RAIL SAFETY BILL 2009

Committee

Resumed from 20 May. The Chairman of Committees (Hon Matt Benson-Lidholm) in the chair; Hon Simon O'Brien (Minister for Transport) in charge of the bill.

Clause 78: Identification for rail safety workers —

Progress was reported on the following amendment moved by Hon Simon O'Brien —

Page 67, after line 18 — To insert —

(b) If it is not practicable for a rail safety worker to produce the identification on being requested to do so, the rail safety worker may produce it within a period considered reasonable by the requesting rail safety officer.

Hon KEN TRAVERS: I will conclude this debate, as we had an extensive debate before the unfortunate break that we have just had after the last time we dealt with this legislation. If it is the government's will to push on and pass this amendment, I have to say that I have some sympathy for the argument that we maintain the current framework in which the production of identification is an expectation and, as with other provisions, there is no penalty. However, I am not sure that we have the perfect wording and I am confused in my own mind about whether the wording of the committee or the government is better. I fully understand the points that have been put before us from the committee. All I can do is suggest that if it is the government's intention to push on with this amendment, we should let the matter go to the floor of the chamber and move on. However, I urge the minister to take the opportunity, if he did not take the opportunity over the break, to reconsider the way in which this matter is dealt with. The practical circumstances for someone who does not have ID probably would be that the he would not be allowed onto a site or a decision would be made based on the circumstances at the time. There does not need to be a penalty clause.

Another element of this clause is that the company must ensure that rail safety officers are qualified to do the work for which they are employed and that they have a certificate to prove it. That side I have no problem with. However, rail safety workers must either be mandated to have ID and show it, or if they have it and do not show it, they must show it in due course. The penalty side of it is the real nub of the problem with this clause.

Hon SIMON O'BRIEN: I thank the honourable member for his observations on behalf of the opposition. I will return the courtesy with some brief remarks to wrap up this matter and we can then move on.

The points I make are these: in establishing a nationally harmonised system, we must have regard for what is happening in other states, where of course the same rail operators are operating across jurisdiction. That is a strong argument for ensuring that this provision is included; it would weaken the position if it were to be excluded. However, Hon Ken Travers and I are in closer agreement than an outside observer might think, because the sentiments he expressed are in fact not ones from which I disassociate myself, but I do agree with him also that we need to make progress.

Let us just summarise what the regime will be with clause 78, if amended in the way that we are proposing. Again I remind the chamber that the spirit of this amendment was identified by a standing committee of the house, and we have simply sought to make the words better for practical application. There is therefore probably no need to argue anything there.

It is the case that a rail transport operator must ensure that each rail safety worker who is carrying out rail safety work has identification, which also includes a portable record of the worker's qualifications. That seems to be agreed and there does not seem to be any dissent about that; so that is a good thing. If a rail transport operator fails to provide those IDs and fails in fact to encourage or require their display, then there will be very serious sanctions against the rail operator.

Hon Ken Travers: We agree with that.

Hon SIMON O'BRIEN: Okay, that is all agreed.

A rail safety officer is a government-appointed officer who has responsibilities to ensure compliance. There are many examples of similar compliance officers who are required to carry and display or produce ID, if not up-front, then at the earliest opportunity depending on the practical situation that may be confronting them. Indeed, if they fail to do that, there are all sorts of ramifications. For one thing, any proceeding would be prejudiced if they failed to comply with the requirement to identify themselves, and there are internal disciplinary sanctions available and all the rest of it. In the course of our Committee of the Whole debate last week, Hon Ken Travers reminded the chamber that we both used to be in a line of work in which we were involved in compliance and

had various needs to provide identification from time to time. I do not think there is any disagreement there; so that is fine.

We just come down to the question of the rail safety workers and a potential sticking point of how practical it is to require them to have their identification with them ready for production on the spot, a difficulty that was picked up by the standing committee and a point that was favourably received in that spirit by the government. That is why I have moved the amendment myself. The question, therefore, is: is a rail safety worker being singled out for some special and unnecessary attention? That is the nub of it. I respectfully submit that members can be reassured on this point that that is not the case. I think it is recognised that certain qualifications are needed to be involved in rail safety work; so we do not need to debate that. That those qualifications prove that rail safety workers should be in a place doing whatever they are doing in connection with rail safety work is something that may have to be established for anyone that observes them; whether it is anybody around them or indeed a rail safety officer ensuring compliance. Again there is no disagreement about that, which is a good thing. At this point I remind members that, particularly in this day and age, in a range of occupations, including the one Hon Ken Travers and I used to be involved in, one must display identification to even be present in certain locations, much less to do anything. Very hefty fines apply if those provisions are breached. In certain waterfront locations, for example, people have to have, is it, an MISC?

Hon Ken Travers: Australian maritime safety certificate.

Hon SIMON O'BRIEN: We all know what we are talking about, even if the acronym temporarily escapes us.

Hon Ken Travers: I know what you mean; it's accreditation to go on the waterfront.

Hon SIMON O'BRIEN: I was with a group of people on a waterfront location recently and we were approached by a security person who felt compelled to tell us that if we did not have it on display we faced a $50 000 fine.

Hon Ken Travers: You probably looked suspect. I would have approached you too!

Hon SIMON O'BRIEN: I am the Minister for Transport; it is my port, so it seemed a bit rich.

Hon Ken Travers: But have you gone through security clearance to get there? That is the question!

Hon SIMON O'BRIEN: Let us say that, in that instance, security was on the ball. Similarly, we know that anyone employed in a range of occupations at airports in particular must display a pass or they will have to pay a penalty. The good news is, of course, that people responsible for enforcing those matters, at least in our country, are generally fairly realistic about it and do not try to point Tommy guns in our general direction and so on. In practice, rail safety workers are simply required, as are many other workers, not only by government but often by company regulation in a range of occupations, to wear their identification at all times. There needs to be some sort of sanction to make sure that that is enforceable, and this clause seems to be it. I would not have thought though that people would be fined for this offence unless there were a pretty compelling reason to do so. I believe the amendment that has been moved allows sufficient discretion for rail safety officers to ensure that people have the relevant ID, without going over the top and encroaching on the individual's rights or dignity any more than is absolutely necessary for the proper observance of the important aspects of rail safety work.

Over the past few days I have thought about this since we last considered this matter, and I am confident that with this amendment this clause should hit the mark. If for some reason it does not, I give members an undertaking that I would be amenable to amending it if it proved to be necessary. It is my considered and reasonably experienced view of these matters that the house should not consider this proposal to be unacceptable or over the top. I look forward to members' support for the amendment.

Amendment put and passed.

Hon ADELE FARINA: In view of the amendment we have just passed I think the committee recommendation falls away. I am happy to withdraw it formally if the chairman wants me to do so.

Clause, as amended, put and passed.

Clauses 79 to 87 put and passed.

Clause 88: General powers after entering a place —

Hon ADELE FARINA: I move —

> Page 76, after line 34 — To insert
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> (3) If a place is entered under subsection (1) and the occupier is present at the place, the occupier is entitled to observe the inspection.

Clause 88 allows a rail safety officer to search and inspect places and things at railway premises, and it is copied from the model bill. However, the clause does not provide for an occupier to observe the search and inspection requirement. Compared with clause 146, which is such a provision, the committee felt that a similar provision should apply in this instance, and that is why the committee has recommended the amendment.

Hon SIMON O'BRIEN: The government will agree to the amendment to put the matter beyond doubt. I hope that satisfies any concerns held by the Standing Committee on Uniform Legislation and Statutes Review or the Committee of the Whole.

Amendment put and passed.

Clause, as amended, put and passed.

Clauses 89 to 92 put and passed.

Clause 93: Search warrant —

The CHAIRMAN: Given the amendments in your name, Hon Alison Xamon, are exactly the same, they can all be moved together.

Hon ALISON XAMON: Thank you, Mr Chairman, I move —

Page 79, lines 3, 18, 22, 23, 25, 26 and 27 — To delete "justice" and insert "Magistrate".

This is an issue that the Greens have raised previously. Hon Giz Watson has raised this particular principle on a number of occasions, in particular during debate on the criminal investigation bill. We have sought to amend the standing of the person who can issue a warrant from a justice of the peace to a magistrate. We note that, at the time, the intent was broadly agreed to in the chamber but the resource implications precluded the amendment. However, in this instance, given the likely small number of search warrants following a safety incident that will be required in Western Australia, it is recommended that the bill be further amended to require a rail safety officer to seek a search warrant from a magistrate rather than a justice of the peace. The resourcing implications are likely to be quite small and therefore can be absorbed from existing Department of the Attorney General resources.

Obviously, the need for a magistrate to issue a warrant rather than a JP provides statutory effect to the recommendation of the Kennedy royal commission, minimises corruption opportunities and enables strong documentation for the grounds for a search warrant. I also wish to say that the use of JPs is contrary to the intent and the text of the Australian Transport Council's model rail safety legislation. As we have seen with the death of elder Ward and as I mentioned with the Kennedy royal commission, as a principle, we think it is very important that JPs do not issue warrants instead of a magistrate.

Hon SIMON O'BRIEN: I firstly acknowledge the spirit with which the amendment is moved. On behalf of the government, though, I respectfully decline to accept and support the amendment. I have some fairly fundamental reasons for doing so, none of which I hope are ultimately discordant with the spirit with which the amendment was moved. It is simply the case that there are some valid reasons for a departure from the model bill locally to use the term "justice" rather than "magistrate". I will concede that the model bill uses the term "magistrate" and that is what will be applied in sundry other jurisdictions, unless they have made a change as I am proposing in this bill.

Firstly, I have to explain why we have changed it. Secondly, I need to address why we would then decline the spirit of Hon Alison Xamon's amendment and the arguments that she has advanced in support of it. The first question is: why would we use the term "justice" instead of "magistrate"? I am aided here by the forty-sixth report of the Standing Committee on Uniform Legislation and Statutes Review. At page 21 it reports that the term "justice" means "justice of the peace" and has been carried over from our existing legislation, the Rail Safety Act 1998, so it is the status quo in that sense. When queried by the committee, in giving evidence, the department provided a couple of explanations. Firstly, it is merely a local, administrative variation. I have already said what that is, and it is consistent with the existing act. To address that further, I will need to come to my second point in a minute of why we are persisting with it. On page 21 of the report, the committee also refers to the evidence of departmental officers, saying it is very much a case of practicality and practical convenience that it requires its officers to go to a JP and not a magistrate to obtain a search warrant. In the answer given, it uses the old clichés that I imagine are always given by officers in such examples. I know because I have done it myself in another life. At the proverbial one o'clock on a Monday morning, or whatever other ungodly hour the member wants to contemplate, it is not very easy to necessarily drum up a magistrate. That situation can perhaps be aggravated more so by the location than the hour. If there is a rail safety emergency and possibly a recalcitrant operator and a warrant is required, time is of the essence. It may not be satisfactory to have to wait for what might be an extended period. Hours can make a long difference when trying to respond to a rail safety incident if one has to wait for hours and/or travel a significant distance to task a magistrate with a request for a warrant

rather than a JP because, by definition, JPs are more available for such functions. That is one of the main reasons we have a system of justices.

Before I conclude and sit down—others probably wish to participate—the other point that Hon Alison Xamon mentioned and that I said I would return to related to the arguments advanced by her and also by the committee report on other committee work in this Parliament and the 2004 royal commission. The report of the Standing Committee on Uniform Legislation and Statutes Review also quotes some eminent local law identities about the desirability of magistrates or other designated persons rather than JPs being the authorisers of search warrants in a range of different situations. Warrants are requested and granted, or not, in a range of situations to a range of people involved in law enforcement or compliance activities. This is yet another case. Having advanced the reasons that we prefer the term "justice" in our local bill, which carries on from the existing act, so there is no change, the government would prefer to see that the debate of magistrate versus JP in connection with warrants become a debate for another occasion. The reason it is a debate for another occasion is because it affects so many different law enforcement activities carried out by so many different officers, both state and federal and, indeed, local government officers as well. If we chose to depart from that locally recognised established standard, we would need to do it at a wider, more in globo, level rather than just pick out a discrete item of legislation such as this, an item of legislation which I think is probably not one of the more controversial in relation to the issuing of warrants either because it relates to regulation of industry practices rather than individual behaviours under criminal law. I will ask the house that we reserve the debate for "magistrate" versus "JP" for another occasion. I do not think this is the right occasion. For the reason I have outlined, I think we should persist with the existing law in the Rail Safety Act 1998 with a justice being the person these matters are put to.

Hon Ken Travers: Is the government working towards bringing in magistrates to oppose justices? You say we should wait for that debate. Is that something that the government is working on at the moment?

Hon SIMON O'BRIEN: I am not in a position to say. I was not claiming in any of my previous remarks that we are. It is a debate for another occasion whenever it is brought on. It is certainly not a precedent to be set today.

Hon ALISON XAMON: I wish to respond further to some of the minister's comments. I also share the concerns voiced by my colleague that I am not quite sure when the debate is going to be had other than when it is presented to us now as legislation. I am not sure I quite accept that argument. Every time this does come in front of the Greens (WA), we keep raising it as an issue fairly consistently and will continue to raise it fairly consistently because the concerns still remain.

I am not unsympathetic to the arguments around the accessibility of justices of the peace. I understand that the argument that Western Australia is a very large state is always proffered as to why we go down the path of using JPs rather than magistrates. However, it still does not address the fundamental concerns that we have about recordkeeping, accountability and best practice around issues of governance. I understand that there is not a desire to see this amendment stand, but we think it is an important issue to keep raising and we will reserve the right to do so.

Hon KEN TRAVERS: First, I congratulate the Standing Committee on Uniform Legislation and Statutes Review on that section of its report dealing with clause 93. It gives a good précis of not only the arguments for and against, but also the history of this matter. It particularly outlines the current government's view on this matter when it was on this side of the chamber. I understand the argument the minister is putting about the issues of justices versus magistrates, the resource implications and the like, because it is the position that the previous government put. However, in the light of the comments that were made by the then opposition—this is the reason I raised the interjection with the minister—regarding the need and the desire for the then government to move towards implementing the role of magistrates, I thought that after almost two years in government it may have started to move on that. I understand the argument. It probably needs to be done in globo.

I thought there would be a need to move towards duty magistrates to ensure that one is available when required. I suspect there are problems with this issue. One of the changes that could be made would be to seek warrants by telephone. For example, due to a person's remoteness, he or she may not be able to present before a magistrate. With modern technology today or a combination of appearing before a justice but the justice seeks guidance from a magistrate in order to get a legally consistent position, the justice could still be there to read the body language and the like which would not be possible to do over the telephone. The outcomes that are intended could be achieved in a range of ways.

I have a desire for the opposition to vote no to these amendments to test whether Hon Peter Collier still holds the view that he once did or now that he is in government he has chosen to change his view. It would not surprise me because there are lots of areas in which this government has done backward somersaults between the time it was in opposition to now.

I put the view to the government that it needs to start moving in this area. One reason for that is, if for no other reason, I suspect that when we get the national rail framework "magistrate" will be specified in it. I suspect that magistrate will also be specified in the legislation that will ultimately be passed by the South Australian Parliament, which will apply to Western Australia. If this government does not start to put in place the mechanisms I referred to, a problem will arise when the national legislation, which will apply to Western Australia, is brought in. The problems the minister highlighted about access to magistrates will arise, because that legislation will require a magistrate to issue search warrants.

In indicating that the opposition is happy for the chamber to progress on this matter, I urge the minister to talk to his colleagues, the Attorney General, the Premier and Treasurer, to get the ball rolling.

It is great to see that Hon Peter Collier has come back into the chamber after urgent parliamentary business. I am glad that he has run back into this chamber, probably to put the case for why we should support the Greens' amendments.

In all seriousness it is something that the government needs to move on. I hope that we are not that far away from the national legislation. When it comes in it will relate specifically to "magistrate". When that happens we need to have all the issues that the minister talked about, such as resourcing and the like, sorted out.

Hon SIMON O'BRIEN: I recognise, as all members do, that we need to progress. I recognise what Hon Ken Travers and Hon Alison Xamon have said and perhaps conclude our debate on this matter for now. We need to note that the references to the comments in the committee's report of other members, including Hon Peter Collier, Hon Giz Watson and Hon George Cash, were faithfully recorded and I am sure those members still retain those views and are consistent in the values they expressed in that report. However, for the sake of consistency with our current arrangements, including our legislative arrangements, we will not persist with this matter now. I am recognising, as the member invited me to do, that this is a debate for another day, but that the day needs to be closer.

Hon Ken Travers: It is a debate that the government should be dealing with today. Although the Parliament may deal with it at a later date, the government needs to deal with it so we are prepared for when the Parliament deals with it.

Hon SIMON O'BRIEN: Indeed, and that is when we will pursue the history of related and relevant matters. We will not be pursuing that now.

Amendments put and negatived.

Clause put and passed.

Clauses 94 to 117.

Clause 118: Oral direction before prohibition notice served —

Hon ADELE FARINA: I move —

Page 97, line 15 — To delete "." and insert —

; and

(e) that it is an offence to do or not to do the stated act; and

(f) that the penalty for an offence is a fine of $28 000 for an individual and for a body corporate, $280 000.

The reason that I moved this amendment on behalf of the committee is that it is an offence under clause 118 for a rail safety worker to not obey a direction provided by a rail safety officer. This particular clause deals with when an oral direction is given by a rail safety officer to a rail safety worker. The clause requires a rail safety officer to tell the person to desist from doing an act and give the reason and the person must comply or a fine of $28 000 applies. I am sure that every member in this chamber will agree that this is a substantial fine. I remind members that in this situation, if a rail safety officer does not have his or her identification at the time of giving this direction; the rail safety worker will not necessarily know that the person is a rail safety officer who has authority under the act to issue directions and may not appreciate that the direction being issued has significant ramifications. While the committee acknowledges that clause 118 requires the rail safety officer to tell the worker why he or she should stop doing an act, that is all that is required. The committee believes that the rail safety officer should go one step further to make it very clear that if the rail safety worker does not follow this direction it is an offence under the act carrying a penalty of up to $28 000. If the rail safety worker is told that failure to stop doing something carries a penalty of $28 000, it will surely focus the worker's attention. The committee did not believe that it was that great an additional obligation or burden on a rail safety officer to provide those additional facts when giving a direction. I again stress to members that the rail safety officer may not have any ID, so the person to whom the direction is being given does not know that the other person is a rail

safety officer with authority under the act to give this direction. The committee is trying to provide some context and some protection, so that people understand the significance of not complying with the direction. Given the magnitude of the penalty—$28 000 is a substantial amount of money—the committee feels that it is reasonable to require that these other parameters be in place.

Hon SIMON O'BRIEN: The government declines to accept the committee's recommendation, and I am very surprised to see this amendment. I was surprised to see this matter referred to in the committee's report anyway. The committee's report on clause 118 commences on page 25, paragraph 9.34, by stating, "This clause is replicated from the Model Bill." When we have a Standing Committee on Uniform Legislation and Statutes Review that is examining a bill that "by reason of its subject matter, introduces a uniform scheme or uniform laws throughout the Commonwealth", then I would have thought that paragraph 9.34 of the committee's report says it all: "This clause is replicated from the Model Bill." I am a little surprised that the committee has sought to interest itself in this specific clause in this way, beyond the fact that it faithfully reflects the intergovernmental agreement. If the Parliament decides that it does not like this provision or wants to construct it in another way, that is fine; but I would have thought that this would not be something that the committee would concern itself with under referral because, of course, under standing order 230B, "Unless otherwise ordered, a standing committee is not to inquire into the policy of a Bill." The committee is trying to reconstruct the clauses. It is saying, "Here is how you construct this provision to make it work better."

Hon Ken Travers: That is detail, not policy.

Hon Adele Farina: It is the practical effect of the law.

Hon SIMON O'BRIEN: I query why this standing committee is getting involved in this sort of matter. It is not a legislation committee—it is a uniform legislation committee.

Hon Adele Farina: Which has to review a bill when it comes to the committee.

Hon SIMON O'BRIEN: Within certain parameters!

Hon Adele Farina: No, as it did when you were its chairman!

Hon SIMON O'BRIEN: Hon Adele Farina can argue that another time.

Hon Adele Farina: I am more than happy to. Why did you raise it now, then?

Hon SIMON O'BRIEN: I raise it because we should not be considering this, in my view, except by the motion of a private member. Nonetheless, it has been raised in this way.

Hon Ken Travers: Unless you give a substantive argument against the issue, I will move it, if that is what the minister wants, so that we can have the debate in this place.

Hon SIMON O'BRIEN: So far what I have said is merely a preamble.

Hon Adele Farina: And it is okay for the government to amend a model bill but not the committee?

Hon SIMON O'BRIEN: Yes, it is. The chairman of this committee has moved this amendment. I do not know how much experience she has of the world that these rail safety activities are meant to inhabit, but her amendment is quite an extraordinary proposition, and to suggest that it could work in practical terms is lunacy. Is the member suggesting that whenever a detective working with WA Police is hot on the trail of a suspected murderer that he or she should say, "Stop! You are committing an offence that could lead to a penalty of 14 years, 10 years or 20 years imprisonment, depending on the circumstances of aggravation"? Of course she is not! A police officer can direct members of the public and identify that he or she is a police officer, and for all intents and purposes that is all that is required at that time. In the same way this bill contemplates that there are circumstances where a rail safety officer who needs to identify that he is a rail safety officer, unless it is manifestly obvious that he is, can give oral directions that have to be followed; and there are very good reasons for doing it. To suggest that when there is a potential disaster about to happen that the officer then has to turn around and call out "I am a rail safety officer, do not pull that lever because if you don't have regard for what I am saying, it is an offence and the penalty for an offence is a fine of $28 000 for an individual and for a body corporate $280 000." Is the member seriously suggesting that is what we should require of a rail safety officer in an emergency situation? That is ridiculous and completely inappropriate. It is completely devoid of any understanding of what goes on in the real world. Those are the substantive reasons, which I think Hon Ken Travers would appreciate, why the government will not agree to the proposal that these words be inserted. This amendment would have the effect of hindering a rail safety officer. They would not enhance any aspect of the bill but would hinder a rail safety officer and, indeed, we would probably have some clever dick lawyer somewhere out there trying to use this wording or lack of wording —

Hon Ljiljanna Ravlich: Watch it!

Hon SIMON O'BRIEN: There are one or two in here as well!—as a reason for letting people off. If Hon Adele Farina thinks that is the way ahead, then the government begs to differ. The government opposes this amendment.

Hon ADELE FARINA: I draw the minister's attention to the standing orders. Schedule 1, clause 8, "Uniform Legislation and Statutes Review Committee", subclause (3) reads —

> The functions of the Committee are -
>
> (a) to consider and report on Bills referred under SO 230A;

Hon SIMON O'BRIEN: I have already referred the honourable member to standing order 230B.

Hon Adele Farina: Which refers it to the committee. Once it is at the committee, schedule 1 takes effect and we are required to review and report on the bill, which is what we do.

Hon KEN TRAVERS: I do not know what the minister had for lunch, but he seems to have come into the chamber this afternoon trying to pick a fight about what I would have thought is a very simple matter that we can calmly debate in the chamber and do not need to get excited about. I put on the record that I do not have a problem with what the committee has done here. This is model legislation. There are some sections of this model legislation that the government has agreed to, and there are some sections of this model legislation that the government has chosen not to adopt. I am not complaining about that. In fact, we did not complain about the last two issues that we debated; that is, magistrates versus justices of the peace, and clause 78 of the bill. The reason for those variations from the model bill was explained to us, and we did not complain about that. So it is clear that we are not implementing this uniform legislation in full.

It is an interesting concept to suggest to the house that in seeking to add some words to ensure that a person is aware of the implications of subclause (1) of a bill, when a person is required to comply with subclause (2) of a bill, it is not a matter of detail, and that the committee therefore has no right to go into that matter. I find that extraordinary. The minister is saying that the only thing the committee can look at is the national uniform legislation. I will have great delight in going back through the time when the minister was the chair of this committee to see whether he complied with that on every occasion and never once suggested to this chamber any recommendations that were not contained within the bill that was under consideration. The minister believes that this is not a matter of detail. I would have thought, if I can give the minister some advice —

Hon Simon O'Brien: You are going to, anyway!

Hon KEN TRAVERS: Yes. I intend to. I did not say that I was asking the minister whether I could give him some advice. I said—as a statement—"If I can give the minister some advice". I would have thought that, rather the excitement that we got from the minister, the minister would have advised the chamber that he understands what the committee is getting at. I certainly understand what the committee is getting at. We have already established that a rail safety officer may not be wearing any identification. A rail safety officer who is not wearing any ID may say to a person at a workplace, "I am instructing you to stop doing that, and I will tell you the reason that I am giving you that instruction." The reason may be that he does not think it is safe; or there may be a more longwinded explanation of the reason. I am sure that if the minister was the person who was giving the oral direction, it would be an extensive explanation. We believe that the officer should then say, "And, by the way, if you do not stop doing that, you will be committing an offence that carries a penalty of $28 000". If the minister does not want to include that in the legislation, he should at least say that he will be instructing our rail safety officers to give that warning where it is appropriate to do so and where they have the time to do so, and that that is how he would expect the scheme to operate. That would have been a far better answer. That is what I would have expected. I would have expected that the rail safety officers, as part of their training, would be instructed to advise people of the implications of not carrying out an instruction. The committee is absolutely right in its comment that a person who is told by a rail safety officer to stop doing what he is doing may just say to that rail safety officer, "I do not know who you are, because I have not seen your ID, and I am not going to listen to you; I am going to keep doing what I think is the right thing to do". That person may then be fined $28 000 when he did not even realise at the time that the person who was giving him the instruction was a rail safety officer. I know that ignorance of the law is no excuse, but I would have thought that as a way of progressing and as a way of operating —

Hon Adele Farina: I would have thought that safety was the issue here.

Hon KEN TRAVERS: We should encourage people to do the right thing. If a person is not willing to stop when he is instructed to stop, it should be pointed out to that person that it is an offence not to stop, and that a fine is attached to that. It has been argued that a rail safety officer will not have the time to explain that to a person. I do not think it will take long for a rail safety officer to say to a person, "You will commit an offence if you do not

stop, and there is a penalty of $28 000." If something is about to blow up and the rail safety officer is saying, "Stop!" —

Hon Adele Farina: The officer is probably not even going to have time to give the reason to stop!

Hon KEN TRAVERS: Exactly. I would hope that, if the minister is not willing to accept this amendment, and if it is not passed by the chamber—it is clearly not going to be, based on the strenuous opposition by the minister to this amendment—at the very least rail safety officers will be encouraged, where appropriate, to tell the person that it is an offence not to obey an instruction, and that a significant penalty will apply if the person does not obey an instruction. I do not think that is an unreasonable thing to ask and expect.

I reiterate that I do not think it is unreasonable for the committee to raise this matter. This is very much about the detail of the legislation. This bill already has many variations from the model bill; therefore I do not think the minister can argue that only the model bill can be considered in this debate. To add one more local variation would not be a killer in terms of this legislation.

Hon SIMON O'BRIEN: I draw the member's attention to the clause that we are debating and invite him to have another look at it. I also invite him to have another look at the committee report, if he wishes to place reliance on it, about the context in which an oral direction is required to be given under law. The rail safety officer first needs to believe, on reasonable grounds, that an activity that is occurring in relation to railway operations or railway premises that involves or will involve a risk to safety —

Hon Ken Travers: An immediate risk to safety, in fact.

Hon SIMON O'BRIEN: Yes, an immediate risk to safety—so immediate, in fact, that under clause 118(1)(b) "it is not possible or reasonable to serve a prohibition notice under that section immediately". So we are talking about a situation in which there is a reasonable belief that an immediate risk to rail safety has arisen or is about to arise. We are talking about what might be a very urgent situation. Let us have that clearly understood. Only in those circumstances, and none other, may a rail safety officer direct a person who has, or appears to have, control over an activity to do or not to do that activity. Only in those extraordinary circumstances will a rail safety officer have the power to give such an oral direction to a person. That is fair enough. The reason for the officer giving that direction may be anything, hypothetically. He may be pointing out an immediate danger —

Hon Ken Travers: "You are doing something that is causing sparks, and do you not see that fuel over there?"

Hon SIMON O'BRIEN: Exactly. We can all contemplate hypothetical situations that are real and immediate and pose a safety threat. That is what has to be able to happen. The officer giving the direction would include whatever practical advice to the person whom he is directing or seeking to direct as may be necessary to get that person to comply and thereby mitigate, reduce or relieve the immediate safety threat. We could also hypothesise about what the officer might need to say to achieve that effect. It could be that the officer says, as Hon Ken Travers said by way of interjection, "Look at that fuel spilt near electrical sparks" or something. If the worker responds by saying, "What are you going on about?" the officer might have to reinforce it by saying, "I'm a safety officer. This thing's about to blow up or something terrible is going to happen. I'm directing you, under the law, to stop doing that. I have the power to direct you" or whatever the rail safety officer might say. He might even go on to tell the person, "You're committing an offence if you don't do it." That is the sort of thing an officer may have to say and, indeed, does have to say if the person he attempts to direct does not comply.

Let us get this clear: workers have to comply. In certain circumstances in which it is not practical to give a prohibition notice, and when an officer has to give a direction verbally because of the immediacy of the situation, he can tell someone to do something or to stop doing something or, dare I say, do something differently; and the person might well comply just like that, jump back, and say, "Oh, wow! Well, I'm glad you told me that. I could've been ignited!" Or they might say, "Sorry, what did you say?" and the officer might repeat himself and then the person says, "Oh, right" or there might be any exchange of words; however, it is all with the goal of getting the person to cease what he is doing or to modify his behaviour so as to mitigate and reduce the immediate safety threat. As soon as that is done, the officer has achieved it. There is no taking anybody to court or fining someone $28 000 or anything; the officer is simply trying to reduce a safety concern and, as soon as he has done that, everyone is happy. However, in order to get it through to the person that he is directing, a safety officer can not only direct the person to do or not to do the stated act, but also give the person the reason why he is giving that direction, whether it is bleeding obvious or not. These are the ways that officers can give a direction, but then it goes further. The concern that members have raised in this proposed amendment is that we do not want people being fined up to $28 000—which is the maximum fine, let us face it. However, we do not want people to be possibly subjected to such penalties unless they are made aware of them. If it gets down to that, if the rail safety officer cannot make the person aware of the immediacy of the threat and is disregarded and the consequences are that it ends up in court, clause 118(3) comes into play. Clause 118(3) states —

> It is a reasonable excuse if the rail safety officer did not tell the person that the person commits an offence if the person does not comply with the direction.

Hon Adele Farina: Which is why we are suggesting that the officer should tell the person it is an offence.

Hon SIMON O'BRIEN: It is already in the legislation to protect the worker against what the member fears being visited upon him; therefore, it is not necessary to spell it out in the bill that this is one of the things that the officer must perforce do. It is a matter of escalation. We would not start off by saying, "Listen, mate, you want to be up for a $28 000 fine?" I do not think that is the first thing we would need to say when responding to an immediate rail safety issue.

Hon Ken Travers: No; the first thing an officer should tell them is what they should do or not do, and the second thing is why they should do it or not do it.

Hon SIMON O'BRIEN: Or identify oneself as a rail safety officer up-front. Okay, so it will depend on the occasion, and an extraordinary occasion it would be. It might be self-evident to anyone involved or present that this person is a rail safety officer. It might be obvious to anyone present what the apparent threat is or is not, so that would guide what the officer must say. Ultimately, if the person is arguing, "Why should I follow it?" it might come down to the officer saying, "Well, it's an offence if you don't do it."

Hon Ken Travers: They won't be able to get a conviction unless they do.

Hon SIMON O'BRIEN: Indeed.

Hon Ken Travers: But don't they have to tell them anyway, which is why I cannot understand —

Hon SIMON O'BRIEN: No; only if it got to that situation. It is self-evident in clause 118(3) that the person would have a reasonable excuse if he was not made aware that he was committing an offence. It is already stated there, and that will be in the general orders that will go out to officers. We do not think that we then, in addition to that, need to start talking about what the penalty is. The officer might actually do that; he might say that there are very big fines or even say it is a $28 000 fine, but if it is not necessary to do that and it is not practical, we certainly do not want an officer in such an immediate emergency situation weighed down by that sort of trivia. That is our reason.

Hon ADELE FARINA: I direct the minister's attention to clause 116 in the bill, which deals with the issue of prohibition notices. Clause 116(1) states, in part —

> (1) This section applies if an activity —
>
> (a) is occurring in relation to railway operations or railway premises that involves or will involve an immediate risk to safety; or
>
> (b) may occur in relation to railway operations or railway premises that, if it occurs, will involve an immediate risk to safety …

In this case, even though the risk is immediate, the bill allows for a prohibition notice to be issued rather than an oral direction given. Clause 116(4)(c) states that a prohibition notice must —

> if the rail safety officer believes that the activity involves a contravention or likely contravention of a provision of a rail safety law, specify that provision and state the basis for that belief …

Clause 116(4)(e) states that the notice must —

> set out the penalty for contravening the notice …

Bearing in mind that if, in a case of immediate safety concern, there is capacity to issue a prohibition notice that details all seven things listed in clause 116(4)—I read out only two of the requirements for a prohibition notice—which includes stating what the penalty is, why should it be so difficult to do that with an oral direction? It simply does not make sense. Both the prohibition notice and the oral direction deal with immediate safety concerns. However, if someone gets a written notice, the very things that the committee is asking for are required in the written notice, but, for some reason, given that we have now established that under clause 118 if the rail safety officer is doing his job properly he will tell the person that it is an offence anyway because otherwise they have a reasonable excuse under the law, all we are suggesting is that the officer does one further thing and just detail what the likely penalty will be for not complying with the direction. Once the officer has given the direction and the reasons for the direction, and stated that it is an offence if the worker does not comply, is the minister expecting this chamber to accept that the officer simply saying that the penalty is $24 000 will be such an onerous burden that cannot be complied with, when there is the capacity under this bill to issue a written prohibition notice rather than issue an oral direction? Both are dealing with situations of immediate risk to safety.

Hon SIMON O'BRIEN: I will deal with the question quite simply and, hopefully, it will find acceptance. The honourable member has just reminded us of what clause 116 says; indeed, I referred to it myself just a few minutes ago. If a prohibition notice is issued under clause 116, it must have certain details on it including the ones the member outlined. I anticipate that a prohibition notice would be in a prescribed form, would be pre-printed and would have a number of elements to it that might involve ticking a box in the way that is required in a lot of other similar government documents. A tick or a cross is placed by the officer issuing a notice or an infringement, or whatever the form is, to say that this is the offence that the person has committed. Most of those details about the penalty for contravening the notice are pre-printed on the form. A statement of the effect of clause 120 is required to be on the notice, although I am glad to say that the honourable member does not want the officer to be yelling out to the person the effect of clause 120 while also giving oral instructions; but it is the same argument that the honourable member has just advanced. That is therefore how a prohibition notice is given. It is a written instrument, probably a pre-printed instrument in many aspects, and not an oral notice. But clause 118, the clause we are looking at, contemplates a step well beyond that when there just is not time to give a prohibition notice. It would not happen very often, I should not think; it clearly would happen in an emergency situation. Therefore, what do we require the rail safety officer to do? We require the rail safety officer to give directions within certain parameters and we require the rail safety worker to comply with a certain level of protection; and that clause is constructed as it should be.

Let us look at what the consequences would be if a rail safety officer were required to give an instruction, presumably in a stressful situation. If the officer said all the things he had to say, or may be empowered to say, to the worker and then told the worker that the penalty for an offence is a fine of $24 000, what would happen if there was non-compliance?

Hon Adele Farina: Twenty-eight.

Hon SIMON O'BRIEN: Twenty-four thousand. What would happen if the officer said to the worker: "You could be subject to a penalty of $24 000"?

Hon Ken Travers: Twenty-eight.

Hon SIMON O'BRIEN: Then when the matter gets to court, it is pointed out that it is $28 000; what would that do? Would that potentially prejudice the case? Does the member think it might? Perhaps it might. If we are being that tiggy touchwood about it, I think it might.

Hon Adele Farina: The problem is that if you tick the wrong square, you are in exactly the same situation.

Hon SIMON O'BRIEN: Indeed. This is not about prohibition notices under clause 116; this is about not having time to issue a prohibition notice. That is why we need to be careful that we do not place unnecessary barriers in the way. I can see doubt in the honourable member's mind about getting the amount wrong. With the member's proposed amendment, and the clause stating that the penalty is $28 000, the member asks whether subsequent court proceedings would be prejudiced if an officer stated the penalty was $24 000. Perhaps it might; perhaps it might not. I did not choose $24 000 by accident in posing that question. Although the member does not realise it, she used the term $24 000 just before she sat down. I therefore do not know whether we want to put that sort of pointless onus of responsibility onto a rail safety officer. I think perhaps the matter has been canvassed and, hopefully, we can at least put the question fairly soon.

Hon KEN TRAVERS: I hope we can as well. I was not the one who came into this place all excited about this clause. I think we are actually in agreement about what practically will happen in the circumstances: in a circumstance of immediate risk, a rail safety officer will identify himself, if he has not already done so, to the person doing the work and will instruct the person to do or not to do something. The officer will then tell the person why that is the case, and if the person continues to do or not do something, the officer will instruct the person that it is an offence to do or not do it.

Hon Simon O'Brien: The reason for giving it; yes.

Hon KEN TRAVERS: No. The officer has already told the person to do or not to do something and has given the reason for telling the person to do or not to do that. That bit we are all agreed on. If the person continues to do that thing, whatever it is, the rail safety officer will then say to the person, "Do you understand that what you are doing is an offence?" The only issue about which there is probably some debate is whether or not the officer must then indicate that the penalty for committing that offence is up to $28 000. That is really the only area where there is any disagreement in terms of the practical situation. I suspect that what will happen in those circumstances is if the person continues to do it, the officer would say, "Don't do that because there is petrol over there and you're going to kill us all if you continue to do it. Stop. What you're doing is an offence. If you don't stop, I will issue a prohibition notice." If the person continues to do it, I suspect the next thing the officer would say, because at this point he is worried about safety, not this proposed section of the act, is: "If you don't stop, do you realise you can be fined up to $28 000?"—or he could even get it wrong and say "$24 000"—to get

the person to stop. That is what the safety officer would try to do. He would not be worried about the proposed section of the act —

Hon Simon O'Brien: There might be a heck of a lot of other things as well, but they are not going into the bill; are they?

Hon KEN TRAVERS: The officer would be worried about stopping the person doing what he is doing. One way to do that would be to point out to the person not only that it is an offence, but also the potential penalty for that offence.

I think that is what will practically happen in the circumstances. In fact the minister in his own comments agreed with the opposition—contrary to what the minister said earlier in the piece—that the officer would not have time to tell the person. For this clause to be implemented and to be used in a court of law, the officer would have to have told the person that it was an offence to do or not to do the stated act. I would have thought we were all agreed on paragraph (e) of the proposed amendment—the committee's recommendation—and that that is what will happen. It is better to make it explicit in the bill. The implication in subclause (3) is that the officer must tell the person anyway. It seems to me that we all agree on putting in paragraph (e) as a clear statement, because the officer must tell the person to apply that clause of the bill. The only question is whether or not the level of the fine needs to be stated. I can understand the minister's argument about what it would mean if the officer got it wrong. Perhaps there could be some better wording around that particular issue so that it does not become a potential escape clause, but I think in practical terms we are talking about exactly the same thing. I cannot see why the government would not at least accept paragraph (e) of the committee's recommendation. But if the government is not of a will to accept paragraph (e) or paragraph (f), I am happy to allow the bill to proceed. It probably means that it will not be as clear to people, but I do not think it will change what happens in the workplace.

Hon ADELE FARINA: I want to respond to a comment made by the minister. He asked why the committee did not seek to make it a requirement for the rail safety officer giving oral direction to make a statement on the effect of clause 120. We did not do that because clause 120 relates specifically to prohibition notices and not to oral corrections.

Committee interrupted, pursuant to temporary orders.

[Continued on page 3192.]