

Rail Safety Bill 2009

Explanatory Memorandum

General

The main purpose of the WA Rail Safety Bill 2009 (WA Bill) is to provide for rail safety legislation that will enhance rail safety and promote regulatory harmonisation and efficiency in rail safety across jurisdictions. The Bill sets out legal duties and operating requirements that are to be applied on a nationally consistent basis to all parties responsible for rail safety and will be supported by national regulations, compliance codes and guidelines.

Australia has adopted a co-regulatory approach to rail safety. Key characteristics of the 'co-regulatory' approach are as follows:

- Responsibilities for regulatory development, implementation and enforcement are shared between industry participants, industry associations and governments.
- Government's role is to establish performance based obligations and specific duties necessary to achieve acceptable levels of safety, meet community expectations and maintain public confidence.
- Rail industry participants accept accountability for achieving required safety outcomes in return for the flexibility to identify and implement the most effective and efficient means of addressing risks to safety.
- Rail industry associations serve to represent industry interests in the regulatory development process, facilitate implementation of safety reforms and to provide guidance to industry in the form of codes and standards indicating effective and efficient means of compliance.
- The Rail Safety Regulator's role is to provide oversight. In the rail safety context this includes assessing the capacity and competence of rail organisations to be safe, ensuring that safety management systems are in place, and monitoring the activities of, and safety outcomes achieved by, individual rail organisations; educating rail organisations on potential opportunities to improve safety performance; and, if necessary, enforcing compliance with performance based obligations and duties using available powers and sanctions.

The WA Bill builds on the existing co-regulatory approach through the implementation of a number of regulatory best practices, including by clarifying the roles and duties of responsible parties, providing for more timely and transparent decision-making by the Rail Safety Regulator, and equipping the Rail Safety Regulator with the powers and tools they require to monitor and enforce compliance with the legislation.

The WA Bill provides for:

- General safety duties that require all rail industry participants that form the 'chain of responsibility' to ensure the safety of their railway operations. These statutory duties of care define the required level of safety and makes clear which parties have accountabilities for rail safety.
- A system of accreditation to provide assurance that rail transport operators have the competence and capacity to operate safely before they are permitted to operate. The system of accreditation requires that a rail transport operator must have a Safety Management System (SMS) suitable for the rail transport operator's railway operations. Specific accreditation requirements are to:
 - a) Consult with persons who are intended to work on or at railway premises, both during the initial development of the SMS and in the on-going process of maintaining and changing the SMS.
 - b) Adopt an integrated approach to risk management to ensure that risks are assessed, evaluated and controlled jointly by those parties that will have a safety interface by virtue of the scope and nature of their intended operations.
 - c) Establish, implement and maintain: security, emergency, health and fitness, drug and alcohol and fatigue management plans.

- Audit and inspection powers necessary to enable the Rail Safety Regulator to monitor the compliance of duty holders with statutory duties and related accreditation requirements.
- A hierarchy of compliance and enforcement powers and sanctions to facilitate an effective and proportionate regulatory response to detected forms of non-compliance by rail transport operators and other persons.
- An array of checks and balances on regulator behaviour to ensure that regulatory decision-making processes are timely, transparent and nationally consistent.
- Creation of subordinate legislation (regulations) to be used to specify more detailed requirements that are not appropriate for inclusion in the Bill itself.

The development of the WA Bill has been underpinned by a set of principles. Each principle has been given effect in the provisions of the WA Bill. The principles are as follows:

- *Principle of shared responsibility* which states there are a number of persons who share responsibility for rail safety and who form part of the rail safety chain of responsibility; and *Principle of accountability* which states that managing risks associated with the carrying out of rail infrastructure operations or rolling stock operations is the responsibility of the person best able to control that risk. These principles are given effect via the establishment of statutory duties of care for rail transport operators [clause 28], their contractors and subcontractors [clauses 29 and 80] designers, manufacturers and suppliers [clause 30] and rail safety workers [clause 79].
- *Principle of integrated risk management* which provides that if approaches to managing risks associated with a railway have a particular impact on other railways or railway networks, the best practicable rail safety outcome should be sought. This principle is given effect by the accreditation requirement [clauses 63-66] to have interface co-ordination plans in circumstances where there are safety interfaces between rail transport operators and/or other parties. If there is non-compliance with the requirement, the Rail Safety Regulator may direct applicants for accreditation (or variations of accreditation) to coordinate their applications and cooperate with each other with a view to getting the best safety outcome [clause 36]. The Rail Safety Regulator may also take action against either of the rail transport operators for failing to meet the prescribed requirements for interface co-ordination plans and safety management plans [clauses 69 and 59, respectively].
- *Principle of transparency and consistency* which provides that rail regulatory decision making processes should be timely, transparent and nationally consistent. Achieving consistency requires a common interpretation of legislative requirements and a coordination of decision making processes. Nationally approved guidelines to support common interpretation by regulators and participants in the rail industry is provided for in clause 219. Coordination of decision making processes between State and Territory Rail Safety Regulators is provided for in clause 37, which requires Rail Safety Regulators to make decisions having regard to nationally approved guidelines that will address such matters as decision-making processes and timeframes on accreditation applications affecting more than one jurisdiction, the manner of consultation between corresponding Rail Safety Regulators, and recording and notifying decisions and reasons for decisions in such cases. Rail Safety Regulators are required to give reasons for their decisions and to make them in a timely fashion [clause 38].
- *Principle of participation, consultation and involvement* which provides that if people and organisations share responsibility for rail safety they should participate and be involved in the management of risks associated with rail operations. The principle is given effect by provisions such as that which requires rail transport operators to consult with rail safety workers during the development, implementation and maintenance of their SMS [clause 59(2)].
- *Principle of proportionate, consistent and fair enforcement* which states that all enforcement action should be proportionate to the seriousness of the non-compliance; a consistent approach should be undertaken in similar situations or circumstances in order to achieve consistent outcomes; and all compliance and enforcement activities should be undertaken with impartiality, balance and integrity. Part 5 of the Bill provides a range of escalating administrative sanction and enforcement options which can be utilised at the discretion of the regulator to apply the most suitable motivator or deterrent. Checks and balances on the use of these powers are provided for in Part 5.

In relation to this latter principle, it is important to note that all stakeholders strongly support the view that a considered and balanced approach to compliance and enforcement, rather than a punitive approach, is required to maintain a cooperative and collaborative relationship between the regulator and the regulated. The presence of cooperative and collaborative relationships between parties (including the regulator and the regulated) is widely acknowledged as being critical to the establishment and maintenance of a safety culture and effective regulation under a co-regulatory regime. It is intended that the Rail Safety Regulator will, in undertaking its functions, rely primarily on a cooperative approach to achieving compliance through education, information dissemination and instructive warnings with the threat of enforcement action remaining so far as is possible, in the background.

It is intended that enforcement powers and sanctions will be applied in circumstances where the regulated remains inactive, uncooperative and or defiant in respect to addressing a safety concern. The over-riding principle is one of making a proportionate response to a detected form of non-compliance with the Act or the regulations. It should be acknowledged that in certain circumstances (e.g. repeat offender) a proportionate response may mean the direct issue of enforcement action at the more punitive end of the hierarchy. If such a response is inconsistent with the regulators stated compliance and enforcement policy, and is fair in light of the circumstances, then this would represent an appropriate use of the regulators compliance and enforcement powers. The powers and sanctions included in the Bill make proportionate responses feasible if and when needed.

The WA Bill includes heads of power for the making of regulations that will prescribe necessary requirements, including, for example:

- The railways and classes of railways to which the Bill does not apply
- The information that must be contained in an application for accreditation
- The form of a notice of accreditation and information that must be specified in the notice
- The form and requirements for safety management systems.

The WA Bill and regulations will also be supported by national compliance codes that will address such matters as:

- Medical fitness assessments for Rail Safety Workers

The WA Bill will also be supported by national guidelines that will address such matters as:

- What an applicant for accreditation must demonstrate
- Management of change
- Safety Management Systems
- Fatigue Management Programme
- Management of Risk / justified decision making (SFAIRP)
- Disclosure of information by Regulators
- Business rules to give effect to 'Uniform Administration'
- Recognition of industry developed Codes and Standards
- Compliance and Enforcement.

The package of reforms that is being developed and delivered is to provide for a nationally consistent legislative framework inclusive of these subordinate instruments.

Western Australian provisions

The WA Bill has been prepared based on the Australian Transport Council approved (ATC) National Transport Commission (NTC) Model Bill, which is a national model law that is intended to provide the basis for nationally consistent rail safety laws. The Model Consolidated Rail Safety Bill December 2007 can be found at <http://www.ntc.gov.au/viewpage.aspx?documentid=1667>.

The Model Bill provided model legislative provisions for implementation, with any necessary adaptations, in each State and Territory. The WA Bill variations to the Model Bill can be summarised into four groups:

(1) Conditions of the WA Ministerial vote and/or have been agree by the ATC/NTC

WA had concerns that the Model Bill could result in a reduction in the level of safety. Consequently, in order for the Office of Rail Safety to continue to have sufficient power to ensure safety, the WA vote on the Model Bill at ATC was subject to the WA Government retaining a number of provisions in its current *Rail Safety Act 1998* (RSA).

The following summarises the model legislation changes that were conditions of the WA Ministerial vote and/or have been agreed by the ATC/NTC:

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| Clause 3 | Terms – new terms added to include definition of ‘accreditation’ and ‘investigator’. |
| Clause 5 | Railways to which Act does not apply – allows for the exemption of the BHP Billiton Pilbarra railways. |
| Clause 43 | Rail Safety Accreditation Account – establishes a trust account for all fees and charges collected and all costs associated with administering the Act. |
| Clause 44 | Periodic Returns – as currently defined in the <i>Rail Safety Act 1998</i> and prescribed under the <i>Rail Safety Regulations 1999</i> . |
| Clause 77 | Assessment of competence – although consistent with the Model Bill, WA has opted for wording that allows for a more practical approach. The NTC has listed the issue for post implementation maintenance process. |
| Clause 122 | Temporary closing of railway crossings, bridges, etc. – is generally consistent with the Model Bill. However, WA opted for wording which allowed for a more flexible outcome to the Model Bill as this may drive a higher regulatory burden than intended and it has been suggested this be considered for the post implementation maintenance process of the Model Bill. |
| Clause 123 | Restoring Rail Infrastructure and rolling stock etc. to original condition after action has been undertaken – places responsibility for this obligation on the Office of Rail Safety rather than on the individual rail safety officer. |
| Clauses 127-177 | Part 6 Investigations – 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 <i>Rail Safety Act 1998</i> and also incorporates many of the best practice features used by the Australian Transport Safety Bureau. |
| Clause 135 | Installation of safety or protective devices – a provision similar to s.28 of the <i>Rail Safety Act 1998</i> and has been inserted into Part 6 of the WA Bill. |

(2) Local variations

Local variation provisions as provided for by the Model Bill to enable conformity with local legal requirements, legislative drafting practice and considered to be administrative in nature. The necessity for adding these clauses is described in each clause note below.

The local variations provisions that WA has amended in the WA Bill are:

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| Clause 8 | Relationship to <i>Government Railways Act 1904</i> – explains the relationship of the new Act to the existing <i>Government Railways Act 1904</i> . |
| Clauses 15 & 18 | Rail Safety Regulator’s Delegation – have been varied to enable the appointment and designation of Rail Safety Regulator. The Regulator is independent of direction from the Act Minister or Agency Director General in his or her powers to carry out the Act and power to appoint rail safety officers and delegation of powers (other than the powers to delegate). |
| Clause 20 | Designation of departmental officer as a rail safety officer – have been varied to enable the appointment of these officers as a rail safety officer. |

Clause 21	Use of other government staff and appointment of other government staff as rail safety officers – has been added to enable the appointment of these staff as a rail safety officer.
Clauses 63-70	Interface co-ordination plans – 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 NTC 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 co-ordination 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.
Clause 189	Offences by bodies corporate, partnerships, associations and employees – has been amended to maintain an onus of proof to establish the nexus between the offence and the director or manager remains before liabilities are passed to corporate officers.
Clause 217	Immunity from tortious liability – 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.
Clause 229	Repeals - provides that the <i>Rail Safety Act 1998</i> and the <i>Rail Safety Regulations 1999</i> are repealed.

The local variation provisions in the Model Bill that WA did not include are:

- **Examples (cl.9)** – it is not the usual practice in WA to have examples incorporated in legislation.
- **Notes (cl.10)** – it is not the usual practice in WA to have notes incorporated in legislation.
- **Proceedings for offences (cl.120)** – this provision related to indictable offences, which are not relevant to WA legislation.
- **Infringements notices (cls.138-139)** – in WA, this division is unnecessary as infringement notices can be dealt with under the *Criminal Procedure Act 2004* Part 2.
- **Fines (cl.142)** – this clause as not required as it related to penalties. The WA Bill deals with penalties in individual clauses.
- **Indemnity of persons authorised by rail Safety Regulator and rail safety officers (cl.151)** – replaced in the WA Bill by clause 127 “immunity from tortious liability” as a result of local legislative practices.

(3) Non-core provisions

Some provisions of the Model Bill were classified as ‘non-core’ where implementation is not essential for nationally consistent rail safety outcomes but is considered valuable and desirable for inclusion in best practice.

The non-core provisions that WA has amended in the WA Bill are:

Clause 184	Authority to take proceedings – are under the sole responsibility of the Rail Safety Regulator.
Clause 185	Vicarious responsibility – provides that a body corporate as employer is responsible for the conduct of an employee, director or agent that contravenes the Act unless the employer can establish that the employer took all reasonable actions and exercised due diligence to prevent the conduct.
Clauses 201-204	Court based sanctions (Part 8, Division 6) – contain a number of variations but maintain the general intent of the Model Bill.

Clauses 205-214 Undertakings (Part 8, Division 7) – contain a number of variations but maintain the general intent of the Model Bill. This clause replaces non-core clauses 145 and 146 of the Model Bill.

The non-core provisions in the Model Bill that WA did not include are:

- **Multiple offences (cl.127)** – this was considered unnecessary by as it provided the ability for someone to be convicted of multiple offences relating to different parts of the rail infrastructure. This ability already exists and the clause was considered redundant.
- **Supervisory orders (cl.145)** – the clause was replaced in the WA Bill with Undertakings in Part 8 Division 7. This was to conform with existing legislation under the *Occupational Safety and Health Act 1984*.

(4) Other changes

Deleted clauses are provisions which have been omitted from the Model Bill as it not the usual practice in WA legislation.

The provisions in the Model Bill that WA did not include are:

- **Purpose (cl.1)** – it is not the usual practice in WA legislation to include purpose clauses in Bills.
- **Objects of the Act (cl.3)** – it not the usual practice in WA legislation to include objects clauses in Bills.
- **Waiver of fees (cl.42)** – this provision was determined to be unnecessary as a result of the provisions of the *Interpretation Act 1984* clause 45.

Clause Notes

The following are the clause notes for the WA Rail Safety Bill 2009.

Part 1

Preliminary

Part 1 of the Bill provides a commencement provision and interpretative provisions, including definitions.

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| Clause 1 | Short Title

Sets out the short title of the Act once proclaimed. |
| Clause 2 | Commencement

Provides for the Act to come into operation on a day or days to be proclaimed. |
| Clause 3 | Terms used

Defines terms used in the Bill; for example 'accredited person', 'rail infrastructure', 'rail infrastructure manager', 'Rail Safety Regulator', 'rail safety work', 'rail safety worker', 'rail transport operator', 'railway', 'railway operations', 'rolling stock', 'rolling stock operator', 'safety management system'. |
| Clause 4 | Declaration of substance to be a drug

Provides that the Minister may by order published in the Government Gazette declare any substance to be a drug for the purposes of the Act. |
| Clause 5 | Railways to which this Act does not apply

Sets out the types of railway to which this Bill does not apply. These are railways in underground mines, slipways, railways used only to guide cranes, aerial cable operated systems and any other railways, or classes of railway that are prescribed by the regulations. These are railways that are covered by specific forms of safety regulation, or whose operation is judged to pose no significant risk. |
| Clause 6 | The concept of ensuring safety

Explains the nature of the duty to ensure safety under the Bill.

Sub-clause (1) provides that a duty imposed on a person under the Bill or the regulations to ensure, so far as is reasonably practicable, safety, requires the person to: <ul style="list-style-type: none">• Eliminate risks to safety so far as is reasonably practicable• If it is not reasonably practicable to eliminate risks to safety, to reduce those risks so far as is reasonably practicable.
Sub-clause (2) sets out certain matters to which regard must be had in determining what is, or what at a particular time was, reasonably practicable in relation to ensuring safety.

The concept of ensuring safety so far as is reasonably practicable is consistent with the concept of ensuring safety in Occupational Health and Safety legislation. |
| Clause 7 | Rail safety work

Sets out the classes of work carried out by rail safety workers which are taken to be rail safety work for the purposes of the Bill, including any work that is prescribed by the regulations to be rail safety work. It also specifies activities that are not to be regarded as rail safety work, including any work that is prescribed by the regulations not to be rail safety work. |

- Clause 8** **Relationship to *Government Railways Act 1904***
Explains the relationship of the new Act to the existing *Government Railways Act 1904*. The relationship is to be the same as that of the Act to be repealed. That is where there is conflict or inconsistency between the two Acts, the new act is to prevail.
- Clause 9** **State or other jurisdiction bound by the Act**
Provides that the Bill binds the Crown

Part 2

Relationship to Occupational Safety and Health Act 1984

The *Occupational Safety and Health Act 1984* is the main Act that deals with the health, safety and welfare of people at work, including people at work in railway operations. Part 2 of the Bill outlines how the Bill relates to occupational health and safety legislation and creates additional protections, rights and obligations necessary because of the special risks associated with railway operations. This Part makes it clear that the Bill provides for an increase in the standard of protection of people at work in railway operations and never results in lesser protection that the occupational health and safety legislation would otherwise provide.

- Clause 10** **Act adds to protection provided by *Occupation Safety and Health Act 1984***
Provides that if a provision of the occupational health and safety legislation applies to railway operations, that provision continues to apply, and must be observed in addition to this Bill and the regulations made under this Bill.
- Clause 11** ***Occupational Safety and Health Act 1984* prevails**
Provides that if a provision of this Bill or the regulations made under this Bill is inconsistent with a provision in the occupational health and safety legislation, then the provision in the occupational health and safety legislation prevails to the extent of any inconsistency.
- Clause 12** **Compliance with this Act is no defence to prosecution under the *Occupational Safety and Health Act 1984***
Provides that if a person complies with this Bill or regulations made under this Bill it is *not* a defence in itself against any proceedings for an offence against the occupational health and safety legislation.
- Clause 13** **Relationship between duties under this Act and *Occupational Safety and Health Act 1984***
Provides for evidence of a relevant contravention of this Bill or the regulations made under this Bill to be admissible in any proceedings for an offence against the occupational health and safety legislation.
- Clause 14** **No double jeopardy**
Prevents a person who commits an offence under this Bill or the regulations made under this Bill and under the occupational health and safety legislation from being punished twice in respect of the same offence.

Part 3

Administration

Division 1 – The Rail Safety Regulator

Clause 15 Rail Safety Regulator

This administrative provision details that a Director Rail Safety is to be appointed and that the appointed person is the Rail Safety Regulator. It also provides that in performing his or her duties under this Act, the Rail Safety Regulator is not subject to control by the Minister, the Chief Executive Officer or any other person.

Clause 16 Functions of the Rail Safety Regulator

Sets out the functions of the Rail Safety Regulator including –

- To administer, audit and review the accreditation regime under this Bill
- To work with parties involved in railway operations to improve rail safety in this jurisdiction and nationally
- To provide information to corresponding Rail Safety Regulators
- To collect and publish information relating to rail safety
- To provide or facilitate the provision or advice, education and training in relation to rail safety
- To monitor, investigate and enforce compliance with this Bill.

Clause 17 Information to be included in annual report

Sets out the information to be included in annual reports by the Rail Safety Regulator.

Clause 18 Delegation

Enables the Rail Safety Regulator to delegate any of his or her function under this Bill or under the regulations to a rail safety officer or to any other person.

Clause 19 Rail Safety Regulator may exercise functions of rail safety officers

Enables the Rail Safety Regulator to exercise any function conferred on a rail safety officer under this Bill or the regulations.

Division 2 – Rail Safety Officers

Clause 20. Designation of departmental officer as a rail safety officer

In addition to clause 22, which enables a Rail Safety Regulator to appoint a person other than a public service officer as a rail safety officer, this clause enables the Chief Executive Officer to appoint a public service officer from his or her department as a rail safety officer if they have the appropriate qualifications.

Clause 21. Use of other government staff and appointment of other government staff as rail safety officers

This clause was added to enables the Chief Executive Officer, by agreement with another employer, to make use of the services of an officer or employee of another government department or agency as a rail safety officer.

Providing a suitable agreement exists, the Rail Safety Regulator may appoint such an officer or employee as a rail safety officer, either full time or part time, subject to similar conditions as those set out in clause 20 for a departmental officer.

An example of when this clause may be used is that the Rail Safety Regulator may appoint a WorkSafe investigator with experience in a particular area to assist an investigation.

Clause 22. Appointment of rail safety officers

Enables the Rail Safety Regulator to appoint a person who holds appropriate qualifications or has appropriate experience to perform the functions of a rail safety officer under this Bill, and also enables the Rail Safety Regulator to appoint a person from a class of persons who hold the appropriate qualifications and experience as rail safety officers under this Bill. This appointment may be subject to conditions in sub-clause (3).

Clause 23. Reciprocal powers of rail safety officers

Provides for the making of agreements between responsible Ministers of two or more jurisdictions to allow rail safety officers appointed in any one of those jurisdictions to exercise powers under the corresponding rail safety laws of the other jurisdiction or jurisdictions.

Clause 24. Identification cards for rail safety officers

Provides that the Rail Safety Regulator must issue a rail safety officer with an identification card.

Clause 25. Rail safety officer must not exercise functions without identification card

Provides that a rail safety officer must not exercise powers conferred under this Bill unless an identification card has been issued.

Clause 26. Display and production of identification card

Provides that a rail safety officer exercising a power under this Bill must display his or her identification card if the officer is not wearing an approved uniform or badge or if requested to do so or as soon as practicable after the request is made.

Clause 27. Return of identification cards

Provides that a person who has ceased to be a rail safety officer must return his or her identification card to the Rail Safety Regulator within the period specified by the Rail Safety Regulator.

Part 4

Rail Safety

Division 1 – General Safety Duties

Part 4 Division 1 contains a range of safety duties on rail industry participants that require them to ensure the safety of railway operations. In particular, safety duties are imposed on rail transport operators (infrastructure managers and rolling stock operators), contractors and subcontractors to rail transport operators, and designers, manufacturers and suppliers of things to be used as or in connection with rail infrastructure or rolling stock to ensure, so far as is reasonably practicable, the safety of railway operations.

These safety duties will impose an explicit obligation to conduct railway operations safely, improving the transparency as to what is required by the legislation for all stakeholders. The expression of the required outcome (in the form of a general duty) rather than prescriptively defining how it must be achieved maintains the flexibility for organisations to determine the most cost effective and practical means of compliance.

The Bill indicates that the recommended formulation of the duty is to ensure safety, so far as is reasonably practicable. So Far As Is Reasonably Practicable (SFAIRP) is a qualification on what would otherwise be an absolute duty, requiring the duty holder to guarantee ('ensure') safety. The qualification recognises that safety cannot be guaranteed, and that the pursuit of safety cannot occur regardless of cost. Although expressed in slightly varying forms, all Commonwealth, State and Territory OHS legislation qualifies the general requirement for duty holders in a similar manner.

It should be noted that a drafting note included in the Model Bill (in relation to this clause) clearly indicates that there is expected to be local variations in the formulation of general duties, to ensure that there is consistency with the formulation of general duties included in OHS law and other forms of jurisdictional law that have adopted the use of general duties. This flexibility for local variation of the formulation of the rail safety duties acknowledges that inconsistency between rail safety law and OHS law (within the jurisdiction) is likely to cause conflict and confusion, and that there is little justification for rail transport being subject to a different safety standard (whether this be in perception or in reality) to that which applies to other industries operating within the jurisdiction.

Clause 28. Safety duties of rail transport operators

Imposes a general safety duty on rail transport operators to ensure the safety of their respective railway operations. The standard to which they must do so is 'so far as is reasonably practicable'. The concept of ensuring safety so far as is reasonably practicable is explained in clause 6.

A rail transport operator contravenes this general duty if the operator fails to do any of the particular things set out in sub-clause (3); for example, if the rail transport operator fails to develop and implement, so far as is reasonably practicable, safe systems for the carrying out of the person's railway operations.

Further, a rail infrastructure manager contravenes the general safety duty by failing to do any of the things set out in sub-clause (4), being things which are particular to the role and responsibility of the rail infrastructure manager; for example, by failing to ensure that any installation, modification, design, construction, commissioning, maintenance or decommissioning of rail infrastructure is done in a way that ensures, so far as is reasonably practicable, the safety of railway operations.

A rolling stock operator contravenes the general safety duty if the operator by failing to do any of the things set out in sub-clause (5), being things which are particular to the role and responsibility of the rolling stock operator; for example, by failing to provide or maintain rolling stock that, so far as is reasonably practicable, is safe.

Clause 29. Duties of rail transport operators extend to contractors

Provides that the duties of a rail transport operator under clause 28 are extended to a contractor engaged to do rail safety work and any employees of that contractor. Sub-clause (2) imposes a penalty if the contractor or the contractor's employee does not comply with those duties.

Clause 30. Duties of designers, manufacturers, suppliers etc.

Imposes general duties on other key rail industry participants, such as designers, manufacturers and suppliers, relating to the safety of their activities.

Sub-clause (1) imposes a duty on those who design, commission, manufacture, supply, install or erect any thing and who know, or ought reasonably to know, that the thing is to be used as or in connection with rail infrastructure or rolling stock to ensure, so far as is reasonably practicable, that the thing is safe for its intended purpose, and must ensure the thing has been tested to be safe and any necessary information is provided to ensure the safety of the thing's use.

Sub-clause (2) imposes a duty on those who decommission any rail infrastructure or rolling stock to ensure, so far as is reasonably practicable, that the decommissioning is carried out safely and that any necessary testing or examinations have been carried out to ensure this.

Sub-clause (3) provides the penalties for these offences.

Sub-clause (4) provides that a person will not be guilty of breaching a duty under this clause simply because the person has supplied the thing in the person's capacity as a financier and the person has not acquired any other interest in the thing. In that situation, the duty lies instead on the person from whom the financier acquired the thing.

Division 2 - Accreditation

Part 4 Division 2 outlines the purpose of accreditation under the Bill and the details of the accreditation system. Under the Bill, the purpose of accreditation is to provide assurance to the public that a rail transport operator has demonstrated competence and capacity to manage risks to safety associated with the railway operations for which accreditation has been sought.

The Bill makes it clear that gaining accreditation is no more than a threshold requirement for rail transport operators: a precursor to being permitted to operate. The granting of accreditation indicates that, in the opinion of the Rail Safety Regulator, the rail transport operator has the capacity, competency and systems to carry out the railway operations for which it is seeking accreditation. The granting of accreditation is not a certification of safety. No such warranty could ever be given by a Rail Safety Regulator.

The Bill limits the range of parties to be accredited: only the rail infrastructure manager and the rolling stock operator (collectively referred to as rail transport operators) are required to be accredited. In many Australian jurisdictions this is consistent with current practice, while it will represent a narrowing of the range of accredited parties in some other cases (particularly in New South Wales and South Australia). The logic of the focus on rail transport operators is that infrastructure managers and rolling stock operators should be primarily responsible for demonstrating the competence and capacity of those other parties with whom they contract due to the fact that the accreditation process essentially relates to the operation of whole systems, characterised by multiple, interacting risks that need to be managed in a systemic fashion. Rail transport operators need to be able to demonstrate that their contractors' practices fit with, and form part of the rail transport operators' safety management systems. Both the capacity and competence of the rail transport operator to manage the contractor and the capacity and competence of the contractor to fulfil the safety critical functions which they are proposing to undertake will be assessed.

Clause 31. Purpose of accreditation

Clarifies that the purpose of accreditation is to attest that a rail infrastructure manager or a rolling stock operator has demonstrated to the Rail Safety Regulator the competence and capacity to manage risks to safety associated with their particular railway operations.

Clause 32. Accreditation required for railway operations

Provides that it is an offence if a person carries out any railway operations without being accredited to do so, or without being exempt from the requirement to be accredited, or without doing so on behalf of a rail transport operator who is accredited or exempt. It is also an offence if the rail infrastructure manager or rolling stock operator causes or permits another person to do so; for example, by using a contractor to carry out the railway operations.

Clause 33. Purpose for which accreditation may be granted

Enables accreditation to be granted for parts of railway operations and for specific activities only. It also enables accreditation to be granted for a limited, rather than an indefinite period, but only where the applicant has requested this.

Clause 34. Application for accreditation

Makes provision in relation to applications for accreditation. It provides that rail transport operators may apply to the Rail Safety Regulator for accreditation in respect of their railway operations.

Provisions of this clause:

- Specify the manner and form in which an application for accreditation must be made, and the things which must be included in or accompany an application
- Allow the Rail Safety Regulator to require an applicant to supply further information or verify by declaration information supplied for the purposes of the application.

Clause 35. What applicant for accreditation must demonstrate

Sets out the criteria on which accreditation applications by rail transport operators are to be assessed. It provides that the Rail Safety Regulator must accredit a rail transport operator in respect of their railway operations if the Regulator is satisfied, having regard to guidelines, that the applicant has demonstrated-

- That the applicant is a rail transport operator in relation to the railway operations for which accreditation is sought
- The competence and capacity to manage risks to safety associated with the person's railway operations
- The competency and capacity to implement the proposed safety management system and the financial capacity to meet potential accident liabilities arising from the railway operations
- That the consultation requirements have been met
- That the applicant has complied with any prescribed requirements.

Clause 36. Rail Safety Regulator may direct applicants to coordinate and cooperate in applications

Enables the Rail Safety Regulator to direct rail transport operators to co-ordinate their applications for accreditation to ensure that railway operations are carried out safely. A direction given under this clause may require each rail transport operator to jointly assess risks to safety associated with the interface of their respective railway operations and to determine appropriate controls that will form part of each rail transport operator's safety management system, such that they can demonstrate competence and capacity to carry out their proposed railway operations safely.

Clause 37. Coordination between Rail Safety Regulators

Makes provision for the co-ordination of the determination of applications for accreditation and applications for variations of accreditation or the conditions or restrictions of accreditation where the applicant operates or is applying to operate in two or more jurisdictions.

The Rail Safety Regulator must consult with the Rail Safety Regulator or Rail Safety Regulators in each of the other relevant jurisdictions prior to determining the application with the aim of co-ordinating decision making between each jurisdiction.

The Rail Safety Regulator must also take into account guidelines issued for the purposes of this clause.

The guidelines that are intended to be made for the purpose of this clause will include such matters as the process and timeframe for Rail Safety Regulators to follow in such cases, the manner of consultation between the relevant Rail Safety Regulators, and factors that should be taken into account, and a national register for recording decisions and reasons for decisions, with a view to achieving consistency of decision making. The guidelines will be national guidelines that have been approved by the Australian Transport Council. The objectives of such

guidelines are to facilitate nationally consistent outcomes in decisions on applications to which this clause applies, along with improved transparency and timeliness of decision making on such applications.

If the Rail Safety Regulator does not act consistently with the guidelines, the Rail Safety Regulator must provide the applicant with reasons for not doing so and the applicant will have a right to seek review of the determination.

Clause 38. Determination of applications

Sets out requirements on the Rail Safety Regulator to determine an application and to provide a notice containing the prescribed information to the applicant of the determination. The determination must be made within 6 months of the Rail Safety Regulator receiving the application, unless further information is required by the Rail Safety Regulator, or unless the Rail Safety Regulator extends the time for determination of the application.

If accreditation is granted, the notice of accreditation must specify the scope and nature of the railway operations for which accreditation is being granted, the manner in which they are to be carried out and any conditions imposed by the Rail Safety Regulator on the grant of accreditation.

A notice refusing an application or imposing conditions must include reasons for the Rail Safety Regulator's decision and must be accompanied by a notice containing information about the right of review under Part 7.

Clause 39. Prescribed conditions and restrictions

Makes provision for an accreditation to be subject to any conditions or restrictions prescribed by the regulations for the purpose of this clause.

Clause 40. Penalty for breach of condition or restriction

Provides that an accredited person must not fail to comply with a condition or restriction of accreditation.

Clause 41. Annual Fees

Provides for an accredited person to pay the annual accreditation fee prescribed by regulations. Also provides for the payment of a fee for a variation of accreditation and allows the imposition of different fees for different kinds of accreditation.

Clause 42. Late payment of fees

Provides for additional fees for late payment of accreditation fees to be imposed by the regulations.

Clause 43. Rail Safety Accreditation Account

Continues the Rail Safety Accreditation Account established under the *Rail Safety Act 1998*. This account will be credited with all fees and charges collected under this Bill and charged with the costs of administering the Bill.

It is an agency special purpose account under the *Financial Management Act 2006*

Clause 44. Periodic returns

Continues the current WA requirement that accredited persons must submit periodic returns of information as specified in regulations. It is intended that the regulations will specify that returns can be required to provide information such as the number of train kilometres travelled and the number of drug/alcohol tests undertaken and/or failed.

Should an accredited person fail to submit the return and fail to respond to a notice in writing to submit the information, then 14 days after the notice is issued, accreditation is suspended

unless the Rail Safety Regulator determines otherwise.

Clause 45. Surrender of accreditation

Provides for surrender of accreditation, in accordance with regulations.

Clause 46. Revocation or suspension of accreditation

Makes provision for Rail Safety Regulator to suspend or revoke accreditation, or impose or vary conditions of accreditation, where the regulator considers the accredited person:

- Is no longer able to demonstrate to the satisfaction of the Rail Safety Regulator the matters referred to in clause 35 or to satisfy the conditions of accreditation
- Is not managing the rail infrastructure or operating rolling stock in relation to any rail infrastructure to which the accreditation relates and has not done so for at least the preceding 12 months
- Has contravened this Bill or the regulations.

Sub-clause (3) provides that the Rail Safety Regulator may, if he or she revokes the accreditation, declare that the accredited person is disqualified from applying again for accreditation for a specified period.

Sub clause (4) provides that the Rail Safety Regulator may, in writing, withdraw a suspension.

However, sub-clause (5) provides that before suspending or revoking accreditation, or imposing or varying the conditions of accreditation under this clause, the Rail Safety Regulator must give the accredited person notice in writing that the Rail Safety Regulator is considering taking such action, must allow the accredited person at least 28 days to show cause why that action should not be taken, and must also consider any submission that the accredited person makes in this regard.

Sub-clause (6) provides that the Rail Safety Regulator must include in the written notice of suspension or revocation the reason for the suspension or revocation and information about the right of review under Part 7.

Sub-clause (7) provides that if the accredited person is accredited in another jurisdiction, the Rail Safety Regulator must give notice of the suspension or revocation to the corresponding Rail Safety Regulator in that jurisdiction.

Clause 47.

Immediate suspension of accreditation

Provides for the immediate suspension of an accreditation, or part of an accreditation, for up to six weeks, where there is an immediate and serious risk to safety.

Sub-clause (2) enables the Rail Safety Regulator to reduce the period of suspension, or to extend the period of suspension by up to a further 6 weeks. Sub-clause (3) provides that the Rail Safety Regulator may withdraw a suspension.

If the Rail Safety Regulator proposes to extend the period of suspension, sub-clause (5) requires the Rail Safety Regulator to give the person whose accreditation has been suspended notice in writing of this intention, as well as the opportunity to show why the suspension should not be extended. The Rail Safety Regulator must also, before making a decision to extend the suspension, consider any submission that the person makes.

- Clause 48. Keeping and making available documents for public inspection**
Provides that a rail transport operator must ensure that the current notice of accreditation or exemption or registration and any other document prescribed by regulations for the purpose of this clause are available for inspection.
- Clause 49. Application for variation of accreditation**
Makes provision for the accredited person to apply for a variation of accreditation.
Provisions of this clause:
- Address the manner and form in which an application for variation of accreditation must be made, and the information which must accompany an application and
 - Allow the Rail Safety Regulator to require an applicant to supply further information or verify by declaration information supplied for the purposes of the application.
- Clause 50. Application that relates to cooperative railway operations or operations in another jurisdiction**
Provides that clause 36 (requiring two or more rail transport operators to co-ordinate their applications to ensure interfaces between their respective railway operations are managed safely) and clause 37 (requiring Rail Safety Regulators to co-ordinate their decision where an applicant is either accredited, or applying for accreditation, in two or more jurisdictions) apply to an application for variation in the same way they apply to an application for accreditation.
- Clause 51. Determination of application for variation**
Provides that the Rail Safety Regulator must give an applicant for a variation notice in writing that the application has been granted or refused within 6 months of receiving the application, unless further information is required by the Rail Safety Regulator, or unless the Rail Safety Regulator extends the time for determination of the application.

If the application for a variation is granted, the notice must also include prescribed details of the applicant (such as the name and registered address of the applicant), information on how the variation affects the scope and nature and manner of carrying out the applicant's railway operations, any conditions or restrictions, and any other prescribed information.

If the application for a variation is refused, or is granted subject to conditions or restrictions, the notice must also include the reasons for doing so, and information about the right of review under Part 7.
- Clause 52. Prescribed conditions and restrictions**
Provides that a variation of an accreditation is subject to any conditions and restrictions that are prescribed by the regulations to be applicable to the accreditation as varied.
- Clause 53. Rail Safety Regulator may direct amendment of a safety management system**
Provides that the Rail Safety Regulator may direct a rail transport operator to amend the person's safety management system within a specified period. The direction must be in writing and must state the reasons why the Rail Safety Regulator considers the amendment is necessary. It is an offence to fail to comply with the direction.
- Clause 54. Variation of conditions and restrictions**
Enables an accredited person to apply for a variation of a condition or restriction to which the person's accreditation is subject, other than a condition or restriction that is prescribed by the regulations to be applicable to the person's accreditation. Such an application must be made in the same manner as an application for variation of accreditation under clause 49 and the Rail Safety Regulator must decide the application and provide notice to the applicant of the decision

as far as possible in the same manner as the requirements for the determination of an application for variation of accreditation.

If the Rail Safety Regulator refuses the application, the notice to the applicant must include the reasons for the refusal and information about the right of review under Part 7.

Clause 55. Rail Safety Regulator may make changes to conditions or restrictions

Provides that the Rail Safety Regulator may, of his or her own volition, vary or revoke a condition or restriction to which an accreditation is subject, other than a condition or restriction that is prescribed by the regulations to be applicable to the accreditation. Unless the Rail Safety Regulator considers the immediate variation or revocation is necessary in the interests of safety, the Rail Safety Regulator must give prior notice to the accredited person and allow the person an opportunity to make representations to the Regulator.

Reasons for making a decision to vary or revoke the condition or restriction must be given to the accredited person, along with information about the right to review under Part 7.

Clause 56. Accreditation cannot be transferred or assigned

Provides that accreditation is personal to the person who holds it and is not capable of being transferred or assigned.

Clause 57. Sale or transfer of railway operations by accredited person

Provides that if railway operations are to be sold or transferred by an accredited person, the Rail Safety Regulator may exercise his or her discretion, when considering an application for accreditation from the proposed transferee, to waive compliance with some or all of the accreditation requirements, provided that the proposed transferee demonstrates the requisite competence and capacity. The waiver of compliance may however be subject to such conditions and restrictions as the Regulator may impose.

Division 3 – Private Sidings

Clause 58 Exemption from accreditation

Provides for exemptions from accreditation for private siding railway operations.

Sub-clause (1) provides that a rail infrastructure manager of a private siding is not required to be accredited in respect of the private siding.

However, sub-clause (2) requires the rail infrastructure manager of any private siding that is connected to a railway or siding of an accredited person to register the private siding with the Rail Safety Regulator, comply with any conditions or restrictions imposed by the Rail Safety Regulator, to have and implement an interface co-ordination plan with the accredited person, and to notify the accredited person of any matters that may give rise to safety risks on the accredited person's railway. It is an offence if the rail infrastructure manager of the private siding fails to comply with any of these requirements.

Sub-clause (4) also provides that the Rail Safety Regulator must issue a notice of registration to the rail infrastructure manager of the private siding.

Sub-clause (5) provides that regulations may require the Rail Safety Regulator to make details of private siding registrations available for public inspection.

Division 4 – Safety Management

Clause 59. Safety management system

Sub-clause (1) provides that a rail transport operator must have a safety management system

for their operations that is in the approved form and complies with the prescribed relevant requirements and the prescribed risk management principles, methods and procedures.

The Bill itself prescribes that rail transport operator's safety management system must include such matters as:

- A security management plan
- An emergency plan
- A health & fitness management programme
- An alcohol & drug management programme
- A fatigue management plan.

Regulations that will be made under this clause will prescribe additional detail on the content of safety management systems. The regulations will, for example, specify that the rail transport operator's SMS must include a management of change process.

The safety management system must identify and assess risks to safety and specify controls to manage those safety risks.

Importantly, there is an explicit requirement that the safety management system include procedures for reviewing and revising the adequacy of the specified controls.

Sub-clause (2) sets out who the rail transport operator must consult with before establishing, reviewing or varying the safety management system.

Sub-clause (3) provides that where there is a safety interface between the railway operations two rail transport operators who have an interface co-ordination plan to manage the safety risks associated with that interface, and if both operator's safety management systems, considered as one, meet the requirements for a safety management system set out in this clause, then the safety management system of either of the operators is also taken to comply with the requirements.

Sub-clause (4) requires the safety management system to be documented and to specify who is responsible for its implementation.

Clause 60. Compliance with safety management system

Provides that a rail transport operator must implement and comply with the safety management system. It is a reasonable excuse to fail to comply with the safety management system if the rail transport operator complies with it to the extent practicable while complying with a condition or restriction of accreditation, or demonstrates that compliance with the safety management system would have posed an unacceptable safety risk.

Clause 61. Review of safety management system

Provides that a rail transport operator must review the safety management system in accordance with the regulations at least once each year or at such other time as is agreed with the Rail Safety Regulator.

Clause 62. Safety performance reports

Provides that a rail transport operator must give the Rail Safety Regulator a safety performance report each calendar year, or within such other period as is agreed with the Rail Safety Regulator. This clause also specifies the required form and content of the safety performance report.

Interface Coordination

The following clauses, 63 to 70, deal with the requirement that the persons responsible for rail infrastructure, rail transport operations and road infrastructure must make agreements as to the management of safety where their infrastructures cross or run in such close proximity that risks to safety may arise. The Bill provides that each

party must assess the safety risks, determine measures to manage the risks where that is necessary and that the parties need to make formal "interface agreements" as to the management of the risks.

Clause 69 provides that where two parties cannot agree on safety management measures, the Rail Safety Regulator may make a direction.

Clause 70 requires both rail transport operators and road managers to maintain a register of interface agreements it has entered into and of directions given by the Rail Safety Regulator regarding those interface agreements.

Clause 63. Interface coordination — rail transport operators

Provides that a rail transport operator must identify, so far as is reasonably practicable, potential risks to the safety of the rail transport operator's railway operations posed by the railway operations carried out for or on behalf of any other rail transport operator.

In circumstances where risks to safety are identified, the two or more rail transport operators with the safety interface must develop and implement interface coordination plans to minimize or eliminate identified risks to safety.

Where none of the rail transport operators involved are rail infrastructure managers it is not necessary that they make a formal interface agreement unless the regulations provide otherwise.

Clause 64. Interface coordination — rail infrastructure manager — public roads

Provides that a rail transport operator must identify, so far as is reasonably practicable, potential risks to the safety of the rail transport operator's railway operations posed by any rail or road crossing that is part of a public road infrastructure.

In circumstances where risks to safety are identified the rail infrastructure manager and the public road manager (notionally Main Roads WA or a local government) must develop and implement interface coordination plans to minimize or eliminate identified risks to safety.

Clause 65. Interface coordination — rail infrastructure manager — roads other than public roads

Provides that a rail infrastructure manager must identify, so far as is reasonably practicable, potential risks to the safety of the rail infrastructure manager's railway operations posed by any rail or road crossing that is part of a non-public road infrastructure.

In circumstances where risks to safety are identified and the rail infrastructure manager is of the opinion that the risks must be managed in conjunction with the road manager, the rail infrastructure manager must give written notice of that opinion to the road manager and must determine measures to manage those risks as far as is reasonably practicable and must enter into an interface agreement with the non-public road manager.

The rail infrastructure manager, if of the opinion that it is not necessary to manage the risks in conjunction with the road manager, must keep a written record of that opinion.

Clause 66. Interface coordination — road manager — public roads and other roads

Provides in sub-clause (1) that a road manager of a public road must identify, so far as is reasonably practicable, potential risks to safety posed by the existence or use of any road or rail crossing that is part of the road infrastructure and must determine measures to manage those risks and seek to enter an interface agreement with the rail infrastructure manager.

Sub-clause (2) provides that any road manager of a non-public road given a written notice by a rail infrastructure manager that certain risks need to be managed, must identify and assess as far as is reasonably practicable those risks and determine measures to manage those risks and must seek to enter into an interface agreement with the rail infrastructure manager.

Sub-clause (3) provides that road managers are not authorised or required by this clause to act inconsistently with any of its obligations or powers as provided by any other Act.

Clause 67. Identification and assessment of risks

Provides that a rail transport operator, rail infrastructure manager or road manager required by clauses 63 to 66 to identify and assess risks may do so by:

- Identifying and assessing the risks itself
- Doing so jointly with other persons, or
- Adopting the identifications and assessments made by the other person.

Clause 68. Scope of interface agreements

Provides that a safety interface agreement may be made between

- Two or more rail transport operators or rail infrastructure managers or
- Between one or more rail transport operators or rail infrastructure managers and one or more road managers.

Any number of risks may form the basis of an infrastructure agreement between rail transport operators or between rail transport operators and road managers.

Provides that interface agreements may relate to any matter by applying, adopting or incorporating any other matter contained in any document and that a rail safety interface agreement may consist of two or more documents.

Clause 69. Rail Safety Regulator may give directions

Provides that if a person is unreasonably refusing or failing to enter an interface agreement or is unreasonably delaying negotiation of an interface agreement the Rail Safety Regulator may issue a notice that:

- Warns of his or her power to make a direction
- Includes a copy of this clause of the Act and
- May include suggested content for an interface agreement

The Rail Safety Regulator may request information of either party that may be required to make a determination.

If the Rail Safety Regulator has issued such a notice and an interface agreement has not been made by the specified date, the Rail Safety Regulator may:

- Determine the arrangements of an interface agreement,
- Direct either or all parties to give effect to the determination, and
- Specify a date by which the direction must be complied with.

Such a direction must be in writing and set out the determined arrangements.

Clause 70. Register of interface agreements

Provides that rail transport operators and road managers must keep a register of interface agreements to which they are a party and arrangements determined by the Rail Safety Regulator under clause 69 that are applicable to their rail or road operations.

Clause 71. Security management plan

Provides that a rail transport operator must have a security management plan and specifies the required content of a security management plan.

Clause 72. Emergency management plan

Provides that a rail transport operator must have an emergency management plan and specifies the required form and content of an emergency management plan. It further provides that the

rail transport operator must ensure that appropriate response measures are implemented in an emergency situation.

Clause 73. Health and fitness management programme

Provides that a rail transport operator must have and implement a health and fitness programme that complies with prescribed requirements for rail safety workers who carry out rail safety work for the operator.

Clause 74. Alcohol and drug management programme

Provides that a rail transport operator must prepare and implement an alcohol and drug management programme for rail safety workers that comply with this Bill and the regulations.

Clause 75. Testing for presence of alcohol or drugs

Provides that the Rail Safety Regulator may arrange with a rail transport operator for the testing, in accordance with the regulations, of any person on duty for the purpose of carrying out rail safety work for the presence of alcohol or any other drug.

Clause 76. Fatigue management programme

Provides that a rail transport operator must prepare and implement a programme for the management of fatigue of rail safety workers in accordance with the prescribed requirements.

Clause 77. Assessment of competence

Provides that a rail transport operator must ensure whether its rail safety workers are competent to carry out rail safety work.

To do so, the rail transport operator is required to ascertain that its workers hold the required units of competency and qualification for rail safety work recognised under the regulations.

The rail transport operator is entitled to rely on a certificate that purports to certify that the rail safety worker holds certain qualifications, in the absence of proof that the rail safety worker does not hold such qualifications.

The rail transport operator may at any time require a rail safety worker to undergo further training.

A rail transport operator must maintain records of the competence of rail safety workers in accordance with regulations.

Clause 78. Identification of rail safety workers

Provides that a rail transport operator must ensure that each of their rail safety workers has a form of identification that is sufficient to enable the Rail Safety Regulator to check the type of competence and training they have for the rail safety work they are performing and that the rail safety worker must provide this identification on request.

Clause 79. Duties of rail safety workers

Sets out the safety duties of rail safety workers.

Sub-clause (1) requires a rail safety worker, when carrying out rail safety work, to take reasonable care for his or her own safety and for the safety of other persons who may be affected by the worker's acts or omissions and to co-operate with the rail transport operator to enable the rail transport operator to comply with applicable rail safety requirements.

Sub-clause (2) provides that a rail safety worker carrying out rail safety work must not intentionally or recklessly interfere with or misuse anything provided to him or her by the rail transport operator in the interests of safety or under the Bill or Regulations.

Sub-clause (3) provides that a rail safety worker, when carrying out rail safety work, must not

wilfully or recklessly place the safety of another person on or in the immediate vicinity of rail infrastructure at risk.

Sub clause (4) sets out the penalties for offences against this clause.

Sub-clause (5) provides that for the purposes of determining whether a rail safety worker failed to take reasonable care, regard must be had to what the rail safety worker knew about the relevant circumstances.

Clause 80. Contractors to comply with safety management system

Sets out the obligations of contractors who undertake railway operations on or in relation to rail infrastructure or rolling stock of rail transport operators to comply with the safety management systems of the rail transport operators to the extent that the safety management systems apply to the contractors' railway operations.

Division 5 – Information about Rail Safety

Clause 81. Rail transport operators to provide information

Empowers the Rail Safety Regulator to require a rail transport operator to provide such information about safety related matters, including financial and insurance arrangements, as is required by the Rail Safety Regulator. It is an offence to fail to comply with this requirement.

Division 6 – Investigating and reporting by rail transport operators

Clause 82. Notification of certain occurrences

Sub-clause (1) requires a rail transport operator to inform the Rail Safety Regulator if any accident or incident occurs that is of a kind defined as a notifiable occurrence.

Sub-clause (2) enables two or more rail transport operators to jointly inform the Rail Safety Regulator of a notifiable occurrence that affects them both or all.

Sub-clause (3) empowers the Rail Safety Regulator to give a notice to a rail transport operator requiring information to be provided by the rail transport operator to the Regulator or to another public authority (for instance, an Occupational Health and Safety authority) on any other accident or incident that could affect the safety of the railway operations.

Clause 83. Investigation of notifiable occurrences

Empowers the Rail Safety Regulator, by notice to a rail transport operator, to require the operator to conduct an internal investigation into any notifiable occurrence or any other accident or incident that could endanger the safety of the railway operations. This provision will often be triggered by a report of a notifiable occurrence or other occurrence under clause 82, or following a Rail Safety Regulator audit or inspection under clause 84.

The rail transport operator's investigation must be carried out in a manner approved by the rail transport operator.

The rail transport operator must submit a report within the time specified by the Rail Safety Regulator.

Division 7 – Audit by Rail Safety Regulator

Clause 84. Audit of railway operations of rail transport operators

Empowers the Rail Safety Regulator to conduct routine audits of all rail transport operators' railway operations and, for that purpose, the Rail Safety Regulator may prepare annual audit programmes.

The Rail Safety Regulator may also inspect railway operations of rail transport operators even though those rail transport operators may not be included in an annual audit programme.

Twenty four hours written notice is required before rail transport operators may be inspected under this clause.

Part 5

Enforcement

Division 1 – Entry to Places by rail safety officers

Clause 85. Power to enter places

Provides that a rail safety officer may, for compliance and investigative purposes, enter any railway premises at any time they are open to the public or railway operations are being carried out, or the occupier consents, or the safety officer has a warrant or any place open to the public.

Clause 86. Limitations on entry powers: places used for residential purposes

Provides that a rail safety officer may only enter residential premises if the occupier consents or the officer is authorised to do so under a warrant.

Clause 87. Notice of entry

Provides that a rail safety officer must give the occupier of the railway premises reasonable notice of the intention to enter unless giving notice would defeat the purpose for which it is intended to enter the premises, or the occupier has given consent, or the rail safety officer believes there is an immediate risk to safety because of the carrying out of railway operations at the premises, or the safety officer has a warrant.

Division 2 – General Enforcement Powers

Clause 88. General powers after entering a place

Provides general powers needed by rail safety officers after entering a place under this Part. It empowers a rail safety officer who enters railway premises or residential premises to do various things, including to inspect, to inquire, to take samples, to make sketches and recordings, to search for evidence, to require production of documents and to make copies of them.

Clause 89. Use of assistants and equipment

Provides that a rail safety officer may use such assistants and equipment as he or she considers reasonably necessary to carry out enforcement powers under this Part under the supervision and control of the rail safety officer. For instance, to enter particular locked premises, a locksmith might be required, or to gain access to certain electronically stored data, an information technology specialist might be needed. This provision would authorise the use of such assistants.

Clause 90. Use of electronic equipment

Empowers the rail safety officer or authorised assistant to operate electronic equipment and devices at premises that are entered under this Part to obtain access to information. For instance, the rail safety officer may require a rail transport operator's employee to operate a computer at the premises to obtain data stored on the computer. However, this provision does not authorise any use of the equipment or device that might damage the equipment or device.

Clause 91. Use of equipment to examine or process things

Empowers the rail safety officer to bring onto premises that are entered under this Part things such as trucks and machinery that are reasonably necessary to examine or process potential evidence at the premises and may carry out such examination or processing at the premises.

Clause 92. Securing a site

Provides that a rail safety officer may secure any part of a place to preserve evidence that might be relevant for compliance or investigative purposes.

Division 3 – Search Warrants

Clause 93. Search warrants

Provides that a rail safety officer may apply to a justice for a warrant to enter and search a particular place if he or she believes on reasonable grounds there is, or may be within the next 72 hours, a document or thing at that place which may provide evidence of the commission of an offence against a rail safety law.

Clause 94. Issue of search warrant

Provides that if satisfied that there are grounds to do so, a justice may issue a search warrant.

Clause 95. Execution of a warrant

Provides that the rail safety officer must, if requested to do so, present the warrant for inspection by the occupier or person in charge of premises

Clause 96. Seizure of things not mentioned in a warrant

Provides that a rail safety officer may seize a thing not described in the search warrant where the officer reasonably believes that the thing:

- Is of a kind which could have been included in the warrant or
- Will afford evidence about the commission of an offence against a relevant transport safety law -

and the officer believes on reasonable grounds that seizure of the thing is necessary to prevent it being concealed, lost, destroyed or used in the contravention of a relevant rail safety law.

Division 4 – Powers to support seizure

Clause 97. Directions relating to seizure

Empowers a rail safety officer, for the purpose of seizure of a thing as evidence, to direct the person in control of the thing to take it to a place nominated by the officer and at a time nominated by the officer, and, if necessary to keep control of the thing at that place and time. The officer may make a further direction about the thing if it is necessary and reasonable. Failure to comply with the original or further direction is an offence, unless the person to whom the direction is given has a reasonable excuse.

Clause 98. Rail safety officer may direct a thing's return

Empowers a rail safety officer to require the person in control of a thing that has been produced pursuant to a direction under the previous clause to collect that thing and return it to the place from which it was taken.

Clause 99. Receipt for seized things

Provides that if a rail safety officer seizes a thing, he or she must provide a receipt to the person from whom the thing was seized or the owner of the thing. The receipt must describe generally the thing seized and its condition.

Clause 100. Access to seized thing

Provides that a rail safety officer must allow the owner of a seized thing to inspect it and, if it is a document, to copy it.

Clause 101. Embargo notices

Empowers a rail safety officer to issue a notice prohibiting the use, removal or any other dealing with a thing that the officer is empowered to seize but which can not readily be moved. This is called an embargo notice. For instance, the rail safety officer may be authorised to seize a piece of machinery that is too heavy to be moved by the officer. Until such time as the officer can arrange for the collection of the machinery, an embargo notice may be used to prohibit the use or interference with the machinery, thereby ensuring its evidentiary value is not diminished.

The notice must either be served on the owner of the thing, or, if the owner can not be located, the notice may be attached to the thing itself. It is an offence to knowingly contravene the notice or cause someone else to contravene the notice, without the consent in writing of the officer or the Rail Safety Regulator, or unless the person moved the thing to protect it and notified the officer within 48 hours of doing so. It is also an offence if the person upon whom the notice is served fails to take reasonable steps to prevent another person from contravening the notice.

Any sale or other dealing with a thing in a manner that is contrary to an embargo notice will be void.

Division 5 - Forfeiture

Clause 102. Return of seized things

Provides that things seized must not be retained any longer than necessary and must be returned, unless they are required as evidence in legal proceedings, or are forfeited under the next clause, or are required by law to be retained, destroyed or disposed of.

The rail safety officer is empowered to impose safety related conditions on the return of a thing; for example that upon the return of an item of seized machinery, a safety device be fitted to the machinery before it is re-used in railway operations. The owner of the thing must comply with such conditions.

Clause 103. Forfeiture

Provides for the forfeiture to the Crown of a thing that has been seized as evidence if the thing can not be returned to its owner, or the owner can not be found despite reasonable enquiries, or if the rail safety officer who seized the thing considers the further retention of the thing is necessary to prevent its use in the commission of a rail safety offence.

Clause 104. Dealing with forfeited sample or thing

Provides that the Crown may deal with a thing forfeited under either of the previous clauses as it sees fit, including by destroying or disposing of the thing.

Clause 105. Forfeiture on conviction

Notes that jurisdictions may use their own provisions to make provision for the forfeiture of a thing that has been seized upon conviction of its owner of an offence against the rail safety laws.

Division 6 - Directions

Clause 106. Rail safety officers may direct certain persons to give assistance

Empowers a rail safety officer to issue a direction to a rail transport operator or a rail safety worker to provide reasonable assistance to the officer to enable the officer to exercise powers under this Part. Reasonable assistance might include such things as unlocking a locked door, operating safety equipment, and providing access to databases on a computer.

It is an offence to fail to comply with the direction without reasonable excuse, and the officer must, when giving such a direction warn the person to whom the direction is given of this fact.

Clause 107. Power to direct name and address be given

Empowers a rail safety officer to direct a person who the rail safety officer reasonably suspects has committed a rail safety offence or other specified classes of persons present on railway premises to provide their name and address and, if necessary, evidence of each person's name and address to the rail safety officer.

The officer must, when giving such a direction warn the person to whom the direction is given that it is an offence to fail to comply with a direction under this clause without reasonable excuse.

Clause 108. Failure to give name and address

Provides it is an offence to fail to comply with a direction under the previous clause without reasonable excuse.

Clause 109. Power to direct production of documents

Empowers a rail safety officer to direct a person to produce a document or other thing for inspection at a specified time and place.

The officer must, when giving such a direction warn the person to whom the direction is given that it is an offence to fail to comply with a direction under this clause without reasonable excuse.

Clause 110. Failure to produce document

Provides it is an offence to fail to comply with a direction under the previous clause without reasonable excuse.

Division 7 – Improvement notices

Clause 111. Improvement notices

Provides that an improvement notice may be served where a rail safety officer believes that a person is contravening a provision of a rail safety law, or has contravened a provision of a rail safety law and it is likely that the contravention will continue or be repeated, or if the person is carrying out or has carried out railway operations that threaten safety.

The improvement notice may require the person to take specified action by a specified date to remedy the contravention or to stop the contraction or unsafe railway operations from continuing or occurring again. An improvement notice must set out the bases of the rail safety officer's belief, and may include directions on the measures to be taken to remedy the contravention or unsafe operations.

Clause 112. Contravention of improvement notice

Provides that it is an offence to fail to comply with an improvement notice without reasonable excuse.

In the case of proceedings against a person for failing to comply with an improvement notice, it is a defence if the person establishes that the contravention of the rail safety law or the unsafe railway operations for which the improvement notice has been issued has been remedied within the period specified in the notice, though by a method different from that specified in the improvement notice.

Clause 113. Withdrawal or amendment of improvement notices

Provides for the amendment or withdrawal of improvement notices by a rail safety officer and when the amendment or withdrawal is to have effect.

Clause 114. Proceedings for offences not affected by improvement notices

Provides that the service, amendment or cancellation of an improvement notice does not affect proceedings for offences in connection with the matter in respect of which the improvement notice was served.

Clause 115. Rail Safety Regulator to arrange for rail safety work required by improvement notice to be carried out

Provides that the Rail Safety Regulator may arrange for the remedial work to be carried out if the person on whom an improvement notice is served fails to comply with the improvement notice and that the Rail Safety Regulator may recover from the person the reasonable cost of the remedial work.

Division 8 – Prohibition notices

Clause 116. Prohibition notice

Provides that where a rail safety officer believes on reasonable grounds that an activity is occurring at a railway premises or in the immediate vicinity of rail infrastructure or rolling stock, that involves or will involve an immediate risk to the safety of a person or railway operations, the rail safety officer may serve on a person who has or appears to have control over the activity a prohibition notice prohibiting the carrying on of the activity until the matters giving rise to the safety risk have been remedied. A prohibition notice must set out the bases of the rail safety officer's belief, and may include directions on the measures to be taken to remedy the risk.

Clause 117. Contravention of prohibition notice

Provides that it is an offence to fail to comply with prohibition notice without reasonable excuse.

Clause 118. Oral direction before prohibition notice served

Empowers a rail safety officer to verbally direct a person not to do a particular act, if it is not possible or reasonable to serve a written notice on the recipient for the same purpose. For instance, a verbal direction may be necessary to immediately prohibit an unsafe train from leaving a station. If giving a verbal prohibition, the rail safety officer must also state the reasons for doing so. The rail safety officer must within 5 days after the direction is given, serve a prohibition notice on the person; otherwise the verbal direction ceases to have effect.

It is an offence to fail to comply with a direction under this clause without reasonable excuse.

- Clause 119. Withdrawal or amendment of prohibition notice**
Sets out the manner by which a rail safety officer may amend or withdraw a prohibition notice and when the amendment or withdrawal is to become effective.
- Clause 120. Proceedings for offences not affected by prohibition notices**
Provides that the service of a prohibition notice does not affect proceedings for offences in connection with the matter in respect of which the prohibition notice was served.

Division 9 – Miscellaneous

- Clause 121. Directions may be given under more than one provision**
Provides that a rail safety officer may, on the same occasion, give directions under one or more provisions in Part 5.
- Clause 122. Temporary closing of railway crossings, bridges etc.**
Provides that an authorised person may temporarily close or regulate a railway crossing, bridge or other structure for crossing or passing over or under a railway if satisfied it is necessary because of an immediate threat to safety. An authorised person is defined as someone who holds a specific authority from the Rail Safety Regulator or the rail transport operator to temporarily close or regulate railway crossings.
- Clause 123. Restoring rail infrastructure and rolling stock etc. to original condition after action taken**
Provides that if damage is caused to rail infrastructure or rolling stock, railway premises or a road vehicle as a result of the unreasonable exercise of power under Part 5, the Rail Safety Regulator must take reasonable steps to return the rail infrastructure or rolling stock, railway premises or road vehicle to the condition it or they were in immediately before the action was taken.
- Clause 124. Use of force**
Provides that a rail safety officer, or person assisting an officer, must not use more force than is reasonably necessary to enter any railway premises, or to do anything in or on any railway premises.
- Clause 125. Power to use force against persons to be exercised only by police officers**
Provides that a rail safety officer, or person assisting an officer who is not a police officer, must not use force against another person in exercising a power under this Part.
- Clause 126. Protection from incrimination**
Sub-clause (1) provides that an individual is not excused from complying with a direction under this Part to provide information or produce a record, or a device or other thing that may contain a record, on the ground that compliance with the direction may result in information being provided that might incriminate the person.

Sub-clause (2) provides that any information, record, device or other thing obtained as a direct result of the compliance with a direction is not admissible in evidence against the person in criminal proceedings -
 - If the person claims beforehand that it might incriminate them or
 - Unless the person's entitlement to make this claim was drawn to their attention before the information was given or the record, device or thing was produced.
Sub-clause (3) provides that, with the exception of sub-clause (2), any information given, or record, device or other thing produced by a person as a direct result of the compliance with the

direction may be used in evidence in any criminal or civil proceedings against the person.

Part 6

Investigations

In 1999 the Australian Transport Council (ATC) accepted and agreed to implement recommendations to achieve best rail investigation practice identified in a review commissioned into independent investigation and open reporting of rail safety matters. Since then Standards Australia has published AS4292.7 rail safety investigation to support best practice reflected in that review. In 2006 the Standing Committee on Transport's Rail Group approved key principles concerning independence, no-blame approach with witness protection, transparency and public reporting.

The key objective of Part 6 is to build on these principles and to give Western Australia best practice law to support independent, systemic no-blame rail investigations that identify the causes and contributing factors of a rail safety matter without attributing blame or determining liability. Similar legislation underpins the operation of rail investigation agencies overseas and in Australia including the Australian Transport Safety Bureau (known as the ATSB), the Office of Transport Safety Investigation in New South Wales and the Chief Investigator Rail and Maritime in Victoria.

Part 6 aims to develop provisions for independent rail safety investigations that meet the following objectives:

- (i) The investigation of railway incidents independent of the rail transport operator to find out the cause and contributing factors of the matter.
- (ii) The making of safety action statements and safety recommendations that draw on the results of those investigations;
- (iii) Publication of the results of those investigations in the interests of rail safety.
- (iv) Not to apportion blame to individuals for transport accidents or incidents;
- (v) Not to provide the means to determine the liability of any individual person in respect of a transport accident or incident;
- (vi) Not to assist in court proceedings between parties (except as expressly provided by this Bill);and
- (vii) Not allow any adverse inference to be drawn from the fact that an individual is subject to investigation.

Objectives (i) to (iii) relate to achieving independent investigations with a no-blame approach and a safety objective. The purpose of these investigations is to uncover all aspects of the incident to find the causal factors, identify safety risks and means to reduce them. They are not to attempt to apportion blame or determine who to punish. The purpose is then to use these findings to help reduce risk and therefore avoid similar rail safety matters in the future.

These investigations are supported by provisions in Part 6 requiring witnesses to answer questions and to provide information to the investigator balanced by provisions to protect witnesses from self-incrimination.

Objectives (iv) to (vii) are supported by provisions to protect witnesses by preventing information collected by the investigator during the course of the investigation from being made available to help others determine blame or liability or from disclosure to courts.

Part 6 will help the investigator make a much broader systemic study of the rail safety matter and to consider a range of factors including human, operational, regulatory and environmental systems and to look for safety deficiencies that pose a risk to people, property or the environment.

Unlike compliance investigations, the independent no-blame investigation is often less formal and designed to create an environment where witnesses can feel comfortable helping investigators get to the truth of the matter. For independent investigation and open reporting to work effectively an environment must be established that is supportive of people freely providing information during the conduct of an investigation.

The Rail Safety Regulator and rail safety officers will undertake compliance inspections and investigations under Part 5 of the Bill. Others appointed as independent investigators will undertake independent no-blame investigations under Part 6 of the Bill.

Division 1 – Independent Investigators

Clause 127. Appointment of independent investigator

Provides that the Director General may, or on the Minister's instruction, must – appoint an independent investigator to investigate and report on a rail safety matter involving a death, serious injury or serious property damage.

In the case of rail safety matters of lesser severity the Rail Safety Regulator may also appoint an independent investigator.

An independent investigator is appointed on agreed terms and conditions, but once appointed is not subject to direction by the Minister, the Director General or any person as to how he conducts the investigation, from whom he seeks assistance or the outcome of the investigation, nor may the independent investigator be directed to stop the investigation. This enables the investigator, once appointed, to undertake the investigation as an external, independent investigator without influence from those connected to the incident or the management of railways.

The independent investigator in conducting the investigation must have regard to minimising disruption to railway operations

Reasonable costs of conducting an investigation are able to be recovered from any one or more of the rail transport operators concerned in the investigation. Such costs are recoverable in a court as a debt to the crown.

Clause 128. Conduct of investigation

Sets out rules for an independent investigator to follow when conducting an investigation. In conducting an investigation the independent investigator is to follow the principles of "no blame" safety investigations. Hence the clause directs that an independent investigator:

- Is to attempt to determine the circumstances surrounding a rail safety matter to prevent a re-occurrence of the matter
- Is not to apportion blame or liability to any person
- Is to consult with the Director General, the Rail Safety Regulator and any person to whom the investigation report may be relevant
- Is to follow procedures based on the Australian standard for railway safety investigation (currently AS 4292.7) as and approved by the Director General for the conduct of investigations. (This requires the independent investigator to follow established procedures and standards for investigations. It is different from having the Director General interfere with the independent investigator's conduct of the specific investigation.)
- Is to act as quickly and with as little formality and technicality as possible without compromising a fair and proper examination of the issues
- Is not bound by the rules of evidence but may inform himself or herself on any matter he or she considers appropriate

Other than complying with the Act, the independent investigator is enabled, by this clause, to conduct the investigation in a manner determined by the investigator. The intention is to allow the investigator to be independent and to work in the most efficient way to achieve the outcome of determining the circumstances surrounding the rail safety matter.

Clause 129. Advice as to immediate action that is required

Provides that if in the course of an investigation the independent investigator believes that an immediate action is required to prevent an occurrence involving loss of life, serious injury or serious property or equipment damage the investigator is to advise the Director General, or the Rail Safety Regulator and rail transport operator, in writing, that immediate safety action is required.

Clause 130. Release of information in the interests of rail safety

The ability of the independent investigator to release information acquired during the investigation is strictly controlled in this Part as a result of the investigator being able to require persons to provide information under clause 143. There are limited situations in which an investigator can divulge information he or she has obtained. This clause provides that the independent investigator may release information acquired in the investigation to any person if he or she considers that the disclosure is in the interests of rail safety. This clause also enables the investigator to release the necessary information to give effect to clause 129.

In doing so, the independent investigator must not release personal information except in accordance with the regulations

Clause 131. Investigation may continue despite other proceedings

Provides that an independent investigation may commence or continue and a report may be given despite proceedings before a court or a tribunal established elsewhere unless a court or tribunal with appropriate jurisdiction orders otherwise. An investigation is often time critical and must be able to be commenced or continued unless a court sees fit to order otherwise.

Clause 132. Draft report or excerpt

Provides in sub-clause (1) that before giving a report of an investigation the independent investigator may release a draft report or excerpt to any person the independent investigator considers appropriate for the purposes of:

- Allowing the person to make a submission to the independent investigator regarding the draft report or excerpt
- Taking steps to remedy safety deficiencies identified in the draft report
- Giving the person advance notice of the likely form of the report

Sub-clauses (2) and (3) provide that a person who receives a draft report or excerpt must not make a copy of any part of it or disclose any of its contents to any person or to a court unless it is necessary to do so to prepare submissions to the independent investigator or to take steps to remedy safety deficiencies identified in the draft report or excerpt.

Sub-clause (4) provides that a person who receives a draft report or excerpt cannot be required to disclose it to a court.

Sub-clause (5) provides that a person who receives a draft report or excerpt may not take any disciplinary action against an employee on the basis of information contained in the draft report or excerpt.

Sub-clause (6) provides that a draft report or excerpt must not contain the name of an individual unless that person has given consent in writing.

Sub-clause (7) provides that the *Coroners Act 1996* sections 33(1)(b) and (c) and 46(1)(a) do not apply to a draft report or excerpt. Thus a coroner may not:

- Take a copy of a draft report or excerpt
- Take possession of a draft report or excerpt believing it to be necessary for the purpose of an inquest
- Summon a person to produce a draft report or excerpt.

(Refer to clause 133(2) – contains the provision for the final report to be introduced in evidence in a Coronial Inquest)

- Clause 133. Report**
Provides that the independent investigator's final report must be submitted to the Minister, the Director General and the Rail Safety Regulator. The report must be in the format prescribed by the regulations and must include any safety recommendations already made by the independent investigator and any other safety recommendations arising from the investigation.
The report must be published by electronic or other means by the Rail Safety Regulator or the person who appointed the independent investigator within 28 days of its receipt.
- Clause 134. Reports not admissible in evidence**
Independent investigations into rail safety matters are intended to be "no blame" with the objective of discovering the cause(s) or probable cause(s) of rail safety matters. Witnesses are compelled to give answers or information on the basis that no liability will be attached to them as a result of their answers or information. Thus answers or information given to an independent investigator are restricted information and may not be used in evidence. It follows that the investigator's draft or final reports must not be admissible in evidence in court proceedings other than coronial inquests.
- Clause 135. Response to report: installation of safety or protective devices**
Provides that in response to a report by an independent investigator, if the Rail Safety Regulator determines it necessary, he or she may, by written notice, require a rail transport operator to install safety or protective systems, devices, equipment or appliances on any part of an operator's rail infrastructure or rolling stock. There is a penalty applicable if the rail transport operator does not comply with the notice within the time specified in the notice. This notice is reviewable under Part 7.
- Clause 136. Appointment of authorised officers**
Provides that an independent investigator may appoint a suitable person to be an authorised officer to assist in conducting an investigation under this Part. This will enable an independent investigator to create a team of suitable expert persons to carry out even the most complex investigations efficiently.
- Clause 137. Delegation by independent investigator**
Delegation provision that enables an independent investigator to delegate to an authorised officer any of the functions of an independent investigator other than the power to appoint an authorised officer.
Under this clause, an authorised officer remains under the direction of the independent investigator.
- Clause 138. Certificate of appointment for independent investigators and authorised officers**
Provides that persons appointing an independent investigator or authorised officers under this Part must issue the independent investigator or the authorised person with a certificate of appointment.
- Clause 139. Independent investigators and authorised officers must not exercise functions without a certificate of appointment**
Provides that an independent investigator or an authorised person must not act in such a capacity without having been issued a certificate of appointment.
A certificate of appointment enables persons dealing with an independent investigator to ensure that the person with whom they are dealing is in fact an independent investigator or authorised officer and does have the powers claimed. The issue of a certificate also ensures that a person cannot exercise powers in the mistaken belief that they have been appointed as an investigator or authorised person. The certificate will also provide the person with a form of identification under clause 140.
The Bill calls for the issue of certificates of appointment rather than identity cards because there

will often be urgency at the time of appointing an investigator or authorised officer with personnel in remote localities where the timely issue of an identity card may be more difficult than the issue of a certificate.

Clause 140. Production of a certificate of appointment

Provides that an independent investigator or an authorised officer must, on request, present to any person with whom he or she deals in the course of an investigation their certificate of appointment. If it is not practical to present the certificate of appointment on request, it must be produced as soon as practicable after the request has been made.

Clause 141. Return of certificate of appointment

Provides that persons who have ceased to be an independent investigator or authorised person, because they may no longer exercise powers of these positions must return their certificate of appointment to the person who appointed them within a time to be specified by the appointer. There is a penalty attached for anyone failing to do so.

Division 2 – Investigation Powers

Clause 142. Securing a site

Provides that, in order to protect evidence that might be relevant to the investigation of a rail safety matter, the Rail Safety Regulator or the independent investigator, or pending the appointment of an independent investigator, the Rail Safety Regulator, may secure the perimeter of any site by any means they considered appropriate.

Further, sub-clause (3) provides that no person may enter the protected perimeter or remain there without the permission of the Rail Safety Regulator or the independent investigator except to:

- Ensure the safety of persons
- Remove deceased persons or animals from the site
- Move a vehicle or the wreckage of a vehicle to a safe place or
- To protect the environment from significant damage or pollution.

Sub-clause (4) provides that a Rail Safety Regulator or an independent investigator must not unreasonably withhold permission to enter the protected perimeter.

Clause 143. Power to obtain information

This clause enables the independent investigator to require information from a person. This will allow the investigator to compile all necessary information in order to determine the circumstances surrounding the rail safety matter. Refusal to comply with this clause is an offence under clause 170. However, the information obtained under this clause cannot be used as evidence against the person as stipulated by clause 172 and is not able to be released by the investigator except in certain situations stipulated under this Part.

When making a requirement of a person to produce a document or thing, the requirement must be in writing and specify a time, place and the manner of providing the document or thing. (e.g. by hand, by mail, or delivered by courier etc) and where the document is not in a readable format then the document must be provided in its original format together with a printed copy of the contents of the document.

Where an independent investigator requires a person to produce a document or a thing or to give information or answer a question it is a requirement that the investigator must first inform the person that they are required under this Act to do so.

Where a document or other thing is produced to an independent investigator, the investigator may inspect it and make copies or take extracts, photograph it or test it.

Clause 144. Other powers

This clause provides an independent investigator the power to use reasonable force, at all reasonable times of the day or night, to enter a railway premises or other premises in order to conduct the investigation. This power enables the investigator to inspect the premises and things at the premises to determine the circumstances leading to a rail safety matter without the requirement to alert the owner or occupier of the intention to inspect. The intention is that the opportunity to remove or alter things is denied.

This clause also provides general powers needed by an independent investigator, after entering a place under this Part in order to conduct an investigation. It empowers an independent investigator who enters railway premises or residential premises to do various things, including to inspect, to inquire, to take samples, to conduct tests, to make photographs, sketches and recordings, to search for evidence, to require production of documents and to make copies of them.

It also confers the power to the investigator to issue a seizure order under clause 161, to require a person to produce evidence of accreditation and to give directions in connection with exercising these powers and conducting an investigation.

The clause requires the investigator to do as little damage as possible but enables the investigator to test something even though that may result in damage to the thing.

Clause 145. Limitation on entry powers: places used for residential purposes

Limits the power of an independent investigator to enter a railway premises place used solely for residential purposes for investigative purposes by requiring the investigator to either obtain the consent of the occupier or obtain a warrant under clause 158

Clause 146. Occupier entitled to be present during inspection

Provides that if an occupier is present when an independent investigator wishes to inspect the premises under the power conferred by clause 144, the occupier may observe the inspection provided that he or she does not impede the inspection. However, this provision does not prevent the investigator and his or her staff from carrying out inspections in two or more parts of the premises simultaneously.

Clause 147. Use of equipment

Allows an independent investigator to use any equipment the investigator considers necessary to conduct an investigation.

Clause 148. Occupier to provide independent investigator with facilities and assistance

Requires the occupier of the premises to provide the independent investigator with all reasonable facilities and assistance to exercise his or her functions. The purpose of this clause is to require a rail operator to assist the investigator where necessary by moving rolling stock, operating machinery or recording devices and to prevent the use by occupiers of obstructive tactics such as refusing to provide keys, move equipment and so on.

Clause 149. Use of electronic equipment

Allows an independent investigator to operate electronic equipment to access information stored on tape, disk or other device, provided that the investigator reasonably believes that the equipment can be operated without damaging the equipment or erasing, corrupting or destroying the recorded information.

Clause 150. Use of equipment to examine or process things

This clause allows the investigator to process things to determine whether or not to issue a seizure order under clause 161. It provides that for that purpose, an independent investigator may bring onto a railway premises, rolling stock or a vehicle, equipment necessary for examination or processing of things found there in order to determine whether they are things that may be seized.

Sub-clause (2) also allows that an independent investigator may operate equipment already in the railway premises, rolling stock or vehicle to examine or process a thing to determine whether the thing may be seized provided that the investigator reasonably believes that the equipment is suitable for the examination or processing and that the examination or processing can be carried out without damage to the equipment.

Clause 151. Notices relating to exercise of powers

Requires that an independent investigator upon entering a railway premises must give the occupier of the premises written notice of the entry as soon as practicable after the entry is made.

Clause 152. Protection orders by Rail Safety Regulator or independent investigator

To protect evidence which may be relevant to any investigation, the independent investigator or pending the appointment of an investigator, the Rail Safety Regulator, may direct that specified things or groups of things at an accident or incident site must not be removed or interfered with, except with the permission of the Rail Safety Regulator, or following his or her appointment, the independent investigator.

The Rail Safety Regulator or the independent investigator after his or her appointment may revoke that direction.

A person may contravene such a direction only to:

- Ensure the safety of persons, animal or property;
- Remove deceased persons or animals from an accident site;
- Move rolling stock or wreckage to a safe place; or to
- Protect the environment from significant damage or pollution.

The Rail Safety Regulator or the independent investigator must not unreasonably refuse permission to remove or interfere with things that are subject to a protection order.

Clause 153. Medical Examination

To assist the independent investigator in determining the circumstances surrounding a rail safety matter by either eliminating or confirming sets of conditions, this clause provides that if an independent investigator believes that a person may have caused or been directly involved in a rail safety matter then the investigator may direct that person to have a medical examination. The investigator may do so if he or she believes that the information gained from the examination may assist in determining the cause of the matter.

If the investigator and the person cannot agree on a medical practitioner, the Director General shall appoint a medical examiner.

The cost of the medical examination is to be borne by a rail safety operator if the person is an employee of the rail safety operator. For other persons, the Director General shall bear the cost. This aims to remove the cost of undergoing a medical examination as a reasonable excuse for a person refusing to comply with the direction of the investigator

When directing a person to undergo a medical examination, the independent investigator is to advise the person that he or she is required by the Act to comply with the direction unless he or she has a reasonable excuse; that the possibility of self-incrimination is not a reasonable excuse for non-compliance and that nothing arising from the examination is admissible in evidence in any civil or criminal proceedings.

Clause 154. Analysis

This clause provides for the drug and alcohol testing of persons following a rail safety matter in order to assist in determining the cause of the matter. This testing may be used to establish whether a person was or was not under the influence of drugs or alcohol at the time of an incident.

Sub-clause (2) provides an authorised person with the power to direct anyone he or she believes may have been involved in a rail safety matter to undergo drug and/or alcohol testing if the authorised person believes that the test results may assist in determining the cause of the occurrence.

Sub-clauses (3) to (6) set out the purpose of a test, being to determine the presence or otherwise of alcohol or prescribed drugs within the persons breath, blood or urine, and the conduct of the testing. These sub-clauses provide that a person is to be given a time, date and place to attend for testing and advised what samples are to be taken. The testing must be conducted according to the regulations and paid for by the rail operator, if the person is an employee or the CEO in other circumstances. This aims to remove the cost of undergoing a test as a reasonable excuse for a person not complying with the direction of the authorised person.

Sub-clauses (7) and (8) make it compulsory for a person to comply with a direction to undergo drug and/or alcohol testing and provide that it is not a reasonable excuse to fail to comply with a direction on the grounds that testing may tend to incriminate or render the person liable to a penalty.

Sub-clause (9) provides that the results of testing are not admissible as evidence against a person in any civil or criminal proceeding.

Sub-clause (10) requires an authorised person, when directing a person to undergo testing to advise the person that it is an offence to fail to undergo testing and it is not a reasonable excuse for failing to undergo testing that the testing may tend to incriminate or make them liable to a penalty, and that the results of testing are not admissible as evidence against them in any civil or criminal proceeding.

Clause 155. Regulations relating to medical examinations and analysis

Provides that regulations may be made under clause 228(1) regarding medical examinations and analyses under clause 153 and 154.

It is intended that the regulations relating to clause 154 will either refer to or be modelled on the breath, blood and urine sampling procedures contained in regulations made under the *Road Traffic Act 1974*

Clause 156. Independent investigator not to use force against persons

This clause provides that any provision that provides that the independent investigator may use reasonable force in carrying out his functions does not authorise the use of force against persons.

The independent investigator is to be able to use force to gain entry to premises or things for the purpose of investigation (e.g. breaking down a door or gate), but it is not intended for the investigator to be able to use force against or physically restrain a person.

Division 3 – Search warrants

Clause 157. Search warrant

Under clause 145 an independent investigator is only permitted to enter a railway premises used solely for residential purposes with the consent of the occupier or under warrant.

This clause provides that where an independent investigator reasonably believes that any thing which may be relevant to the investigation on a railway premises used as a residence and the occupier denies access to the investigator, the independent investigator may apply to a justice for a search warrant.

The clause sets out the requirements that apply to an application for a warrant.

The clause states that a justice must refuse a warrant if it does not comply with the requirements of this clause or the independent investigator does not provide further justification for the warrant when asked to do so by the Justice.

The information in the application must be verified on oath or affirmation before the justice or by affidavit.

Clause 158. Issue of search warrant

Provides in sub-clause (1) that if satisfied that there is any thing on the premises that may be relevant to the investigation, the justice may issue a warrant authorising the investigator to enter the named premises and search for and seize any thing described in the warrant.

Sub-clause (2) details what must be included in the warrant for it to be valid.

Sub-clause (3) provides that the issuing justice must record the particulars of any grounds upon which he or she has relied to justify the issue of the warrant.

Clause 159. Execution of warrant

Provides in sub-clause (1) that the person executing the warrant is to produce the warrant upon the request of the occupier.

Sub-clause (2) provides that the warrant ceases to have effect:

- On the day stated in the warrant, or
- It is withdrawn by the issuing justice, or
- When it is executed.

Whichever occurs first

Clause 160. Seizure of things not mentioned in the warrant

Provides that a warrant issued under clause 158 authorises the independent investigator to seize, in addition to any thing described in the warrant, any other thing which the investigator reasonably believes could have been included in the warrant.

Division 4 – Seized things and samples taken

Clause 161. Provisions relating to seizure

Provides for the seizure of a thing by an independent investigator by means of a seizure order, which is to be a written notice served on the owner of the thing or the person in control of it at the time of seizure. The seizure order may be varied or revoked by a further written notice.

Once a seizure order is issued it places a protection on that thing and a person must not interfere with or remove that thing without the approval of the independent investigator.

Upon seizure the thing must be held until the independent investigator completes the report into the rail safety matter unless the investigator releases the thing to the person from whom it was seized or to its legal owner. This is to be at the discretion of the independent investigator and may be conditional.

Sub-clause (4) provides that when the report into the rail safety matter concerned is given, or where the report is not given after the prescribed period, the person from whom it was seized or its legal owner may recover the thing from the independent investigator, by court action if necessary, unless the investigator has transferred the thing to a rail safety officer for another audit or inspection purpose under clause 169(1).

The prescribed period for sub-clause (4) is six months, but the independent investigator may extend that to not more than twelve months.

Clause 162. Securing seized things

Provides that, after seizing a thing, the independent investigator may:

- Remove it from the place of seizure
- Leave the thing at the place of seizure but restrict access to it; or
- Disable the thing.

This decision is at the discretion of the independent investigator and will depend on circumstances.

Clause 163. Powers to support seizure

This clause provides the necessary legal clarification and powers to enable the independent investigator to issue seizure orders and seize things for the purpose of the investigation.

This clause enables the investigator to direct the person in control of a thing to take it to a specified place within a specified time and if necessary remain with the thing for a specified period and the person must comply.

The person must comply with the direction unless he or she has a reasonable excuse and it is a reasonable excuse for failing to comply if in all the circumstances, the direction was unreasonable.

The cost of complying with a direction under this clause must be borne by the person in control of the thing.

Clause 164. Independent investigator may direct a thing's return

Where an independent investigator has given a direction under clause 163, the investigator may direct the person to return that thing to the place it was taken from and the person must comply unless he or she has a reasonable excuse.

The cost of complying with a direction under this clause must be borne by the person in control of the thing.

If the person fails to comply with the direction the investigator is able to release it to any person entitled to its possession.

- Clause 165. Manner in which independent investigator may give directions under this Division**
Provides that a direction by an independent investigator may be given orally or in writing.
Where a direction is given orally the independent investigator must state whether the direction is to be complied with immediately or within a specified period and must warn the person that it is an offence not to comply with the direction.
Where a direction is given in writing the independent investigator must ensure that the direction states the period within which the direction is to be complied with and must also state that it is an offence to fail to comply with the direction.
A direction in writing may be given to the person concerned or sent by post.
- Clause 166. Receipt for seized things or sample**
Provides that if an independent investigator seizes a thing he or she must give a receipt to the person in control of the thing detailing the thing seized, the name of the investigator who seized the thing and the reason why it has been seized.
If it is not practicable to give the person a receipt at the time of seizure, the investigator must leave a receipt in a secure and prominent place in the premises or send the receipt to the occupier of the premises from which the thing was seized.
- Clause 167. Copies of certain seized things to be given**
Stipulates the steps an independent investigator must take when seizing something that can be readily copied, such as a document or an item stored in or on a storage device.
If the independent investigator seizes a document, an electronic storage device, or any other thing that may be readily copied, the investigator must give the owner of the thing a copy of it as soon as practicable unless he or she has reason to believe that the owner has a copy or if the investigator is unable to discover the identity of the owner or custodian of the thing.
- Clause 168. Transfer of seized thing to independent investigator**
By its nature, the investigation being conducted by the independent investigator is of significant importance and is time critical. The requirement of the investigator to conduct the investigation is of a higher priority than that of a rail safety officer needing to retain an item in order to investigate a suspected breach of a rail safety law. This clause provides that priority for the independent investigator to obtain a thing held by a rail safety officer.
- Clause 169. Transfer of seized thing to a rail safety officer**
Provides that when an independent investigator has seized a thing which could have been seized by a rail safety officer by warrant issued under clause 94 and the rail safety officer requests that the seized thing be transferred to him or her, then when the independent investigator has completed the investigation or is satisfied that doing so will not prejudice the investigation, the investigator must transfer the thing to the rail safety officer and notify the owner of the thing of the transfer.
The seized thing is then to be taken to have been seized by the rail safety officer under the authority of the warrant.
The intention of this clause is to enable a rail safety officer to obtain an item in order to investigate a potential breach of rail safety law but to ensure that this does not interfere with the investigation being undertaken by an independent investigator, which has priority.
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Division 5 – Provisions relating to investigations

Clause 170. Offences in relation to investigation

In order to assist the independent investigator in determining the circumstances surrounding a rail safety matter, the investigator may require the compliance of persons involved.

This clause makes it an offence for any person, when so required under clause 143, to:

- Fail to give information or answer a question
- Give any false information or answer
- Omit anything which tends to make a statement misleading
- Fail to produce a document or thing within the time specified.

Sub-clause (2) provides that it is a defence in proceedings under sub-clause (1) that:

- The independent investigator failed to warn the accused of his or her obligations under sub-clause (1)
- The time specified to produce a document or thing was insufficient to enable the accused to comply with the requirement, or
- The independent investigator when making a requirement under sub-clause (1) did not have reasonable grounds to believe that the compliance of the accused would materially assist the investigation.

Clause 171. Offence to hinder persons appointed under this Part

It is recognised that some persons involved in a rail safety matter that is being investigated under this Part may be hostile toward the investigation and it may be in their best interest for the investigation to fail. This clause provides that it is an offence for a person to:

- Wilfully hinder an independent investigator or authorised person in the exercise of their powers and duties
- Use abusive, threatening or insulting language to an independent investigator or authorised person
- Refuse or fail to comply with a requirement or direction of the independent investigator or an authorised person without reasonable excuse
- Falsely represent themselves by words or conduct as an independent investigator or authorised person.

Clause 172. Incriminating information, questions or documents

The intention of an investigation under this Part is to determine causes of rail safety matters, not to apportion blame or liability. Accordingly, this clause provides that a person may not refuse to comply with a requirement by an independent investigator under clause 143 to produce a document or a thing, answer a question or give information on the grounds that it may incriminate the person or make him or her liable to a penalty.

Neither an answer that is given, nor the fact that any thing or document was produced to the investigator is admissible in evidence in any civil or criminal proceedings against the individual except for an offence under clause 193 involving giving a false answer or information

Clause 173. Legal professional privilege

The effect of clause 143 is to require any person, to produce a thing or answer a question. It does not exclude a person who might otherwise be restrained by legal professional privilege concerns from complying.

Clause 172 explicitly provides that a person may not refuse to answer a question or give information on the ground that it may render him or her liable to a penalty.

This clause, however, allows that should a person refuse to comply, claiming legal professional privilege, and being entitled to claim such privilege, no action may be brought against him or her.

Clause 174. Certification of independent investigator's or authorised officer's involvement in investigation

This is an evidentiary provision regarding certificates for independent investigators and authorised persons. It provides that a certificate that is claimed to be one issued by a person who appointed the investigator or authorised officer and stating that a person was or is an independent investigator or authorised officer is to be taken as evidence to that effect.

This clause ensures that the person who authorised the certificate is not required to attend court simply to verify the fact that they issued the certificate as the certificate itself will suffice.

Clause 175. Independent investigator and authorised officer not compellable as witnesses

Provides that a person who has been an independent investigator or an authorised person may not be compelled to attend any court to answer questions, to produce any document or other thing or to give an expert opinion in relation to a rail safety matter. This does not apply to a coronial inquest.

This is to ensure the integrity of a "no blame" investigation and to allow persons to assist the investigator by providing information without the fear that the information could then be used in court.

The Coroner's Court is exempted because similar rules apply to evidence given in a Coroner's Court as apply to evidence and information given to an independent investigator.

Division 6 – Protection of restricted information

Clause 176. Limitations on disclosure etc. of restricted information

Provides that an independent investigator, an authorised person or a person who has or had access to restricted information under clause 177 must not make a record of restricted information or disclose restricted information to any person or to a court (for civil proceedings or criminal proceedings against another Act).

This provision does not apply to:

- Anything done by a person in performing functions under or in connection with this Act
- Disclosure to a court in criminal proceedings for an offence against this Act
- Disclosure to a coroner for the purposes of a coronial inquest.

If a person is prohibited by this clause from disclosing restricted information then:

- The person cannot be required by a court to disclose the information, and
- Any information disclosed by the person in contravention of this clause is not admissible in evidence in any civil or criminal proceedings other than proceedings against the person under this clause

Clause 177. Disclosure of restricted information in the interests of rail safety

An independent investigator or an authorised officer is given the power under clause 143 to require persons to supply information or answer questions for the purposes of discovering the causes of a rail safety matter. The information gathered is "restricted information" which the investigator may not disclose to anyone or even to a court.

However, this clause provides that the independent investigator may direct that restricted information be disclosed to any person if he or she considers that disclosure is necessary or desirable for the purposes of rail safety or for the purpose of an investigation under another Act or an Act of the Commonwealth, another State or a Territory.

The independent investigator may not disclose restricted information that contains personal information except in circumstances prescribed by the regulations.

Part 7

Review of Decisions

Clause 178. Terms used

Defines *reviewable decisions* and *eligible persons in relation to the reviewable decision*.

Clause 179. Application of *Parliamentary Commissioner Act 1971* to Rail Safety Regulator and rail safety officers

Provides that the *Parliamentary Commissioner Act 1971* applies to the Rail Safety Regulator and rail safety officers irrespective of whether the regulator is a public statutory authority.

Clause 180. Reviewable decisions

Provides that certain decisions made under the Act are reviewable decisions and specifies these decisions in the table set out in this provision.

Clause 181. Review by the Rail Safety Regulator

Provides for the internal review by the Rail Safety Regulator. The clause sets out the procedure for applying for internal review and the procedures that must be followed by the Rail Safety Regulator in reviewing the decision.

Clause 182. Review by the State Administrative Tribunal

Provides for review by the Tribunal of reviewable decisions under the Bill. A person may apply to the Tribunal for a decision that was made, or that was subject to internal review, by the Rail Safety Regulator.

Part 8

General liability and evidentiary provisions

Division 1 - General

Clause 183. Period within which proceedings for offences may be commenced

Provides that proceedings for offences against a rail safety law may be commenced within 2 years after the commission of the alleged offence or a further period of one year commencing on the day on which the Rail Safety Regulator, a rail safety officer or a police officer first obtained evidence of the commission of the alleged offence considered reasonably sufficient to warrant commencement proceedings.

Clause 184. Authority to take proceedings

Provides that only the Rail Safety Regulator, or a person authorised by the Rail Safety Regulator may initiate prosecution or fee recovery proceedings under this Bill,

A certificate purporting to provide authorisation or consent that purports to have been signed by the Rail Safety Regulator for the purposes of this clause is evidence of the authorisation or consent and does not require proof of the signature of the Rail Safety Regulator.

Clause 185. Vicarious responsibility

Provides that where an offence is committed by a body corporate and it is necessary to prove state of mind in relation to particular conduct, it is sufficient to show that a director, employee or agent of the body corporate engaged in that conduct within the scope of his or her role and had the necessary state of mind.

In such a case, the body corporate will be bound by the conduct and state of mind of the director, employee or agent, unless the body corporate can establish it took reasonable precautions and exercised due diligence,

Similarly, where an offence is committed by an employer not being a body corporate (for instance, an employer who is an individual), and it is necessary to prove state of mind in relation to particular conduct, it is sufficient to show that an employee or agent of the employer engaged in that conduct within the scope of his or her role and had the necessary state of mind,

In such a case, the employer will be bound by the conduct and state of mind of the employee or agent, unless the employer can establish it took reasonable precautions and exercised due diligence to prevent the offence from occurring.

Clause 186. Records and evidence from records

Provides that the Rail Safety Regulator must keep certain records relating to the accreditation of rail transport operators and that any certificate purporting to be signed by the Rail Safety Regulator that certifies particulars of any such record is prima facie evidence of the matters it certifies, without the need for proof of the signature of the Rail Safety Regulator and without the need for production of the actual record.

Clause 187. Certificate evidence

Provides that a certificate purporting to be signed by the Rail Safety Regulator that certifies particulars of matters that appear in or can be calculated from records that are kept by the Rail Safety Regulator is prima facie evidence of the matters it certifies.

Clause 188. Proof of appointments and signatures unnecessary

Provides that it is not necessary to formally prove the appointment of certain officials, 'office holders', and that a signature purporting to be that of an office holder is presumed to be the signature it purports to be.

Clause 189. Offences relating to bodies corporate, partnerships, associations and employees

Provides that where an employee commits an offence, the employer is taken to have committed the offence and is punishable accordingly. This includes where a body corporate, partner or person concerned in management commits an offence then other persons involved in the body corporate, partnership or management are also taken to have committed the offence.

Volunteers are excluded from this provision.

A defence is provided where the person was not in a position to affect the behaviour of the first offender, or if they were in such a position, they had taken reasonable precautions and exercised due diligence to prevent the commission of the offence.

This clause ensures that persons involved in the management of a railway undertake their

responsibility with regard to rail safety to the best of their ability and always apprise themselves of the activities of partners/employees.

Division 2 – Discrimination against employees

Clause 190. Dismissal or other victimisation of employee

Provides that it is an offence to dismiss or otherwise victimise an employee who has given a public agency information about an alleged rail safety breach or has raised concerns about rail safety.

An employee is defined to include an individual who works under a contract for services.

A public agency is defined to include an Australian Rail Safety Regulator, a rail safety officer, a police officer and a police officer of another jurisdiction

Clause 191. Defendant bears onus of proof

Provides that the defendant bears the onus of proof in showing that the fact that the employee or contractor provided information about an alleged rail safety breach or raised concerns about rail safety was not the dominant reason for the dismissal or victimisation of the employee or contractor.

Clause 192. Order for damages or reinstatement

Provides remedies of reinstatement or compensation for employees or contractors if an employer or prospective employer is found guilty of an offence of dismissing or victimising the employee or contractor.

Division 3 – False or Misleading Information

Clause 193. False or misleading information provided to Rail Safety Regulator or officials

Provides it is an offence to provide false or misleading information to the Rail Safety Regulator or an official exercising a power under a rail safety law (including a rail safety officer).

Division 4 – Other Offences

Clause 194. Obstructing or hindering rail safety officers

Provides it is an offence to obstruct or hinder the Rail Safety Regulator, a rail safety officer or a person assisting a rail safety officer, including concealing from or failing to provide, documents or other things requested by the rail safety officer or a person assisting a rail safety officer.

It is an offence to assault, threaten or intimidate the Rail Safety Regulator, a rail safety officer or a person assisting the Rail Safety Regulator or a rail safety officer.

Clause 195. Offence to impersonate rail safety officer

Provides it is an offence to impersonate a rail safety officer.

Clause 196. Not to interfere with rail infrastructure etc.

Provides it is an offence to interfere with, or operate any equipment, rail infrastructure or rolling stock owned or operated by a rail transport operator, without the permission of the rail transport operator.

Clause 197. Applying brake or emergency device

Provides it is an offence to operate the brake or emergency device on a train or tram or railway premises without reasonable excuse.

Clause 198. Stopping a train or tram

Provides it is an offence to stop or attempt to stop a train or tram that is moving, without reasonable excuse.

Division 5 – Enforceable voluntary undertakings

Clause 199. Rail Safety Regulator may accept undertakings

Provides that a Rail Safety Regulator may, instead of or in addition to proceedings for a breach of an offence accept an undertaking from the alleged offender. An undertaking may address such matters as the steps that will be taken by the alleged offender to ensure compliance in future and steps to remedy the alleged contravention.

Clause 200. Enforcement of undertakings

Enables the Rail Safety Regulator to apply to a Magistrates' Court for the enforcement of the undertaking if the Rail Safety Regulator considers the person who has entered into the undertaking has contravened the undertaking.

Division 6 — Court-based sanctions

Clause 201. Daily penalty for continuing offences

Provides that if a person commits an offence by doing a thing, or ceasing to do a thing, the offence is taken to continue for as long as the person fails to comply with the provision contravened.

A person convicted of such an offence is liable to a penalty of up to one-fifth of the maximum penalty prescribed the offence for each day that the offence continues, in addition to the prescribed penalty for the offence.

Clause 202. Commercial benefits order

Provides for the imposition by a court of a penalty of up to three times of the estimated gross commercial benefit that was derived or could have been derived by a person or an associate of the person from the commission of an offence against a rail safety law.

An associate is defined for the purposes of this clause as a person who has a particular type of close personal or commercial relationship with the offender.

Clause 203. Exclusion orders

Provides that a court may also, upon the application of the prosecutor or the Rail Safety Regulator, exclude an offender who is considered by the court to be a systematic and persistent offender against the rail safety laws from carrying out all or specified railway operations for the period specified in the order.

Clause 204. Contravention of exclusion order

Provides it is an offence to fail to comply with the exclusion order.

Division 7 — Undertakings

This Division replaces the non-core provisions relating to Supervisory Intervention Orders (145 & 146) in the Model Bill. It was decided that a process of undertakings similar to existing WA legislation in the *Occupational Safety and Health Act 1984* would better achieve the purpose of encouraging and achieving compliance as intended by the Model Bill.

Clause 205. Court may allow offender to make election

Provides that where a person is found guilty of an offence against a rail safety law and a fine has been imposed and the court considers the person to be a systematic or persistent offender the court may make an order to allow the offender to pay the fine or to enter an undertaking with the Rail Safety Regulator provided that the offender and the Rail Safety Regulator are likely to reach agreement on the terms of the undertaking.

Clause 206. Making of election

Provides that the offender must lodge an election under clause 205 at the court within 28 days of the order being made and must serve a copy on the Rail Safety Regulator. Failure to do lodge an election within the 28 days is taken to be an election to pay the fine.

Clause 207. Failure to enter into undertaking

Provides that an election lapses if an undertaking has not been made with the Rail Safety Regulator by the date specified by the court.

Clause 208. Time for payment of fine

Provides various times for payment of the fine with regard to the particular circumstances.

Clause 209. Nature and terms of undertaking

Provides that an undertaking is an agreement between the offender and the Rail Safety Regulator that the offender will take the action agreed upon at his or her expense within the time agreed. A copy of the agreement is to be provided to the court.

Clause 210. What may be included in undertaking

Provides a number of actions or things to be done which may be the subject of an undertaking that are measures which the Rail Safety Regulator believes will assist the offender in compliance with the Act. Actions or things which are already required of the offender by this Act should not be the subject of an agreement. The Rail Safety Regulator may include reporting requirements as actions the offender must take as part of the undertaking.

Clause 211. Effect of undertaking

Provides that the liability of an offender to pay a fine is suspended by the making of an undertaking and is cancelled by the offender's full discharge of the undertaking.

Clause 212. Failure to comply with undertaking

Provides that if an offender fails to fully discharge his or her obligations under an undertaking an offence is committed and the court must order that the fine suspended by the undertaking be paid and must impose a further fine in respect of the offence of failing to complete the undertaking.

Clause 213. Amendment of undertaking

Provides that an undertaking may be amended by an instrument in writing signed by both the offender and the Rail Safety Regulator.

Clause 214. Compliance report

Provides details of the things the Rail Safety Regulator may require to be reported by the offender in a compliance report in respect to an undertaking.

Part 9

General

Division 1 - Confidentiality

Clause 215. Confidentiality

Provides that a Rail Safety Regulator, a rail safety officer and other delegates or persons engaged or previously engaged in the administration of this Bill must not disclose information obtained in the course of that engagement except:

- As required under this or any other Act
- With the consent of the person from whom the information was obtained or relates
- In connection with the administration of rail safety laws and corresponding rail safety laws
- For law enforcement purposes, rail safety inquiries or public safety
- In accordance with the regulations.

Regulations made under this clause are intended to prescribe the additional checks and balances that will apply to the disclosure of information, including consultation requirements with persons likely to be affected by the release of the information.

Division 2 – Civil liability

Clause 216. Civil liability not affected by Part 4 Division 1 or 4

Provides that a breach of any duty in Division 1 or 4 of Part 4 does not automatically give rise to a civil action, and conversely, compliance with any duty in Division 1 or 4 of Part 4 does not automatically provide a defence to any civil action.

Clause 217. Immunity from tortious liability

Provides that the Rail Safety Regulator, rail safety officers, independent investigators and authorised persons are not liable for actions done honestly and in good faith in the course of exercising powers under the Act. The State is also relieved of any liability for the actions in good faith of any official.

Clause 218. Immunity for reporting unfit rail safety worker

Provides an immunity from civil or other action to a medical practitioner or physiotherapist or optometrist who raises concerns in good faith about the fitness of a particular rail safety worker to a Rail Safety Regulator or a rail transport operator or a person engaged by a rail transport operator or who reports the results of any tests or examination performed on the rail safety worker or any opinion the practitioner has formed from such tests or examination.

Division 3 – Compliance Codes and Guidelines

Nationally approved guidelines are intended to guide regulator behaviour and provide rail organisations with a nationally consistent set of expectations regarding what the regulator is looking for, the process to be followed by the regulator and the conduct of the regulator. They are intended to be detailed rules, procedures and technical standards for infrastructure, rolling stock, etc that can be voluntarily adopted by rail organisations with confidence of knowing that, if adhered to, the rail organisation will be 'deemed to comply' with the regulatory requirements to which the code or standard relates to. These instruments therefore are intended to be used to specify a means of compliance, not a regulatory requirement.

Clause 219. Approval of compliance codes and guidelines

Provides for the approval of compliance codes and guidelines. The provisions of this clause:

- Empower the Minister to approve compliance codes and guidelines to provide guidance to persons who have duties or obligations under the Bill
- Empower the Minister to approve a variation or revoke a compliance code or guideline
- State that a compliance code or guideline takes effect the day it is published in the Government Gazette.

Approved compliance codes or guidelines must be made available for inspection by members of the public without charge.

Clause 220. Effect of compliance codes or guidelines

Provides that failure to comply with a compliance code or guideline does not give rise to any civil or criminal liability.

Clause 221. Effect of complying with a compliance code

Provides that a person who complies with a compliance code that makes provision for a duty or obligation imposed by the Act or regulations is deemed to have complied with that duty or obligation.

Clause 222. Disallowance of compliance codes

Provides that an order by the Minister approving a compliance code or guideline or variation is subject to being disallowed by Parliament.

Division 4 - Miscellaneous

Clause 223. Recovery of certain costs

Provides that the Rail Safety Regulator may recover as a debt from a rail transport operator the reasonable costs of entry and inspection of railway infrastructure, rolling stock or railway premises in respect of which the person is accredited.

Clause 224. Recovery of amounts due

Enables amounts due under the Act or regulations to be recovered by the Rail Safety Regulator as a debt due to the jurisdiction.

Clause 225. Compliance with conditions of accreditation

Provides that an accredited person who complies with a condition or restriction of accreditation that makes provision for a duty or obligation under the Act or regulations is deemed to have complied with that duty or obligation.

Clause 226. Prescribed persons

Provides for the making of regulations that prescribe persons who must give rail transport

operators notice of any operations that might adversely affect the safety of the rail transport operators' railway operations.

Clause 227. Contracting out prohibited

Provides that any contract or agreement that purports to exclude or limit or modify the operation of the Act or of any provision of the Act is void.

Clause 228. Regulations

Provides that the Governor may make regulations under the Act with respect to various relevant matters.

Clause 229. Repeals

Provides that the *Rail Safety Act 1998* and the *Rail Safety Regulations 1999* are repealed.

Part 10

Transitional

Clause 230. Terms used

Defines terms used in this Part — 'commencement day', 'development period', 'the repealed Act'.

The development period, during which accredited or registered persons must meet any new requirements imposed by this Act, is 12 months, beginning on the commencement date.

Clause 231. *Interpretation Act 1984* not affected

Provides that the *Interpretation Act 1984* applies in respect of the repeals effected by clause 229.

Clause 232. Authorised officer

Provides that a person who was an authorised officer under the repealed Act is to be taken to be a rail safety officer under clause 22(1) of this Act for 2 years from the commencement date under the same conditions and limitations of his original appointment. An identity card issued to such an authorised officer before the commencement date is to be taken to be an identity card issued under clause 24(a) of this Act for 6 months from the commencement date.

Clause 233. Accreditation

Provides that a person granted accreditation under repealed Act will be taken to be granted accreditation under this Act appropriate to the circumstances and subject to the same conditions (unless accreditation is no longer required under this Act).

Clause 234. Interim accreditation

Under this Act, the term "interim accreditation" will cease to be used. Accreditation may be granted for specific purposes for specific periods.

A person granted interim accreditation under the repealed Act is to be taken to be accredited under clause 33(1)(c) for one year from the commencement date of this Act for the purposes of the interim accreditation granted before the commencement date and subject to the same conditions.

- Clause 235. Temporary accreditation**
- Under this Act, the term "temporary accreditation" will cease to be used. Accreditation may be granted for specific purposes for specific periods.
- A person granted temporary accreditation under the repealed Act is to be taken to be accredited under clause 32 for the period of the original temporary accreditation or for one year from the commencement date of this Act for the purposes of the temporary accreditation granted before the commencement date and subject to the same conditions.
- Clause 236. Annual fees**
- Provides that the date on which the person was accredited under the repealed Act is to be the date on which the person is to be taken to have been accredited under this Act. (This has the effect of ensuring that the anniversary date for payment of fees does not change with the commencement of this Act.)
- Clause 237. Private siding**
- Provides that a private siding registered under the repealed Act is to be taken to be registered under this Act and gives a 12 month development period for establishment of the railway to siding interface agreement.
- Clause 238. Suspension of accreditation**
- Provides that where a person's accreditation was suspended under clauses 18 or 19 of the repealed Act, then clauses 18 or 19 continue to apply to the person as if the Act were not repealed.
- Clause 239. Safety management plan**
- Provides that a safety management plan (SMP) under an accreditation existing on the commencement date is to be taken to be both a safety management system and a security management plan under this Act during the development period.
- The Rail Safety Regulator may give an accredited person directions regarding development of the Safety Management System or security management plan during the development period and a rail transport operator must comply with such directions.
- Clause 240. Emergency Management Plan**
- Provides that a rail transport operator must develop an emergency management plan before the end of the development period and must comply with any direction that may be given by the Rail Safety Regulator regarding the development of an emergency management plan.
- Clause 241. Health and fitness management programme**
- Provides that a rail transport operator must develop a health and fitness management programme for its rail safety workers before the end of the development period and must comply with any direction that may be given by the Rail Safety Regulator regarding the development of a health and safety management programme.
- Clause 242. Alcohol and drug management programme**
- Provides that a rail transport operator must develop an alcohol and drug management programme for its rail safety workers before the end of the development period and must comply with any direction that may be given by the Rail Safety Regulator regarding the development of an alcohol and drug management programme.

- Clause 243. Fatigue management programme**
- Provides that a rail transport operator must develop a fatigue management programme for its rail safety workers before the end of the development period and must comply with any direction that may be given by the Rail Safety Regulator regarding the development of a fatigue management programme.
- Clause 244. Assessment of competence**
- Provides that rail transport operators have 24 months from the commencement day in which they are exempt from the requirement under clause 77 to ensure that all rail safety workers are assessed as being competent to carry out rail safety work by reference to any units of competence recognised by the regulations or by direct assessment of the worker's skills.
- Clause 245. Identification for rail safety workers**
- Provides that accredited persons have a period of 24 months or any other prescribed period in which they are exempt from the requirements of clause 78 to ensure that each rail safety worker has a form of identification which carries sufficient details to enable a rail safety officer to check the worker's competencies as a rail safety worker.
- Clause 246. Installation of safety or protective devices**
- Provides that where the Director General has given a person a direction under clause 28 of the repealed Act in regard to the installation of safety or protective devices and with which the person has not complied with the direction by the commencement day, then clause 28 will continue to apply to that person as if the clause had not been repealed.
- Clause 247. Closing railway crossings, bridges etc.**
- Provides that a railway crossing, bridge or other structure is temporarily closed or regulated under clause 29(1) of the repealed Act immediately before the commencement day then clause 122 of this Act applies to the temporary closure or regulation of the crossing, bridge or other structure as if the closure was made under clause 122.
- Clause 248. Direction to stop, alter or not to start the works**
- Provides that if a person is subject to a stop work direction under clause 30 of the repealed Act immediately before the commencement day, clause 30 will continue to apply to the person as if the clause had not been repealed.
- Clause 249. Direction to undertake remedial safety work**
- Provides that if a person is subject to a remedial safety work direction under clause 33 of the repealed Act immediately before the commencement day, clause 33 will continue to apply to the person as if the clause had not been repealed
- Clause 250. Safety reports**
- Provides that if an accredited person is required under clause 36(1) of the repealed Act to submit an annual safety report to the Director General within the 28 day period immediately before the commencement day and the report is not submitted before the commencement day, the accredited person must still submit the report within the 28 days before the due date but to the Rail Safety Regulator as if clause 36 of the repealed Act had not been repealed and the reference to the in clause 36 were a reference to the Rail Safety Regulator.
- Clause 251. Supply of information**
- Provides that if an accredited person was required by the Director General to supply information and on the commencement day that information has not been supplied, clauses 37 and 51(2) of the repealed Act will apply to the accredited person as if they had not been repealed. That is,

the information must be supplied within the period specified and the person must not supply false information.

Clause 252. Notifiable occurrences and other incidents

Provides that an accredited person required to report a notifiable occurrence or other incident under clause 38 of the repealed Act and has not done so by the commencement day is required to make the report after the commencement day under the provisions of clause 82 of this Act.

Clause 253. Report from owner or operator

Provides that a notice served on an accredited person under clause 39(1) of the repealed Act requiring the submission of a report which has not been submitted by the commencement day is to be taken from the commencement day to be a notice under clause 83(1) of this Act and reference in clause 83 to a rail transport operator is to be taken to be a reference to the accredited person.

Clause 254. Request for certain details

Provides that if a notice has been served on an accredited person under clause 40(1) of the repealed Act requiring a report and the report has not been submitted before the commencement day clauses 40 and 51(2) apply to the accredited person as if they had not been repealed. That is, the information must be supplied within the period specified and the person must not supply false information.

Clause 255. Inquiries

Provides that an investigator conducting an inquiry under Part 5 of the repealed Act immediately before the commencement day is to continue the investigation as if he or she had been appointed under Part 6.

Clause 256. Evidentiary provision

Provides that in any proceedings under the repealed Act on or after commencement day, clause 57 of the repealed Act applies as if it had not been repealed.

Clause 257. Powers in relation to transitional provision

Provides that where there is no sufficient provision in this Part for dealing with a transitional matter, the Governor may within 12 months make regulations required, necessary or convenient in relation to that matter.

Part 10

Consequential Amendments

Division 1– *Government Railways Act 1904* amended

Clause 258. Act amended

This division deals with consequential amendments to the *Government Railways Act 1904*.

Clause 259. Section 2A amended

Updates the reference to *Rail Safety Act 1998* to this new *Rail Safety Act 2009*.

Clause 260. Section 13 amended

Updates the reference to *Rail Safety Act 1998* to this new *Rail Safety Act 2009*.

Clause 261. Section 61 amended

Updates the reference to *Rail Safety Act 1998* to this new *Rail Safety Act 2009*.

Division 2 – *Mines Safety and Inspection Act 1994* amended

Clause 262. Act amended

This division amends the *Mines Safety and Inspection Act 1994*

Clause 263. Section 7 amended

Updates the reference to *Rail Safety Act 1998* to this new *Rail Safety Act 2009*.

Division 3 – *Public Transport Authority Act 2003* amended

Clause 264. Act amended

This division amends the *Public Transport Authority Act 2003*

Clause 265. Section 3 amended

Updates the reference to *Rail Safety Act 1998* section 3(1) to the *Rail Safety Act 2009* section 3.

Clause 266. Section 4 amended

Updates the reference to *Rail Safety Act 1998* to this new *Rail Safety Act 2009*.

Division 4 – *Rail Freight System Act 2000* amended

Clause 267. Act amended

This division amends the *Rail Freight System Act 2000*

Clause 268. Section 9 amended

Updates the reference to *Rail Safety Act 1998* to this new *Rail Safety Act 2009*.

Division 5 – *Railways Access Act 1998* amended

Clause 269. Act amended

This division amends the *Railways Access Act 1998*

Clause 270. Section 8 amended

Updates the reference to *Rail Safety Act 1998* to this new *Rail Safety Act 2009*.