



Rail Safety Bill 2009 Public Consultation

The Department of Transport (previously part of the Department for Planning and Infrastructure) conducted two public forums on the *WA Rail Safety Bill 2009* (WA Bill) on the 3 and 4 June 2009. Information about the public consultation process was advertised in the West Australian newspaper, and a notice of the workshops was sent directly to industry members via email.

Industry stakeholders were invited to make written submissions on the variations of the WA Bill. The Department received nine (9) submissions, with two (2) being provided in confidence. The other seven (7) submissions that were received are listed below and can be found at <http://www.transport.wa.gov.au/rail/20005.asp> or <http://www.transport.wa.gov.au/submissions>

1. Asciano Limited
2. Association of Railway Preservation Groups WA Inc
3. Association of Tourist and Heritage Rail Australia
4. Australasian Railway Association
5. Australia Western Railroad Pty Ltd
6. Perth Electric Tramway Society
7. Public Transport Authority of WA

The submissions raised a range of issues covering corporate entity directors and managers' liability, exemption for volunteers, appointment of independent investigators, penalties, reviewable decisions, objects of the Act and assessment of competence. Issues raised and actions taken by the Department can be summarised as follows:

1) Section 188 - Offences by bodies corporate, partnerships, associations, and employees

A number of submissions maintained that the specific WA variation of s.188 to remove the exemption from this section for volunteers is unacceptable. It was pointed out that in the recent National Occupational Health and Safety (OHS) reviews, the consensus among Ministers is that only in exceptional circumstances should volunteers be treated as employees for such liabilities. It was also pointed out the currently drafted s.188 raises a conflict with existing exemptions for volunteers from liabilities in other legislation.

***Resulting Action:** Given recent decisions of Ministers on the National OHS review in regard to volunteer's liability; the Department has agreed to change s.188 to reinstate the National Model Bill (NM Bill) exemption for volunteers in line with this policy.*



Section 188 of the WA Bill also requires directors and managers of corporate entities to prove innocence of liability. This principle is embodied in the NM Bill, but differs from the *Rail Safety Act 1998* (RSA) which requires guilt of a connection of the offence to corporate officers to be proved. It was noted that industry objected to the predisposition of guilt onto directors and managers of corporate entities. Submitters pointed out that the NM Bill position is not consistent with current best practice. Industry has stated that wording similar to s.55(1) of the RSA would resolve the situation.

Resulting Action: After discussions with the National Transport Commission (NTC), the Department accepts the suggestion to change the provision to reflect the RSA bringing it back into line with the practice of proving guilt. The change would reflect s.55(1) of the RSA in terms of providing proof of a nexus between the offence and corporate officers of the entity.

2) Section 126 - Appointment of independent investigator

Submissions contended that the Rail Safety Regulator (RSR) was not fettered in calling special investigations and only the Minister or CEO should have the power to do so. Without placing tests or boundaries on the RSR this would lead to ad hoc and indiscriminate investigations. One submission suggested that if the RSR were to maintain this authority that it be restricted in line with that of the Minister and CEO to incidents involving death, serious injury, or major property damage.

A number of submitters also asserted that as the independent investigations were to be instigated by Government and for the public good, then they should be paid for from Government revenues the same as other investigations carried out for OHS purposes or by police. Furthermore, industry contended there would be no fair way to apportion cost without allocating blame, and there would be complexities of apportionment where third parties were involved. They also believed that it would be unfair and onerous for it to be responsible for costs of independent investigations where they could not control or limit these costs.

Resulting Action: On balance of the arguments, the Department considers that the RSR, who is considered to be the most knowledgeable person about rail safety issues in Government, should maintain the ability to call for independent investigations on minor matters (i.e. other than incidents involving death, serious injury and major property damage) and be provided with an option to recover costs. Parliamentary Counsel's Office has advised that the current provision in the WA Bill reflects a discretionary approach to cost recovery.

3) Section 134 - The RSR may direct installation of safety or protective devices

Two submitters raised concern on this provision as it does not recognise the risk management principle of minimising risks so far as is reasonably practicable



(SFAIRP). The cost of complying with the direction may be inhibitive to the rail transport operator and does not consider other controls that may reduce or minimise the risk SFAIRP. Furthermore, if the direction is of such safety critical nature then consideration should be given to whether the direction should apply to other rail transport operators. It was proposed that these directions by the RSR be included as decisions reviewable by the State Administrative Tribunal.

Resulting Action: The Department considers making these decisions reviewable to be an acceptable position to take and has included s.134 in the table of reviewable decisions in Part 7 of the WA Bill.

4) Sections 27 to 29 – General safety duties includes penalty provisions for imprisonment

Comments were directed towards the increase in penalties for ss.27-29 that includes provision for imprisonment. The increases were to be aligned with other jurisdictions' proposed legislation to ensure national consistency in the application of the legislation.

Resulting Action: On reviewing the penalties enacted in other jurisdictions and in relation to the OHS tier of penalties, the Department agrees that the penalties set for imprisonment were excessive and have been deleted.

Another comment noted that the general safety duties in ss.27-29 are unclear and there is potential for confusion created by the application of the *Occupational Safety and Health Act 1992* (OSH Act).

Resulting Action: The Department believes the wording in Part 2 of the WA Bill is sufficient to determine the legislative jurisdictions that are required and that the Memorandum of Understanding between the RSR and inspectors of the OSH Act will meet the day-to-day practical application of the WA Bill.

5) Section 76 - Assessment of competence

A number of submitters requested that industry be consulted when regulations are developed to specify the qualifications or units of competence required to carry out rail safety work.

Resulting Action: This provision in the NM Bill is scheduled for further review nationally, and industry will be consulted as part of the process.



6) Objects of the Act as contained in s.3 of the National Model Bill to be included

A number of comments were received on the desirability for the Objects of Act as contained in s.3 of the NM Bill to be incorporated into the WA Bill.

Resulting Action: The Parliamentary Counsel's Office advised that its practice is to preclude "Objects of Act" in Bills, stating that "unless the clause is in such terms that it will be of assistance in the interpretation of ambiguous provisions of the Act by revealing the intended purposes of the legislature, it will be at best redundant and at worst misleading".