

RAIL SAFETY NATIONAL LAW (WA) BILL 2014

Consideration in Detail

Clause 1 put and passed.

Clause 2: Commencement —

Ms R. SAFFIOTI: I would like clarification on which states have already passed this law and which states are waiting to pass this legislation.

Mr D.C. NALDER: All have passed the act, except Queensland, the Australian Capital Territory and Western Australia.

Ms R. SAFFIOTI: When was this state first approached about passing this law? How long has it been in front of the state government and how long has it taken for the government to bring this bill into Parliament?

Mr D.C. NALDER: It was first brought to the attention of Western Australia in August 2011.

Ms R. SAFFIOTI: Was there any particular hesitancy by the previous minister in bringing this legislation forward? We understand that as this was proposed by a federal Labor government, there was a bit of hesitancy to bring this forward. Was that the reason for the delay in bringing it to Parliament?

Mr D.C. NALDER: I cannot speculate on the motives of previous ministers, so I am not sure. I know that as a state, Western Australia has always been quite conservative in ensuring that we protect our sovereign rights and that it is in the industry's best interests that we pursue it. We have taken our time to ensure that we do it right for Western Australian industry and that our caution in introducing mirror legislation to protect WA sovereignty is the right approach.

Ms R. SAFFIOTI: Obviously, this government did not believe in the national law under a federal Labor government but it does under the Abbott government. Why did this bill take so many years to come to this Parliament?

Mr D.C. NALDER: I cannot see that it has anything to do with being a federal Labor government. I do not think that level of politics was there. I have been minister for nine months and I am not aware of it. I am conscious that the government wanted to protect state sovereignty and was more concerned in its approach to ensure that it did the right thing by industry in rail safety. I am not conscious or aware of a political motive.

Ms R. SAFFIOTI: This is my last question on this point. I understand that some possible concerns were raised about heritage and tourism railway operators and it was suggested that they could have been an excuse for some of the delays. Were those concerns expressed to the minister? Have those issues been addressed? Does the minister believe that this legislation works around those issues?

Mr D.C. NALDER: Yes, the issue around heritage railway operators was raised. There was concern about whether it was in their best interests to come under this legislation. In the reply to the second reading debate, I read into the record a lot of the detail around that. Basically, heritage railway operators can either be part of the national rail safety law or opt out. However, if they opt out, they have to come under the Occupational Safety and Health Act. They have been given the choice to be part of the national law or not. After going through a consultation process, I am pretty sure that all of them have agreed to be part of the Rail Safety National Law because they see that existing accreditation will be accepted. They do not need to go through any other undue processes, so it is seen as the best way forward for them. They still have the right to opt out of the Rail Safety National Law and come under the Occupational Safety and Health Act if they wish to.

Ms R. Saffioti: How are they currently regulated?

Mr D.C. NALDER: They are regulated under the Rail Safety Act 2010.

Ms R. SAFFIOTI: I have a further question on heritage railway operators. How many operators come under the heading of heritage railway operators? Will this legislation cause them to incur greater costs and expend greater resources to comply with the new act?

Mr D.C. NALDER: Eight operators come under the heritage railway operators heading. In my response to the second reading debate I read about the cost implications. I will read it again for the benefit of the member. The Office of the National Rail Safety Regulator is currently estimating the cost of rail safety regulation to be prescribed in the 2015–16 fee regulations. The fees applicable in WA will be considered by the Transport and Infrastructure Council. It is recognised that tourist and heritage operators have unique operational requirements that are different from commercial rail operators and that they have an important role to play within the WA rail industry. The following measures have been put in place to assist tourist and heritage operators in complying with the Rail Safety National Law (WA) Bill and to continue to operate in WA under the Office of the

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National Rail Safety Regulator. Firstly, there will be assistance with fees and the fixed accreditation fee will be reduced to \$2 000, compared with \$15 000 for commercial operators. The government will contribute towards tourist and heritage operators' accreditation fees as a community service obligation. Tourist and heritage operators will be required to pay only 10 per cent of certain other fees, including application for accreditation, variation, registration and exemption fees.

Mr F.M. LOGAN: Why has Queensland not passed the legislation?

Mr D.C. NALDER: My advice is that the Queensland government is still considering whether it is the best option. I cannot respond with more than that for other jurisdictions.

Mr B.S. WYATT: If Queensland and the Australian Capital Territory do not adopt, will there be any detrimental impacts? The minister's second reading speech referred to the benefits from the efficiencies that this will generate. Will there be any particular detriment to Western Australia if all states and territories do not adopt this particular standard? Secondly, is there a sense of urgency now in terms of us adopting it? Is there a time frame by which we need to adopt this?

Mr D.C. NALDER: No, there is not expected to be any detrimental effect if they do not. However, it is believed that they will be at some point but we cannot say categorically for sure. There is no perceived detrimental effect on Western Australia if they choose not to.

With regard to proceeding, it is anticipated that we will be fully operational under the national law by mid-2015, hence the need to try to progress this as expeditiously as possible.

Mr B.S. Wyatt: Was the 2015 date agreed at the Council of Australian Governments meeting or is that the date the Western Australian government has set?

Mr D.C. NALDER: It is the national office's anticipated date for commencement of the national rail safety law for WA. It cannot occur until legislation passes.

Mr B.S. Wyatt: I get that; I just want to know if the 2015 date is a stipulated date.

Mr D.C. NALDER: No.

Mr B.S. Wyatt: That is just our time frame?

Mr D.C. NALDER: Yes.

Mr B.S. WYATT: In answer to the member for West Swan, the minister made the point that the reason for the delay or the time it took to bring this legislation to the house was "to protect our sovereignty as a state". I am curious about what the minister meant by that. Did the minister mean he wants to protect the current standards that we have as a state? Is it the minister's view that what we are signing up to will forever give up an area of jurisdiction that we have no capacity to resume at any point in the future? Could the minister explain to me what he means by protecting the sovereignty of our state?

Mr D.C. NALDER: My understanding of that is to protect the opportunity for Western Australia to approve any amendments to any national law that applies to Western Australia. It is to ensure WA parliamentary sovereignty is upheld by retaining powers to make, amend and scrutinise the Rail Safety National Law. It ensures that the Parliament of Western Australia still has a role and that other jurisdictions cannot change it when we might not be happy with it. We have the ability to oversee it.

Mr B.S. Wyatt: I think the minister said in his second reading speech that the original—was it the South Australians that passed the act that we are modelling?

Mr D.C. NALDER: That is correct.

Mr B.S. Wyatt: If South Australia decides at some point to amend that act, it does not automatically come to us—does it still have to come before Parliament before there is any change to our jurisdiction?

Mr D.C. NALDER: Correct; whereas New South Wales and Victoria abide by whatever happens. If South Australia amends it, they are bound by it.

Mr B.S. Wyatt: Is it an automatic amendment in those jurisdictions?

Mr D.C. NALDER: Sorry?

Mr B.S. Wyatt: In Victoria and New South Wales, it automatically amends, but in Western Australia —

Mr D.C. NALDER: Yes; whereas we have applied mirror legislation so that we protect the sovereignty in Western Australia. This Parliament has to approve any amendment.

Ms Rita Saffioti; Mr Dean Nalder; Mr Fran Logan; Mr Ben Wyatt; Ms Janine Freeman; Mr David Templeman;
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Mr B.S. Wyatt: So there will not be any automatic amendment as a result of what happens in South Australia or anywhere else?

Mr D.C. NALDER: No—correct; including regulations.

Ms J.M. FREEMAN: I have a question about that. In effect the minister is saying that every other state will change rail safety law. Western Australia will have to change its law subsequently and bring it into this house. If this house is not sitting or we do not get that law before us or anything else, what impact does that lag have in terms of safety? Does it have any practical effect? As it goes across borders, one assumes that safety issues will be implemented. Let us suggest that the new safety aspect is the implementation of a requirement—when the train driver comes up to a rail crossing, they need to slow down to a certain speed or something like that. That would be more of a change to regulations. Let us suggest it is something to do with a certificate of evidence or the use of a test analysis result in the court proceedings. What will that mean, in effect, for Western Australia? Will it mean a lag? If there is an issue about a technicality in court proceedings over analysis of urine testing, would we not be able to pursue that, unlike New South Wales, Victoria and South Australia? How does that in any way benefit a harmonised safety network across the borders and in a national rail system?

Mr D.C. NALDER: This legislation allows us to oversight any amendments to ensure that we are comfortable with them, irrespective of whether the Liberal Party or the Labor Party is in power. It is to protect the rights of the Western Australian Parliament to scrutinise any changes.

Ms J.M. Freeman: I'm asking you what effect it will have.

Mr D.C. NALDER: I am telling the member.

If it is a legislative change or a change to the act, it will need to come through Parliament. If it is a regulation change, it still needs to be signed off by the Governor, so it is a process that will not necessarily take as long because it can go straight to the Governor for sign-off.

Ms J.M. Freeman: It has to sit in the house though, doesn't it, if it is a regulatory change?

Mr D.C. NALDER: Only if it is a disallowance.

Ms J.M. Freeman: It has to sit in the house, and if it is disallowed, it has to come to the house. But it has to sit in the house before it's disallowed. That's the process—it sits before the house and the house either allows it or disallows it.

Mr D.C. NALDER: No, that is not right. A regulation is signed off by the Governor first before it sits in the house. The house can then move a disallowance at that point, but it is already in effect. That is for a regulation change, whereas for —

Ms J.M. Freeman: I sat on the delegated legislation committee, so I get it.

Mr D.C. NALDER: Then the member knows how it works. Why is she asking the question? Is it just to test me?

Ms J.M. Freeman: No, I'm asking you the question because it has serious implications for national rail safety that you lag, just like it has serious implications that we lag in consumer laws and registration of nurses.

Mr D.C. NALDER: Our view as a government is that we regard it as important to protect the sovereignty of this state and ensure that this Parliament retains the power to approve or decline any legislative change. If the member does not agree with that, that is a fundamental difference, but we believe that retaining in this Parliament the power to oversight any amendment or legislative change to this legislation is in the best interests of Western Australia.

Ms J.M. Freeman: How can it be in its best interests if you're lagging in safety and you're not delivering on safety?

Mr D.C. NALDER: The member is drawing the conclusion that any change is therefore in the best interests of rail safety.

Ms J.M. Freeman: One assumes that if you've got five states all agreeing to the same thing, then it's in the best interests of national rail safety, because you've got a majority of states that agree to it.

Mr D.C. NALDER: Queensland and the Australian Capital Territory have not yet agreed at this time. As I say, we believe it to be prudent, and the purpose of having the Parliament of Western Australia is to look after the best interests of Western Australia, and we maintain that.

Clause put and passed.

Clauses 3 and 4 put and passed.

Ms Rita Saffioti; Mr Dean Nalder; Mr Fran Logan; Mr Ben Wyatt; Ms Janine Freeman; Mr David Templeman;
Acting Speaker

Clause 5: Local modifications to the Rail Safety National Law —

Mr F.M. LOGAN: It is proposed under clause 5(2) to delete from section 127 “oral fluid analysis” and to insert instead “oral fluid analysis, urine analysis”. Sections 127 and 129 deal with the drug and alcohol testing provisions set out by the regulator. These are the local amendments that have been made to the national law. Sections 127 and 129 deal with the national component of the law that is being implemented here tonight. Under section 127, an authorised person has the capacity to request both oral fluid analysis and urine analysis from a rail safety worker who is about to carry out a whole series of work-related issues. Under section 129, an oral fluid blood sample is not to be used for any other purpose. In the amendment that the government has made, a urine sample is not to be used for any other purpose.

Can the minister explain why it is important, from a Western Australian perspective, to make those changes to those provisions that deal with the work of the national regulator but when we come back to the provisions contained in part 3, “Local provisions for alcohol and drug testing”, from clause 9 on, there is no provision for urine testing? There is blood sampling but no provision for urine testing for alcohol in clause 10 onwards. The only reference to urine analysis is in clause 20, which is under the drug testing provisions. Why were those changes made to the national law but they are not also consistent with the government’s provisions that have been included under local laws?

Mr D.C. NALDER: This is to do with urine testing. The original reforms were based on the 2006 model, which allowed for drug and alcohol testing by way of urine sampling and analysis. New South Wales and Western Australia were the only jurisdictions to provide for it and have opted to continue doing so. The experience of Western Australia Police has been that urine testing, although perhaps not essential, can be a valuable investigation and enforcement tool. Further, it is possible that there will be advances by which urine testing becomes a more attractive option in that respect. Accordingly, the bill includes terms specifically directed to ensuring that it remains available as an option. They are essentially the reasons why urine testing has been included.

As far as clause 10 is concerned, and the provisions in which the member said there is no reference to urine testing, a urine test is not used for alcohol testing; it is used for drug testing.

Mr F.M. LOGAN: Can I then ask a question relating to the changes to sections 127 and 129 but also included in clause 20 on page 14, which states that an authorised person may require a rail safety worker to submit to urine analysis? That part of the bill is also reflected in sections 127 and 129, which refer to an authorised person. Can the minister take me to the definition of “authorised person” in this bill because I cannot find one, and what is an authorised person?

Mr D.C. NALDER: “Authorised person” is defined in schedule 1, section 4. It is on page 38 of the bill. “Authorised person” means a police officer or a person appointed under section 124.

Mr F.M. Logan: Can you repeat that?

Mr D.C. NALDER: It is schedule part 1, section 4, page 38—an authorised person.

Mr F.M. Logan: It is not on page 38.

Mr D.C. NALDER: Lines 26, 27 and 28.

Mr F.M. Logan: No, it is not on mine. It is “participating jurisdiction” on ours.

Mr D.C. NALDER: It is page 36 of the member’s copy of the bill.

The ACTING SPEAKER: In the copy I am looking at, “authorised person” is at page 36, line 24.

Mr D.C. NALDER: Can I check that it is the same? It is schedule part 1, section 4?

The ACTING SPEAKER: Yes.

Mr B.S. Wyatt: You might want to clarify, because there is a two-page difference.

Mr D.C. NALDER: The explanation I have received is that the content is the same, but the formatting is different.

Mr B.S. Wyatt: While you are on your feet, can I ask that we are on clause 5 at the moment?

Mr D.C. NALDER: Yes.

Mr B.S. Wyatt: What page is that in your copy of the bill?

Mr D.C. NALDER: Clause 5 is at page 3.

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Mr B.S. Wyatt: That starts with part 2 “Application of Rail Safety” and finishes with subclause (4), “Western Australia,”?

Mr D.C. NALDER: Yes. It is that same?

Mr B.S. Wyatt: It is at the moment, but at some point it changes. Does the minister see what I mean?

Mr D.C. NALDER: Do members want to go through page by page and work it out, because it must change somewhere?

The ACTING SPEAKER: It is up to the minister whether he feels confident with the advice he is receiving or whether he wants to go through the bill page by page up to page 36.

Mr D.C. NALDER: Can I check that page 36 is the schedule, “Rail Safety National Law”.

Mr B.S. Wyatt: My page 36 starts with Rail Safety National Law (WA) Bill 2014, Schedule, Part 1, section 4. The first definition is “application Act” and the final definition is “drug”. We are okay up to page 3 of the bill, so somewhere between pages 4 and 36 something changes.

Mr D.C. NALDER: We will go through quickly, page by page, if that is all right, Mr Acting Speaker.

The ACTING SPEAKER: The minister can clarify it expeditiously and then we will carry on with clause 5 once that is confirmed.

Mr D.C. NALDER: At page 4, we are right, are we not?

Mr B.S. Wyatt: We have done page 3, so let’s start with page 4.

Mr D.C. NALDER: It starts with section 6(5) and finishes with (b), “for the purposes of part 10, division 6, the Magistrates Court”. Page 6 starts with “emergency services”.

Mr B.S. Wyatt: Do you mean page 5?

Mr D.C. NALDER: Yes. Page 5 starts, “emergency services” and finishes “riders of bicycles”?

Mr B.S. Wyatt: No. My page 5 starts, “emergency services” and finishes “shared path means”. I do not have any definition of riders of bicycles.

Mr D.C. NALDER: Do members have “shared path means” at the end?

Mr B.S. Wyatt: Did you say “riders of bicycles”?

Mr D.C. NALDER: Yes, I have (a) and (b).

Mr B.S. Wyatt: I do not have that.

Mr D.C. NALDER: “Shared path means an area that (a) is open to or used by the public”.

Mr B.S. Wyatt: Yes.

Mr D.C. NALDER: And (b) is developed for —

Mr B.S. Wyatt: See, (b) for me flips over to page 6.

Mr D.C. NALDER: Does the member have (a)?

Mr B.S. Wyatt: I’ve got (a)—“is open to or used by the public; and”, and that is the end of page 5. Then I go over.

Mr D.C. NALDER: The next page, page 6, starts for me, “this jurisdiction means Western Australia” and finishes “Public Sector Management Act 1994”

Points of Order

Mr D.A. TEMPLEMAN: There is clearly some grave confusion about the documentation that has been provided to the opposition as it corresponds to the documentation the minister has. I would suggest that the house adjourn and that this be addressed overnight so that we can address it at a point tomorrow.

The ACTING SPEAKER (Mr N.W. Morton): It is up to the minister whether he wants to continue with consideration in detail. The minister is alluding to the fact that he now has an updated copy of the bill. There is no longer agreement within the house to go page by page, I am sensing. Therefore, if the minister is comfortable continuing with the consideration in detail stage, we will continue with the times, as is the standard procedure for consideration in detail.

Mr D.C. Nalder: I am.

Ms J.M. FREEMAN: If we are now going through the bill clause by clause, we will have to know —

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The ACTING SPEAKER: No. We are not going through the bill clause by clause. We were going page by page, up to page 36. There is now dissent from the house and people do not want to necessarily do that, and there was a call to adjourn the debate. At this time, it is up to the minister whether he wants to continue with the consideration in detail stage. The minister has indicated that he is happy to do that, but we now need to go back to the standing orders that predicate how the consideration in detail stage is undertaken. So we will go back to clause 5, which is what we were debating.

Mr B.S. WYATT: The problem is that when we said we do not have any questions on clauses 3 and 4, we assumed that we were dealing with the same bill. The minister has now told us that we were not dealing with the same bill, effectively. Does the Acting Speaker see what I am saying?

The ACTING SPEAKER: Yes, I do see what the member is saying, but clauses 3 and 4 have been agreed to.

Mr B.S. WYATT: I do not know what has been agreed to, because the minister has now changed the bill that he has. Is that right? Does the minister now have a different version, Leader of the House?

Mr J.H.D. Day: I am told that the minister now has the same formatted version as you do.

The ACTING SPEAKER: Member, clauses 3 and 4 have been agreed to.

Mr B.S. WYATT: Yes, but we have agreed to a format that the minister has now changed.

The ACTING SPEAKER: The advice I am receiving, member, is that clauses 3 and 4 have been agreed to.

Mr B.S. WYATT: I can say now that the opposition is not comfortable with simply accepting what has previously been put, because clearly the minister had a very different version of the bill.

The ACTING SPEAKER: My further advice, member, is that those pages actually match.

Mr B.S. WYATT: That is your advice. Have you checked on that, Mr Acting Speaker?

The ACTING SPEAKER: That is the advice that I have received, yes. So we are now back to the debate on clause 5, and the minister has indicated that he is happy to continue with the consideration in detail stage. The question is that clause 5 stand as printed.

Debate Resumed

Ms R. SAFFIOTI: I find this extraordinary, because basically in relation to amendments and everything else, we have two different bills operating in this place. Frankly, we will now have to go through this bill page by page and clause by clause to be confident that we are dealing with the same legislation. We were not going to go through each page and each clause, but it now appears that we need to. We are on clause 5 at page 3, and I think we are back to the question that the member for Cockburn was asking. So I will sit down and allow the member for Cockburn to stand up and ask the question he was asking earlier.

Mr F.M. LOGAN: Back to my original question, I asked where we find the definition of “authorised person”. Of course, that is what set this all in motion because the minister referred us to page 38 and that is not the case with the version of the bill currently before the house—it is actually on page 36—and I think the minister needs to clarify that.

Mr D.C. NALDER: I can confirm that it is the same bill that was formatted slightly differently, which threw the pages out. We have the same version now and the definition of “authorised person” is in the same schedule, same part 1, clause 4. It is on page 36, not page 38 as in the previous version. It is on lines 24 through 26.

Ms J.M. FREEMAN: Given that we are debating clause 5 and it reflects proposed section 129 that deals with drug and alcohol testing, this seems like a good place to raise this issue. This clause also deals with proposed section 127. Can the minister clarify whether clause 5 reflects the actual definition of “prescribed drug” in proposed section 128? My question refers to that proposed section and I might have to wait until we get to proposed section 128.

Mr D.C. NALDER: Clause 5 does not relate to proposed section 128.

Mr B.S. WYATT: Can the minister confirm that clause 5 goes from line 9 on page 3 to line 17 on page 4 finishing with the words “to be used for other purposes”?

Mr D.C. Nalder: Correct.

Ms R. SAFFIOTI: In relation to clause 5, what is the extent of the local modifications from a policy point of view? What is the extent of the difference between our laws and those being adopted in other states?

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Mr D.C. NALDER: The first is consideration of urine sampling and the second is the power of the Governor to sign off on the regulations; that is, we do not automatically assume the South Australian amendments.

Ms J.M. FREEMAN: Can the minister take me to clause 5(7) which states —

In Schedule 2 clauses 30(2) and (3)(b), 33, 35 and 36 delete “South Australian” (each occurrence) and insert:

Western Australian

What page number is that on? At the top of the bill it does not tell me. It just says “Schedule, Part 3”; it does not tell me what schedule number I am in. I had a look at clauses 30 to 32 and I could not see where South Australia was referred to. Is it at pages 59 and 60 or are there other clauses 30 and 32? So we are looking at pages 220 —

Mr D.C. Nalder: Page 236.

Clause put and passed.

Clause 6: Meaning of generic terms in *Rail Safety National Law (WA)* for purposes of this jurisdiction —

Mr B.S. WYATT: Can the minister confirm that clause 6 goes from line 18 on page 4 to line 11 on page 6 and finishes with the words “Public Sector Management Act 1994 section 3(1)”.

Mr D.C. Nalder: Correct.

Mr B.S. WYATT: I have a question about the definition of public sector auditor. The bill states —

... the Auditor-General as defined in the *Public Finance and Audit Act 1987* (South Australia) ...

Does that mean that as a result of this legislation our Auditor General has no role with respect to the Rail Safety National Law (WA) Bill 2014?

Mr D.C. NALDER: the Office of the National Rail Safety Regulator comes under the jurisdiction of the South Australian Auditor-General, whereas police officers operating in Western Australia still come under the jurisdiction of the Western Australian Auditor General when they are applying something about rail safety issues in Western Australia.

Mr B.S. Wyatt: While the minister is on his feet, does the South Australian Auditor-General have a role only with respect to the current jurisdiction around police officers?

Mr D.C. NALDER: No, officers under the Western Australian regulations are subject to the Western Australian Auditor General, but officers employed by the National Rail Safety Regulator would come under the jurisdiction of the South Australian Auditor-General. It does not apply to police officers, so the member was right.

Mr B.S. WYATT: Further to that, in his second reading speech, the minister stated —

However, the Western Australian rail industry and wider community can be assured that a permanent staffing presence will be retained in Western Australia.

Will that staffing presence fall under the jurisdiction of the Western Australian Auditor General or the South Australian Auditor-General?

Mr D.C. Nalder: The South Australian Auditor-General.

Mr B.S. WYATT: Will the South Australian Auditor-General have the capacity to investigate staff employed in the WA public service?

Mr D.C. NALDER: The staff employed by the National Rail Safety Regulator will not be under the WA public service. They will be under the national regulator and will therefore come under the jurisdiction of the South Australian Auditor-General, even though they are based here looking after Western Australia.

Mr B.S. Wyatt: Is that effectively the commonwealth public service?

Mr D.C. NALDER: No, because the legislation has been set up under the South Australian act as opposed to a commonwealth act. The national Rail Safety Act is under a South Australian act, because South Australia established the first act and that has been taken to be the central act for the Rail Safety National Law.

Ms R. SAFFIOTI: I understand from the second reading speech and the debate on this bill that staff employed under the current regulator can either opt-in, be seconded to or leave. I understand that someone becomes employed under the national body, but is a secondee who retains their state public service status subject to the South Australian Auditor-General?

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Ms Rita Saffioti; Mr Dean Nalder; Mr Fran Logan; Mr Ben Wyatt; Ms Janine Freeman; Mr David Templeman;
Acting Speaker

Mr D.C. NALDER: If a person is seconded, they are fundamentally being paid the salary, but as a secondee they would come under the national regulator, which in this case would be the South Australian regulator.

Ms R. SAFFIOTI: It is quite bizarre. Given the minister was so hot on sovereignty in the first few minutes of this debate and this is state legislation, why would the minister not state that the Western Australian Auditor General is to be given the task to perform those functions for the body situated in WA?

Mr D.C. NALDER: It is primarily for consistency in how the staff are treated by the regulator nationally. Essentially, Western Australia will be a branch of the national regulator, and hence consistent treatment of those staff will be necessary.

Mr F.M. LOGAN: I understand where the minister is coming from and how South Australia takes the lead quite often in pieces of legislation that are adopted nationally. Usually, that is the drafting, and then the commonwealth takes over and it becomes a commonwealth law that we then pick up. It is not always the case, but quite regularly the South Australian government does the drafting and then it is picked up and passed by the commonwealth and adopted in each state. Can the minister explain what happens in this case if the employees of the regulator are employed under the national act and their behaviour is governed by the South Australian Auditor-General and a complaint is raised by a member of the public, a member of Parliament, a local council or another rail user about the regulator, the employees of the regulator, or the workings of the regulator? Would that have to go to the South Australian Auditor-General to get the investigation underway?

Mr D.C. NALDER: There are a couple of points there. First of all, this would not move to the commonwealth because rail is not covered under the commonwealth Constitution. That is why it is under a state act. The second point is that complaints about staff would go to the South Australian jurisdiction.

Mr F.M. LOGAN: I have to support what the member for West Swan was talking about earlier. The minister raised the issue of sovereignty earlier and said that Western Australians would stick out over a period of three years and fiercely defend the sovereignty of Western Australia. In practical terms and from a jurisdictional point of view, how is the South Australian Auditor-General going to investigate a complaint raised in Western Australia?

Mr D.C. NALDER: For me, having had a bit of experience in this aspect, he would do it the same way as any national body. The staff would be treated consistently, otherwise we would end up with all sorts of rules for the staff of one body. This is to get a consistent treatment. The national body is responsible for those staff, hence that reason.

Mr B.S. WYATT: Of course, any national body funded by the commonwealth government is funded to be a national body. To what extent is the South Australian Auditor-General funded to perform a national role? Do we know, or are we subject to costs? Do we contribute to the budget of the South Australian Auditor-General? What is the contribution that we make?

Mr D.C. Nalder: It is on a cost recovery basis.

Mr B.S. WYATT: It is a cost recovery basis. If, as the member for Cockburn pointed out, another rail user or an individual makes a complaint that the South Australian Auditor-General decides is worthy of investigation, would that investigation take place regardless of whether that person is able to provide funding for the Auditor-General to do so?

Mr D.C. NALDER: South Australia would have to fund it. This will be overseen by the South Australian Auditor-General, which is covered under this bill. The Auditor-General will take responsibility for establishing the Rail Safety National Law to investigate any issue that comes about. So they will take responsibility for it, and it is a body that they are responsible for investigating.

Mr B.S. Wyatt: My concern of course is that it is subject to the funding discretions of the South Australian government.

Mr F.M. Logan: For the rest of the country.

Mr B.S. Wyatt: For those who sign up, so currently not Queensland and the ACT.

Mr D.C. NALDER: Yes, that is correct.

Mr F.M. LOGAN: Given the minister's responses to the house so far, can the minister tell the house in which jurisdiction the South Australian Auditor-General, who is responsible for any investigation of this Rail Safety National Law, will hand down reports about their work with this law and their annual reports? Will they also be available in every other jurisdiction? Will they be tabled in the Parliaments of every other jurisdiction that has signed up to this law?

Mr D.C. NALDER: They will be handed down in South Australia, but they will be public documents; so they are made public.

Mr F.M. Logan: But, minister, how will we know when they are handed down and how will we get copies of them? This is a national law.

Mr D.C. NALDER: The national regulator's annual report will be tabled in every Parliament as well.

Mr F.M. LOGAN: We come back to the sovereignty question that the minister was talking about earlier. I would have thought that this is an obvious case of state sovereignty. The South Australian Auditor-General takes responsibility for the oversight under the Public Finance and Audit Act of South Australia for its application to this national law. It is then obvious that Western Australia and other states would say that when any of those reports are handed down in South Australia, commensurate copies should be tabled in each other jurisdiction's Parliament, so that the other states that are actually subject to the work of the public sector on behalf of those states have access to those copies. At this point in time we do not even know when copies from the South Australian Auditor-General will be handed down. That is a clear sovereignty issue that Western Australia should have raised.

Mr D.C. NALDER: I take the member's point, but this is seen as a South Australian responsibility to keep the consistency over the approach nationally. It is part of the national body for rail safety. I am happy to discuss it in between houses, but this seems like a consistent approach to ensure that we get that consistency nationally rather than, from the South Australian Auditor-General's perspective, having different jurisdictions ruling over it differently.

Mr F.M. LOGAN: I understand it, minister but clearly, members of the public of Western Australia, from whom the minister seeks the confidence that this legislation is in their interests, will not be made aware of the work of the public sector auditor overlooking this legislation and particularly the workings of the South Australian Public Finance and Audit Act as it applies to this legislation. They will not be able to see it, oversight it or even be aware of that work of the public sector auditor because there is no reference in this bill to ensure that the work of the public sector auditor is handed down in the jurisdictions to which this bill applies. That is a major failing of this legislation because the public is flying blind and the Parliament is flying blind and apparently we have signed up to it.

Mr D.C. NALDER: I apologise; a modification will come in from the Rail Safety National Law that we will need to pass after this bill, which will overcome it, and that means it will be tabled in every Parliament. The national regulations will follow once it is law, which will ensure that it is tabled in every Parliament.

Mr B.S. Wyatt: Has that modification been agreed to? Why is it not part of this? Why do we not make the amendment now?

Mr D.C. NALDER: It is a regulation. It will modify the South Australian law, which will then insist that it is tabled in every jurisdiction.

Mr B.S. Wyatt: Presumably, once it happens, we will have to deal with it here. As we discussed earlier, it does not matter what South Australia does; we still have to deal with it in our Parliament, so why don't we deal with it now if South Australia has done it?

Mr D.C. NALDER: It is not a change to the legislation; it is a regulation. It is a change to South Australia's law, but it is a regulation change. Hang on while I get it right. I am sorry. This is a change to the South Australian Public Finance and Audit Act, not a change to the Rail Safety National Law, which South Australia needs to change to ensure that anything is then tabled in each and every jurisdiction—every Parliament.

Ms J.M. Freeman: Have they changed it yet?

Mr D.C. NALDER: This is contained in the regulations.

Mr B.S. Wyatt: Which are obviously not here.

Mr D.C. NALDER: They will be attended to when the bill is passed for this Rail Safety National Law. It is a regulation but it is a change to the South Australian Public Finance and Audit Act. South Australia needed the change that act to allow for Auditor General reports to be tabled in every Parliament.

Ms J.M. Freeman: Has South Australia changed the South Australian law?

Mr D.C. NALDER: South Australia has changed its act, so it now has the regulations, and that will change South Australia's act applicable to us here once we have passed the Rail Safety National Law here. Does that make sense? Have I explained that correctly?

Extract from Hansard

[ASSEMBLY — Tuesday, 25 November 2014]

p8718c-8731a

Ms Rita Saffioti; Mr Dean Nalder; Mr Fran Logan; Mr Ben Wyatt; Ms Janine Freeman; Mr David Templeman;
Acting Speaker

Mr B.S. WYATT: I am very interested in the response from the minister, because obviously we have some concerns. The minister has raised issues around sovereignty. I have the South Australian Public Finance and Audit Act before me, so while the minister is getting some advice about that, I would be keen to find out which part of that act is being amended to allow our regulations—which we have not seen as they have not been drafted—to be changed at some point. Herein lies the problem.

Mr F.M. Logan: Those regulations will be modelled on the South Australian regulations.

Mr B.S. WYATT: Yes, but the way I understand the explanation from the minister —

The SPEAKER: Member for Victoria Park, I think we had better deal with one point at a time.

Mr B.S. WYATT: I am just waiting for the minister to give me an indication that he is ready.

The SPEAKER: I think we just need to have a breather. Is the minister ready?

Mr D.C. NALDER: The national regulations that will follow this law will modify the effect of the South Australian Public Finance and Audit Act 1987 to provide that anything that is tabled before the houses of the South Australian Parliament will have to be tabled in the houses of Parliament of participating jurisdictions—that is, our Parliament.

Ms R. Saffioti: Say that again.

Mr D.C. NALDER: The national regulations that will follow the passage of the Rail Safety National Law will modify the effect of the South Australian Public Finance and Audit Act to provide that anything that is tabled before the houses of the South Australian Parliament will have to be tabled in the houses of Parliament of participating jurisdictions—that is, our Parliament.

Mr B.S. Wyatt: So the national regulations that will be done will effectively amend the South Australian Public Finance and Audit Act?

Mr D.C. NALDER: Yes, which will then provide that anything that is tabled before the houses of the South Australian Parliament on the Rail Safety National Law will have to be tabled in participating jurisdictions—that is, our Parliament—as well.

Mr F.M. LOGAN: Honestly, that sounds like the cart being put before the horse. My understanding is that regulations cannot change an act. An act changes and then regulations follow. I assume that the minister is telling the house that the South Australian Public Finance and Audit Act 1987 will be modified and regulations will reflect that modification. Following the passage of this bill, similar regulations that reflect the South Australian regulations will be applied in each jurisdiction and those regulations will bind South Australia to ensure that when the public sector auditor hands down his report, there is a commensurate handing down in each jurisdiction. I assume that is what the minister means. The regulations do not change the act; it is the other way around.

Mr D.C. NALDER: To clarify, the Public Finance and Audit Act is applied only by the national law. The regulations can modify how the legislation applies in WA.

Mr F.M. Logan: I understand that.

Mr D.C. NALDER: That is what we are trying to clarify.

Mr B.S. Wyatt: When this bill passes—we want to support this—something will follow before the start date in 2015 that changes this again; is what the minister is saying?

Mr D.C. NALDER: Regulations will apply following the passage of the bill. Those regulations will come in and if we are comfortable with them, they will go to the Governor for signing. Then they have to be tabled in Parliament and we can disallow them if we feel that is appropriate. Is that clear as mud?

Mr B.S. Wyatt: Yes.

Ms R. SAFFIOTI: Maybe I missed a key point, but what allows the report to be tabled in Parliament?

Mr B.S. Wyatt: What is the legal impetus for it to happen?

Ms R. SAFFIOTI: Exactly.

Mr D.C. NALDER: It is the regulations.

Clause and passed.

Clause 7: No double jeopardy —

Mr B.S. WYATT: Can the minister confirm that clause 7 starts at line 12 on page 6 and finishes at line 17 on page 6 with “substantially corresponds to the WA offence”?

Mr D.C. Nalder: Correct.

Mr B.S. WYATT: I am curious about this no double jeopardy clause, which states —

Proceedings for an offence against the *Rail Safety National Law (WA)* (the **WA offence**) cannot be brought against a person if the person has, for the same alleged act or omission, been convicted or found guilty in a participating jurisdiction of an offence that substantially corresponds to the WA offence.

Could the minister give me an example in which it might not be the same offence but substantially corresponds to the WA offence? My understanding of double jeopardy is that someone cannot be prosecuted twice for the same offence, not an offence that substantially corresponds to the offence.

Mr D.C. NALDER: It is consistent with cross-border jurisdictions in the sense that if someone is found guilty in one jurisdiction, they cannot then be charged with the same offence in another.

Mr B.S. WYATT: But we are not dealing with the same offence; we are dealing with an offence that substantially corresponds to the WA offence. Does the minister see what I am saying? They might be two different offences, but one offence might substantially correspond to the offence in the participating jurisdiction. I want to get this right. In the circumstance in which someone has been found guilty of the same offence in a participating jurisdiction or an offence that substantially corresponds with that offence, we are giving up the right to prosecute. I have not come across that term before. I know the definition of “double jeopardy”, but not “substantially corresponds”.

Mr D.C. NALDER: It is the third line of clause 7, which is on line 15, “for the same alleged act or omission”. That is that cross-border jurisdiction.

Mr B.S. Wyatt: Can the minister confirm this: “substantially corresponds” deals with the offence and the reason it is “substantially corresponds” is that it might be a different name or title?

Mr D.C. NALDER: Yes.

Mr B.S. Wyatt: Gotcha.

Clause put and passed.

Clause 8: Exclusion of legislation of this jurisdiction —

Mr F.M. LOGAN: This comes back to the debate we have just been having about the role of South Australia and the application of Western Australian acts of Parliament. Clause 8(1) clearly states —

... the following Acts of this jurisdiction do not apply to the *Rail Safety National Law (WA)* or to the instruments made under that Law —

- (a) the *Freedom of Information Act 1992*;
- (b) the *Interpretation Act 1984*.

Subclause (2) states —

The *Interpretation Act 1984* sections 41 and 42 apply to regulations made under the *Rail Safety National Law (WA)*.

What regulations are they? Are they regulations made by the South Australian jurisdiction or regulations that will ultimately be allowed or disallowed in this house?

Mr D.C. NALDER: It is exactly the same principle as the Auditor General. It is not under the WA acts that are tabled; it is under the South Australian acts. It is the same principle we talked about in a previous clause, clause 5.

Mr F.M. LOGAN: I understand that. Clause 8(2) quite clearly says that sections 41 and 42 of the Western Australian Interpretation Act 1984 will apply to regulations made under the Rail Safety National Law (WA), which is effectively handing over a heap of jurisdiction to South Australia. Which regulation is this clause talking about? Is it the regulations that South Australia hand down or is it the regulations that ultimately will be reflected in this house, if we get regulations in this house? I am still not clear about that.

Mr D.C. NALDER: Sections 41 and 42 of the Interpretation Act will apply to allow for either house of the WA Parliament to pass a resolution to disallow national regulations, amend national regulations and substitute regulations in place of the national regulations.

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Acting Speaker

Mr F.M. Logan: Will these regulations be effectively tabled in this house?

Mr D.C. NALDER: Correct. It is the making of regulations and the disallowance of regulations. Section 41 is the making of them; section 42 disallows.

Mr F.M. LOGAN: At least we have cleared it up, minister—the regulations will be tabled in this house.

I move on to subclauses (3) and (4). The acts set out in clause 8(3) clearly do not apply to the Rail Safety National Law. However, subclause (4) states —

The Acts referred to in subsection (3) apply to a public sector body as defined in the *Public Sector Management Act 1994* section 3(1), and an officer or employee of the body, performing a function under the *Rail Safety National Law (WA)*.

The five acts referred to in subclause (3) are Western Australian acts that do not apply to anything under the bill we are passing tonight, except section 3(1) of the Public Sector Management Act 1994, which applies to Western Australia. It applies to an officer or an employee of the body performing a function under the Rail Safety National Law (WA). What is that function? Would section 3(1) of the Western Australian Public Sector Management Act 1994 apply to somebody performing a function under what is effectively a South Australian law?

Mr D.C. NALDER: The acts apply to WA public sector bodies performing functions under the act, for example, WA Police. Does that make sense?

Mr F.M. Logan: Is that the only place in which it applies?

Mr D.C. NALDER: They are the only people with the function currently.

Ms J.M. FREEMAN: The Western Australian Freedom of Information Act 1992 will not apply to the Rail Safety National Law. I assume that the South Australian Freedom of Information Act will apply. Does the South Australian Freedom of Information Act allow the same process in gaining information or are there any restrictions that we should be made aware of? For all intents and purposes, does it have the same process, the same substance and the same capacity as the Western Australian Freedom of Information Act 1992 or will the provision of it not applying in any way diminish the current provisions and the capacity of people to gain information? As the minister can imagine, when safety issues are involved, if something goes wrong and there is an accident—hopefully, knock on wood, none of those things happen—sometimes people can be seen as scapegoats in the process. It is very important for people to be able to access all the information that is before them. If we are protecting our sovereignty, are we also protecting our workers to ensure that none of their rights and entitlements are diminished?

Mr D.C. NALDER: Section 263 of the bill applies the South Australian freedom of information legislation. The freedom of information legislation in Western Australia and South Australia are broadly consistent. The purpose of both acts is to provide for public access to documents and records and to enable the public to ensure that personal information in documents is accurate, complete, up to date and not misleading and for related purposes.

Mr F.M. LOGAN: Given the fact that clause 8 refers to the number of Western Australian acts that do not apply to the Rail Safety National Law, what happens when an offence is committed, either by a corporation or an individual? In which jurisdiction does the regulation prosecute?

Mr D.C. Nalder: Where the offence occurs.

Mr F.M. LOGAN: If an offence is committed and a regulator takes action, in which jurisdiction is the offence heard?

Mr D.C. Nalder: In the jurisdiction where the offence occurs.

Ms J.M. FREEMAN: Clause 8 relates to the exclusion of legislation. The Workers' Compensation and Rehabilitation Act 1981 is not excluded. Does it apply? Are employees employed under the Western Australian jurisdiction for workers' compensation and rehabilitation or do they come under the South Australian act?

Mr D.C. NALDER: The act is not excluded, so it would apply.

Ms J.M. FREEMAN: The common law restrictions in the Western Australian Workers' Compensation and Rehabilitation Act 1981 are not necessarily the same common law restrictions that apply in South Australia. Would a worker who wants to pursue a common law liability claim and seek damages for their injuries have access to the South Australian law, because it is a federal law for common law damages, or would they be restricted under the Workers' Compensation and Rehabilitation Act 1981 (WA), or would they have greater access to common law rights?

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Mr D.C. NALDER: This bill does not affect what the member is talking about at all.

Ms J.M. Freeman: No; I am asking if it actually expands it.

Mr D.C. NALDER: No.

Ms J.M. Freeman: So they won't be able to claim common law under the South Australian act. It's closed down the Western Australian act.

The SPEAKER: Could we have one person speaking at a time and speaking nice and clearly, please. I am speaking to the member for Mirrabooka. What would the member for Mirrabooka like to say?

Ms J.M. FREEMAN: I will clarify. The Workers' Compensation and Rehabilitation Act 1981 (WA) restricts common law. We have made legislation to override a common law entitlement for a worker to pursue damages for injury. The South Australian act does not restrict and override common law, but if a worker is working under and covered by this act and wants to pursue a common law damages claim, would that mean that they still have access to pursue it under the South Australian law because it is not closed, or would they be holus-bolus within the Western Australian jurisdiction?

Mr D.C. NALDER: It is not covered by this bill.

Mr F.M. Logan: That's the problem, because they are employees of an organisation that is regulated in South Australia.

Mr D.C. NALDER: Correct.

Mr F.M. Logan: Why, therefore, doesn't South Australia's workers' compensation cover it?

Mr D.C. NALDER: It probably does, but it is not covered in this bill.

Ms J.M. Freeman: You just told me that the state —

The SPEAKER: One person at a time. Has the minister finished his answer?

Ms J.M. FREEMAN: In my first answer to the question, the minister told me that the Workers' Compensation and Rehabilitation Act 1981 (WA) applies and the South Australian act does not. Could the minister confirm that? I am happy for the minister to confirm that, and the question is about common law application.

Mr D.C. NALDER: That is in relation to Western Australian employed people in Western Australia.

Ms J.M. Freeman: But they're not employed by WA, are they?

Mr D.C. NALDER: No. They are South Australian employees and there is every chance they are covered under that act, but we are not covering that in this part of the bill. It is not in the bill. It does not deal with that at all. It is not applicable.

Ms J.M. FREEMAN: I understand that. It does not exclude it, though.

Mr D.C. Nalder: No, it does not.

Ms J.M. FREEMAN: It does not exclude the Workers' Compensation and Rehabilitation Act as it does aspects of that. Is the minister telling us that the workers are based here, but employed as South Australian employees?

Mr D.C. Nalder: Correct.

Ms J.M. FREEMAN: And employed by the South Australian government.

Mr D.C. Nalder: Correct.

Ms J.M. FREEMAN: So the question is —

Mr D.C. Nalder: The South Australian regulator—or the national regulator in South Australia.

Ms J.M. FREEMAN: The national regulator in South Australia employs them, but they will be working here, so the question is: does the Workers' Compensation and Rehabilitation Act apply? I think the minister will find it does apply. I think the minister will also find that there are common law rights under the South Australian act. I can answer that myself, really. I just put that on record: I think it applies and I think that they will have common law rights under the South Australian act.

The SPEAKER: We have got that on record. Thank you.

Mr B.S. WYATT: Before I ask my brief question, can I confirm that clause 8 starts at line 18, on page 6 of the bill, and concludes at line 7, on page 7, with "a function under the *Rail Safety National Law (WA)*"?

Mr D.C. Nalder: Correct.

Extract from *Hansard*

[ASSEMBLY — Tuesday, 25 November 2014]

p8718c-8731a

Ms Rita Saffioti; Mr Dean Nalder; Mr Fran Logan; Mr Ben Wyatt; Ms Janine Freeman; Mr David Templeman;
Acting Speaker

Mr B.S. WYATT: I dare say that the answer the minister gave to the member for Cockburn about freedom of information will be similar here. Clause 8(3) provides that the Auditor General Act 2006, the Financial Management Act 2006, the Parliamentary Commissioner Act 1971 and the Public Sector Management Act 1994 do not apply, because, presumably, the equivalents in South Australia apply.

Mr D.C. NALDER: Correct.

Mr B.S. WYATT: I cannot understand why the State Record Acts will not apply. We are still creating records here. I can understand why the other four acts will not apply, because they are effectively regulators in some form. But why will the State Records Act not apply?

Mr D.C. NALDER: It is because it is covered under the equivalent legislation in South Australia. It is because it is recording a business transaction for government.

Mr B.S. Wyatt: It does not just record a business transaction.

Mr D.C. NALDER: It is the records of government.

Mr B.S. WYATT: In terms of our archives processing, we will not have those archives. What will become of our archives as created in Western Australia?

Mr D.C. NALDER: The records are recorded by a South Australian entity, under their legislation.

Clause put and passed.

Debate adjourned, on motion by **Mr J.H.D. Day (Leader of the House)**.