

Protecting Critical Infrastructure and Systems of National Significance

Comments on the Draft Bill and current developments in the implementation proposed provisions; having specific regard to the transport sector

Having regard to the latest developments within the Critical Infrastructure reform program, the environment remains indistinct in many respects, not least given that the proposed legislation has to digest the foibles of 11 different sectors, to which provisions will, eventually apply. As sector specific detail is contemplated, I would make a number of observations regarding the transport portfolio.

This environment is complex and should be considered in terms of the sub sectors that make up the sector's constituent parts. Ports and airports have their own dynamics and specific challenges, as well as already being governed by federal legislation, in the security context. Surface transport might equally be broken down into passenger transport and freight: Equally, there will be operators who will be declared as vital critical infrastructure for both functions. Road freight is fundamentally different from rail; tram operations have distinctions from bus services and heavy rail: Though there are common factors across each of these modes, there are also many differences between them that will make the application of of a regulatory framework challenging.

In addition to the sector being incredibly diverse, there is also the matter of existing jurisdictional regulatory frameworks to consider, when contemplating security and critical infrastructure. States and Territories have their own individual approaches with some already placing significant obligations on operators. Any contemplation of a sector-based application of regulation and compliance, therefore, must also consider the jurisdictional issues already in play. Notwithstanding that there is also a national regulator for rail, which also places obligations on operators in terms of safety, security and emergency management. It would be sub optimal for obligations to apply based on sector, or even sub sector, criteria alone. Any such approach takes no account of the role of state government and national regulator, or the commitments that many operators are currently wedded to.

Given the complexity of the environment, the introduction of an additional regulatory burden needs to be considered carefully. There is a strong risk of duplication of effort and bureaucratic process, where the law of diminishing returns will apply to outcomes. Operators do not want to be in a position where they are dancing to the tune of two, in some cases more, different fiddles.

The issue of who is the most appropriate regulator in this space is also a contentious one. Given the shortcomings of the Transport TISN and associated structures over recent years, not to mention the lack of direction or progress in terms of the Inter-Governmental Agreement on Surface Transport Security; the absence of a specific transport connection to the Australian Strategy for Protecting Crowded Places from Terrorism: All of these factors erode operator confidence in the federal government's ability to manage the implementation of the proposed legislation and its regulatory provisions.

Given that state governments have traditionally, and constitutionally, been responsible for the surface transport portfolio, it would not be unreasonable for operators to assume that any regulators from the Department of Home Affairs do not have the required experience or exposure, nor adequately understand the environment. If this is the preferred option then the consultation process that will look to develop the ongoing compliance regime will need to be crafted carefully and stakeholder management be considered with this caveat firmly in mind.

For transport credentials and credibility might be purchased through renewed effort in re-crafting the IGA on Surface Transport Security, aligning it with the proposed legislation and the intended outcomes. Similarly, a reconstruction of the Transport TISN would buy further credits for the federal government.

In terms of the IGA, there is also an opportunity to deliver on the intended outcomes of the legislation, most particularly given that it seems that legislated obligations will not fall upon public/private partnerships or state agencies responsible for delivering transport infrastructure projects. Federal and state governments are pouring billions of dollars into transport infrastructure and will continue to do so for the foreseeable future. However, there is no consistent application of security standards in the design and construction phases of these enterprises. In addition, those standards that currently exist focus on technical specifications, rather than end user requirements and outcomes. This situation permits entities to provide sub standard security architecture that, under the proposed legislative provisions, operators, ultimately, will be made to account for. This is neither equitable, nor sustainable: It also runs contrary to the intent of the new legislation.

The future IGA on Surface Transport Security provides an opportunity for the introduction of revised standards and accompanying guidelines that government agencies, and public/private partnerships, might be better bound to. An accompanying TISN might also establish an assurance framework to monitor the application of standards and report back to the federal government. This would also add value to the new legislative framework and assist in realising the sought after outcomes.

There remain multiple challenges in delivering the proposed legislation, exacerbated by the compressed timeframe for delivery. If the Bill is to succeed it is important to get the implementation right. For transport, in particular, this requires a mature understanding of the sector, its sub sectors and the myriad of jurisdictional idiosyncrasies. The federal government also needs to acknowledge to shortcomings of past incursions into the surface transport portfolio and use this as a platform to develop new ideas and add value to the legislation. In so doing it should be able to deliver quality outcomes that transcend one dimensional legislated solutions; delivered through simple compliance and regulation. By thinking creatively in this space, there is also an opportunity to step beyond legislated provisions and embrace a proactive agenda that promotes fit for purpose security construction and design standards, and their application in current and future infrastructure projects.

David Crompton-Guard | Manager Business Resilience

V/Line Corporation
Southern Cross Station

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