

ONRSR Guideline

Draft

Consultation under the Rail Safety National Law

Document ID:	ONRSR-1963997744-4499
Version number:	1.0
Approved by:	Chief Executive for public consultation
Date approved:	29 January 2026

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1 Purpose

The purpose of this document is to provide guidance to accredited rail transport operators, and those applying for accreditation, on the legislative requirements and expectations for meaningful consultation on the establishment, review or variation of their Safety Management System (SMS).

2 Background

Under section 52 of the Rail Safety National Law (RSNL), rail transport operators (operators) have a duty to ensure, so far as is reasonably practicable, the safety of their railway operations. Discharging this duty requires the effective involvement of relevant stakeholders in determining the best way to eliminate or minimise the safety risks to rail safety workers (workers) and the public arising from railway operations. Specifically, section 99(3) of the RSNL requires operators to consult with stakeholders on the establishment, review or variation of their SMS.

3 Scope

The scope of this guideline is limited to the RSNL requirements for consultation as part of safety management. It is intended to provide guidance to people applying for accreditation and accredited rail transport operators on the National Rail Safety Regulator's (the Regulator) expectations for:

- > consultation with stakeholders when establishing, reviewing, or varying an SMS as per section 99(3) of the RSNL
- > meeting the specific consultation requirements for emergency management (regulation 19) and network rules (Part 4, Division 4 of the regulations)

Any consultation required by occupational health and safety law or any other legislation is out of the scope of this Guideline.

4 Principles of meaningful consultation

Consultation means asking for and considering stakeholder views when making decisions. It is different to communicating which is more typically one-way. It is also different to reaching agreement as the duty to ensure the safety of an operator's railway operations remains with the operator accredited for those operations. Meaningful consultation is not necessarily about the length or breadth of consultation, but the quality of the activity. Operators must document the process that was undertaken.

Consultation is important to safety because it helps to close the gap between how an operator thinks rail safety work is undertaken versus how it is undertaken, so the risks can be managed so far as is reasonably practicable (SFAIRP). Good consultation encourages trust and a positive safety culture and results in:

- > more informed decisions that harness the knowledge and experience of workers
- > better shared understanding of safety risks and duties

The principles of meaningful consultation are that it:

- > is planned, genuine and collaborative within a process that is open and receptive to rail safety worker participation
- > ensures all people likely to be affected are included
- > provides opportunities for feedback on issues raised
- > is characterised by mutual trust and respect between the rail transport operator and its workers, even when there are conflicting views

- > requires the application of interpersonal, facilitative and listening skills
- > includes a proactive role for directly affected workers who are encouraged to suggest ideas
- > requires the provision of relevant and applicable information
- > aims to have outcomes that improve the SMS
- > is documented so there is evidence of the process and outcomes.

While consultation may not always result in agreement, agreement should be the objective as it will make it more likely the decisions are effective and actively supported.

5 Part 1: Safety Management System consultation requirements

5.1 What does the RSNL require?

Section 99(3) of the RSNL requires that before establishing an SMS in relation to the railway operations in which the operator is required to be accredited; or reviewing or varying the SMS, the operator must, SFAIRP:

- a) consult with the prescribed stakeholders,
- b) provide people consulted with a reasonable opportunity to make submissions on the proposed SMS, and
- c) advise those people in a timely manner of the outcomes.

Establishing and maintaining an SMS is a fundamental requirement of accreditation in ensuring the safety of railway operations SFAIRP. It governs how operators manage the safety risks of their railway operations and looks different for different operators, depending on the scope and nature of their railway operations.

The RSNL prescribes what an SMS must address in Part 3, Division 6. Schedule 1 to the Rail Safety National Law National Regulations 2012 (National Regulations) lists mandatory content of an SMS, including element 13 - consultation. The SMS must provide a level of detail with respect to these elements as appropriate to the scope, nature and risks to safety of the operator's operations and duties under section 52 of the RSNL.

Changes to the scope and nature of an operator's accreditation will require a variation to the SMS and include the consultation required by section 99(3). This will look different for different organisations, noting that the RSNL sets minimum SMS requirements.

For example, if an operator's SMS includes their operating model, then a change to this is considered a change to the SMS. A change in geographic location may also be a change to the SMS for one operator (e.g., a freight operator extending to a new network) but not another (e.g., a contractor whose SMS is based on moving between sites).

5.1.1 Meaningful Consultation

The concept of SFAIRP is to achieve the best possible safety outcomes, to the extent that is 'reasonably practicable' under the circumstances. It is determined objectively to the standard of what would be expected of a reasonable person with the same duty and in the same circumstances. To demonstrate this, it should be based on a process of justified decision-making. For further information refer to ONRSR *Meaning of duty to ensure safety so far as is reasonably practicable* guideline.

Meaningful consultation SFAIRP has the key aim of gaining knowledge about a hazard or risk, and any ways of eliminating or minimising it, to help the operator to make a good safety decision and to ensure that

further risks are not introduced because workers or other stakeholders did not understand or know about a change. Evidence should be collected to document the process and outcomes. It is a part of meeting the operator's broader duty to ensure the safety of their railway operations SFAIRP.

This means that consultation under section 99(3) should reflect the circumstances (workplace and issue) and involve stakeholders to the extent possible to best eliminate or manage the safety risk. When determining what is reasonable in the circumstances, an operator should consider:

- > The nature and the severity of safety risks
- > The nature of the decision or action (including the urgency to make a decision or take action)
- > Who is likely affected including, their availability and work arrangements (section 99(3)(a) prescribes a list of stakeholders – refer section 5.2 below)
- > Ways to consult to best ensure that the operator can acquire the best understanding possible of the safety risks and effectiveness of the proposed change (including the size and structure of the organisation, and nature of the work carried out)
- > How to ensure that those people likely affected understand how the change impacts them.

What is 'reasonably practicable' increases with the safety risks and nature of the proposed decision. This means that more consultation is expected for a safety critical decision, such as a major rewrite of procedures or the incident management framework, than for a change to role titles where the safety impacts are less.

It also means that the level and type of consultation will be different, for example, a major rewrite of procedures may require workshops with people responsible for using the procedures to enable discussion and for the procedures to be worked through. Whereas targeted communication with those whose titles are changing may be more appropriate to provide them with an opportunity to raise any safety issues.

Access to stakeholders is also an important factor in determining what is 'reasonably practicable' and the more direct access an operator has to stakeholders the more that is expected in demonstrating consultation has been undertaken SFAIRP. Employees and regular contractors are more likely to be accessible than people hired ad hoc or changeably as labour hire. There might however be circumstances, such as changes to competency or personal protective equipment (PPE) requirements where consultation with the labour hire agency, rather than individuals, is reasonable in determining the feasibility of the change including any unintended safety impacts.

Reasonably practicable does not mean that an operator must consult with everyone. This may be because the change is unlikely to affect them, for instance, it is limited to people performing a particular task or role.

An example of a consideration as to what is 'reasonably practicable' is where there is a need for an immediate change which may limit the extent of consultation possible. Consider for example; an urgent safety warning has been received from the manufacturer of an operator's rolling stock which requires an immediate modification to minimise any risk to safety.

Consultation in this case may not be possible (in exceptional circumstances or an emergency) or may be necessarily limited before making the modification, however the operator should still communicate the change to affected workers to ensure they understand the implications for their role. If the change will affect the operator's SMS, then further consultation after the change is likely to be required before varying the SMS. For example, the safety warning means that changes must also be made to the service schedule for the operator's rolling stock.

As an example, take a track protection officer (TPO). After identifying that a change to pre-start procedures will likely affect what the TPO must do to perform their role safely, the operator identifies that this role is typically performed by people hired temporarily through labour hire companies and it is often not the same person each time.

Consultation with this person is not likely to be possible, however the operator must still undertake consultation where it is reasonably practicable, and consulting with their employees who manage the TPOs would be reasonably practicable. The operator is also required to have a system in place to ensure any people performing the role of a TPO are inducted with the new procedures before they commence work.

If the circumstances were different and the TPOs were directly employed or contracted to the operator, consultation with those people would be possible and should be conducted SFAIRP.

It may also be because an affected worker is on extended leave. In those circumstances where it was not reasonably practicable to consult, the operator must still ensure that affected workers are informed and trained (as applicable) on any changes before returning to work to ensure the safety risk of them following the previous procedures is minimised.

This is also relevant to returning contractors. For example, a change to the isolation lockout procedure may present a serious safety risk to people working for a returning construction company if they are not informed of the change.

For further guidance refer to the ONRSR *Meaning of duty to ensure safety so far as is reasonably practicable* guideline.

5.1.2 Establishment of systems and procedures

A rail transport operator's SMS must include systems and procedures to ensure the consultation required by section 99(3) occurs when their SMS is reviewed or varied (element 13 in schedule 1 of the National Regulations). The aim is to ensure that all prescribed stakeholders are consulted unless there are extenuating circumstances. To do this, systems and procedures should be appropriate for the size and nature of the operator's operations, the way work is arranged and what suits workers, including shift-workers and contractors.

Best practice will also see the establishment of regular and varied communication channels, such as safety committees, team meetings, weekly e-newsletters, intranet forums, and surveys. This should be supported with policy and processes to encourage regular communication between employees and

managers about the SMS that is clear, honest and respectful. This may also include informal communication channels, such as an 'open door policy' which encourages employees to make suggestions or raise issues at any time and without repercussion.

Consideration should also be given to arrangements for training the people who will facilitate consultation about the proposed change. This will help to enable effective participation by prescribed stakeholders.

5.2 Who to consult? (section 99(3)(a))

People likely to be affected by the establishment, review or variation of the SMS must be consulted SFAIRP. An operator must undertake an analysis to determine which people within the following three categories are likely to be affected These are (section 99(3)(a)(i)):

- > people who carry out those railway operations, or
- > work on or at the operator's railway premises, or
- > with the operator's rolling stock.

People or entities that carry out railway operations may include employees, contractors, or personnel sourced from labour hire companies.

Other affected parties and representatives who must be consulted, SFAIRP are:

- > health and safety representatives, being those within the meaning of occupational health and safety legislation representing any of the people or entities likely affected,
- > any union representing their members who are identified as likely affected,

Operators must consult with any union with members among the persons who have been identified as likely to be affected.

- > any other rail transport operator with whom the first mentioned operator is required to enter into an interface agreement relating to risks to safety of railway operations carried out by or on behalf of either of them; and
- > the public - as appropriate.

For example, if an operator is introducing a new technology as part of their signalling system, this is likely to affect network controllers setting routes, as well as signal technicians and engineers. However, if there are no visual signal differences for drivers and no changes to their rules, it is not likely the drivers will be affected. In this example, while the drivers would not need to be consulted, they should still be informed of the change.

If, on the other hand, there are visual signal differences and changes to rules, for example if line-side signalling is removed and replaced with in-cab signalling, drivers will likely be impacted and consultation with the drivers will be required.

If an operator is not sure whether those workers likely affected are represented by a union, when the workers who are likely affected are notified, the operator should invite them to nominate a union representative. In terms of identifying specifically who to consult with from a nominated union, consultation should commence with the local union delegate. If wider consultation within the union is required, it is the responsibility of the local union delegate to escalate this within their union and to keep the operator informed.

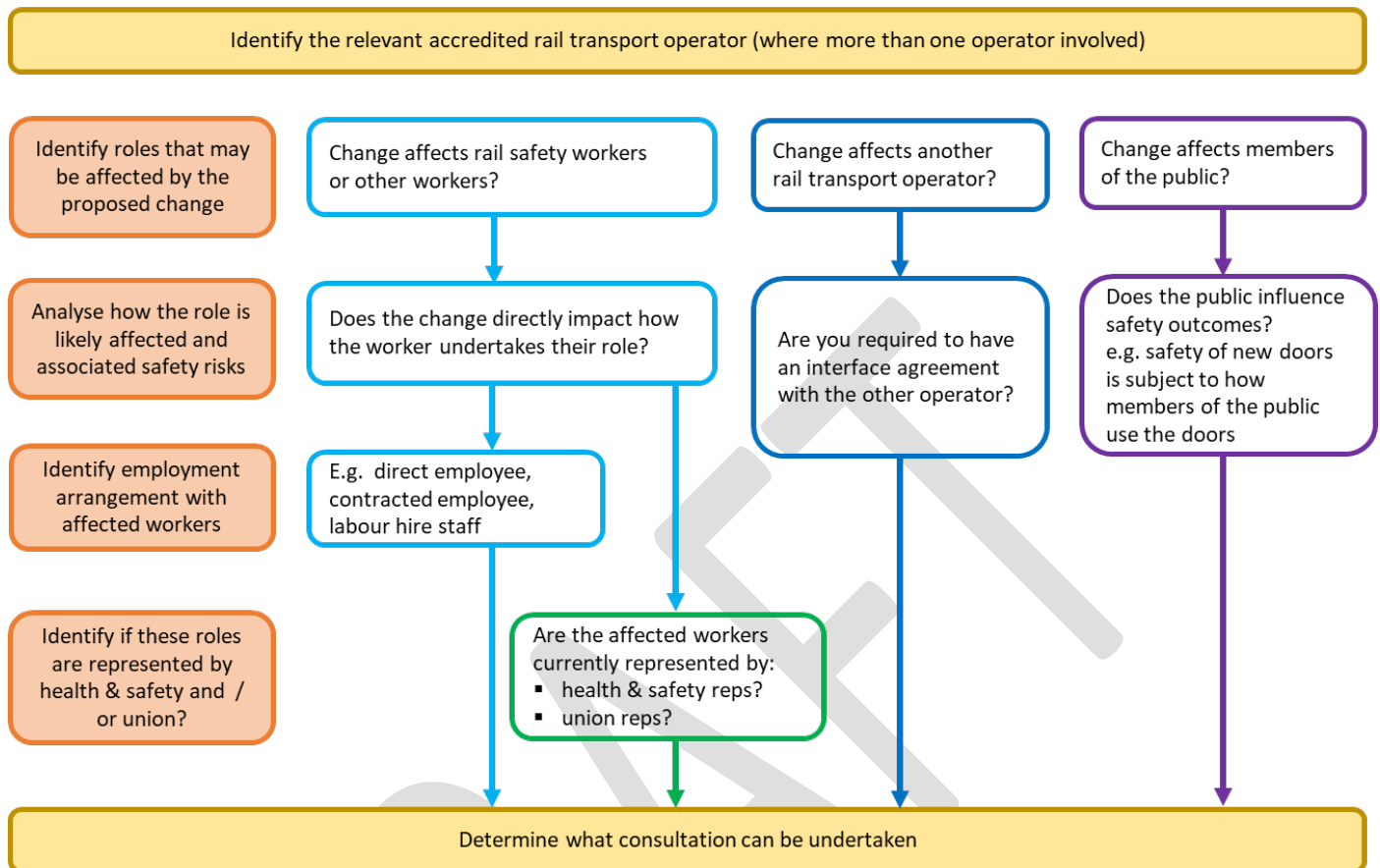
The identification and analysis of stakeholders should form the first part of an operator's consultation plan. It may be undertaken as part of, or at least with reference to, the operator's change management documentation.

For further information in relation to Section 99(3) and the scope and nature of consultation refer to the NSW Court of Appeal Decision - *Aurizon Operations Ltd v ARTBIU*; *ONRSR v ARTBIU* [2024] NSWCA 24 (16 February 2024), which can be found via the following link

[*Aurizon Operations Limited v Australian Rail Tram and Bus Industry Union NSW Branch; The Office of the National Rail Safety Regulator v Australian Rail Tram and Bus Industry Union NSW Branch* \[2024\] NSWCA 24 \(16 February 2024\)](#)

The diagram below provides a framework for considering with whom you are required to consult.

Who to consult?



5.3 Providing reasonable opportunity for input (section 99(3)(b))

People consulted must be given reasonable opportunity to make submissions on the proposed safety management system (as required by section 99(3)(b)). This means allowing those people to share their knowledge and ideas, ask questions, raise concerns, make recommendations and be part of the process. If an operator is consulting as part of a review of the SMS, they are required to ask those consulted for their opinion on whether the SMS can be improved, and if so, how.

This may involve:

- > providing a suitable time during their work hours for consultation with workers
- > using existing channels for consultation
- > allowing opinions about safety to be regularly discussed and considered during workplace meetings, and
- > providing workers with different ways to provide feedback, for example using email, setting up an intranet safety page or a suggestion box.

Careful planning is required to ensure that meaningful consultation occurs before the establishment, variation or carrying out the annual review of the SMS. A documented consultation plan (or strategy) is an option that would clearly articulate how the consultation will occur (including who with, what information will be provided, the timing, how input will be gathered and considered, and how decisions will be made). The

aim is to ensure that those affected understand what is being proposed, how to contribute, and the potential impacts on them. It is also a means to providing evidence of the quality of consultation.

How long it takes to consult, and the detail in a consultation plan, will depend on how significant the impacts are likely to be to the safety of the operator's railway operations, how complex the information is and how much consideration is necessary, as well as the size and nature of the workplace, and the method of consulting.

A change that will affect more workers or that could present a significant safety risk will require more time, than a minor change affecting only a few workers that could be resolved in hours or days through the established communication channels (and may not require a consultation plan). If an operator has shift-workers or workers are geographically dispersed, then it may also take longer to ensure they have all been given an opportunity to participate during their work hours.

Consulting with the employees of a contractor who work under an operator's SMS also poses additional considerations, such as coordinating consultation with the contractor. This means that the operator should allow time to plan and coordinate with the contractor to ensure those workers are given a reasonable opportunity to provide a submission. While arrangements can be coordinated, the requirement to consult remains with the operator as the accredited rail transport operator varying their SMS, as does the final decision.

The RSNL also requires an operator to consult with any other rail transport operators that are a party to any interface agreement with them. While the obligation is to consult with the interfacing operator, it may be reasonable to allow them time to consult with their workers.

For example, a rail infrastructure manager (RIM) who is consulting with the rolling stock operators (RSOs) on their network about a proposed change from line-side signalling to in-cab signalling, should reasonably allow time for the RSOs to consult with their drivers on the safety risks before providing a submission to the RIM.

In this scenario, it is up to the interfacing operator to determine what consultation they will undertake with their workers, but the RIM should allow for this to the extent that it is reasonably practicable for ensuring the safety of the RIM's railway operations. This scenario would also likely require an amendment to the RIM's network rules so specific requirements apply to the timing of this consultation under Part 4, Division 4 of the National Regulations (see section 6.1 of this guideline).

A consultation plan may not be required for some changes, depending on the nature and scope of the change. In demonstrating that the level of consultation has still been undertaken SFAIRP a record of consultation on the change should be made regardless of whether there was a consultation plan.

5.3.1 What information to share?

Meaningful consultation includes providing those consulted with all the information relevant to enable them to give informed feedback. This means that an operator is expected to share any information they have about the associated safety risks and options for eliminating or minimising these SFAIRP, unless it is confidential (for example, relating to an individual or subject to legal privilege) however learnings should be shared. This should include policies, procedures, technical guidance, hazard reports and risk assessments, proposed changes to railway operations, systems of work, and data on incidents.

The scope of the information to be provided should be guided by the proposal. For example, only the information in relation to a proposed change is required for a variation.

5.3.2 Types of consultation

The RSNL does not prescribe the types of consultation, however in meeting the requirement to consult with workers SFAIRP the operator must ensure that information is accessible (for example, using existing communication channels, such as noticeboards, intranet and email), easy to understand, and considers literacy and cultural diversity.

To achieve this, information can be presented in different ways, such as (but not limited to) face-to-face, telephone or video call, email, news and information on intranet sites or noticeboards, in writing, through a workshop, or using diagrams (particularly if the subject matter is complex).

5.4 Outcomes of consultation (section 99(3)(c))

After an operator has gathered the submissions made by stakeholders, they must assess these and consider if any subsequent amendments are required. The operator must then advise those consulted of the outcome of the consultation process in a timely manner SFAIRP.

Assessment should be undertaken in accordance with the operator's duty to ensure safety SFAIRP (section 47 of the RSNL). If there is disagreement the operator should be satisfied that they have met this duty, noting there is no requirement for agreement to be reached.

A record of the opportunities provided for consultation (which may be part of the consultation plan), the suggestions made, the evaluation of these suggestions and the outcomes of consultation should be kept. For example:

- > toolbox meeting minutes
- > signed off acknowledgement of a procedure
- > feedback on issues raised and how these issues were considered.

If an operator is consulting prior to establishing their SMS or in relation to a proposed change, this may form part of an application for accreditation or variation of accreditation. In deciding your application, the Regulator must be satisfied that consultation has been completed as per section 99(3) (so far as is applicable to the proposed variation).

The regulations prescribe what information on consultation must be included in an application for accreditation (regulation 8(h)) or a variation of accreditation (regulation 11(d)) (or exemption, regulation 33). You must include:

- > who was consulted
- > when and how the consultation occurred
- > the results of the consultation.

Consultation is required to the extent of the scope and nature of the accreditation or variation that is sought.

Advising those people consulted on the outcomes of consultation in a timely manner means that they are advised of the decision before it is implemented.

As part of the operator's SMS, they must then ensure that those people affected by the change are informed and trained (as necessary) to implement the change safely.

For example, an application for accreditation to construct track at a specific location should include consultation with the workers likely affected by that construction SFAIRP but would not include consultation with workers that will be engaged in the future.

The Regulator will consider what consultation has occurred and how the applicant has considered and acted in response to any submissions provided during the consultation process in relation to the application at hand. The Regulator would expect this consultation to have occurred at the time of application or during the early stages of the assessment period.

6.1 Network rules

Part 4, Division 4 of the National Regulations sets out specific consultation requirements for rail infrastructure managers (RIMs) when establishing and amending their network rules, including removing, adding, or substituting a rule. This includes a list of stakeholders to which written notice must be given of the proposal to change the network rules. To ensure that the RIM meets regulatory requirements, and that all stakeholders understand the rule and its impacts on the safety of railway operations, adequate time and resourcing should be planned. It may also require impacted rail transport operators to make supporting changes to their SMSs.

The RIM must consult with the following stakeholders in relation to the rail infrastructure they are accredited to manage (regulation 21):

- a) rolling stock operators who operate or move rolling stock on that rail infrastructure
- b) any other rail infrastructure managers of rail infrastructure that connects with or has access to that rail infrastructure
- c) if the safety of the railway operations of any other rail infrastructure managers may be affected by the network rules —those other rail infrastructure managers; and
- d) persons likely to be affected by the network rules, being persons who—
 - (i) carry out the railway operations in respect of which you are required to be accredited; or
 - (ii) work on or at your railway premises; or
 - (iii) carry out the operation or movement of rolling stock on your rail infrastructure; and
- e) health and safety representatives (within the meaning of the occupational health and safety legislation) representing any of the persons referred to in paragraph (d); and
- f) any union representing any of the persons referred to in paragraph (d).

Section 5.1 provides guidance on meaningful consultation SFAIRP, and section 5.2 provides guidance on identifying who is likely affected and union representation.

6.1.1 Establishing and amending network rules (regulation 22)

When the RIM has established their stakeholder list they are required to provide a written notice to them, SFAIRP, as well as to the Regulator, inviting them to make a submission on the RIM's proposal. This written notice must:

- > Specify the date that submissions must be made by (being at least 28 calendar days after the date of the notice)
- > Specify the date which the RIM proposes to commence the rule or amendment (being at least 28 calendar days after submissions close).

This means the RIM must allow at least eight weeks from the date that the Regulator and other stakeholders were invited to make submissions before the RIM may commence the rule or amendment.

The written notice to the Regulator may be a notification of change (regulation 9) and should be submitted via the ONRSR Portal. Further guidance on this is available on ONRSR's website.

The written notice should include information on what the rule or proposed amendment is, the reason for the proposal, and the change process. The use of diagrams may be helpful for communicating complex processes.

After the date for submission has closed, the RIM must consider the submission received and determine whether to proceed with the rule or change. Guidance on this assessment is in section 5.4. The final rule should be communicated to all stakeholders as per the RIM's change management process.

6.1.2 Emergency amendments to network rules (regulation 23)

In exceptional circumstances where there is an immediate risk to safety requiring a change to a network rule, consultation with stakeholders and the Regulator is not subject to the normal timeframes. Instead, the operator is required to:

- > take reasonable steps to notify stakeholders of the proposed amendment and the reasons for that change
- > take appropriate steps to mitigate any reasonably foreseeable adverse consequences arising from implementing the amendment without stakeholders being informed of the amendment
- > notify the Regulator via the ONRSR Portal as a notification of change

The amendment will only have effect for 180 days after it is implemented unless the RIM complies with the requirements for establishing or amending a network rule in regulation 22 or withdraws the amendment.

Withdrawing the amendment is required where circumstances change (either the circumstances no longer exist, or the amendment is no longer necessary). The operator must take reasonable steps to notify stakeholders and the Regulator (as a notification of change).

6.2 Emergency management plans

A rail transport operator must have an emergency management plan (section 113 of the RSNL) which must be prepared in conjunction with any of the emergency services that would be expected to attend in the event of a significant incident.

Part 4, Division 3 of the National Regulations sets out the requirements for consulting with stakeholders when preparing the plan. In addition to the stakeholders prescribed by section 99(3) (as described in section 5.2 of this guideline), an operator is required to consult with:

- > providers of emergency services, for example police, ambulance or firefighting services;
- > any other rail transport operator that may be affected by implementation of the plan;
- > those who may be required to assist in the implementation of the plan including:
 - providers of utility services such as water, sewerage, gas, electricity or telecommunications or like services;
 - any person who is permitted to own or use a pipeline or is licensed to construct a pipeline; and providers of public transport.

In addition, people who work outside of the rail industry but on or at the operator's railway premises or with the operator's rolling stock, such as retail / hospitality workers or other lease holders, should be included in the consultation process.

The timing and how the operator consults are not prescribed however it is a requirement of the operator's SMS to have an emergency management plan that has been consulted upon.

There are also requirements for communicating and testing the plan. For more information on these requirements refer to *ONRSR Guideline Safety Management System* which is available on the ONRSR website.

6.3 Contract arrangements between operators

Under the RSNL, accredited rail transport operators are responsible for the safety of railway operations under their accreditation and cannot contract out this responsibility. This means that a rail transport operator proposing changes to their SMS is responsible for meeting the consultation requirements, and the decision about the change to their railway operations.

Not all rail transport operators are accredited either because they are carrying out operations for or on behalf of an accredited operator, or they are exempted from the requirement to be accredited. However, it is expected that these operators would put into practice the principles of meaningful consultation described in this Guideline as a means of eliminating and minimising risks SFAIRP. Meaningful consultation should be part of discharging the duty to ensure, so far as is reasonably practicable, the safety of the operator's railway operations.

In a contract arrangement with another rail transport operator, operators may consider undertaking shared consultation. Each rail transport operator is responsible for ensuring they have met their consultation requirement, complied with their safety duties, and for any subsequent safety decisions about how they manage their railway operations.