

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

## Section 1: General information

Purpose
Final decisions to proceed with a policy change to be taken by Cabinet.

Key Limitations or Constraints on Analysis
<p>Policy analysis has been completed under time constraints, due to the problem (compliance with an amendment to the Employment Relations Act 2000) being signalled late by industry to the Government. However, the problem is well defined and the range of options to address it are discrete and identifiable.</p> <p>To an extent, the range of options to address the problem has been limited by the time available for policy analysis and the need to provide a solution before 6 May 2019. Therefore, greater weight has been allocated to a regulatory option over non-regulatory options.</p> <p>The evidence for the problem is largely anecdotal evidence from councils, unions and bus service operators who are affected by the law change. Options to address the problem respond to advice from these parties about how they plan to implement the law change and the impacts of that on their operations. Some evidence of service scheduling impacts and subsequent disruption has been provided to the Ministry but assumptions have needed to be made about the level of disruption that will be caused.</p> <p>There has not been time for public consultation or thorough departmental consultation, however, a Steering Group with representatives from affected parties (unions, councils, and bus service operators) and central government agencies has been formed to consider the options to address the problem. The Steering Group has reviewed and contributed to the drafting of the regulatory solution. A Memorandum of Understanding has been entered into between Ministers and affected parties, establishing the foundation of a relationship to develop the regulatory solution and implement it.</p>
Responsible Manager (signature and date):
Brent Johnston Mobility & Safety Regulatory & Data Ministry of Transport

# Section 2: Problem definition and objectives

## 2.1 What is the policy problem or opportunity?

The Employment Amendment Act 2018 (ERAA) comes into force on 6 May 2019. It reinstates workers' entitlements to rest and meal breaks under the Employment Relations Act 2000 (ERA). From 6 May 2019, bus drivers will be entitled to additional 10-minute rest breaks during the course of typical driving shifts.

The ERAA provides flexibility for employers and employees to agree when rest and meal breaks should be taken. If they cannot agree when the breaks are to be taken, the ERAA requires that breaks be provided at times prescribed in the ERAA, so far as is "reasonable and practicable".

There are concerns about public transport bus service operators' and councils' ability to provide these 10-minute breaks safely, and without causing significant disruption to public transport services, in the short-term. These concerns relate to:

- the likely inability of operators to gain agreement from their employees to the timing of 10-minute rest breaks in the time frame available; and
- in the absence of agreement, the requirement that these breaks are provided at times prescribed in the ERAA, so far as is "reasonable and practicable".

Operators are concerned they could face a legal challenge over the scope of what is "reasonable and practicable" should they schedule rest breaks in order to avoid disruption to services. As a result, some operators have been planning to provide rest breaks at times close to those prescribed in the ERAA (e.g. in the middle of a work period of 2 to 4 hours), with little regard for the impact on services. Operators have also raised concerns that the timing of these breaks may mean buses have to be stopped in unsafe locations. On this basis, operators have indicated that providing the rest breaks while maintaining existing public transport service levels will require additional buses and drivers, resulting in a substantial increase in cost.

Our view is that it is unlikely that the new requirements under the ERAA can be implemented in a timely way, given the shortage of available drivers and the lead-time required to procure additional vehicles. As a result, there will be cancellation of services in the short-term, since in most cases the required vehicles and drivers will not be available on 6 May 2019. In addition, there is a likelihood that buses may have to be stopped in unsafe locations.

## 2.2 Who is affected and how?

We have been engaging with the following groups:

- the Bus & Coach Association, on behalf of bus service operators
- the New Zealand Council of Trade unions, on behalf of bus drivers
- Greater Wellington Regional Council, representing councils and Auckland Transport.

Bus service operators wish to apply flexibility in the provision of the rest breaks required under the ERAA, to avoid service disruption impacts for public transport users and financial costs. However, the operators are reluctant to apply flexibility without firm direction from central government.

Without a direction to apply flexibility to avoid disruption, bus service operators have advised the Ministry that they will need to cancel a significant number of services on 6 May 2019 and for a transition period thereafter. Central government, unions, councils and bus service operators all agree that a direction to apply flexibility is necessary and desirable.

Employees of bus service operators, and unions, have an interest in ensuring that breaks are taken at points in a shift that are optimal for employees (ideally towards the middle of shift periods). However, in the short term, the affected parties accept there needs to be a transition period during which greater flexibility is required to avoid disruption to services. During the transition period, which the parties have provisionally agreed will be up to 12 months, bus service operators, councils and unions have agreed to work together to adjust the scheduling of services to accommodate rest breaks at times that are more optimal for bus drivers, whilst avoiding disruption.

### **2.3 Are there any constraints on the scope for decision making?**

#### ***Out of scope***

Amendments to primary legislation have been ruled out of scope as there is limited time to make amendments to the ERA and the problem to be addressed is a short-term, industry specific one.

#### ***Interdependencies***

There are a number of known systemic issues affecting the bus industry. These include service efficiency, workforce recruitment and retention issues, infrastructure provision, driver wages and conditions, and workplace relations. In the context of negotiating a Memorandum of Understanding between affected parties to ensure the smoothest possible transition to implementation of the changes required by the ERAA, the Minister of Transport has committed to investigating these issues.

## Section 3: Options identification

### 3.1 What options have been considered?

#### ***Status Quo***

Evidence from bus service operators is that if Government does nothing to address their uncertainty about the requirements for rest breaks under the ERA from 6 May 2019, there will be service disruption across New Zealand, including delayed and cancelled services on a significant scale. Some operators have advised that they will narrowly interpret the ERA to rigidly provide rest breaks in or towards the middle of shifts. This carries a safety risk and has a high potential public transport disruption impact.

Our view is that it is unlikely that the new requirements under the ERA can be implemented in a timely way, given the shortage of available drivers and the lead-time required to procure additional vehicles. As a result, there will be cancellation of services in the short-term, since in most cases the required vehicles and drivers will not be available on 6 May 2019. In addition, there is a likelihood that buses may have to be stopped in unsafe locations.

#### ***Collaborative approach***

Under this approach, the Minister of Transport works collaboratively with bus operators, councils and unions to try to agree a non-regulatory approach that would minimise the impacts of the rest breaks that will be required under the ERA. This approach was tested when the problem was first identified – it became clear that the industry was not prepared to apply the new legislation in a way that minimises service disruption and cost without further assurance. This is because bus service operators are concerned they will face legal risk should they schedule breaks with the objective of minimising service disruption.

#### ***Written guidance on the ERA rest and meal breaks***

The Government could issue written guidance on how the rest and meal breaks should be provided. Such guidance could help bus operators to understand what is expected under the ERA when the changes come into force. However, guidance would have no legal standing should a bus operator be challenged on their scheduling of rest breaks, and therefore it would not substantially reduce their legal risk.

#### ***Make a land transport rule***

The ERA recognises that individual sectors may have different rest and meal break requirements to those prescribed. This is authorised by the ERA, so long as the number and duration of breaks is not less than provided by the ERA. Currently, the land transport sector has a specific requirement that commercial drivers, including public transport bus drivers, take 30-minute meal breaks. This requirement is in the Land Transport Rule: Work Time and Logbooks 2007 (the Work Time Rule).

A land transport rule could be made to require bus operators to provide, and bus drivers to take, 10-minute rest breaks in addition to the existing 30-minute meal breaks. This rule would maintain bus driver's entitlement to 10-minute breaks to be established under the ERA, while providing greater certainty to bus operators that they can adjust the timing of these breaks to minimise service disruption. This requirement for 10-minute breaks would apply instead of the provisions in the ERA.

### 3.2 Which of these options is the proposed approach?

**Make a land transport rule** is the preferred option. To assess the options the following criteria were used:

- maintains protections for employees
- improves legal certainty
- minimises impacts on bus public transport
- minimises financial costs to affected parties.

Options	Maintains protections for employees	Improves legal certainty	Minimises impacts on bus public transport	Minimises costs to parties.	Overall assessment
Status quo	0	0	0	0	0
Collaborative approach	0	0	0	0	0 This approach has been tested. There is a very low likelihood of achieving agreement on an approach without direction from central government
Written guidance	- Bus drivers may be required to take rest breaks at sub-optimal times in the short-term.	+ Guidance would clarify government expectations but be non-binding. The legal status of guidance is open to question. Bus service operators have advised they prefer a regulatory option to ensure compliance and reduce legal risk.	+ Operators that apply the guidance will be able to schedule rest breaks with flexibility to minimise service disruption.	+ Operators that apply the guidance will be able to schedule rest breaks with flexibility, reducing requirements for additional buses and drivers.	+ Guidance would clarify government expectations but is non-binding. There is a risk of non-compliance due to legal uncertainty.
Land transport rule	- Bus drivers may be required to take rest breaks at sub-optimal times in the short-term.	++ Rule would provide certainty. ERA anticipates different requirements for industries that need them.	++ Operators will schedule breaks with flexibility to minimise service disruption.	++ Operators will schedule breaks with flexibility, reducing requirements for additional buses and drivers.	++ A land transport rule would provide flexibility to schedule rest breaks to minimise disruption, legal risk and costs.

**Key:**

- ++ much better than doing nothing/the status quo
- + better than doing nothing/the status quo
- 0 about the same as doing nothing/the status quo
- worse than doing nothing/the status quo
- much worse than doing nothing/the status quo

**Preferred option**

The preferred option is to make a land transport rule allowing increased flexibility for bus service operators when they schedule the 10-minute breaks to be taken by public transport bus drivers. The rule would provide operators with certainty that they can take a flexible approach to the timing of breaks, whilst acting lawfully.

A land transport rule would provide an interim solution to resolve the specific set of challenges with providing 10-minute breaks for bus drivers from 6 May 2019 while the impact of the rest breaks on staffing, vehicles and costs is worked through by the operators, councils and government in the short to medium term (likely a period of 12 months).

The rule would provide that the timing of breaks can be determined by agreement between

the operator and driver, but in the absence of agreement the timing of breaks would be prescribed by the rule. The rule would clarify that bus operators can adjust the scheduling of 10-minute breaks in order to minimise the disruptive impact of the breaks.

A land transport rule is the preferred option because it provides legal certainty. Bus service operators have advised that they prefer a regulatory option and cannot guarantee compliance with guidance material. Without regulation, some bus service operators have indicated they will apply the new provisions of the ERA narrowly (i.e. rest breaks in or near the middle of shifts). This carries a safety risk and has a high potential public transport disruption impact.

Without flexibility, it will not be possible to incorporate the new rest breaks and maintain service levels. A rule providing for flexibility will allow bus service operators to minimise disruption and cost. Additional buses and drivers will be required to maintain service levels if flexible scheduling of breaks is not available.

The proposed rule is generally consistent with the Government's 'Expectations for the design of regulatory systems'.

The Employment Relations Act contains a provision that contemplates that there may be circumstances where 'overrides' are appropriate, and provides appropriate protections around the boundaries of such overrides. The rule is an interim solution to resolve the specific set of challenges associated with providing 10-minute breaks for bus drivers in the short term. In addition, the Rule has precedence – there is already a Rule in place (the Land Transport Rule: Work Time and Logbooks 2007) which overrides the Employment Relations Act in relation to meal breaks.

The ERAA contains specific exemptions to the new rest and meal break requirements for security and essential services. We do not consider that it would be appropriate to extend these exemptions to bus drivers.

## Section 4: Impact Analysis (Proposed approach)

### 4.1 Summary table of costs and benefits

Affected parties (identify)	Comment: nature of cost or benefit (eg ongoing, one-off), evidence and assumption (eg compliance rates), risks	Impact \$m present value, for monetised impacts; high, medium or low for non-monetised impacts
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#### Additional costs of proposed approach, compared to taking no action

Regulated parties	<p><b>Bus operators</b></p> <p><i>The are no additional monetary costs to bus service operators flowing from the proposed approach.</i></p> <p><i>The proposed approach will moderate costs (paid break times, additional buses and drivers) for bus service operators implementing the ERAA provisions from 6 May 2019.</i></p> <p><b>Public transport bus drivers</b></p> <p><u>Short- to medium-term cost:</u> Applying the ERAA provisions flexibly may mean that some drivers receive rest breaks at suboptimal times during work periods, at least during a period of transition after 6 May 2019. This could have minor health and safety impacts for some drivers.</p>	Low
Regulators	<p><b>NZ Transport Agency</b></p> <p><u>Ongoing cost:</u> Additional cost of monitoring compliance with the rule – e.g. auditing of schedules. Note however, that this is a shift of the compliance burden from MBIE as the regulator of the ERA so may be regarded as neutral.</p>	Low
Wider government	<p><b>Local authorities</b></p> <p>There are no additional monetary costs to wider government. The proposed approach will moderate costs for bus service operators that are shared between councils and the National Land Transport Fund.</p>	Low
<b>Total Monetised Cost</b>		Unclear



Other parties	<p><b>Public transport users</b></p> <p><u>Ongoing benefit:</u></p> <p>Urban bus services are critical for the mobility of New Zealanders. They are a crucial element of New Zealand’s integrated safe and accessible public transport system. Without the proposed approach, public transport users will have a less reliable and responsive public transport system.</p>	Medium
<b>Total Monetised Benefit</b>		Medium.
<b>Non-monetised benefits</b>	Described in the impacts above	Medium

#### **4.2 What other impacts is this approach likely to have?**

Making a land transport rule (tertiary legislation) to address a problem arising from primary legislation is uncommon, though there is precedent in the land transport regulatory system. Currently, the land transport sector has a specific requirement that commercial drivers, including public transport bus drivers, take 30-minute meal breaks under the Land Transport Rule: Work Time and Logbooks 2007 (the Work Time Rule).

Making the rule sets a further precedent for similar action in future. It would be ideal if problems such as the problem being addressed by the rule could be managed under primary legislation.

## **Section 5: Stakeholder views**

#### **5.1 What do stakeholders think about the problem and the proposed solution?**

There has been limited time for consultation with affected industry participants. However, immediately after the problem was raised by industry, workshops were held in Wellington with bus service operators to scope the problem and possible solutions to it.

Subsequently, a Steering Group with representatives from affected parties (unions, councils, bus service operators) and central government agencies was formed to consider the options to address the problem. The Steering Group has reviewed and contributed to the drafting of the regulatory solution, which takes into account members' feedback. A Memorandum of Understanding has been entered into between Ministers and affected parties, establishing the foundation of a relationship to develop the regulatory solution and implement it.

There has not been time for public consultation or thorough departmental consultation, however, the Ministry of Transport has engaged with the NZ Transport Agency, the Ministry of Business, Innovation and Employment, The Treasury and the Department of the Prime Minister and Cabinet during the development of the proposed option.

Industry stakeholders support the proposed approach. A Memorandum of Understanding has been entered into by representatives of stakeholders (councils, unions, bus service operators and central government) confirming their commitment to the land transport rule approach and to working collaboratively to implement it.

## Section 6: Implementation and operation

### 6.1 How will the new arrangements be given effect?

The legislative vehicle will be a land transport rule made pursuant to section 152A of the Land Transport Act 1998, which provides that the Governor-General may, by Order in Council, on the recommendation of the Minister, make, amend, or revoke an ordinary rule for any of the purposes for which the Minister may make, amend, or revoke an ordinary rule.

The rule is scheduled to be made on 29 April 2019. This will require a waiver of the 28-day rule. It is expected that, after a period of 12 months, bus service operators will have adjusted schedules to transition rest breaks towards or in the middle of shifts so that greater flexibility than that provided under the ERA is no longer needed. When this is achieved the rule will be revoked.

Under the Memorandum of Understanding agreed by councils, unions and bus service operators, the parties have agreed to work collaboratively to oversee the implementation of the rule. This will include councils taking into account the impact of rest and meal breaks in their management of the service performance of bus operators.

The NZ Transport Agency is the regulator with responsibility for compliance with the rule. The Agency is a member of the Steering Group, through which forum it will monitor the implementation of the rule and provide guidance about compliance. Administration of land transport rules is core business for the Agency.

The Steering Group has agreed to develop joint communications and guidance about the application of the rule and to disseminate those to the parties they represent. The Steering Group also operates as a forum for councils, unions and bus service operators to raise issues or concerns related to the implementation of the rule.

## Section 7: Monitoring, evaluation and review

### 7.1 How will the impact of the new arrangements be monitored?

As regulator, the NZ Transport Agency will monitor the scheduling of rest and meals breaks by bus service operators to achieve the objective of the rule. This will involve examining schedules for compliance with the rule. Under the Memorandum of Understanding agreed by industry stakeholders and government, bus service operators and councils have agreed to facilitate open access to information necessary for the Agency to perform its monitoring function.

The Steering Group will provide general oversight of the implementation of the rule. The Steering Group will meet regularly during the transition period after 6 May 2019 to monitor and review progress and act as a forum for addressing issues.

### 7.2 When and how will the new arrangements be reviewed?

The nature of the problem and its regulatory solution necessitates a close and ongoing review of the efficacy of the solution. Members of the Steering Group have committed to meeting regularly within a period of 12 months to review progress with the implementation of the rule and to operate as a feedback channel for stakeholders concerns.

If, during the 12-month period, bus service operators have successfully adjusted schedules to transition rest breaks towards or in the middle of shifts so that greater flexibility than that provided under the ERA is no longer needed the rule will no longer be needed.