

Summary of Variations to the National Model Rail Safety Legislation incorporated into the Western Australian Draft Rail Safety Bill 2009

1. Model legislation changes that have been agreed by the Australian Transport Council (ATC)

The inclusion of **Part 6 – Investigations** (Sections 126 to 176) provides for independent investigations to be carried out on a no blame basis. This aligns with, and strengthens, Part 5 – Inquiries and inspections of the current *Rail Safety Act 1998* and also incorporates many of the best practise features used by the Australian Transport Safety Bureau. Part 6 is consistent with directions and principles agreed to by the ATC in a report on investigation practice in May 1999, and since reflected in AS4292.7 as well as in legislation in NSW, Victoria and Queensland. The Standing Committee on Transport Rail Group approved key principles concerning independence, no-blame approach with witness protection, transparency and public reporting in August 2006.

The Agency Director General (for high severity level investigations) and the Rail Safety Regulator (for low severity level investigations) may appoint an independent investigator with delegated powers. The Independent Investigator may, by instrument in writing, delegate particular powers and functions to investigation team members, but not the power to delegate. Team members will remain subject to the direction and control of the Independent Investigator.

The Act Minister can direct the Agency Director General to appoint an Independent Investigator to investigate a particular rail occurrence, but cannot direct on how that investigation is to be conducted or about the outcome of the investigation. Furthermore, the Act Minister cannot stop an investigation. The Independent Investigator or Investigator (investigation team member) is not subject to direction from the Act Minister, the Agency Director General, or the Rail Safety Regulator in respect of the exercise of the Independent Investigator's powers under the model Bill.

The Independent Investigator or Investigator is not personally subject to any liability, action, claim or demand for anything done or omitted to be done in good faith in connection with the exercise of powers.

Periodic Returns (Section 43) are required as currently defined in the *Rail Safety Act 1998* (Section 24) and prescribed under the *Rail Safety Regulations 1999* (Clause 8).

Installation of Safety or Protective Devices (Section 134) is a provision similar to Section 28 of the *Rail Safety Act 1998* and has been inserted in Part 6.

Temporary closing of railway crossings, bridges, etc. (Section 121) is generally consistent with the Model Legislation. However as the Model Bill allows for implementation by means that are convenient and effective for each jurisdiction and may be varied to enable conformity with local legal requirements and legislative drafting practice, WA opted for wording which allowed for a more flexible outcome. Further discussion with the National Transport Commission suggests the Model Legislation wording may drive a higher regulatory burden than intended and it has

been suggested this be considered for the post implementation maintenance process. To overcome the preliminary outlook for this provision, wording similar to Section 29 of the *Rail Safety Act 1998* was inserted to allow for a senior manager of a railway to have the power to close a railway crossing rather than require a specific delegation from the Rail Safety Regulator.

Assessment of Competence (Section 76) is generally consistent with the Model Legislation. However after considerable discussion with the National Transport Commission WA opted for wording which is still within the concepts of the Model Legislation but allows for a more practical approach. In considering this variation WA based the wording change predominately on that used by South Australia in its model rail safety legislation. Discussion with the National Transport Commission has resulted in the issue being listed for the post implementation maintenance process.

2. Local variations as provided for by the Model Legislation

Variations allowed under the Model Legislation to enable conformity with local legal requirements, legislative drafting practice and considered to be of administrative nature are listed below.

The Rail Safety Regulator and Rail Safety Officers (Part 3) have been varied to enable the appointment and designation of these Officers. The Regulator is independent of direction from the Act Minister or Agency Director General in his/her powers to carry out the Act and power to appoint Rail Safety Officers and delegation of powers (other than the power to delegate).

Immunity from Tortious Liability (Section 216) has been inserted allowing an exemption for officers acting under the Act from personal liability, action, claim or demand for anything done or omitted to be done in good faith in connection with the exercise of any duties or powers. No act or omission in the course of exercising functions gives rise to any civil liability (including, for example, liability in negligence or for breach of statutory duty) against the State or any authority of the State.

Rail Safety Accreditation Account (Section 42) establishes a trust account for all fees and charges collected and all costs associated with administering the Act.

Interface Co-ordination Plans (Sections 62 to 69) provisions place complementary obligations on rail and road managers to develop, implement and maintain interface co-ordination plans for rail, road and footpath interfaces. The provision, which was drafted by the National Transport Commission and endorsed by jurisdictions, places obligations on rail managers as well as road and land use planning authorities to consult with rail transport operators on safety interface issues and to comply with interface coordination plans. A variation has been made to include by regulation railways that are contained within roadways, such as the passenger rail within the Perth urban freeway, rather than by a discretionary definition of the term “railway crossing”. Further the Rail Safety Regulator was deemed to be the “appointed person” to give directions where parties cannot agree.

Restoring rail infrastructure and rolling stock etc. to original condition after action has been undertaken (Section 122) places responsibility for this obligation on the Rail Safety Regulator Office rather than on the individual Rail Safety Officer.

3. Non core provisions

Variations to “non-core provisions” in the Bill, considered to be valuable and desirable for best practice but not essential for national consistency, are listed below.

Authority to take proceedings (Section 183) are under the sole responsibility of the Rail Safety Regulator.

Offences by bodies corporate, partnerships, associations and employees (Section 188) has been amended to ensure that volunteers are treated equally to employees in regard to liabilities imposed by this provision under the Model Legislation.

Court Based Sanctions (Part 8, Division 6) and **Undertakings** (Part 8, Division 7) contain a number of variations but maintain the general intent of the proposed Model Legislation.

4. Transitional arrangements (Part 10)

Transitional issues primarily relate to compliance with the new accreditation, particularly requirements for risk management and safety management systems. The intention is that the current *Rail Safety Act 1998* will be repealed when the Bill is proclaimed and Operators' current accreditations will continue under transitional arrangements of the new Act but enforceable in line with the *Rail Safety Act 1998* for a period of twelve months. At the end of twelve months, Operators are expected to fully comply with the new Act or lose their accreditation.

Operators under an interim accreditation or suspension will continue under the conditions of that arrangement but be expected to fully comply with the new Act before moving from that status to an accredited status.

Private sidings registration will remain in force for a year after which all private sidings connected to accredited railways will be required to be registered, meet any conditions and pay the fee imposed.

There will be a two year transition period for full compliance with rail safety workers' competencies and requirements.

There will be a three year transitional period to manage development of Interface Coordination Plans with road managers through a staged approach.

5. Penalties

Penalties are set by reference to the *Occupational Safety and Health Act 1984*, be reasonably consistent with recent rail safety legislation adopted or being adopted in other jurisdictions, and proportionate to the seriousness of the non compliance.

6. Consequential Amendments

References to the *Rail Safety Act 1998* in any other Act or regulation, including the *Occupational Safety and Health Act 1984*, *Mines Safety and Inspection Act 1994* and *Freedom of Information Act 1992* so that these references are to the Bill.