

UNDER

THE CORONERS ACT 2006

AND

IN THE MATTER OF

An inquiry into the death of  
GEORGE ROBERT ELLIS

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**COMMENT OF  
ROAD CONTROLLING AUTHORITIES FORUM (NEW ZEALAND) INC.**

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Dated: 29 August 2016

[1] By a Minute dated 10 August 2016 the Road Controlling Authorities Forum (New Zealand) Incorporated (RCA Forum) has been given the opportunity to make comments on the draft recommendations to road controlling authorities within 21 days of the date of that Minute.

[2] The RCA Forum is a closed, non-political incorporated society of road asset managers and roading professionals from all territorial local authorities (except the Chatham Islands Council), the Department of Conservation and the New Zealand Transport Agency. It was established in 1996.

[3] The invitation to make comments on the draft recommendations to road controlling authorities was discussed by the Research and Guidelines Steering Group of the RCA Forum on 11 August 2016 and by members of the RCA Forum in an ordinary meeting on 12 August 2016. The RCA Forum Research and Guidelines Steering Group makes the following comments on behalf of the RCA Forum.

[4] The RCA Forum considers that the delineation of responsibility and duty in relation to level crossings is not as distinct as suggested in the draft recommendations. Level crossings are the place where rail interacts directly with

road and the RCA Forum believes that it was the intention of Parliament that the operation and management of level crossings should reflect that interaction.

[5] The Railways Act 2005 has, as its stated purpose, the promotion of rail operation safety and the definition of the duty of rail participants to ensure safety. The Act requires rail participants to take all practicable steps to ensure that no rail activity causes or is likely to cause the death or serious injury of individuals. Thus, there is a duty for rail participants to take all practicable steps to provide safety at level crossings.

[6] The Act allows for cost to be one of the considerations in determining what constitutes 'all practicable steps'. This is consistent with the value for money concept in the Land Transport Management Act 2003. Participants have limited financial resources and must apply these to manage risks in a cost-effective way.

[7] In determining remedial measures the participants need to consider, but not solely rely on, conventional cost-benefit analysis. Level crossings are different from roads in that the overall risk profile is for a low-probability, but high-consequence, event.

[8] As level crossings are the intersection of the rail and road networks, their safety requires the integration of 'value for money' and 'all practicable steps'. It also requires a partnership between the road controlling authority and rail access provider in the management of each level crossing to ensure both parties are able to meet their statutory objectives.

[9] Section 4 of the Railways Act 2005 defines a road as having the same meaning as in section 315 of the Local Government Act 1974, but it specifically does not include a level crossing (*road (b)(iv)*). It defines level crossing to mean:

*(a) any place where –*

*(i) a railway line crosses a road on the same level, or*

*(ii) the public is permitted to cross a railway line on the same level;*

[10] There are two broad categories of level crossing: statutory and deed of grant. The former applies where the construction of the railway line interfered with the existing rights of a landowner or authority and is provided for in two sections of the Public Works Act 1981 and in similar provisions of statutes since 1894. The latter applies where, sometime after the construction of the railway, an adjacent landowner or authority sought the construction of a level crossing and a level crossing has been created pursuant to a statutory right to grant easements of right

of way, as exemplified by section 35 of the New Zealand Railways Corporation Act 1981, or by exercise of common law powers available to all landowners.

[11] The exercise of powers under both statutory and common law easements is limited by Section 75 of the Railways Act 2005, which requires all third parties seeking access to the rail corridor to obtain the consent of the licensed access provider or railway premises owner (through the permit to enter process) before entering the railway to undertake work on railway premises. Section 75 cannot be argued to apply to the normal use of level crossings, however, and Subpart 2 of the Act, on the Interaction of rail and road, indicates that it does not.

[12] Section 81(1) of the Act provides that licensed access providers may install the notices and warning devices at level crossings that the provider considers necessary. The determination of the exact level of protection to be provided is not at the discretion of the licensed access provider. This is made clear by Section 81(2), which reveals that Parliament recognises that other persons are directly involved with the management of the level crossing and requires the licensed access provider, when considering what is necessary, to consult those other persons.

[13] Section 81(4) repeats that Parliament recognises that other persons are directly involved with the management of the level crossing. Furthermore, while the licensed access provider must form, surface and maintain the carriageway of the road at a level crossing (Section 83), it may open or break up that road only in accordance with any reasonable conditions that may be prescribed by the road controlling authority for the road (Section 87(2)).

[14] It is clear that Parliament, while recognising that a level crossing is distinct from a road (Section 4), recognised equally that a road at a level crossing does not cease to be a highway (Section 84(1)). The conduct, working and management of the railway at that level crossing cannot unreasonably impede the flow of road traffic (Section 84 (2)), notwithstanding Section 80.

[15] Clause 9.2(1) of the Land Transport Rule: Traffic Control Devices 2004 (TCD Rule) imposes a duty on the road controlling authority to install warning signs in advance of a level crossing on a public road, and authorises the installation of such signs on other roads. Clause 9.3(1) imposes a duty to install specified road markings in advance of a level crossing on a road that has a speed limit of 70km/h or more, or that is marked in multiple lanes.

[16] Clause 9.2(2) reflects Section 81 of the Act in providing that a rail access provider may install warning signs and other traffic control devices at a level

crossing after consultation with the road controlling authority. Nothing in this clause or in Section 81 implies that the rail access provider has sole responsibility for the level crossing or a right to determine what is necessary for the protection of persons using the level crossing.

[17] Clauses 9.3(4) and 9.4 effectively provide that any licensed access provider that does install warning signs or other traffic control devices at a level crossing must ensure that those signs and other traffic control devices comply with the requirements of the TCD Rule.

[18] It is correct to say, therefore, that KiwiRail is legally responsible for complying with the *Traffic Control Devices Manual*. It is not so clear that there is an equal legal responsibility to comply with ALCAM, as has been suggested.

[19] The Australian Level Crossing Assessment Model (ALCAM) is a safety assessment tool used to help prioritise disparate level crossings according to their comparative safety risk. It provides a rigorous defensible process for decision making for road and pedestrian level crossings, as well as a method to help determine the optimum safety improvements for individual sites. ALCAM has been adopted for use in New Zealand by KiwiRail.

[20] Although the Act refers to “safety assessments” some 50 times in 19 sections, it does not once refer to any level crossing assessment model.

[21] Although it is a comprehensive tool for the assessment of level crossing hazards, ALCAM cannot be applied in isolation. The *Traffic Control Devices Manual* notes that any risk assessment and treatment also needs to consider other factors, including:

- collision and near miss history;
- engineering experience (both rail and road);
- local knowledge of driver or pedestrian behaviour;
- social and economic assessments; and
- standards and international best practice.

[22] The *Traffic Control Devices Manual* recognises that ALCAM does not provide warrants for upgrades or attempt to define a safe or acceptable level of risk. This is seen as a decision for each jurisdiction that will depend on the standard of existing crossings, upgrade budgets and the level of risk that they are prepared to tolerate.

[23] It is, in short, for all persons involved with the management of the particular level crossing to determine the final recommended treatment.

[24] The RCA Forum agrees that it is, therefore, not unreasonable to expect a road controlling authority to ensure that it has systems in place to record and collate information which it receives about a level crossing and to make it available to rail providers as part of the Section 81(2) process.

[25] The information relating to each level crossing within its purview for which a road controlling authority should have recording and collating systems in place might reasonably include:

- i. collision and near miss history;
- ii. engineering experience (relating to road, but not rail);
- iii. local knowledge of driver or pedestrian behaviour;
- iv. social and economic assessments; and
- v. standards and international best practice.

[26] As any determination of what is necessary for the protection of persons using the level crossing could not reasonably be made without this information, it should be provided to rail providers as part of the process of consultation and agreement with other persons directly involved with the operation and management of the level crossing, as required under Section 81(2).

[27] The RCA Forum is grateful for this opportunity to offer comments on the draft recommendations and is fully supportive of the general tenor of these.

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