

Attention: Mr Phil Ariti

I refer to your request of 18 May 2009 for comments on the draft Rail Safety Bill 2009. Thank you for the opportunity to submit the following consolidated industry comments. Some rail operators will also have provided comments directly to you.

### General

Whilst supporting the draft WA Bill, given that its provisions are largely drawn from the ATC approved national model Bill, industry considers some changes need to be made to this draft legislation. Industry has three major concerns and seeks reconsideration and changes to some provisions in the draft Bill.

### Major concerns – provisions opposed by industry

Page 104 – section 126 (2): Industry opposes the provision that would allow the Rail Safety Regulator to initiate and appoint an independent investigation of rail safety matters. This power should only be exercised by the portfolio chief executive/Minister. The provision in the draft Bill would allow ad hoc and indiscriminate investigations initiated by the Regulator without tests or boundaries. When coupled with 126 (6) – see below – it could place an unreasonable, onerous burden on rail operators. This provision should be deleted.

Page 105 –section 126 (6): Industry opposes, in principle, the provision where the costs of conducting independent, no blame investigations are recoverable from the rail transport operator of the railway operations concerned. The independent investigation can be initiated by the Minister, portfolio chief executive or Rail Safety Regulator – and would presumably be done so in the public interest. The cost should be met by government to reflect that public interest and to support the independent nature of the investigation. Industry accepts that fees are determined by statute and are paid by rail operators to reflect the cost of regulatory functions.

However, industry strongly opposes the provision in the draft Bill as it offers the investigator unlimited funding over whatever time period may be involved – with the rail operator bearing costs without any recourse or capacity to control such expenditure by the investigation.

The proposition is also impracticable. An operator undertakes its own investigations into an incident and when requested by the regulator. Police and workplace safety authorities also undertake investigations. Independent investigations are to be conducted in an open and transparent manner and this would not be achieved if there were operator funded cost constraints. The draft provision could recover costs from more than one rail operator – how would costs be apportioned? What happens when a third party, not an operator, such as a council road owner is involved? This provision should be deleted.

Page 146 – section 188: Industry opposes these provisions concerning offences by bodies corporate, partnerships, and employees etc which apply a “reverse onus of proof.” This is an onerous and intolerable provision that is both contrary to criminal law and runs counter to the trend to change this requirement in OHS legislation. Under section 55(1) of the current WA Act directors and managers liability has to be proven by the prosecution. This provision in the draft Bill should be reviewed and replaced by the provision in the current WA legislation. Industry has raised this issue with ATC Ministers in the context of the model Bill and will oppose it in any legislation developed by jurisdictions.

## Other matters

Page 2: The draft Bill does not include the 'clause 3 Objects of Act' provision contained in the model Bill. Industry considers these objects are desirable – if WA parliamentary drafting practice precludes them, industry recommends the sense of the objects be included in the Explanatory Memorandum accompanying the WA Bill.

Page 67 section 76 (2): The draft Bill intends to assess the competence of a worker by reference to qualifications etc "recognised under the regulations." This is different to the model Bill which refers to qualifications etc recognised under the Australian Quality Training Framework. Industry should be consulted as you develop the approach to be specified in the regulations.

Regards

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