



REPORT OF THE
STANDING COMMITTEE ON CONSTITUTIONAL AFFAIRS
IN RELATION TO THE
RAIL SAFETY BILL 1998

Presented by the Hon Murray Nixon (Chairman)

Report 25

June 1998

STANDING COMMITTEE ON CONSTITUTIONAL AFFAIRS

Date first appointed:

21 December 1989

Terms of Reference:

1. The functions of the committee are to inquire into and report on:
 - (a) the constitutional law, customs and usages of Western Australia;
 - (b) the constitutional or legal relationships between Western Australia and the Commonwealth, the States and Territories,
and any related matter or issue;
 - (c) a bill to which SO 230 (c) applies but subject to SO 230 (d);
 - (d) any petition.
2. A petition stands referred after presentation. The committee may refer a petition to another standing committee where the subject matter of the petition is within the terms of reference of that standing committee. A standing committee to which a petition is referred shall report to the House as it thinks fit.

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Hon M D Nixon MLC (Chairman)
Hon Ray Halligan MLC
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1. Executive Summary

- 1.1 The principal purpose of the *Rail Safety Bill* ("the Bill") is to clearly set out standards and criteria that all persons wishing to own or operate a railway will need to meet in order to be accredited owners or operators.
- 1.2 The standards to be applied will be national, based on industry best practice and subject to ongoing development through the work of the Standards Association of Australia. It features mutual recognition of railway accreditation granted in other Australian jurisdictions and incorporates a process of conciliation and mediation as a means of resolving disputes.
- 1.3 The objectives of the Bill are purely safety related and directed at the promotion of ongoing safety improvements. The purpose of any inquiries or investigations will be to determine the cause and means of avoiding further occurrences of serious incidents or accidents and not the determination of liability or apportionment of blame.

2. Recommendations

- 2.1 The Committee's report makes recommendations in relation to each and every clause of the Bill and, where appropriate, provides comment on the clause. The Committee has recommended that all clauses should be passed with the exception of the following clauses -
 - (a) clause 4 which deals with the *Application of the Act* and, in particular, the exemption of specified classes (see pg 7);
 - (b) clause 31 which deals with *Railway employees* and, in particular, the issue of performing rail safety work while affected by drugs or alcohol (see pg 25); and
 - (c) clause 50 which deals with *Self-incrimination* and the protection afforded to a person providing evidence to an inquiry (see pg 41).

The Committee has recommended that clauses 4, 31 and 50 be fully debated in the House.

**Report of the Legislative Council
Constitutional Affairs Committee**

in relation to the

Rail Safety Bill 1998

3. Reference and Procedure

- 3.1 The Rail Safety Bill 1998 ("the Bill") was referred to the Constitutional Affairs Committee by the Legislative Council under Standing Order 230(c).

4. Contents and Purpose

- 4.1 The purpose of the Bill is to enable the development of a common national framework for the regulation of rail safety.

In his Second Reading speech in the Legislative Council, Hon Eric Charlton MLC outlined the nature of the Bill and stated -

Its objectives are purely safety related. It contains no non-safety related barriers to entry or operation and consistent with its objective of promoting ongoing improvements in safety, the purpose of any inquiries or investigations conducted under this Act will be to determine the cause and means of avoiding further occurrences of serious incidents or accidents and not the determination of liability or apportionment of blame.

- 4.2 The Bill contains 64 clauses in six parts -

Part 1: Preliminary

Part 2: Accreditation of owners and operators

Part 3: Safety Standards and Measures

Part 4: Compliance Inspections and Reporting

Part 5: Inquiries and Inspections

Part 6: Miscellaneous

- 4.3 The Bill is outlined below and the Committee has provided comment, where appropriate, on the relevant clauses. The Committee has provided recommendations in relation to each clause of the Bill.

4.4 As part of the review, the Committee heard evidence from a number of witnesses concerning the operation of the Bill. The witnesses who appeared before the Committee were -

- Trevor Maughan, Legal Officer, Department of Transport;
- Rob Burrows, Policy Officer, Department of Transport;
- Fred McKenzie, Deputy President, Friends of the Railway;
- Robert Wells, Australian Rail, Tram and Bus Industry Union; and
- Trevor Tobin, ex Westrail Occupational Health and Safety Officer.

PART 1 — PRELIMINARY

Short title

1. This Act may be cited as the *Rail Safety Act 1998*.

Recommendation 1: the clause be passed

Commencement

2. This Act comes into operation on such day as is fixed by proclamation.

Recommendation 2: the clause be passed

Interpretation

3. (1) In this Act, unless the contrary intention appears —

“**accreditation**” means accreditation under Part 2;

“**approved**” means approved in writing by the Director General;

“**Australian Rail Safety Standard**” means such principles and standards prepared, approved and published by the Standards Association of Australia in relation to railway safety management as are prescribed for the purposes of this definition;

“**authorized officer**” means a person appointed as an authorized officer under section 45;

“**Director General**” means the Director General of Transport referred to in section 8 of the *Transport Co-ordination Act 1966*;

“**document**” includes any record of information accessible only through the use of a computer or other device;

“**investigator**” means a person appointed as an investigator under section 41;

“**Minister**” means the Minister administering the *Transport Co-ordination Act 1966*;

“**notifiable occurrence**” means an occurrence prescribed as a notifiable occurrence;

“**operation of a railway**” means the operation of rolling stock on a railway;

“**operation of rolling stock**” includes provision, maintenance or movement of rolling stock;

- “**operator**”, in relation to a railway, means a person who is responsible, whether by reason of ownership, control or management, for the operation of rolling stock on the railway, or for the purposes of the railway;
- “**owner**”, in relation to a railway, means the person who is responsible, whether by reason of ownership, control or management, for —
- (a) the construction and maintenance, or the construction or maintenance, of rail infrastructure; or
 - (b) the operation of train control, signalling or communication systems;
- “**private siding**” means a siding owned and maintained by a person who does not own, control or manage the running line with which the siding connects or to which it has access, but does not include a marshalling yard or a passenger or freight terminal, or a siding of a kind prescribed as excluded from this definition;
- “**rail infrastructure**” or “**infrastructure**” means the facilities necessary to enable a railway to operate safely and includes railway track, associated track structures, over or under track structures, supports (including supports for equipment or items associated with the use of a railway), tunnels, bridges, stations, platforms, train control systems, signalling systems, communication systems, electric traction infrastructure, buildings, workshops and associated plant, machinery and equipment;
- “**railway**” means a guided system designed for the movement of rolling stock which has the capability of transporting passengers, freight or both on a railway track, together with its infrastructure and associated sidings, and includes a heavy railway, light railway, monorail, inclined railway or tramway, a railway within a marshalling yard or a passenger or freight terminal, and a railway of a kind prescribed for the purposes of this definition;
- “**railway employee**” means a person who performs railway safety work for an owner or operator and includes an employee or contractor and a person who performs railway safety work on a voluntary or unpaid basis;
- “**railway safety work**” means any of the following classes of work —
- (a) work that involves or relates to the driving or operation of a train or trains;
 - (b) work that involves or relates to the control of the movement of a train or trains;
 - (c) work that involves or relates to the design, construction, repair, maintenance, upgrading, inspection, testing or removal of rail infrastructure or rolling stock; or
 - (d) other work of a kind prescribed for the purposes of this definition;
- “**rolling stock**” means a vehicle, whether or not self propelled, that operates on or uses a railway track (for example — a locomotive, carriage, rail car, rail motor, light rail vehicle, train, tram, light inspection vehicle, road/rail vehicle, trolley and wagon) but does not include a vehicle designed to operate both

on and off a railway track when the vehicle is not operating on a railway track;

“**running line**” means railway tracks, other than sidings, used for the through movement of trains;

“**safety management plan**” means a plan referred to in section 10;

“**safeworking system**”, in relation to a railway, means the systems and procedures for operating trains safely and for protecting railway employees, passengers, freight, rolling stock and motor vehicles on or in the proximity of railway tracks;

“**siding**” means a portion of a railway track, connected by points to a running line or another siding, on which rolling stock can be placed clear of the running line and left unattended;

“**State**” includes a Territory;

“**track**” means the combination of rails, rail connectors, sleepers, ballast, points and crossings, or substitute devices, if used;

“**train**” means one or more units of rolling stock coupled together, at least one of which is a locomotive or other self-propelled unit.

- (2) An example used in or under this Act —
- (a) is not exhaustive; and
 - (b) does not limit meaning, but may extend it.

Recommendation 3: the clause be passed

Application of Act

4. (1) This Act applies to and in relation to —
- (a) a railway within, or partly within, the State with a track gauge equal to or greater than 600 mm; and
 - (b) any other system designed to transport passengers or freight or both and prescribed to be a railway for the purposes of this Act,

and to the operation of any such railway.

- (2) This Act does not apply to or in relation to —
- (a) a railway in a mine which is underground or predominantly underground and used in connection with the performance of mining operations;
 - (b) a slipway;
 - (c) a crane-type runway; or

- (d) a railway or system of a class prescribed as a railway or system to which this Act does not apply.

(3) The Minister may, by notice published in the *Gazette* and on such conditions, if any, as are specified, exempt from this Act, or specified provisions of this Act —

- (a) specified persons or persons of a specified class; or
- (b) specified railways or railways of a specified class.

(4) In subsection (3) —

“**specified**” means specified in the notice.

(5) The Minister may amend or repeal a notice at any time by subsequent notice published in the *Gazette*.

(6) A person must not contravene a condition imposed under this section.

Penalty: \$20 000.

Comment: Subclause (3) provides the Minister with the appropriate power to exempt single user railways associated with the mining industry in the north west of Western Australia; namely the three railways operated by BHP, Hamersley Iron and Robe River. The rationale behind the exemption is that these railways are single operator facilities which are regularly audited by the Department of Minerals and Energy and covered by the *Mines Safety and Inspection Act 1994*.

The Committee notes that the safety requirements of operating the private railways in the north west are regulated and monitored under the *Mines Safety and Inspection Act 1994*. However, the Committee considers that the aim of the Bill, to implement a common approach to rail safety regulation in Australia, may not be fully achievable if certain classes are exempted.

The Committee also notes that sub clause (3) of the Bill provides the Minister with the power to exempt the specified classes by notice published in the *Gazette*. Sub clause (5) provides the Minister with the power to amend or repeal a notice at any time by subsequent notice published in the *Gazette*. In support of this clause, the Committee has received evidence that a notice is a more expedient manner in which to deal with a rail safety matter. However, the Committee also recognises the opposing argument that a notice does not receive the same degree of scrutiny, as a Regulation, by the Delegated Legislation Committee nor is it subject to a disallowance motion in the House.

Recommendation 4: the clause be fully debated in the House

Relationship to *Government Railways Act 1904*

5. If there is a conflict or inconsistency between a provision of this Act, or subsidiary legislation made under this Act, and the *Government Railways Act 1904*, or subsidiary legislation made under that Act, the provision of this Act or subsidiary legislation made under this Act prevails to the extent of the conflict or inconsistency.

Recommendation 5: the clause be passed

Act binds the Crown

6. (1) This Act binds the Crown in right of the State, and in so far as the legislative power of the State permits, in all its other capacities.

(2) This section does not make the Crown itself, as distinct from any agent or instrumentality of the Crown, liable to be prosecuted for an offence under this Act.

Recommendation 6: the clause be passed

PART 2 — ACCREDITATION OF OWNERS AND OPERATORS

Division 1 — General provisions

Requirement for accreditation

7. (1) A person must not be the owner of a railway unless the person holds an appropriate owner accreditation for a railway under this Act.

Penalty: \$50 000.

(2) A person must not be the operator of a railway unless the person holds an appropriate operator accreditation for the railway under this Act.

Penalty: \$50 000.

(3) A person may hold both owner accreditation and operator accreditation.

Comment: This clause makes it an offence for a person to own or operate a railway unless they are accredited by the Director General. It should be noted that there will be no prohibition on a company being accredited as both an owner and operator.

Recommendation 7: the clause be passed

Granting accreditation

8. (1) Subject to sections 9 and 10, the Director General must, on application under this Act, accredit an applicant as the accredited owner of a railway if satisfied —

- (a) that the applicant has the competency and capacity to meet the requirements of the Australian Rail Safety Standard, and any other safety standard prescribed, or approved, as relevant to the operation of this Act, and generally to ensure the safe construction and maintenance, or construction or maintenance, of rail infrastructure or, if relevant, the proper operation of train control, signalling and communication systems;
- (b) that the applicant has an appropriate safety management plan;
- (c) that appropriate standards will be met in relation to the availability and adequacy of rail infrastructure and that appropriate safeworking and operating systems will apply under the accreditation;
- (d) that the applicant has the financial capacity or public risk insurance arrangements to meet reasonable potential accident liabilities for the railway;
- (e) that the applicant has a right, or is in a position to obtain a right —

- (i) of access to land where the railway is, or is to be, constructed or located; and
 - (ii) to use relevant rail infrastructure;
- and
- (f) as to any other matter prescribed.

(2) Subject to sections 9 and 10, the Director General must, on application under this Act, accredit an applicant as the accredited operator of a railway if satisfied —

- (a) that the applicant has the competency and capacity to meet the requirements of the Australian Rail Safety Standard, and any other safety standard prescribed, or approved, as relevant to the operation of this Act, and generally to ensure the safe operation of rolling stock on the railway;
- (b) that the applicant has an appropriate safety management plan;
- (c) that appropriate standards will be met in relation to the suitability of rolling stock and that appropriate safety systems will apply under the accreditation;
- (d) that the applicant has the financial capacity or public risk insurance arrangements to meet reasonable potential accident liabilities for the railway;
- (e) unless the applicant is the owner of the railway, that the applicant possesses, or is in a position to possess, appropriate rights to operate a railway on the railway specified in the application; and
- (f) as to any other matter prescribed.

(3) If an applicant holds an accreditation in another State or by the Commonwealth for a similar railway consistent with the requirements of the Australian Rail Safety Standard and with the form of accreditation to which the application relates, the applicant will be taken to have the competency and capacity to meet the requirements of the Australian Rail Safety Standard for the purposes of this section.

Comment: Sub clause (1) sets out the criteria an **owner** (responsible for the construction and maintenance of the track, signals and other infrastructure) must meet to be accredited. Sub clause (2) sets out the criteria an **operator** (responsible for the operation of rolling stock on railway) must meet before being accredited. Sub clause (3) provides that where an applicant holds an **accreditation from another jurisdiction**, the applicant will be taken to have the competency and capacity to comply with the Australian Rail Safety Standard.

Recommendation 8: the clause be passed

Safety standards — compliance specification

9. (1) An applicant for owner accreditation in relation to a railway must submit to the Director General appropriate safety standards with which the applicant agrees to comply, to the satisfaction of the Director General, relevant to the safe construction and maintenance, or construction or maintenance, of rail infrastructure or, if relevant, the proper operation of train control, signalling and communication systems, associated with the railway.

(2) An applicant for operator accreditation in relation to a railway must submit to the Director General appropriate safety standards with which the applicant agrees to comply, to the satisfaction of the Director General, relevant to the safe operation of rolling stock.

Comment: This clause provides that applicants for accreditation will be required to specify the standards to which they agree to comply if their application is successful. The applicant will need to demonstrate to the Director General that these standards are appropriate.

Recommendation 9: the clause be passed

Safety management plans

10. (1) An applicant for accreditation must submit to the Director General a comprehensive safety management plan that —

- (a) in the case of —
 - (i) an owner — identifies significant potential risks that may arise from the construction and maintenance, or construction or maintenance, of rail infrastructure or, if relevant, the operation of train control, signalling and communication systems associated with the relevant railway; or
 - (ii) an operator — identifies significant potential risks that may arise from the operation of rolling stock on the relevant railway;
- (b) specifies the systems, audits, expertise and resources that are to be employed by the applicant to address those risks; and
- (c) specifies who is to be responsible for the implementation and management of the plan.

(2) An accredited person must revise the person's safety management plan on an annual basis to the satisfaction of the Director General at least 28 days before each anniversary of the accreditation.

Penalty: \$20 000.

Comment: An applicant for accreditation will be required to submit a safety management plan that identifies significant potential risks, specifies strategies to address those risks, and specifies who will be responsible for implementation and management of the plan.

Recommendation 10: the clause be passed

Interim accreditation

11. The Director General may grant interim accreditation to an applicant to permit activities such as —

- (a) site preparation;
- (b) restoration or repair work;
- (c) testing of railway track or other infrastructure,

or for other purposes considered appropriate by the Director General.

Recommendation 11: the clause be passed

Duration of accreditation

12. (1) Subject to subsection (2), an accreditation remains in force unless or until it is suspended, cancelled or surrendered.

(2) The Director General may, if of the opinion that it is appropriate to do so, grant a person temporary accreditation for a period not exceeding 12 months.

Recommendation 12: the clause be passed

Style and particulars of accreditation

13. (1) Particulars of accreditation are to be given in writing by the Director General to the accredited person.

(2) An accreditation may be general or limited and, for example, may apply —

- (a) to the whole of a railway;
- (b) only to a part or parts of a railway designated in the accreditation, or having a designated scope or characteristic;
- (c) to all public or private passenger or freight services or both; or
- (d) to an operation or service designated in the accreditation, or having a designated scope or characteristic.

Recommendation 13: the clause be passed

Conditions

14. (1) An accreditation is subject to any conditions —

- (a) imposed by the Director General, by written notice given to the accredited person;
- (b) prescribed; or
- (c) otherwise imposed under this Act.

(2) An accredited person may apply for the variation of a condition to which the accreditation is subject, and the Director General may, as the Director General considers appropriate —

- (a) grant the variation; or
- (b) refuse to grant the variation.

(3) The Director General may, if of the opinion that it is appropriate to do so, by written notice given to an accredited person, vary a condition to which the accreditation is subject.

(4) The conditions of an accreditation may be varied by the addition, substitution or deletion of one or more conditions.

(5) An accredited person must not contravene a condition of the person's accreditation.

Penalty: \$20 000.

Recommendation 14: the clause be passed

Private sidings

15. (1) A person who owns a private siding is not required to hold an accreditation.

(2) A person who owns a private siding which is connected with, or to have access to, a railway or siding owned by an accredited owner, must —

- (a) register the private siding with the Director General; and
- (b) comply with any conditions imposed by the Director General by written notice given to the owner of the siding, or prescribed, with respect to the safe construction, maintenance and operation of the siding.

Penalty: \$20 000.

Comment: A private siding is defined in Clause 3 as a siding owned and maintained by a person who does not own, control or manage the running line with which the siding connects or to which it has access, but does not include a marshalling yard, or passenger, or a freight terminal, or a siding of a kind excluded by the regulations from the ambit of this definition.

Whilst the owners of private siding which are integrated into the railway system will not be required to be accredited, this provision will require that they be registered with the Director General and meet certain minimum safety requirements.

Recommendation 15: the clause be passed

Division 2 — Refusal, variation, suspension or cancellation of accreditation

Refusal of application for accreditation

16. If the Director General refuses an application for accreditation, the Director General must notify the applicant in writing of —

- (a) the refusal;
- (b) the reasons for the refusal; and
- (c) the procedures for conciliation, mediation and appeal under this Act.

Recommendation 16: the clause be passed

Variation of accreditation

17. (1) An accredited person may apply for the variation of the accreditation, and the Director General may, as the Director General considers appropriate —

- (a) grant the variation; or
- (b) refuse to grant the variation.

(2) The Director General may, if of the opinion that it is appropriate to do so, vary an accreditation on the Director General's own initiative.

(3) Before varying an accreditation under subsection (2), the Director General must give the accredited person written notice —

- (a) stating the proposed variation;

- (b) stating the reasons for the variation; and
- (c) inviting the person to show, within a specified time (of at least 28 days), why the variation should not be made.

(4) If, after considering representations made within the specified time, the Director General still considers that the accreditation should be varied, the Director General may vary the accreditation —

- (a) in the way proposed; or
- (b) in another way (having regard to the representations).

(5) The Director General must give the accredited person written notice of a decision under this section.

(6) If the Director General decides to vary the accreditation under subsection (4), the notice must also state —

- (a) the variation;
- (b) the reasons for the variation; and
- (c) the procedures for conciliation, mediation and appeal under this Act.

(7) Subsections (3) to (6) do not apply if the Director General proposes a variation for a formal or clerical reason that does not adversely affect the accredited person's interests.

(8) A variation for a purpose referred to in subsection (7) is effected by giving the accredited person written notice of the variation.

Recommendation 17: the clause be passed
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Suspension or cancellation of accreditation

18. (1) If an accredited person —

- (a) contravenes a requirement of this Act or the person's accreditation;
- (b) fails to meet a standard that applies to or in respect of the accreditation;
- (c) contravenes a direction under this Act;
- (d) in the course of acting under the accreditation, acts negligently, or in an unsafe or unlawful manner;
- (e) provides false or misleading information in connection with the operation of this Act; or
- (f) contravenes a requirement, standard, qualification or condition prescribed for the purposes of this paragraph,

the Director General may suspend or cancel the accreditation.

(2) Before taking action under subsection (1), the Director General must give the accredited person written notice —

- (a) stating the proposed action;
- (b) stating the reason for the proposed action; and
- (c) inviting the person to show, within a specified time (of at least 28 days), why the proposed action should not be taken.

(3) If the Director General, after considering representations made within the specified time, still considers that action should be taken, the Director General may —

- (a) suspend the accreditation for a specified period, until the fulfilment of specified conditions, or until further written notice is given;
- (b) cancel the accreditation; or
- (c) take other action (for example, by attaching conditions to the accreditation) determined by the Director General to be appropriate in the circumstances.

(4) The Director General must give the accredited person written notice of a decision under this section.

(5) If the Director General takes action under subsection (3), the notice must also state —

- (a) the reasons for the action; and
- (b) the procedures for conciliation, mediation and appeal under this Act.

Comment: This provision details the grounds on which the Director General must rely if it has been decided to suspend or cancel an accreditation. Prior to suspension or cancellation of an accreditation, the Director General must give a notice of intention and reasons to the owner/operator and allow at least 28 days in which the owner/operator may make representations.

Recommendation 18: the clause be passed

Immediate suspension

19. (1) If the Director General considers that there would be an immediate and serious threat to the safety of the public or to property or both unless an accreditation is suspended immediately, the Director General may, without complying with section 18, suspend the accreditation, wholly or partially, immediately.

(2) Written notice of a suspension under this section is to be given to the accredited person and is to specify —

- (a) whether the accreditation is wholly or partially suspended, and if partially suspended, is to specify the extent of the suspension;
- (b) any conditions relating to the suspension; and
- (c) the period of suspension.

(3) A suspension under this section is not to exceed 6 weeks except with the written agreement of the Minister.

(4) The Director General may —

- (a) withdraw a suspension under this section at any time; or
- (b) with the written agreement of the Minister, extend a suspension under this section (pending resolution of the matter under section 18, as appropriately modified to meet the circumstances of the case).

Comment: If the Director General considers that there is an immediate and serious threat to safety, it may immediately suspend an accreditation for a period of up to six weeks. The suspension may concern all or part of the railway. With the concurrence of the Minister, this period may be extended indefinitely.

Recommendation 19: the clause be passed

Division 3 — Dispute resolution

Dispute resolution

20. (1) A person —

- (a) whose application for accreditation has been refused, or who considers that his or her application for accreditation has not been decided within a reasonable period;
- (b) who is an accredited person and is aggrieved by a decision of the Director General with respect to conditions imposed with respect to the accreditation, or a variation or proposed variation of such conditions; or
- (c) who is, or was, an accredited person and is aggrieved by a decision of the Director General under Division 2,

may —

- (d) apply for the matter to be dealt with by conciliation or mediation in accordance with the scheme prescribed; or
- (e) appeal to the District Court.

(2) An application or appeal under subsection (1) in respect of a decision is to be made within one month after notice of the relevant decision has been given.

(3) A person who is dissatisfied with the outcome of conciliation or mediation proceedings under subsection (1) may, subject to the regulations, within one month after the conclusion of the proceedings, appeal to the District Court.

(4) Subject to subsection (5), the operation of a decision continues pending the outcome or determination of conciliation or mediation proceedings, or the outcome of an appeal.

(5) The Director General or the District Court may make an interim order suspending the operation of a decision.

(6) The District Court may, on hearing an appeal, do one or more of the following, according to the nature of the case —

- (a) after having regard to this Act and the regulations, relevant standards under this Act, the policies of the Director General made known to the Court, and other matters considered relevant by the Court — affirm, vary or quash the decision appealed against or substitute, or make in addition, a decision that the Court considers appropriate;
- (b) remit the subject-matter of the appeal to the Director General for further consideration;
- (c) refer a matter to the Director General for determination, or re-determination;
- (d) make any further or other order as is required.

(7) Fresh evidence, or evidence in addition to or in substitution for evidence on which the original decision was made, may be admitted in the hearing of an appeal.

Comment: This clause will enable a person who is aggrieved by the decision of the Director General with respect to the refusal of an accreditation to apply to have the matter dealt with either by mediation or by way of appeal to a Court.

The regulations will prescribe the conciliation and mediation processes, however, in general terms the parties will select a conciliator/mediator from a panel of qualified persons with wide experience in rail safety issues who will attempt to reach a negotiated settlement.

The operation of the decision will continue pending the outcome of the appeal.

This clause also details the criteria the Court must consider, and the orders which it may make when determining an appeal. Unlike the normal appeal process, the application will be treated as a re-hearing which will enable the court to have regard to any additional matters which may not have previously be known by the Director General.

Recommendation 20: the clause be passed

Division 4 — Related matters

Matters relating to applications

21. (1) An application under this Part is to be made to the Director General —

- (a) in writing; and
- (b) in the manner and form approved,

and is to be accompanied by the relevant prescribed application fee.

(2) The Director General may request from a person who makes an application under this Part such other information as the Director General requires to determine the application.

(3) The Director General may request that information furnished in respect of an application under this Part be verified by statutory declaration.

Recommendation 21: the clause be passed

Annual fees

22. (1) Such annual fee as is prescribed must be paid by an accredited person or the owner of a private siding at the time of accreditation or registration and in each subsequent year on or before the anniversary of the person's accreditation for the particular railway or the registration of the private siding.

(2) If an accreditation is varied, such additional annual fee as is prescribed in respect of the variation is to be paid.

(3) The Director General may accept payment of an annual fee in accordance with an agreement (for example, an agreement that provides for the payment of fees by instalments) made with the person who is liable to pay the fee.

(4) If a person fails to pay an annual fee in accordance with this section, or an agreement made under this section, the accreditation or registration is, by force of this section, suspended until the fee is paid, and the Director General is to advise the person in writing of that suspension as soon as practicable.

Recommendation 22: the clause be passed

Fees to be paid to Transport Co-ordination Fund

23. All fees collected under this Act are to be credited to the Transport Co-ordination Fund established under section 62 of the *Transport Co-ordination Act 1966*.

Recommendation 23: the clause be passed

Periodic returns

24. (1) An accredited person must, for each period prescribed, not later than the relevant day for the accreditation, as determined in accordance with the regulations, lodge with the Director General a return containing the information prescribed.

(2) If an accredited person fails to comply with subsection (1), the Director General may, by written notice given to the accredited person, require him or her to do so and in that notice is to advise the person of the effect of subsections (3) and (4).

(3) If an accredited person fails to comply with a notice under subsection (2) within 14 days after service of the notice, the accreditation is, by force of this section, suspended, unless otherwise determined in writing by the Director General.

(4) If an accredited person fails to comply with a notice under subsection (2) within 2 months after service of the notice, the accreditation is, by force of this section, cancelled, unless otherwise determined in writing by the Director General.

Comment: This clause places responsibility of operational safety with the accredited person. However, the Director General will have a vital role in auditing compliance with the terms and conditions of their accreditation. To enable the Director General to discharge this responsibility, and to collect information which may be necessary for the calculation of fees, the required information will be prescribed in Regulation.

Failure to provide returns may lead to suspension and eventually cancellation of accreditation.

Recommendation 24: the clause be passed

Surrender of accreditation

25. An accredited person may surrender the accreditation.

Recommendation 25: the clause be passed

PART 3 — SAFETY STANDARDS AND MEASURES

Compliance with rail safety standards

26. (1) The owner and the operator of a railway must comply with —
- (a) the Australian Rail Safety Standard;
 - (b) safety standards —
 - (i) prescribed; or
 - (ii) approved, as relevant to the operation of this Act, of which written notice has been given to him or her;
- and
- (c) safety standards with which he or she has agreed to comply under this Act.
- (2) The owner and the operator of a railway must comply with the provisions of his or her safety management plan.

Penalty: \$50 000.

Recommendation 26: the clause be passed

Requirement to maintain safety systems, devices or appliances

27. (1) An accredited person must install and maintain, or maintain, systems, devices, equipment and appliances on or with respect to a railway or rolling stock in accordance with the requirements of this Act and the person's accreditation.

Penalty: \$20 000.

- (2) In subsection (1) —

“**systems, devices, equipment and appliances**” include, but are not limited to, safeworking systems, braking systems, wheels, isolating switches and points.

Comment: This clause requires an accredited person to install and maintain safety systems in accordance with the Act and the accreditation including all approved safety standards, and the safety management plan.

Recommendation 27: the clause be passed

Installation of safety or protective devices

28. (1) The Director General may, if of the opinion that action is necessary for the purpose of the safe construction or operation of a railway, direct an accredited person, by written notice, to install on or with respect to the infrastructure of the railway, or on or with respect to rolling stock, within the time specified in the notice, safety or protective systems, devices, equipment or appliances specified in the notice.

(2) An accredited person must comply with the requirements of the notice.

Penalty: \$20 000.

Comment: Where the director believes that there is an urgent safety issue which needs to be remedied, it may direct an accredited person to install safety systems and failure to comply with such a direction will be an offence.

Recommendation 28: the clause be passed

Closing railway crossings, bridges etc.

29. (1) An authorized 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 to do so due to a threat to the safety of the railway or the public.

(2) If an authorized person decides to close or regulate a crossing, bridge or other structure the authorized person must, as soon as practicable after its closure or regulation, notify the authorities responsible for it of its closure or regulation, unless the Director General has previously agreed in writing with the authority that such notification is unnecessary.

(3) In this section —

“authorized person” means —

- (a) a person who holds a specific authority from the Director General for the purposes of this section; or
- (b) a senior manager within the staff of the accredited person who holds a specific authority issued by the accredited person in accordance with relevant guidelines issued by the Director General.

Recommendation 29: the clause be passed

Power to require works to stop

30. (1) A person, other than an accredited person, must not, without the written approval of the Director General or the owner of the railway, carry out works near a railway if the works threaten, or are likely to threaten the safety of the railway or its operational integrity.

Penalty: \$20 000.

(2) If —

- (a) a person is carrying out, or proposes to carry out, works near a railway; and
- (b) the Director General reasonably considers that the works threaten, or are likely to threaten, the safety of the railway or its operational integrity,

the Director General may give the person a written direction to stop, alter or not to start the works.

(3) A person must comply with the direction, unless the person has a reasonable excuse.

Penalty: \$20 000.

(4) If works are carried out contrary to subsection (1) or a direction under subsection (2), the Director General may, by written notice, require the owner of the land where the works are situated to alter, demolish or take away the works within such reasonable time as is specified in the notice.

(5) A person must comply with the requirements of a notice, unless the person has a reasonable excuse.

Penalty: \$20 000.

(6) If the requirements of a notice are not complied with, the Director General may take any action required by the notice.

(7) Action under subsection (6) may be taken on the Director General's behalf by an authorized officer or by another person authorized by the Director General for that purpose.

(8) The Director General may recover the reasonable costs and expenses incurred by the Director General in taking action under subsection (6) as a debt due from the person who failed to comply with the requirements of the notice.

(9) For the purposes of this section, an authorized officer, or a person who holds a specific authority from the Director General, may enter land and inspect works, and carry out any work under subsection (6) —

- (a) after giving 3 days written notice to the owner or occupier of the land;
- (b) with the written agreement of the owner or occupier of the land; or
- (c) without notice or agreement, if the Director General reasonably believes that there is an immediate and significant threat to the safety of the railway or its operational integrity.

Comment: This clause is designed to prevent unauthorised works near a railway that may threaten the railway's safety or operation integrity. Where works have already been undertaken, the Director General may order that the works be demolished.

Recommendation 30: the clause be passed

Railway employees

31. (1) It is a condition of accreditation that an accredited person must take all reasonable steps to ensure that a railway employee who performs railway safety work —

- (a) has the capacity and skills, and is adequately trained, to perform the work;
- (b) is of sufficient good health and fitness to perform the work; and
- (c) does not carry out railway safety work —
 - (i) while there is present in his or her blood, alcohol of, or greater than, the concentration prescribed; or
 - (ii) while affected by a drug in a way which could detrimentally affect the person's ability to perform that work.

(2) A railway employee must not carry out railway safety work —

- (a) while there is present in his or her blood, alcohol of, or greater than, the concentration prescribed; or
- (b) while affected by a drug in a way which could detrimentally affect the person's ability to perform that work.

Penalty: \$5 000.

Comment: Clause 31 (1) is intended to provide for an accredited person to take reasonable steps to ensure that their employees engaged in rail safety work have the appropriate skills, the physical capacity and are not adversely affected by alcohol or drugs.

Clause 31 (2) provides that it is an offence for a railway employee to carry out railway safety work while there is present in his or her body, blood alcohol at a prescribed level, or while under the influence of a drug.

Rail safety work is defined in clause 3 as -

- (a) work that involves or relates to the driving or operation of a train or trains;
- (b) work that involves or relates to the control of the movement of a train or trains;
- (c) work that involves or relates to the design, construction, repair, maintenance, upgrading, inspection, testing or removal of rail infrastructure or rolling stock; or
- (d) other work of a kind prescribed by the regulations for the purposes of this definition.

Clauses 31(1)(c)(i) and 31(2)(a) concern the concentration of alcohol in a railway employee's blood while carrying out rail safety work. The Committee has been informed that the concentration of alcohol prescribed under Regulation will be 0.02. The Committee is satisfied that research has established a direct correlation between blood alcohol levels and performance impairment. Accordingly, the Committee supports the clauses relating to blood alcohol concentrations and the appropriate testing procedures.

Clauses 31(1)(c)(ii) and 31(2)(b) concern railway employee's drug use which could detrimentally affect their ability to perform rail safety work. It has been argued that an accredited person may be placed in an untenable position to fulfil the requirements of these clauses and that random drug testing may provide the only solution. In this regard, the clauses may impede attempts to improve cooperation between the accredited person and railway employee regarding the use of drugs while carrying out rail safety work. It has also been argued that the correlation between certain drugs and work performance is currently uncertain and that further research may be required in this area. Similarly, the class of "drug" is extremely wide and it may be necessary for prohibited drugs to be *prescribed* under Regulation.

Recommendation 31: the matter be fully debated in the House.

PART 4 — COMPLIANCE INSPECTIONS AND REPORTING

Safety compliance inspections

32. (1) The Director General may, at least once in every 12 months, inspect, or cause to be inspected, any or all of the following —

- (a) the railway track, other infrastructure and rolling stock of an accredited person;
- (b) the construction, maintenance and operation of a railway by an accredited person; and
- (c) the performance of railway employees of an accredited person,

to ascertain the extent of compliance with the requirements of this Act and the relevant accreditation.

(2) The Director General may at any time, by written notice, direct an accredited person to cause to be inspected any railway track, other infrastructure or rolling stock.

(3) The accredited person is to comply with the direction.

Penalty: \$20 000.

(4) The Director General may, at any time, inspect, or cause to be inspected, documents held by, or under the control of, an accredited person relating to —

- (a) the construction, maintenance or operation of a railway;
- (b) the acquisition, operation, disposal, renovation or repair of rail infrastructure or rolling stock;
- (c) the preparation, implementation or operation of the safeworking systems of a railway; or
- (d) other matters the Director General considers relevant to the safe construction, maintenance or operation of a railway (or any aspect of a railway) by an accredited person or otherwise relevant to compliance with the requirements of this Act and the person's accreditation.

Comment: This section will enable the Director General to carry out periodical safety inspections relevant to the safe operations of a railway.

Recommendation 32: the clause be passed

Directions to undertake remedial safety work

33. (1) The Director General may, as a result of a safety compliance inspection under section 32 or otherwise, direct an accredited person to undertake remedial safety work to secure compliance with the requirements of this Act and the person's accreditation.

(2) The direction is to be given to the accredited person by written notice setting out details of the work to be undertaken and the period within which it is to be completed.

(3) The accredited person is to comply with the direction.

Penalty: \$20 000.

(4) If an accredited person fails to comply with the direction, the Director General may arrange for the work to be undertaken and may recover as a debt from the person the reasonable costs and expenses associated with the undertaking of the work.

Recommendation 33: the clause be passed

Directions to provide programme of remedial safety work

34. (1) The Director General may, as a result of a safety compliance inspection under section 32 or otherwise, direct an accredited person who has failed to comply with the requirements of this Act or the person's accreditation to provide the Director General with a programme (including a timetable) for remedial safety work that the person proposes to undertake to remedy that failure.

(2) The direction is to be given to the accredited person by written notice and is to specify the date by which the programme is to be provided.

(3) The accredited person is to comply with the direction.

Penalty: \$20 000.

Recommendation 34: the clause be passed

Declarations as to variation of accreditation

35. An accredited person must, at least 28 days before each anniversary of the person's accreditation —

(a) furnish the Director General with a declaration in the approved form stating that, so far as the person is aware, no circumstance exists that might require the person to apply for variation of the person's accreditation in the coming year; or

(b) apply to the Director General for variation of the accreditation.

Penalty: \$ 20 000.

Recommendation 35: the clause be passed

Safety reports

36. (1) An accredited person must submit an annual safety report dealing with the general conduct of the accredited person's operations under the accreditation and any significant developments relating to those operations to the Director General within 28 days before each anniversary of the person's accreditation.

Penalty: \$20 000.

(2) In addition, an accredited person must submit a safety report to the Director General at such other times as the Director General directs by written notice given to the person.

Penalty: \$20 000.

(3) A report under this section is to be in such manner and form as is approved.

Recommendation 36: the clause be passed

Supply of information

37. (1) An accredited person must provide the Director General with information concerning measures taken by the accredited person to promote rail safety or concerning other matters relating to rail safety as the Director General may reasonably require from time to time.

Penalty: \$20 000.

(2) A requirement under subsection (1) is to be by written notice given to the accredited person.

Recommendation 37: the clause be passed

Reports — notifiable occurrences and other incidents

38. (1) An accredited person must report to the Director General within the time prescribed all occurrences of a kind prescribed as notifiable occurrences that happen on, or in relation to, a railway owned or operated by the person, or in relation to rolling stock operated by the person.

Penalty: \$20 000.

(2) Accredited persons may make a joint report with respect to a notifiable occurrence.

(3) In addition to notifiable occurrences, the Director General may, by written notice given to an accredited person, require the person to report to the Director General any other incident which endangers or could endanger the safe construction, maintenance or operation of a railway.

Penalty: \$20 000.

(4) A report under this section is to be in such manner and form as is approved.

(5) The Director General may require information supplied in a report to be verified by statutory declaration or such a requirement may be prescribed.

Recommendation 38: the clause be passed
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Director General may require report from owner or operator

39. (1) The Director General may, by written notice given to an accredited person, require the person to inquire into and report to the Director General under this section on —

- (a) a railway accident; or
- (b) an incident or other matter that may affect, or may have affected, or is otherwise relevant to, the safe construction, maintenance or operation of a railway.

(2) If the Director General has received a report on an accident, incident or other matter, the Director General may, by written notice given to the accredited person, require the person to inquire into the matter by reviewing or commenting on the report.

(3) The accredited person must conduct the inquiry in the manner, and within the time, approved and after completing the inquiry, is to provide a written report on the matter to the Director General.

Penalty: \$20 000.

Recommendation 39: the clause be passed
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Request for certain details

40. (1) If the Director General becomes aware that an accident, incident or other matter on, involving or associated with a railway or rolling stock may have occurred, the Director General may, by written notice given to an accredited person, require the person to furnish a written report on the matter within such reasonable period as is specified by the Director General in the notice.

(2) The accredited person must comply with the requirement within the time specified in the notice.

Penalty: \$20 000.

Recommendation 40: the clause be passed

PART 5 — INQUIRIES AND INSPECTIONS

Division 1 — Inquiries

Appointment of investigator

41. (1) If an accident or other incident on, involving or associated with a railway causes or results in a person's death, serious personal injury, or major property damage, the Director General may, on the Director General's own initiative or at the request of an accredited person, and must at the request of the Minister, appoint an independent investigator or investigators to inquire into and report on the accident or incident in accordance with this Division.

(2) The Director General may also appoint an independent investigator or investigators to inquire into and report under this Division on any other accident or incident.

(3) The Director General must, before making an appointment under subsection (1) or (2), consult with any relevant accredited person regarding the person to be appointed as the investigator.

(4) An investigator is to be appointed on such terms and conditions as are agreed between the Director General and the investigator.

Comment: This provision will empower the Director General to appoint an independent investigator to conduct an inquiry into an accident or incident etc.

The clause also provides for the appointment of an independent investigator in other railway safety issues where it is in the public interest to do so.

Recommendation 41: the clause be passed

Procedures and powers of an investigator

42. (1) In conducting an inquiry under this Division, an investigator —

- (a) is to attempt to determine the circumstances surrounding any accident or incident to prevent the occurrence of accidents or incidents and is not to apportion blame for the occurrence of accidents or incidents or determine the liability of any person in respect of any accident or incident;
- (b) must follow such procedures as are approved with respect to inquiries;
- (c) must act as quickly, and with as little formality and technicality, as is consistent with a fair and proper consideration of the issues; and
- (d) is not bound by the rules of evidence, but may inform himself or herself on any matter as the investigator considers appropriate.

(2) An investigator may, for the purposes of an inquiry under this Division —

- (a) by summons signed by the investigator, require the attendance of any person, or require the production of any document, object or material;
 - (b) require a person to answer relevant questions;
 - (c) require a person to make an oath or affirmation to answer questions put by the investigator; and
 - (d) exercise the powers of an authorized officer under Division 2.
- (3) A person must not —
- (a) if the person has been served with a summons, fail without reasonable excuse to attend in obedience to the summons;
 - (b) if the person has been served with a summons to produce a document, object or material, fail without reasonable excuse to comply with the summons;
 - (c) fail, without reasonable excuse, to answer a relevant question when required to do so under this section;
 - (d) when required by an investigator to answer a relevant question, make a statement that —
 - (i) the person knows to be false and misleading in a material particular; or
 - (ii) omit anything without which the statement is, to the person's knowledge, misleading in a material particular;
 - (e) refuse to be sworn or to affirm; or
 - (f) without reasonable excuse, hinder or obstruct an investigator in the exercise of powers under this section, or fail to obey any other requirement of, or direction given by, an investigator.

Penalty: \$10 000.

(4) If a document, object or material is produced to, or found by, an investigator, the investigator may —

- (a) inspect it;
- (b) make copies of, photograph or take extracts from, or test, it;
- (c) take possession of it, and keep it while it is necessary for the inquiry.

(5) Except as provided by this section, an inquiry under this Division is to be conducted in a manner determined by the investigator.

(6) An investigator may appoint a person or persons to assist him or her in an inquiry under this Division.

Comment: This clause describes the procedures and powers of an investigator. An inquiry will be dealt with expeditiously and involve the minimum formality and legal technicalities. The primary focus of the report will not be to apportion blame but identify the cause of the accident and what remedial action should be taken to prevent recurrence.

Any person who is summonsed to appear before the investigator who without reasonable excuse, fails to comply with the terms of the summons, refuses to answer questions or hinders the inquiry, will commit an offence.

Recommendation 42: the clause be passed

Report

43. (1) The Director General and the Minister must be furnished with a copy of an investigator's report on its completion.

(2) The report is to contain such recommendations, if any, that the investigator considers appropriate and any other relevant matters.

(3) The Director General is to ensure that, within 28 days of receiving a copy of an investigator's report, a copy of that report is available for public inspection, without charge, during normal office hours at a prescribed place.

(4) Before making a copy of the report available for public inspection the Director General is to remove from the report anything that the Director General reasonably believes may —

- (a) prejudice any proceedings before a court or tribunal constituted by law respecting the same, or a related, incident or accident;
- (b) be considered defamatory; or
- (c) be contrary to the public interest.

Comment: This clause requires that a copy of the report must be furnished to the Director General and the Minister and the Director General must make the report available to the public within 28 days immediately following receipt.

The clause also provides that before a report is released to the public, the Director General may remove anything from the report that may prejudice any court proceedings or any information considered defamatory or contrary to the public interest.

Recommendation 43: the clause be passed

Inquiry may continue despite other proceedings

44. An inquiry under this Division may start or continue, and a report may be prepared or given, despite proceedings before a court or tribunal constituted by law, unless a court or tribunal with the necessary jurisdiction orders otherwise.

Recommendation 44: the clause be passed

Division 2 — Inspections, etc.

Appointment of authorized officers

45. (1) The Director General may, in writing, appoint suitable persons to be authorized officers for the purposes of this Act.

(2) An appointment under this section may be subject to such conditions, or limitations on the authorized person's powers, as are imposed in writing by the Director General.

(3) A person appointed under this section must be issued with an identity card —

- (a) containing a photograph of the person;
- (b) certifying that the person is an authorized officer under this Act; and
- (c) stating any limitations on the person's powers, imposed under subsection (2).

(4) An authorized officer must, at the request of a person in relation to whom the authorized officer intends to exercise a power under this Act, produce for the inspection of the person his or her identity card.

(5) A person who possesses an identity card and who is not, or ceases to be, an authorized officer must cause the card to be returned to the Director General as soon as is practicable.

Penalty: \$500.

Recommendation 45: the clause be passed

Inspection powers

46. (1) An authorized officer may, as may reasonably be required in connection with the administration, operation or enforcement of this Act —

- (a) subject to subsection (2), enter a place associated with a railway or the operation of a railway and inspect the place, or any railway, rail infrastructure or rolling stock or other vehicle;
- (b) give directions with respect to the stopping or movement of rolling stock;
- (c) take measurements, make surveys and take levels and, for those purposes, dig trenches, break up soil and set up posts, stakes or markers;
- (d) take samples of any substance or thing from any place or rolling stock or other vehicle for analysis;
- (e) require a person to produce a document, object or material;
- (f) examine, copy or take extracts from a document, object or material so produced or require a person to provide a copy of any such document;
- (g) take photographs, films, audio, video or other recordings;
- (h) examine or test any rail infrastructure, rolling stock, plant, system, device, equipment, appliance, vehicle or other thing, or cause or require it to be examined or tested, or seize it or require its production for examination or testing;
- (i) seize and retain, or issue a seizure order in respect of, anything that the authorized officer reasonably suspects has been used in, or may constitute evidence of, an offence under this Act;
- (j) require a person to answer questions;
- (k) require a person to produce evidence of an accreditation, authorization or qualification required by or under this Act;
- (l) give directions reasonably required in connection with the exercise of a power conferred by this subsection or otherwise in connection with the administration, operation or enforcement of this Act;
- (m) exercise other powers as are prescribed for the purposes of this paragraph.

(2) Before an authorized officer enters land under this section, the authorized officer must give the owner or occupier of the land reasonable written notice of the intention to enter the land unless —

- (a) the giving of the notice would defeat the purpose for which it is intended to enter the land;
- (b) entry to the land is made with the consent of the owner or occupier of the land;
- (c) the owner or occupier has been given written notice of the entry and has not objected to the entry;
- (d) entry is required in circumstances where the authorized officer reasonably believes that immediate action is required; or

(e) the entry is authorized by a warrant issued under section 47.

(3) An authorized officer may with the authority of a warrant issued under section 47, or without warrant in circumstances in which the authorized officer reasonably believes that immediate action is required, enter a place the authorized officer is authorized to enter under this section using such force as is necessary.

(4) In the exercise of power under this section, an authorized officer may be assisted by such persons as he or she considers necessary in the circumstances.

(5) An authorized officer may require the occupier of a place, or a person apparently in charge of any rail infrastructure, rolling stock, plant, equipment, vehicle or other thing, to give to the authorized officer or a person assisting the authorized officer such assistance as is reasonably required by the authorized officer for the effective exercise of powers conferred by this Act.

(6) In the exercise of powers under this section, an authorized officer, and a person assisting an authorized officer, must do as little damage as possible.

Comment: This clause empowers an authorised officer to -

- enter onto railway property;
- where necessary obtain a warrant to enter a property by force;
- direct the movement of rolling stock;
- take physical evidence;
- require the production of documentation and take copies of that documentation;
- take photographic evidence;
- examine and test rolling stock and infrastructure;
- seize and retain items used or which constitute evidence of an offence under the Act;
- require persons to provide information;
- require persons to produce copies of accreditation and qualifications;

The clause requires authorised officers to either negotiate entry onto premises or give notice of their intention to enter, unless the giving of a notice could compromise their inquiry, and in those circumstances, they must obtain a warrant from a Justice of the Peace.

Recommendation 46: the clause be passed

Entry under warrant

47. (1) In the circumstances described in subsection (2), a justice may issue a warrant authorizing an authorized person to enter a place associated with a railway or the operation of a railway and inspect the place, or any railway, rail infrastructure or rolling stock or other vehicle using such force as is necessary.

(2) A warrant may be granted under subsection (1) where a justice is satisfied that the entry and inspection is reasonably required by an authorized person in connection with the administration, operation or enforcement of this Act, but —

- (a) entry has been refused or is opposed or prevented;
 - (b) entry cannot be obtained; or
 - (c) notice of the required entry under section 46 (2) cannot be given without unreasonable difficulty, unreasonably delaying entry or defeating the purpose for which it is intended to enter the land.
- (3) A warrant granted under subsection (1) —
- (a) is to be in the form prescribed;
 - (b) is to specify the purpose for which the entry may be made; and
 - (c) continues to have effect until —
 - (i) the purpose for which it was granted has been satisfied;
 - (ii) the end of the period of one month after its issue; or
 - (iii) it is withdrawn by the justice who issued it,

whichever occurs first.

Comment: This clause will enable a Justice of the Peace to issue a warrant to an authorized person to enter places associated with a railway or operation of a railway provided that the entry and inspection is reasonable, and in the connection with the administration, operation or enforcement of the Act. The warrant will specify the reasons for entry, and will be valid for one month or until it is withdrawn by the Justice, whichever occurs first.

Recommendation 47: the clause be passed

Provisions relating to seizure

48. (1) A seizure order issued by an authorized officer under this Division —
- (a) is to be in the form of a written notice served on the owner or person in control of the thing to which the order relates; and
 - (b) may be varied or revoked by further such written notice.
- (2) If a seizure order is issued, a person must not remove or interfere with the thing to which the order relates without the approval of the Director General before an order is made under subsection (3) (b) in respect of the thing or the seizure order is discharged under subsection (3) (c).
- Penalty: \$10 000.
- (3) If a thing has been seized or made subject to a seizure order the following provisions apply —
- (a) the thing must, if it has been seized, be held pending proceedings for an offence against this Act related to the thing seized, unless the Director General, on application, authorizes its release to the person from whom it was seized, or to a person who had legal title to it at the time of its seizure,

- subject to such conditions as the Director General considers appropriate (including conditions as to the giving of security for satisfaction of an order under paragraph (b) (ii));
- (b) if proceedings for an offence against this Act relating to the thing are instituted within the prescribed period after its seizure or the issuing of the seizure order and the defendant is convicted of the offence, the court may —
- (i) order that it be forfeited to the Director General; or
 - (ii) if it has been released pursuant to paragraph (a) or is the subject of a seizure order, order that it be forfeited to the Director General or that the person to whom it was released, or the defendant, pay to the Director General an amount equal to its market value at the time of seizure, or the issuing of the seizure order, as the court considers appropriate;
- (c) if —
- (i) proceedings are not instituted for an offence under this Act relating to the thing within the prescribed period after its seizure or the issuing of the seizure order; or
 - (ii) proceedings have been so instituted and the case is heard and determined but no order for forfeiture is made under paragraph (b) then —
 - (I) in the case of a thing seized, the person from whom the thing was seized, or a person with legal title to it, is entitled to recover from the Director General (if necessary, by action in a court of competent jurisdiction) the thing, or if it has been damaged or destroyed, compensation of an amount equal to its market value at the time of seizure; or
 - (II) in the case of a thing subject to a seizure order, the order is discharged.
- (4) In subsection (3) —

“the prescribed period” means 6 months or such longer period as a magistrate, on application by the Director General, allows.

Recommendation 48: the clause be passed

Division 3 — Provisions relating to inquiries and inspections**Offence to hinder persons appointed under this Part**

49. A person must not —

- (a) wilfully hinder, obstruct or interfere with an authorized officer, an investigator, or a person assisting such a person, in the exercise of a power conferred under this Act;
- (b) use abusive, threatening or insulting language to an authorized officer, an investigator, or a person assisting such a person;
- (c) without reasonable excuse, refuse or fail to comply with a requirement or direction of an authorized officer or investigator under this Act;
- (d) fail, without reasonable excuse, to answer a relevant question put under the authority of this Part or give an answer that the person knows is false or misleading in a material particular; or
- (e) falsely represent, by words or conduct, that he or she is an authorized officer or an investigator.

Penalty: \$10 000.

Recommendation 49: the clause be passed
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Self-incrimination

50. (1) It is not a reasonable excuse for the purposes of section 42 (3) or 49 to fail to answer any relevant question or produce a document, object or material when required to do so under this Part on the ground that the answer, or the production of the document, object or material might incriminate the person or make the person liable to a penalty, but the answer given and evidence of the answering of the question or the production of the document, object, or material is not admissible in evidence against the person in any civil or criminal proceedings, other than proceedings arising out of the false or misleading nature of the answer or production.

(2) The protection afforded by subsection (1) applies only if —

- (a) the person objected before the answer was given or the document, object or material produced on the ground that the answer or production might tend to incriminate him or her; or
- (b) although the person did not object as described in paragraph (a), the person's attention was not drawn to the right to object in sufficient time to enable the right to be exercised.

(3) Nothing in subsection (1) prevents a person from refusing to answer a question or produce a document, object or material because the answer, document, object or material would relate to, or contain, information in respect of which the person claims legal professional privilege.

Comment: Clause 50(1) provides that it will not be a defence for a person to refuse to answer questions on the grounds of self incrimination. However, the person's answers will not be admissible in any criminal prosecution unless the proceedings arose out of the false or misleading nature of the answer or production.

By virtue of clause 50(2), the protection afforded by clause 50(1) applies only if -

- (a) the person objected before the answer was given or the document, object or material produced on the ground that the answer or production might tend to incriminate him or her; or
- (b) although the person did not object as described in paragraph (a), the person's attention was not drawn to the right to object in sufficient time to enable the right to be exercised.

It has been argued that clause 50 should be amended by deleting subclause (2) which would reflect the position in Tasmania and South Australia. This would mean that, other than proceedings arising out of the false or misleading nature of the answer or production, any information provided by the person during the course of the inquiry cannot be used in any civil or criminal proceedings. It is arguable that this would be consistent with the overall aim of the Bill to promote railway safety rather than make a determination of liability or apportionment of blame. Furthermore, the deletion of clause 50(2) may have the effect of encouraging the person to be open and honest with the inquirer without fear of further civil or criminal prosecution.

As a separate argument, it has been said that clause 50 should be amended by inserting a subclause (3) which would provide that -

For the purpose of the paragraph 2(b), "sufficient time" includes adequate time to seek legal advice.

It could be said that this argument is based on the premise that many railway employees may have little knowledge of civil or criminal law and may not appreciate the implications of providing a statement to the inquirer. Accordingly, it is argued that an employee should be provided with the opportunity to obtain legal advice to enable them to make an informed decision about their legal rights.

The argument for clause 50, as the Bill currently stands, is that it achieves a fair balance between the rights of individuals and the interests of the public in compliance with statutory requirements. The balance is achieved by ensuring that the employee is advised of their rights and that, if they object, the information cannot be used in any civil or criminal proceedings. The clause provides further protection by ensuring that the person's attention be drawn to his or her entitlement to object. In this regard, it has been said that the insertion of a subclause (3) would be impractical and in some cases delay the investigation for some months.

Recommendation 50: the clause be fully debated in the House

PART 6 — MISCELLANEOUS***Division 1 — General offences and proceedings*****False information**

51. (1) A person must not —

- (a) by a false statement or misrepresentation, obtain or attempt to obtain an accreditation;
- (b) forge, or fraudulently alter or use, an accreditation; or
- (c) fraudulently allow an accreditation to be used by another person.

Penalty: \$20 000.

(2) A person must not, in furnishing information or a report under this Act, knowingly make a statement that is false or misleading in a material particular.

Penalty: \$20 000.

Recommendation 51: the clause be passed

Tampering with railway equipment

52. (1) A person must not tamper with or disable —

- (a) the safety equipment of a railway or rolling stock;
- (b) the interlocking system of a railway; or
- (c) any other safeworking system associated with a railway.

Penalty: \$40 000.

(2) In this section —

“**interlocking system**” means any lever or collection of levers, or electrical and mechanical devices, or electrical devices, that operate or control points and signals, or signals, at locations where trains can be directed from one track to another and that are interlocked to prevent conflicting movements of trains.

Recommendation 52: the clause be passed

Offender to state name and address

53. (1) A person reasonably suspected by a police officer or an authorized officer to be committing or to have committed an offence against this Act may be required to state his or her full name and usual place of residence, and to produce evidence of his or her identity.

(2) A person must not —

(a) contravene a requirement made by a police officer or an authorized officer under this section; or

(b) in purported compliance with such a requirement, state a name that is not his or her name or an address that is not his or her usual place of residence.

Penalty: \$5 000.

(3) A person is not guilty of an offence under this section unless it is established that the police officer or authorized officer —

(a) warned the person that a failure or refusal to comply with the requirement is an offence; and

(b) produced an official identity card for inspection by the person.

Recommendation 53: the clause be passed

Daily penalty for continuing offences

54. (1) Without limiting section 71 of the *Interpretation Act 1984*, where an offence is committed by a person by reason of a contravention of a provision of this Act under which the person is required or directed to do any act or thing, or to refrain from doing any act or thing, that offence is taken to continue so long as the act or thing so required or directed remains undone, or continues to be done, as the case may be.

(2) A person convicted of such an offence is liable, in addition to the penalty otherwise prescribed for the offence, to a daily penalty not exceeding one fifth of the maximum penalty prescribed for the offence for each day or part of a day during which the offence continues after written notice of the offence has been given to the offender by the Director General, whether before or after conviction.

Comment: The clause provides for a daily penalty not exceeding 20% of the maximum penalty for continuing offences. A continuing offence is one where a person fails to adhere to certain obligations such as failing to submit a report or take remedial action to rectify a safety issue.

Recommendation 54: the clause be passed

Provision relating to offence by body corporate

55. (1) If a body corporate commits an offence against this Act and it is proved that —

- (a) the offence was committed with the consent or connivance of an officer of the body corporate; or
- (b) the officer failed to exercise such due diligence to prevent the commission of the offence as ought to have been exercised having regard to the nature of the officer's functions and to all the circumstances,

the officer commits the same offence.

(2) If the affairs of a body corporate are managed by its members, subsection (1) applies in relation to the act and defaults of a member in connection with the member's functions of management as if the member were an officer of the body corporate.

(3) An officer or a member may be proceeded against and convicted of an offence against this Act under subsection (1) or (2) whether or not the body corporate has been proceeded against and convicted of the offence.

(4) If, in a proceeding for an offence against this Act, it is necessary to establish the state of mind of a body corporate in relation to particular conduct, it is sufficient to show that —

- (a) the conduct was engaged in by an officer, employee or agent of the body corporate within the scope of his or her actual or apparent authority; and
- (b) the officer, employee or agent had that state of mind.

(5) If an officer, employee or agent of a body corporate engages in conduct on behalf of the body corporate within the scope of his or her actual or apparent authority, the body corporate must be taken, for the purposes of a prosecution under this Act, also to have engaged in the conduct unless the body corporate establishes that it took reasonable precautions and exercised due diligence to avoid the conduct.

(6) In this section —

“**officer**” has the same meaning as in the Corporations Law but does not include an employee of the body corporate unless he or she was concerned in the management of the body corporate.

Comment: This clause provides that officers of body corporations may be criminally responsible for offences committed by the corporation if it is proven that the offence was committed with their consent, or the officer failed to exercise due diligence to prevent the commission of the offence.

Recommendation 55: the clause be passed

Proceedings

56. (1) Despite section 51 of the *Justices Act 1902*, a complaint of an offence against this Act may be made within 2 years from the time when the matter of complaint arose or, with the written authority of the Attorney General, at a later time within 3 years from the time when the matter of complaint arose.

(2) An apparently genuine document purporting to be signed by the Attorney General and to authorize the commencement of a complaint of an offence against this Act will be accepted in any legal proceedings, in the absence of proof to the contrary, as proof of the authorization.

Comment: This clause extends the time constraints contained in the *Justices Act*, and allows prosecutions to be commenced within 2 years of the date of the commission of the alleged offence. However, with the consent of the Attorney General, this may be extended to 3 years. These times are considered appropriate having regard to the complexity of enquiries which may follow a serious railway accident.

Recommendation 56: the clause be passed

Evidentiary provision

57. In any proceedings, a certificate purporting to be executed by the Director General certifying as to a matter relating to —

- (a) an authority under this Act;
- (b) an accreditation, or lack of an accreditation;
- (c) a notice, requirement or direction of the Director General under this Act; or
- (d) the receipt or non-receipt by the Director General of a notification, record or information required to be given, furnished or provided under this Act,

constitutes proof, in the absence of proof to the contrary, of the matter so certified.

Recommendation 57: the clause be passed

Division 2 — Other matters**Recovery of cost of entry and inspection**

58. The Director General may recover as a debt from an accredited person the reasonable costs of the entry and inspection of a railway or rolling stock in respect of which the person is accredited, other than the costs of a routine safety compliance inspection under section 32.

Recommendation 58: the clause be passed

Protection from liability for wrongdoing

59. (1) An action in tort does not lie against a person for anything that the person has, in good faith, done in the performance or purported performance of a function under this Act.

(2) If this section provides that an action does not lie against a person for doing anything, the Crown is also relieved of any liability it might otherwise have had for the doing of the thing by the person.

(3) The protection given by this section applies even if the thing done in the performance or purported performance of a function under this Act may have been capable of being done whether or not this Act had been enacted.

(4) In this section a reference to the doing of anything includes a reference to the omission to do anything.

Recommendation 59: the clause be passed

Vicarious liability of accredited person for acts or omissions of employees or agents

60. For the purposes of this Act, an act or omission of an employee or person acting on behalf of an accredited person will be taken to be an act or omission of the accredited person unless the accredited person proves that the employee or person was not acting within the scope of his or her actual or apparent authority.

Recommendation 60: the clause be passed

Regulations

61. (1) The Governor may make regulations prescribing all matters that are required or permitted by this Act to be prescribed, or are necessary or convenient to be prescribed for giving effect to the purposes of this Act.

(2) Without affecting the generality of subsection (1), regulations may be made with respect to any of the matters specified in Schedule 1.

(3) A regulation made under this Act may create an offence punishable by a penalty not exceeding \$5 000 and, if the offence is a continuing one, a further penalty not exceeding \$200 for each day or part of a day during which the offence continues after written notice of the offence has been given to the offender by the Director General, whether before or after conviction.

Recommendation 61: the clause be passed

Adoption of code etc. in regulations

62. (1) The regulations may adopt, either wholly or in part, with or without modification and either specifically or by reference, any code, standard or other document prepared or published by a prescribed body —

- (a) either as at the time the regulations are made, or at any time before then; or
- (b) as amended from time to time.

(2) Where the regulations adopt a code, standard or other document prepared or published by a prescribed body —

- (a) the Director General is to ensure that a copy of the code, standard or other document (as amended, if applicable) is available for public inspection, without charge, during normal office hours, at a prescribed place; and
- (b) in any legal proceedings under this Act, production of a copy of a code, standard or other document adopted under this section purporting to be certified by the Director General to be a true copy as at any date or during any period is, without proof of the signature of the Director General, sufficient evidence of the contents of the code, standard or other document as at that date or during that period.

Recommendation 62: the clause be passed

Review of Act

63. (1) The Minister is to carry out a review of the operation and effectiveness of this Act not later than 6 months after the expiration of 5 years after its commencement and in the course of that review the Minister is to consider and have regard to —

- (a) the effectiveness of this Act in promoting and encouraging rail safety and inquiring into rail accidents and incidents;
- (b) the administration of this Act; and
- (c) such other matters as appear to be relevant to the operation of this Act.

(2) The Minister is to prepare a report based on the review under subsection (1) and, as soon as is practicable after the report is prepared, cause it to be laid before each House of Parliament.

Recommendation 63: the clause be passed

Consequential amendments and transitional provisions

64. (1) The transitional provisions set out in Schedule 2 have effect.

(2) The Acts specified in Schedule 3 are amended as set out in that Schedule.

Comment: This clause gives affect to transitional provisions in Schedule 2. These provide that existing owners and operators of railways and private sidings are taken to be accredited or registered for a prescribed period after the Act is proclaimed. This prescribed period will give the existing owners and operators time to get safety management plans approved and continue to operate at the same time.

This clause also causes consequential amendments to be made to other legislation to allow the *Rail Safety Act* to operate. In particular, the *Government Railways Act 1904* is amended to delete safety powers that are covered in the *Rail Safety Act*.

Recommendation 64: the clause be passed

SCHEDULE 1 — SUBJECT MATTER FOR REGULATIONS

[Section 61 (2)]

1. Accreditations under this Act, including —
 - (a) requirements, standards, qualifications or conditions that are to be satisfied;
 - (b) requirements as to any conditions or particulars applying; and
 - (c) other matters relating to their award, refusal, variation, suspension, cancellation or surrender.
2. A scheme for certificates of competency (and, if required, provisional certificates of competency) for persons employed or engaged in railway safety work, and for the duration, variation, suspension or cancellation of those certificates.
3. The prohibition of the carrying on of railway safety work or other prescribed activity except by or under the supervision of a person —
 - (a) who holds an appropriate certificate of competency; or
 - (b) who has prescribed qualifications, training or experience.
4. Safety standards or other requirements that must be complied with —
 - (a) in connection with the construction, maintenance or operation of a railway;
 - (b) in connection with the performance of any work or activity;
 - (c) in relation to any rail infrastructure, rolling stock, trains, system, devices, appliance or equipment; or
 - (d) in relation to sidings.
5. The safeguarding, siting, installing, testing, altering, maintaining or removal of any rail infrastructure, rolling stock, system, device, appliance or equipment.
6. The records and documents to be kept by any person, the manner of keeping those records and documents, and their inspection.
7. Notifiable occurrences.
8. The furnishing of returns and other information, verified as prescribed.
9. The recording, investigation and reporting of accidents and incidents.
10. The health, fitness, training and functions of railway employees.
11. Requirements and procedures for testing, by accredited persons or other persons of a prescribed class, for compliance with section 31 (1) (c) and (2) in respect of railway employees who —
 - (a) have been involved in a notifiable occurrence or an incident which is to be reported under this Act;
 - (b) are about to carry out, or are carrying out, railway safety work,including procedures for breath, urine and blood testing, the requirement for railway employees to submit to testing, and procedures and penalties if an employee does not so submit, the analysis of test results, the provision and keeping of samples, the approval of equipment or any apparatus for the purposes of testing or analysis, and evidence in any proceedings for an offence against the relevant regulations.
12. The conduct of passengers and other persons on railways, or on land or premises adjacent to, or associated with, a railway.
13. The safety of railways and their operational integrity.
14. Trespass on, or entry to, railways, or on land, premises, infrastructure or rolling stock associated with a railway.
15. The carriage of goods, freight or animals on railways.
16. The unauthorized use of railways or rolling stock.

17. The display of signs and notices.
18. The opening and closing of railway gates.
19. Vehicles, animals and pedestrians crossing railways.
20. Railway crossings.
21. The loading, unloading or transportation of freight.
22. The identification of rolling stock, rail infrastructure, devices, appliances, equipment or freight.
23. Causing damage to, or interfering with or removing, rolling stock, rail infrastructure, devices, appliances, equipment or freight.
24. Procedures associated with inspections, examinations or tests.

25. The form and service of notices and other documents, and the effect of failure to comply with a notice or document.
26. Empowering the Director General to require a person to attend before an appointed person and to provide documents or information or to answer questions.
27. Empowering the Director General to prohibit a person from acting (or from continuing to act) as a railway employee for a particular period, or until further order of the Director General.
28. Fixing fees and charges for the purposes of this Act or in respect of any matter arising under this Act, including any additional fee that is to be paid by way of penalty for late payment of a fee.
29. Generally, evidence in proceedings for an offence against the regulations.

Recommendation 65: the clause be passed

SCHEDULE 2 — TRANSITIONAL PROVISIONS

[Section 64 (1)]

Persons who owned or operated a railway before commencement

1. (1) An owner or operator of a railway (other than a private siding) who, immediately before the commencement of this clause, owns or operates a railway to which this Act applies is, from that commencement, to be taken to hold an accreditation appropriate to the owner's or operator's circumstances until such time as is prescribed.

(2) If an owner or operator applies to the Director General for accreditation or interim accreditation under Part 2 during the period that the owner or operator holds an accreditation under subclause (1), and the application is not determined by the Director General during that period then the owner or operator is to continue to be taken to hold the accreditation until the application is determined.

(3) A private siding in existence immediately before the commencement of this clause is, from that commencement, to be taken to be registered under this Act until such time as is prescribed.

(4) If the owner of the private siding applies to the Director General for registration of the siding under Part 2 during the period that the private siding is registered under subclause (3), and the application is not determined by the Director General during that period then the private siding is to continue to be taken to be registered until the application is determined.

Transitional regulations

2. (1) If there is not sufficient provision in this Schedule for dealing with a matter that needs to be dealt with for the purpose of the transition to this Act, regulations may prescribe all matters that are required or necessary or convenient to be prescribed for dealing with the matter.

(2) Regulations made under this clause may have effect before the day on which they are published in the *Gazette*.

(3) To the extent that a regulation under this clause has effect before the day of its publication in the *Gazette*, it does not —

- (a) affect, in a manner prejudicial to any person (other than the State), the rights of that person existing before the day of its publication; or
- (b) impose liabilities on any person (other than the State) in respect of anything done or omitted to be done before the day of its publication.

Recommendation 66: the clause be passed
--

SCHEDULE 3 — CONSEQUENTIAL AMENDMENTS TO OTHER ACTS

[Section 64 (2)]

Government Railways Act 1904

1. (1) After section 2 insert the following section —

“

Relationship to Rail Safety Act 1998

2A. If there is a conflict or inconsistency between a provision of this Act, or subsidiary legislation made under this Act, and a provision of the *Rail Safety Act 1998* or subsidiary legislation made under that Act, the provision of that Act or subsidiary legislation prevails to the extent of the conflict or inconsistency.

”.

(2) Sections 6, 17, 19, 20, 41, 42, 66A (2) and (3), 66B, 68 (3), 70 and 85 (1) to (10) are repealed.

(3) Section 13 (1) is amended by inserting after “this Act” the following —

“ , the *Rail Safety Act 1998* ”.

(4) Section 61 (5) is amended by inserting after “enactment” the following —

“ other than the *Rail Safety Act 1998* ”.

(5) Section 62 (4) is amended by inserting after “subject to” the following —

“ the *Rail Safety Act 1998*, ”.

(6) Section 66A (1) is amended by inserting after “ , and” the following —

“ , subject to the *Rail Safety Act 1998*, ”.

(7) Section 66A (3) continues to apply in respect of any certificate given under section 66A (2) before the repeal of those provisions.

Recommendation 67: the Act be amended
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Mines Safety and Inspection Act 1994

2. In section 7 insert before ``If'' the subsection designation ``(1)'' and insert after subsection (1) as so designated the following subsection —

``

(2) This Act does not apply to or in relation to a railway to which the *Rail Safety Act 1998* applies or to the ownership or operation of such a railway.

''.

Recommendation 68: the Act be amended

Transport Co-ordination Act 1966

3. (1) In section 8 (1) insert after ``this Act'' the following —

``

or enabling the functions of the Director General under this or any other Act to be performed

''.

(2) In section 8 (2) insert after ``this Act'' the following —

``

or assisting in enabling the functions of the Director General under this or any other Act to be performed

''.

(3) Section 8 (3) is repealed and the following subsections are substituted —

``

(3) The Minister may engage persons, otherwise than under the *Public Sector Management Act 1994*, to provide such professional, technical or other assistance as the Minister considers necessary to enable the Minister to perform his functions under this Act, or to assist in enabling the functions of the Director General under this or any other Act to be performed.

(3a) Nothing in subsection (3) affects the operation of the *Workplace Agreements Act 1993*.

(3b) Subsection (3) does not affect the operation of section 100 of the *Public Sector Management Act 1994*.

''.

(4) In section 15A (1) delete ``powers and functions under this Act'' and substitute the following —

``

functions under this Act or enabling the functions of the Director General under this or any other Act to be performed

''.

(5) In section 15A (6) delete ``the purposes of carrying this Act into effect'' and substitute the following —

`` a purpose referred to in subsection (1) ''.

(6) In section 15C (1) delete ``and'' after paragraph (c) and insert the following —

`` (The Standing Committee on Constitutional Affairs and Statutes Revision) the *Rail Safety Act 1998*; and ''.

(7) After section 17 the following section is inserted —

``

Recommendation 69: the Act be amended

Delegation

18. (1) The Director General may, and shall at the request of the Minister to the extent specified in the request, either generally or in relation to any particular matter, by instrument, delegate to any

person any of the functions or powers of the Director General under this, or any other, Act, except this power of delegation.

(2) A delegation under this section is revocable at will by the Director General, except that, to the extent that the delegation was at the request of the Minister, it is revocable only at the Minister's request.

(3) A function performed or a power exercised by a delegate is to be treated as performed or exercised by the Director General.

(4) A delegate performing a function or exercising a power is to be taken to do so in accordance with the terms of the delegation unless the contrary is shown.

(5) Subject to this section, section 59 of the *Interpretation Act 1984* applies to and in relation to any delegation under this section.

".

Recommendation 70: the clause be passed