by its existing accreditation, it will need to apply for and be granted a variation of accreditation before undertaking the railway operations.

### 6.2 Identifying the scope and nature of railway operations

In planning to engage contractors to carry out railway operations, it is recommended that the principal identifies the scope and nature of railway operations to be carried out under the contract, ie. the type of railway operations to be carried out.

The RSNL sets out the purposes for which accreditation may be granted under section 63. If the rail transport operator for the specific railway operations is already accredited or exempt from accreditation, their existing notice of accreditation or exemption may be reviewed to determine whether the railway operations to be carried out fit within this accreditation or exemption.

It is recommended that the principal and contractor also consider the need for accreditation for ancillary railway operations, for example the movement of track maintenance vehicles to, from and around a site for the purpose of carrying out rail infrastructure maintenance.

### 6.3 Establishing who has effective control and management

In planning to engage contractors to carry out railway operations, it is recommended that the principal identifies whether the principal or the contractor will be considered to be the rail transport operator in relation to the specific railway operations. The key question here is: which party has the effective control and management?

Section 5 of this Guideline sets out the factors that a principal and contractor should consider when establishing the roles and responsibilities of each party.

In relation to worksites it is necessary to distinguish between contractors having control over a worksite for the purposes of carrying out discrete construction or maintenance work on railway infrastructure from the person that has the overall control and management responsibility for the whole of the railway infrastructure. It is unlikely that contractors carrying out such work will be regarded as having “effective control and management” over rail infrastructure as this will only be temporal. They are not the party that defines or prescribes the above matters in relation to the particular rail infrastructure or rolling stock.

The following may be indicators of effective control and management in a contracting arrangement  
Generally, in the case of rail infrastructure:

- > the owner or lessee is likely to have effective control and management if functions such as construction, maintenance and operations have not been contracted out;
- > if all functions such as construction, maintenance and operations have been contracted out to a single party, that party is likely to have effective control and management;
- > if functions such as construction, maintenance and operations are contracted out to more than one party then the contractor exercising the operations functions or the owner may have effective control and management.

Generally, the party likely to have effective control and management of the operation or movement of rolling stock may be the party:

- > that has the access agreement with the relevant rail infrastructure manager; or
- > under whose safety management system the operation and movement of rolling stock is carried out.
- > that assesses and checks drivers' competency and training requirements.

It is suggested that, in the first instance, the relevant parties should consider which of them has effective control and management and, therefore, ought to be accredited. Following this, the parties may wish to contact the ONRSR for advice.

#### **6.4 Documenting which party is to be accredited**

The NRSR will expect to see evidence that the accredited person for railway operations under and ancillary to a contract has been identified. It is recommended that the following is documented:

- > railway operations to be carried out under the contract and any ancillary railway operations;
- > identification of under whose accreditation the railway operations will be carried out;
- > if works are carried out under the contractor's accreditation, evidence that the principal has obtained a copy of the contractor's notice of accreditation and has reviewed it;
- > if works are carried out under the principal's accreditation, evidence that the contractor has obtained a copy of the principal's notice of accreditation and has reviewed it; and
- > processes for the review of accreditation requirements if the railway operations to be carried out under the contract or ancillary to the contract change during the course of the contract.

### **7. Contractor compliance with the rail transport operator's safety management system**

The RSNL requires a contractor carrying out railway operations for a rail transport operator to comply with the operator's safety management system to the extent that it applies to the contractor's railway operations (RSNL s119).

Options for complying with this obligation may include:

1. The rail transport operator sets safety and operational outcomes, and the contractor is required to demonstrate that it has systems to meet these outcomes through the tendering and/or contracting process (i.e. the rail transport operator amends its safety management system to incorporate the contractor's systems);
2. The accredited operator sets out the systems by which a contractor must carry out the railway operations (i.e. the contractor applies the rail transport operator's existing safety management system to the extent that it applies to the contractor's railway operations).

3. A combination of options 1 and 2.

A rail transport operator, before establishing or reviewing or varying its safety management system, is obliged to consult, so far as is reasonably practicable, with:

- > any person likely to be affected by the safety management system, or its review or variation, being persons who carry out those railway operations or work on or at the operator's railway premises or with the operator's rolling stock;
- > health and safety representatives and applicable unions;
- > any other rail transport operator with whom there is an interface; and
- > the public, as appropriate (RSNL s99(3)).

It is recommended that the rail transport operator and contractor agree the safety management system arrangements through the contract formation process and that these arrangements are specified in the contract documentation.

## **7.1 How a contractor's systems may be incorporated into the rail transport operator's safety management system**

The following steps may be taken to incorporate a contractor's systems into the rail transport operator's safety management system:

1. Rail transport operator sets safety and operational outcomes.
2. Rail transport operator develops list of railway operations to be undertaken under contract and conducts risk assessment.
3. Rail transport operator reviews contractor's systems against railway operations, safety and operational outcomes and its safety management system to identify any inconsistencies or issues.
4. Contractor amends systems to meet railway operations, safety and operational outcomes and address inconsistencies or issues if necessary.
5. Rail transport operator amends the safety management system to address any inconsistencies or issues if necessary.
6. Rail transport operator references contractor's systems in its safety management system.
7. The safety management system arrangements are documented.

## **7.2 How the rail transport operator's existing safety management system may be applied to a contractor**

The following steps may be taken to apply a rail transport operator's existing safety management system to a contractor:

1. Rail transport operator develops a list of railway operations to be undertaken under contract and conducts a risk assessment.
2. Rail transport operator reviews its safety management system to identify and assess the parts of the safety management system relevant to the railway operations to be undertaken under the contract.
3. Rail transport operator amends its safety management system if necessary to reflect railway operations to be undertaken under contract.
4. Contractor reviews relevant parts of the rail transport operator's safety management system to identify any issues.
5. Rail transport operator amends the safety management system to address issues if necessary.

6. The safety management system arrangements are documented.

### **7.3 Documenting arrangements for complying with the requirements for a safety management system**

Rail transport operators and contractors will need to be able to provide evidence that they have considered and agreed the safety management system arrangements that are to apply to railway operations to be undertaken under the contract.

As part of the safety management system, a rail transport operator must, if relevant to the railway operations for which it is accredited, have systems and procedures:

- > for the review of tender documents and contracts to ensure that safety requirements under the rail transport operator's safety management system are adequately defined and documented;
- > to ensure that the terms of any tender documents or contracts do not lead to unsafe work or an activity that may affect the safety of railway operations;
- > for the selection and control of contractors and to ensure the monitoring and performance of contractors, including conducting or commissioning audits of the contractor's performance in relation to the safety aspects of the contract;
- > to ensure that safety duties under the law are being met under contracts, and procedures for the taking of remedial action where necessary; and
- > to ensure that goods and services provided to the railway operations meet the standards and specifications required for the safety of the railway operations (Regulation 18 of Division 1 of Part 4 of the National Regulations).

The safety management system itself must comply with the requirements set out in the RSNL (s99). In particular, a safety management system must identify and assess any risks to safety arising from railway operations carried out on or in relation to the rail transport operator's rail infrastructure or rolling stock, and specify controls to manage those risks.

A safety management system is required to cover elements that are relevant to the railway operations for which the rail transport operator is accredited, and the level of detail in the safety management system must reflect the scope, nature and risks to safety of the railway operations (Regulation 16).

The NRSR will expect to see a compliant safety management system with a level of detail that is appropriate to the scope, nature and risks to safety of the railway operations and the need to comply with general duties (Regulation 16).

The *ONRSR Guideline: Preparation of a Rail Safety Management System* provides more detailed guidance on the requirements for a safety management system.

### **7.4 Achieving good practice in contract management**

Good practice in contract management is achieved by knowledge of legislative requirements, sound planning, cooperation and communication between the parties to the contract. It requires safety and compliance considerations at all stages of the contracting process from pre-tendering to contract evaluations.

The checklist at Appendix A is a guide to the safety considerations in contracting for the use of both all parties. The checklist supplements the guidance on contractor management which is provided in the *ONRSR Guideline: Preparation of a Rail Safety Management System*.

Some other helpful documents and guidance on contractor management include:

- > Australian Safety and Compensation Council *Guidance on OHS in Government Procurement* 2006



- > Contractor Management System, Civil Contractors' Federation of Australia
- > Health and Safety Executive UK, *Use of Contractors: a joint responsibility*
- > Roads and Traffic Authority of NSW *Contractor Health & Safety Information Pack*
- > WorkCover Authority of NSW *Subby Pack*

## **8. Acknowledgements**

The National Rail Safety Regulator acknowledges the assistance of the National Transport Commission, members of the National Rail Safety Regulators Panel, industry and members of the Safety Management System Advisory Committee in the preparation of this document.

## Appendix A: Checklist for good practice in contract management <sup>1</sup>

Contract stage	Rail safety considerations	Action
<p><b>Procurement stage</b></p> <p><b>Planning:</b></p> <ul style="list-style-type: none"> <li>&gt; Identify railway operations to be undertaken under contract</li> <li>&gt; Identify elements relevant to the railway operations: supply, design, verification, construction, manufacture, install, erect, repair, modification, operation, decommissioning</li> <li>&gt; Risk management</li> </ul>	<ul style="list-style-type: none"> <li>&gt; Identify the railway operations to be carried out under the contract.</li> <li>&gt; Identify which party to the contract will be the rail transport operator for those railway operations and ensure that the appropriate accreditation or exemption is held.</li> <li>&gt; Ensure there are formal links between the safety and contract functions.</li> <li>&gt; Review your SMS against the railway operations to be undertaken. e.g. <ul style="list-style-type: none"> <li>- undertake contract specific risk assessments relevant to each contract stage;</li> <li>- identify contract risk controls, including rail safety worker competence, and document who will be responsible for applying and managing these controls; and</li> <li>- consult with persons likely to be affected by the review of the SMS, their health and safety representatives and the unions which represent them; rail transport operators with whom you have interfaces; the public (if appropriate).</li> </ul> </li> <li>&gt; Check that relevant SMS safety and design, supply, manufacture, verification, construction, commissioning, modification, operation, repair, maintenance, and/or decommissioning requirements are included in the contract documentation</li> <li>&gt; Consider the contract safety requirements in relation to sub-contracting.</li> <li>&gt; Consider the contract requirements, such as record keeping and reporting, in relation to monitoring safety.</li> <li>&gt; Identify the safety representatives for all stages of contract management and document their roles and responsibilities.</li> <li>&gt; Consider what tender documentation relating to safety you might require from prospective contractors.</li> </ul>	
<p><b>Approaching the</b></p>	<ul style="list-style-type: none"> <li>&gt; Ensure tender safety requirements are</li> </ul>	

<sup>1</sup> This design concept and some content of this checklist has been drawn from the *ASCC Guidance on OHS in Government Procurement 2006*

Contract stage	Rail safety considerations	Action
<p><b>market:</b></p> <ul style="list-style-type: none"> <li>&gt; Select method of procurement of goods or services</li> <li>&gt; Prepare tender and contract documentation</li> <li>&gt; Prepare evaluation plan</li> </ul>	<p>appropriate to the railway operations and to the type of procurement – simple, panel contract, pre-qualification scheme, involved and/or complex contracts.</p> <ul style="list-style-type: none"> <li>&gt; Ensure tender documents specify safety and operational outcomes.</li> <li>&gt; Look at different safety requirements for services tenders versus design/supply/ manufacture tenders.</li> <li>&gt; Check for adequate control of contract compliance and reporting requirements.</li> <li>&gt; Include specific safety management requirements in contract.</li> <li>&gt; Consider guidance for evaluating safety criteria.</li> <li>&gt; Consider weighting safety criteria, and whether there is a “no go” evaluation decision if safety requirements are not met.</li> <li>&gt; Consider penalties on contractors for failing to meet safety criteria</li> </ul>	
<p><b>Evaluation of submissions</b></p> <ul style="list-style-type: none"> <li>&gt; Supplier selection</li> <li>&gt; Feedback</li> </ul>	<ul style="list-style-type: none"> <li>&gt; Check that submissions address the safety criteria.</li> <li>&gt; Identify and obtain any further particulars needed from tenderers regarding safety.</li> <li>&gt; Check skills and qualifications of contractor management and safety staff, including previous clients' safety references for project and safety managers.</li> <li>&gt; Check contractor incident history.</li> <li>&gt; Check contractor procedures for sub contractor selection.</li> <li>&gt; Seek demonstrated evidence of contractor's SMS implementation.</li> <li>&gt; Apply weighting for safety criteria.</li> <li>&gt; Give feedback on safety content to unsuccessful tenderers.</li> </ul>	
<p><b>Contract award Stage</b></p> <p><b>Contract negotiation</b></p>	<ul style="list-style-type: none"> <li>&gt; Establish shared understanding of safety risks and issues.</li> <li>&gt; Discuss, consult on and agree SMS content.</li> <li>&gt; Develop and finalise SMS documentation.</li> <li>&gt; Schedule contract safety coordination and communications, pre-job meetings, safety inspection and test/hold points, KPI monitoring.</li> <li>&gt; Agree and establish a program for education, instruction, supervision and training in new or</li> </ul>	

Contract stage	Rail safety considerations	Action
	<p>contract specific aspects of SMS.</p> <ul style="list-style-type: none"> <li>&gt; Discuss and agree specifications for design, supply, manufacture, verification, construction, modification, operation, repair, maintenance, decommissioning.</li> <li>&gt; Agree non compliance procedures.</li> <li>&gt; Agree on contract risk assessment, register and controls, including rail safety worker competence.</li> <li>&gt; Identify persons responsible for these controls and document their responsibilities.</li> <li>&gt; Establish clear and formal process for variations and management of change including sub-contracting.</li> <li>&gt; Agree performance reporting and incident notification requirements</li> </ul>	
<p><b>Responsibilities and accountabilities</b></p>	<p>Identify who from the rail transport operator and the contractor is responsible for:</p> <ul style="list-style-type: none"> <li>&gt; Supervision of safety aspects of contract</li> <li>&gt; SMS compliance</li> <li>&gt; Safety assurance</li> <li>&gt; Safety representation at project management meetings</li> <li>&gt; Managing reporting content and format for project management meetings</li> <li>&gt; Negotiations/Disputes discussions</li> <li>&gt; Variations</li> <li>&gt; Approvals – develop a register of approved signatures</li> <li>&gt; Management of change</li> <li>&gt; Communications</li> <li>&gt; Induction</li> <li>&gt; Training</li> <li>&gt; Hazard and risk management</li> <li>&gt; Safety occurrence investigation and reporting</li> </ul>	
<p><b>Variations and</b></p>	<ul style="list-style-type: none"> <li>&gt; Ensure compliance with variation procedure and</li> </ul>	

Contract stage	Rail safety considerations	Action
<b>management of change</b>	<p>approvals, including management of change.</p> <ul style="list-style-type: none"> <li>&gt; Ensure use of register of approved persons and signatures for variations and management of change.</li> <li>&gt; Identify, communicate and action variations and management of change impacts – such as interface agreements, programs for fatigue management and drug and alcohol management, plans for emergency management</li> <li>&gt; Communicate variations that affect staff, contractors and others</li> </ul>	
<b>Communications</b>	<ul style="list-style-type: none"> <li>&gt; Make arrangements or prepare communications plan about contract arrangements to staff contractors and others</li> </ul>	
<b>Contract management stage</b>  <b>Induction</b>	<ul style="list-style-type: none"> <li>&gt; Staff, contractors, sub-contractors and others.</li> <li>&gt; Progressive for contract stage, site and works.</li> <li>&gt; Check all contractor and sub-contractor staff meet the required competencies, health assessments, and other relevant requirements.</li> </ul>	
<b>Monitoring</b>  > Dependent on nature of works, risks, length of contract, number of sites and sub-contractors, consultation and reporting requirements	<ul style="list-style-type: none"> <li>&gt; Undertake monitoring as agreed, ensuring schedule is met and site visits occur</li> <li>&gt; Document findings from inspections, compliance audits and investigations and provide copies to relevant parties.</li> <li>&gt; Monitor SMS generally, including specific monitoring such as: <ul style="list-style-type: none"> <li>– managing sub contractors.</li> <li>– implementation of programs, plans and competencies</li> <li>– safety and design management and procedures</li> <li>– notification of occurrences and incident investigations</li> <li>– effectiveness of on-site risk controls</li> <li>– currency and effectiveness of risk register</li> <li>– management of non compliance</li> </ul> </li> </ul>	
<b>Auditing</b>	<ul style="list-style-type: none"> <li>&gt; Undertake auditing as agreed, both desk top and site based.</li> </ul>	
<ul style="list-style-type: none"> <li>&gt; Supervision</li> <li>&gt; Dependent on nature of</li> </ul>	<ul style="list-style-type: none"> <li>&gt; Check supervision occurs as required in contract, especially where protection and/ or</li> </ul>	

Contract stage	Rail safety considerations	Action
<p>operations, number of sub-contractor, levels of protection under network rules</p> <p>&gt;</p>	<p>possessions are in place.</p> <p>&gt; Ensure approvals and permits are properly established and managed in compliance with supervision requirements and network rules.</p>	
<p><b>Communications</b></p>	<p>&gt; Identify compliance/non compliance.</p> <p>&gt; How was non compliance managed? Was non-compliance reported in a timely manner?</p> <p>&gt; What lessons were learned? How can these lessons improve future tendering and contract management?</p> <p>&gt; Review occurrences and notifications.</p>	
<p><b>Risk assessment</b></p> <p>&gt; What unanticipated issues emerged?</p> <p>&gt; Lessons learned for the future procurement?</p>	<p>&gt; Review SMS risk register against project/ contract risks, issues, and notifications of occurrences.</p> <p>&gt; Add newly assessed risks and controls to contract risk register.</p> <p>&gt; Add contract management specific risks that affect safety to the risk register.</p>	