Minister for Transport; Disability Services

Hon. Simon O'Brien MLC

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CLERK OF THE LEGISLATIVE COUNCIL

Standing Committee on Uniform Legislation and Statutes Review - Report No. 46 - *Rail Safety Bill 2009*

Please find attached the Government's response to the Standing Committee on Uniform Legislation and Statutes Review's Report No. 46: *Rail Safety Bill 2009.*

I request that the Government's response be tabled as soon as practicable.

SIMON O'BRIEN MLC
MINISTER FOR TRANSPORT

13th Floor, Dumas House, 2 Havelock Street, West Perth Western Australia 6005
Telephone: +61 8 9213 6400 Facsimile: +61 8 9213 6401 Email: Minister.Obrien@dpc.wa.gov.au

GOVERNMENT'S RESPONSE TO REPORT NO. 46: *RAIL SAFETY BILL 2009*

Paragraph 5.3: Of 12 proposed variations, the National Transport Commission (NTC) accepted nine. The three not accepted were:

- ...
- Rolling stock lights. This was dismissed because of costs.
- ...

Comments made in relation to rolling stock lights relate to their reported effectiveness. The general view is that there have been no noticeable positive effects in reducing rail incidents. This naturally progresses to the issue of the cost being worthwhile if there is no quantifiable gain. The statement suggesting that the case for lights was argued on the basis of cost alone is not correct.

Finding 2: The Committee finds that the absence of formal recognition of the roles of the Rail Safety Regulator Panel and the Principal Regulator does not give sufficient regard to the institution of Parliament.

Recommendation 1: The Committee recommends that the responsible Minister advise the Legislative Council whether it is intended that the roles of the Rail Safety Regulators Panel and the Principal Regulator will be given statutory recognition in regulations and if so, identify the regulation making head of power in the Bill.

Finding 3: The Committee finds that the Bill (to the extent that the Model bill was varied to State requirements) protect State sovereignty when the legislative proposal was approved subject to the majority of the conditions listed in Paragraph 5.2. However, the ability of the Rail Safety Regulator Panel and the Principal Regulator to direct the Western Australian Regulator on accreditation matters has the potential to derogate from State sovereignty.

It is not intended that the Rail Safety Regulators Panel (RSRP) or the Principal Regulator be given statutory recognition in regulations.

The roles of the RSRP and that of the proposed Principal Regulator (which has yet to be considered by the Australian Transport Council) are no different to any other national committees and working groups established to coordinate on policies, programs, standards and guidelines; ensure consistency in processes and procedures; and facilitate communications for aspects of government activities that cut across jurisdictions.

There is no proposal that the RSRP or the Principal Regulator be able to direct the Rail Safety Regulator on accreditation or other matters in any jurisdiction.

Recommendation 2: The Committee recommends that the responsible Minister advise the Legislative Council how the objective of discontinuing different accreditation conditions in each jurisdiction is achieved by the Bill.

Paragraph 8.4: The Committee is of the view that the Bill remains unclear:

- as to what happens if one jurisdiction has additional conditions to another jurisdictions; and
- given that there is flexibility for the regulator to require additional conditions, how the Bill then introduces consistency.

The Rail Safety Bill 2009 is based on the National Model Rail Safety legislation which sets out an agreed consistent approach to accreditation requirements to be adopted by all jurisdictions. Part 4, Division 2 of the Bill is copied directly from the relevant Accreditation section in the National Model Rail Safety legislation (with the exception of Australian Transport Council agreed variations in clause 43 Rail Safety Accreditation Account and clause 44 Periodic returns).

It should also be pointed out that clause 37 of the Bill requires consultation and coordination between Rail Safety Regulators on application for accreditation matters if the applicant is accredited, or is seeking accreditation, under a corresponding law of one or more other jurisdictions.

If Western Australia insists on an additional requirement to other jurisdictions because of, for example geographical reasons or some unique characteristics of its rail infrastructure, then the interstate operator concerned would have to comply with the additional requirement when operating in Western Australia.

Paragraph 8.2: For Western Australia, the proposed accreditation process may result in three rail operators (Rio Tinto, Robe River and BHP Billiton) being accredited in the eastern states and not in Western Australia, thereby impacting on the financial viability of the Office of the Rail Safety Regulator in terms of its current level of service.

Footnote 24: Historically, these were exempted under state agreements and later by the *Rail Safety Act 1998*. Three have been exempted over the past 12 years, but one from amalgamation.

The reference to the Rio Tinto, Robe River and BHP Billiton rail operators being accredited in the eastern states under the proposed accreditation process is not correct.

The footnote is also incorrect in stating that the Pilbara railways were exempted under state agreements prior to the *Rail Safety Act 1998* as there was no legislative coverage to be exempted from.

Paragraph 8.7: The Committee confirmed that ... and that volunteers running a heritage railway like the Perth Electric Tramway Society are not liable to be prosecuted.

The statement may be misleading if read in too wide a context. Certain volunteers under clause189(9) of the Bill are not liable to prosecution, however all volunteers under other parts of the Bill are still liable where relevant.

Paragraph 9.19: The Committee finds that the distinction between:

- rail safety officers, independent investigators and authorised officers appointed by the Minister being allowed onsite without (respectively) their identification or certificates of appointment; and
- the rail safety worker whose skills, qualifications and competencies are already known and documented at the time of employment,

has not been adequately drawn or explained for the purposes of identification.

Recommendation 3: The Committee recommends that the responsible Minister advise the Legislative Council the difference between rail safety officers, independent investigators and authorised officers being allowed to produce their respective identification at a later time; and rail safety workers who are given no such opportunity.

The fundamental difference is the purpose of identification.

A rail safety worker (who can be a rail transport operator, an employee, or a contractor) is undertaking tasks that require specific skills that he (or she) is required to be competent in because rail safety is dependent on this work being done correctly. A contractor, for example, doing work may be unknown to not only a rail safety officer but also to the rail transport operator, so being able to immediately ascertain through his identification that the worker is competent to do the work required is paramount. If he was to provide information of competency at a later time after the rail or rolling stock is in full operation it could be too late to determine if the work was done appropriately.

The rail safety officer on the other hand has his identification to merely identify who he is, not to provide verification of his qualifications for the task he is undertaking. In the case of independent investigators, due to the urgent nature of carrying out investigations to capture undisturbed information and allow operations to resume, there may not have been time to issue the investigator with the appropriate certificate of appointment.

Recommendation 4: The Committee recommends that clause 78 of the Bill be amended in the following manner.

Page 67, after line 19 - To insert -

(3) If it is not practicable for a rail safety worker to produce the identification on being requested to do so, the rail safety worker must produce it as soon as practicable after the request is made.

While my comments to Recommendation 3 indicate that the amendment to Clause 78 should not progress, I am supportive of the intent of the Committee's recommendation and appreciative of the day-to-day operations that could become frustrated because of the immediacy of clause 78 requirements.

I am prepared to accept the Committee's recommendation to amend clause 78. However, as the term "as soon as practicable" is too vague and may result in the penalty not being enforceable, I suggest that the new subclause be as follows:

> (3) If it is not practicable for a rail safety worker to produce the identification on being requested to do so, the rail safety worker must produce it within a period considered reasonable by the requesting rail safety officer.

Also, the new subclause 3 would need to go before line 19 rather than after.

The length of this "reasonable" period would be at the discretion of the rail safety officer who would take into consideration the nature of the task at hand and the extent to which safety could be affected, the length of disruptive time required to produce the identification, and the duration of the work since there is no point in getting the identification after the work is done.

Recommendation 5: The Committee recommends that clause 88 of the Bill be amended in the following manner.

Page 76, after line 34 - To insert -

(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.

I would point out that the local variation in the model legislation referred to by the Committee is in regard to "seeking answers to questions", and not for the purpose the Committee has suggested, that being to amend the provision to allow the occupier to be present.

Clause 88 is copied directly from the National Model Rail Safety legislation. It contains no prohibition on the occupier accompanying the rail safety officer. The Committee may have inferred this because in Part 6 provisions in respect of independent investigations, there is in clause 146, a provision giving the occupier the right to observe an inspection.

The difference in drafting style between clause 88 and clause 146 is because the Parliamentary Counsel's Office was not constrained in the latter by a model provision. In any event, nothing in clause 88 as drafted precludes the occupier observing the progress of the investigation.

However I can see that the proposed amendment to clause 88 would make it clear that the occupier should not be precluded from observing the investigation and for this reason would be agreeable to the amendment.

Recommendation 6: The Committee recommends that subclause 118(1) of the Bill be amended in the following manner.

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

; and

Page 97, after line 15 - To insert -

(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.

Parliamentary Counsel's Office has advised that it is not normal legislative practise to include a requirement to state the quantum of the penalty in such situations. Because clause 118 enacts the National Model Bill clause 107, it follows the drafting style in that Bill. The wording is sufficient as is and the amendment is not needed.

It should be noted that the penalties are a maximum as imposed under a court action, so stating the amount of the maximum penalty is not a true reflection of the scenario that may unfold.

Recommendation 7: The Committee recommends that subclause 127(6) be amended in the following manner.

Page 103, lines 4 to 5 - To delete "are recoverable" and insert -

may be recovered

Parliamentary Counsel's Office has been questioned on this wording a number of times and maintains that the provision as drafted allows for discretionary recovery of costs. However, the Committee has mounted a strong interpretive argument in regard to this wording, and I have concluded that the amendment is suitable and will agree to it.

Recommendation 8: The Committee recommends that the Minister provide the House with details of the proposed industry investigation fund.

I have been advised, at Australian Transport Council meetings, that industry would be comfortable with a component of accreditation fees being allocated for the use of independent investigations. However to my knowledge there is no specific industry investigation fund proposed at this stage.

Recommendation 9: The Committee recommends that the Minister explain how subclause 127(6) can be reconciled with the 'no blame' policy objective of the Bill.

Subclause 127(6) allows the Government to consider recovery of costs in situations where that might be appropriate. In the event that costs of a no blame investigation were to be recovered this would not be done on the basis of blame.

It could be seen that an isolated network such as is found in the Pilbara may have an incident which the Government decides that an independent investigation is warranted, or the single rail operator-infrastructure owner has requested that an investigation be carried out to ascertain the true cause of the incident. In this instance, it would be reasonable to request that the rail operator-infrastructure owner in question pay for the investigation.

Where an investigation of an incident is required and the setting is one that is common across the industry (such as accidents at level crossings), it may be that the findings would result in overall safety improvements in the delivery of rail transport. In this circumstance a contribution from all rail operators and/or infrastructure owners could be considered appropriate.

The above examples do not base the amount of recovery on who is to blame. When and how an amount might be recovered would be dependent on the incident in question and while circumstances to enforce this provision have been surmised, the clause stands available for when these instances do eventuate.

Recommendation 10: The Committee recommends that clause 129 be reformatted in the following manner.

Page 104, lines 5 to 13 - To delete the lines and insert -

If, in the course of an investigation, an independent investigator reasonably believes that immediate action is required to prevent an occurrence involving the rolling stock or rail infrastructure of a rail transport operator that could result in, or that has the potential to result in -

(a) the death of, or injury to, any person, or

(b) damage to any property or equipment,

the independent investigator may, in writing, advise the CEO, the Rail Safety Regulator and the rail transport operator that that action is required.

Parliamentary Counsel's Office is of the view that the current wording does not present a problem. However, I am prepared to accept the Committee's reformatting of the provision to ensure that clause 129 is unambiguous and sufficiently clear.

Recommendation 11: The Committee recommends that subclause 154(10) of the Bill be amended in the following manner.

Page 119, line 31 - To delete "." and insert -

; and

Page 119, after line 31 - To insert -

(iii) the penalty for an offence is a fine of $28,000.

Refer to my response to Recommendation 6.

Finding 7: The Committee finds that the delegation to the Governor is inappropriate and that the liability of persons administering tests or taking samples should be in the Bill, not subsidiary legislation.

Recommendation 12: The Committee recommends that subclause 155(k) be deleted from the Bill. This may be effected in the following manner.

Page 120, line 24 - To delete - ";" and insert -

Page 120, lines 25-27 - To delete the lines.

Recommendation 13: The Committee recommends that the Bill provide a separate, protection against liability clause for persons administering tests or taking samples.

Recommendation 14: The Committee recommends that in order to provide a separate, protection against liability clause for persons administering tests or taking samples, a new clause 218A be inserted in the Bill. This may be effected in the following manner.

Page 168, after line 14 - To insert -

Clause 218A - Immunity for administering a test or taking a sample

No action may be taken against a person who, in good faith administers a test or takes a sample of blood or urine or other body tissues or fluids carried out under this Act.

Parliamentary Counsel's Office has advised that Part 6 of the Bill, which contains clause 155(k), is a part that applies only in Western Australia and should be as self contained as possible. On the other hand, clause 217 is to adopt the effect of clause 151 in the National Model Rail Safety Legislation.

Clause 155(k) has been drafted to reflect a similar approach taken by New South Wales (NSW Rail Safety (Drug and Alcohol Testing) Regulation 2008, clause 26).

I have considered the Committee's findings on the liability of persons administering tests or taking samples and would be agreeable to Recommendations 12, 13 and 14.

Recommendation 15: The Committee recommends that subclause 165(2) be amended in the following manner.

Page 126, line 11 - To delete "." and insert -

; and

Page 126, after line 11 - To insert -

(c) must advise that the penalty for an offence is a fine of $11,000.

Refer to my response to Recommendation 6.

Recommendation 16: The Committee recommends that subclause 165(3) be amended in the following manner.

Page 126, line 17 - To delete "." and insert -

; and

Page 126, after line 17 - To insert -

(c) states that the penalty for an offence is a fine of $11,000.

Refer to my response to Recommendation 6.