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**THE LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY**

RAIL SAFETY NATIONAL LAW (ACT) BILL 2014

EXPLANATORY STATEMENT

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Rail Safety National Law (ACT) Bill 2014

Overview and Purpose

The main purpose of the *Rail Safety National Law (ACT) Bill 2014* is to provide for a national rail safety regulation scheme, including a national rail safety regulator and a national rail safety investigator, in accordance with the ACT's intergovernmental obligations.

Rail safety regulation and investigation reform is identified as a competition reform priority in the National Partnership Agreement to Deliver a Seamless National Economy. The Commonwealth and the States and Territories recognise that they have a mutual interest in improving outcomes in rail safety regulation and investigation, and need to work together to achieve those outcomes.

In December 2009 the Council of Australian Governments agreed to the creation of a National Rail Safety Regulator (the Regulator) to administer the Rail Safety National Law (RSNL). Both the RSNL and the Regulator are hosted by South Australia. The Regulator, while based in Adelaide, will have branch offices in each of the states and territories that had regulators before January 2013 (6 in all). The RSNL was passed by the South Australian Legislative Council on 1 May 2012, enabling the states and territories to apply (reference) the law in their jurisdiction.

The ACT has not previously had a legislative framework for rail operations or rail safety. Commercial passenger rail services are provided by NSW Trains (formerly RailCorp), which holds a licence to maintain existing ACT rail track. The ACT Division of the Australian Railway Historical Society (ARHS) also operates occasional tourist railway services within the ACT, and between the ACT and Bungendore/Sydney. The ARHS holds accreditation under the RSNL for its operations in NSW, Victoria and South Australia. When the RSNL is implemented in the ACT, the Regulator will vary the ARHS' existing NSW rail safety accreditation to cover its ACT operation. Similarly, NSW Trains will have its accreditation varied to include its operation in the ACT.

While the RSNL applies to the entire rail sector, including freight and passenger rail, it does not apply to some classes of railways. The RSNL clarifies the railways to which it does not apply. Examples include non-moving displays and some amusement railways; a railway used only to guide a crane; a railway used only by a horse-drawn tram; and a railway that is privately owned and operated as a hobby on private property (which does not cross a public road and to which the public has no access). Railways with a track gauge of less than 600 millimetres also do not fall within the scope of the RSNL. In the ACT, the Kingston Miniature Railway which is run by the Canberra Society of Model and Experimental Engineers and the privately owned and operated Weston Park Railway do not fall within the scope of the RSNL.

The establishment of a single, national rail safety regulator is expected to deliver improved safety outcomes for Australia's rail system, reduce the regulatory burden on industry, allow operators to improve productivity and efficiency, increase cost-effectiveness for governments and create a single national transport market in rail. Having a national regulator means that rail operators working across multiple jurisdictions need only obtain one rail safety accreditation. As a result, the scheme particularly benefits rail operators who operate across State and Territory borders, which will need only one safety management system and be ultimately responsible to one regulator. For this reason, the scheme is positioned to reduce red tape and costs to national operators.

The Rail Safety National Law

The RSNL was enacted as a schedule to the application law of South Australia, as the host jurisdiction, with enabling legislation to facilitate passage by each State and Territory. This Law establishes the Office of the National Rail Safety Regulator (ONRSR) and the responsibilities and obligations of all people undertaking work that affects or could affect rail safety in Australia.

Key features of the RSNL include:

- general duties that apply to responsible parties along with the statutory recognition of shared responsibility for rail safety;
- risk management criteria based on the requirement to ensure, so far as is reasonably practicable, that rail operations are safe;
- detailed requirements for the development and contents of safety management systems;
- clear criteria for the accreditation of rail infrastructure managers and rolling stock operators, and the registration of managers of private sidings;
- requirements for consultation and communication, particularly when planning a change to railway operations;
- a hierarchy of sanctions and penalties where breaches of rail safety requirements occur; and
- requirements for the contents and accessibility of the National Rail Safety Register (to be maintained by ONRSR).

ONRSR has been established under the RSNL to administer a national system of rail safety regulation. The Regulator is established as the chief executive of ONRSR responsible for day to day management and carrying out functions conferred on them under the RSNL, another Act or by ONRSR.

ONRSR has the following functions under the RSNL:

- to administer, audit and review the accreditation regime under the RSNL;
- to work with rail transport operators, rail safety workers and others involved in railway operations to improve rail safety nationally;
- to conduct research, collect and publish information relating to rail safety;
- to provide, or facilitate the provision of, advice, education and training in relation to rail safety;
- to monitor, investigate and enforce compliance with the RSNL; and
- to engage in, promote and co-ordinate the sharing of information to achieve the objects of the RSNL, including the sharing of information with a relevant authority.

Under the RSNL, a person must not carry out any railway operations unless the person is an accredited rail transport operator, or undertakes railway operations for or on behalf of an accredited rail transport operator, or is specifically excluded or exempt from the RSNL.

ONRSR has the principal objective of facilitating the safe operation of rail transport services across Australia. This is achieved through regulation of the rail industry in accordance with the RSNL, supporting National Regulations, guidelines and policies, and promotion of safety as a fundamental objective in the delivery of rail transport services.

The RSNL also imposes a shared responsibility through general duties on all parties, including rail transport operators, rail safety workers, others involved in the rail industry, the

Regulator and the public, in so far as is reasonably practicable, to ensure the safety of railway operations.

It is a requirement of accreditation that a rail transport operator has appropriate procedures in place for the management of change as part of a safety management system. The aim is to ensure that change to rail operations does not reduce the effectiveness of the safety management system and increase the risks associated with the railway's operation.

Rail transport operators are also required to notify the ONRSR of certain changes to their railway operations. Other changes may require the ONRSR to assess and approve a variation to a rail transport operator's notice of accreditation.

In practical terms, a single National Rail Safety Regulator will mean that rail operators who work across multiple jurisdictions will be able to get one certificate for national accreditation instead of having to apply for accreditation in all the jurisdictions they operate in. In addition, one set of rules will apply to an operator's safety management system and operators will need to respond to one national regulator instead of multiple regulators.

Regulatory impact assessment

In November 2009, the Australian Transport Council endorsed a Regulatory Impact Statement (RIS) that evaluated whether to retain and significantly enhance the state-based regulation of rail safety, or establish a national regulatory body. That RIS recommended the establishment of a single, national rail regulator as the best option for delivering improved safety outcomes on Australia's rail system, reducing the regulatory burden on industry and increasing cost-effectiveness for governments. The total incremental benefit (that is, against the current regulatory environment) of establishing a single national model of rail safety regulation and law was assessed in that RIS at between \$36 and \$67 million.

Based on that RIS, in December 2009 the Council of Australian Governments agreed to implement a national single rail safety regulator. It was also agreed that a rail safety national law be developed, which the regulator will administer. A draft RIS for the RSNL was published on September 2011, and approved on November 2011, which assessed the cost impacts and benefits of the transition from Model Law (on which the previous state-based regulatory frameworks were based on) to a National Law.

That RIS estimated that the RSNL would have a benefit to society (net present value) of between \$28 and \$71 million over a 10 year period. The RIS also found that a single, national system of rail regulation would have a number of benefits, both to improving levels of safety, as well as cutting costs and red tape. These include:

- accrediting rail transport operators on a national basis, alleviating the need for interstate operators to hold multiple accreditations to different standards;
- a national system of regulating compliance with the law, cutting duplication between states and territories in the auditing, monitoring and inspecting of interstate rail transport operators;
- making available a larger, national pool of resources and specialist knowledge for the Regulator to draw on in making technical decisions and judgments, and investigating safety incidents;

- strengthening the capability of policy makers and the Regulator to make more evidence-based decisions through the introduction of a national standard for the recording, sharing and management of rail safety data;
- reduced compliance costs for rail transport operators and enhanced confidence in the regulatory regime through nationally consistent application and interpretation of rail safety laws; and
- reducing duplication in compliance tasks, freeing up resources of both rail transport operators and the Regulator to concentrate more on measures to improve safety.

The RIS assessed that implementing the proposed RSNL would have substantial benefits to society, both in terms of improved levels of safety, as well as enhanced productivity resulting from a more streamlined and seamless national regulatory regime that would result in significant transport cost savings.

Offences in the Rail Safety National Law

The RSNL contains a number of offences. Maximum penalties range from \$2,500 to \$300,000 or imprisonment for 5 years, or both (for an individual) or \$3,000,000 for a body corporate. Breaches of safety duties imposed in the RSNL are grouped into 3 categories depending on the consequences and severity of the breach of that duty. A category 1 safety breach, where a person engages in conduct that exposes an individual to a risk of death or serious injury or illness, and the person is reckless as to that risk, attracts the highest maximum penalty – \$300,000 or imprisonment for 5 years, or both (for an individual) or \$3,000,000 for a body corporate: section 58. This maximum penalty is appropriate and reflects the potential for widespread loss of life that may be caused by a breach of a rail safety duty. The offence in section 58 is the only offence in the RSNL that attracts a period of imprisonment.

Penalties in the RSNL are subject to a corporate multiplier for offences committed by a body corporate. Offences that involve a breach of a safety duty or safety management system requirement attract a corporate multiplier of 10 times the individual penalty amount, while all other offences attract a maximum of 5 times the individual penalty amount.

All penalties are monetary. By national agreement, penalties are not expressed in penalty units to ensure consistency across jurisdictions.

Human rights considerations

The application of the RSNL as a law of the Territory may be seen as engaging a number of rights in the *Human Rights Act 2004*. These rights are discussed below in relation to whether any limits on rights which they may create can be considered reasonable, consistent with section 28 of the *Human Rights Act 2004* (Human rights may be limited). That section provides that human rights may be subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society, and sets out relevant factors which must be considered in deciding whether a limit is reasonable.

The discussion of rights engaged follows similar discussion in the Statement of Compatibility tabled in the Victorian Parliament on 7 March 2013 by the Victorian Minister for Public Transport in accordance with the Victorian *Charter of Human Rights and Responsibilities Act 2006*. The Victorian Parliamentary Scrutiny of Acts and Regulations Committee analysed

the human rights implication of the RSNL, and its report (No 4 of 2013, tabled 19 March 2013) includes extensive discussion of these issues. Both the Statement of Compatibility and the Scrutiny Report are available at <http://www.parliament.vic.gov.au>.

Drug and alcohol testing of rail safety workers

The RSNL establishes a framework for testing rail safety workers for the presence of certain drugs or alcohol. The RSNL provides that rail safety workers may be required to submit to preliminary (screening) alcohol or drug tests, and may also be required to provide a sample of breath, oral fluid or blood for analysis. These requirements may apply in various circumstances, including while the worker is engaged in rail safety work or after a prescribed notifiable incident. The processes to be followed for carrying out tests and analysis for the RSNL are set out in part 3 of the Bill. The RSNL contemplates that each jurisdiction will make provision under its application law for the processes to be followed in conducting alcohol and drug tests and analysis, to allow jurisdictions (should they so wish) to align their rail safety testing regimes with their road transport testing regimes. This is the approach taken in the ACT's application law.

The alcohol and drug testing provisions are an important and necessary feature of the RSNL, and are similar to provisions that regulate the use and detection of alcohol and drugs while driving motor vehicles. The use of alcohol and drugs has been clearly demonstrated to have adverse effects on the capacity of people to undertake tasks and responsibilities associated with rail safety work in a safe and reliable manner. The potential for widespread casualties and property damage from a railway accident means that it is necessary to have a robust process for ensuring compliance with alcohol and drug standards.

The alcohol and drug testing provisions within the RSNL may engage the right to a fair hearing, rights in criminal proceedings, privacy, protection from medical treatment without consent and freedom of movement. Any limitation on these rights is considered to be necessary and proportionate having regard to the purpose of the legislation, which is the regulation of rail safety. The limitations are similar to those that arise in relation to the *Road Transport (Alcohol & Drugs) Act 1977* and have a similar justification – the reduction of risk to the public and individuals from the risks of serious injury arising from the use of vehicles (in this case, rolling stock) under the influence of alcohol or drugs.

Non-compliance with the testing procedures set out in application law will be taken to be an offence against the relevant enabling provisions under the RSNL that require a rail safety worker to submit to tests for the presence of alcohol or drugs: see sections 126 and 127. However, the application law provides specific defences that may be raised in particular circumstances in proceedings that arise from non-compliance with the testing procedures, which are additional to defences that apply under the general principles of criminal law.

The penalties set out in the RSNL for non-compliance with sections 126 and 127 are each a maximum fine of \$10,000. While this level of penalty is higher than the maximum fine applicable under similar provisions in the road transport legislation, it is considered appropriate in the rail safety context. The negative impact on a person's ability to undertake complex tasks following the consumption of alcohol and/or drugs has been well documented. It reflects both the importance placed on ensuring the safe operation of the rail transport system nationally and within the ACT, and the potential for serious injury and damage to property that breaches of the alcohol and drug restrictions may cause. As such, this penalty is

important to protect the rights and safety of not just rail safety workers, but the community at large.

Evidentiary provisions

Evidentiary provisions in the bill, including the provisions relating to certificate evidence, may engage the right to a fair trial (particularly the presumption of innocence) and the calling of witnesses. The Act provides for evidence of the results of alcohol and drug tests to be given by way of an evidentiary certificate. The certificate allows an authorised person, doctor or nurse to provide evidence without having to attend court. However, it does not prevent or exclude the possibility of the witness's attendance or the right to examine that witness. These provisions may engage the right to the presumption of innocence as the document is admissible in evidence and, in the absence of evidence to the contrary, is proof of the facts and matters contained in it. The associated right to a fair hearing is engaged for the same reasons. Any engagement is minor, and related to its purpose of facilitating the effective prosecution of rail safety offences involving the use of alcohol or drugs. There are no less restrictive means to achieve this objective. The provisions also reflect evidentiary provisions in the Territory's roadside alcohol and drug testing scheme. The use of certificate evidence for matters that are not in active dispute between the parties is a cost effective means of presenting evidence to the court.

Medical testing

The alcohol and drug testing provisions in the Act engage the right not be subjected to medical or scientific experimentation or treatment without a person's free consent. Under the RSNL, workers may be required to provide a sample of their breath, blood or oral fluid for the purposes of testing to determine if the person is impaired by alcohol or drugs, despite the person's not giving consent.

Any limitation on the right is reasonable and justified to protect the safety of the worker, the travelling public, the community and other rail workers. There is clear and longstanding evidence that the use of drugs and alcohol can have adverse effects on the capacity of people to carry out tasks safely, and are key risk factors in transport-related accidents and incidents. The potential for injuries and possible deaths as well as damage arising from a rail accident or incident is high where rail safety workers have used these substances.

Any limitation on the right is also minimised by ensuring that blood tests are only required where the breath or oral fluid analysis is not possible or where the rail safety officer has refused to provide a breath or oral fluid sample. Under the RSNL, a person is regarded as failing to comply with a requirement to submit to a test or analysis if he or she refuses or fails to take a test or provide a sample in accordance with the processes set out in the application Bill. The Bill contains defences to the offences in the RSNL that may apply in particular circumstances: for example, where the defendant establishes the refusal or failure is based on conscientious or medical grounds. These defences are based on those found in the road transport legislation.

Strict liability offences

The RSNL contains a number of strict liability offences, including in relation to general safety duties. Where strict liability applies, the prosecution is required only to prove the

physical element of the offence. There are certain defences at common law that may be available to a defendant depending on the facts (including mistake of fact) – noting that the ACT Criminal Code does not apply to offences under the RSNL.

While the imposition of strict liability is sometimes categorised as limiting the presumption of innocence in section 22 of the Human Rights Act, it may be considered a minor limitation because the imposition of strict liability does not preclude the defence of mistake of fact. The limitation is considered reasonable and justifiable in this context given the serious consequences arising from a breach of safety obligations in the rail sector. There are strong public safety reasons for ensuring that the rail safety regulatory regime is observed. As such, the use of strict liability offences in the RSNL is considered a reasonable limitation of rights.

Right to be presumed innocent until proven guilty

Section 22 (1) of the Human Rights Act provides that everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.

That right may be engaged by provisions in the RSNL that place an evidential burden on the accused (such as offences which contain a defence that must be established by the defendant). Once the prosecution provides evidence of the offence, a reasonable excuse defence requires the accused to satisfy the evidential burden to suggest a reasonable possibility of the existence of facts that, if they existed, would establish the defence. The prosecution must then rebut the defence beyond reasonable doubt. Examples of offences that contain a “reasonable excuse” defence with an evidential onus on the defendant are sections 101 of the RSNL (compliance with safety management system) and sections 104 (2) (failing to comply with direction to amend safety management system).¹

Any engagement of the right to be presumed innocent is justified, as these types of provisions ensure people accused of committing an offence under the RSNL will cooperate with rail safety officers or the regulator and comply with their obligations under the law. The accused is best placed to raise the existence of a reasonable excuse and to produce evidence to substantiate that defence once it is raised. The presumption of innocence is protected as the prosecution is required to negative the reasonable excuse to the ordinary criminal standard once it has been asserted.

Power of Entry

Section 143 of the RSNL provides rail safety officers with powers of entry to premises and powers that may be exercised on entry. In theory, the provision of powers of entry may engage a person’s right under the Human Rights Act not to have his or her privacy, family, or home or correspondence interfered with unlawfully or arbitrarily. However, the right of entry in the RSNL is subject to safeguards and restrictions that reduce its impact on human rights.

The powers of entry may be exercised in respect of railway premises used in connection with the carrying out of railway operations, as well as a place that adjoins railway premises if entry is required urgently for the purpose of dealing with a railway accident or incident. With limited exceptions, where entry powers are exercised, it must be with the consent of the occupier or under warrant. The ability to enter residential premises without warrant or

¹ This is not an exhaustive list of offences in the RSNL that contain defences with an evidential onus.

consent must be for the sole purpose of gaining access to railway premises, if the rail safety officer believes that no reasonable alternative access is available and the access is at a reasonable time. The exercise of this power would be exceptional and may be balanced against the paramount need to secure rail safety.

The safeguards in the development of the powers in the RSNL for entry ensure the exercise of these powers will not unreasonably limit or restrict the right to privacy. The limitation of rights is directly related to achieving the objects of the law (that is, the regulation of rail safety) and there are no alternative mechanisms for achieving the policy objective of ensuring rail safety or investigating safety breaches.

Seizure powers

The RSNL provides limited powers of search, seizure and inquiry. While the powers for seizure in the RSNL (sections 145, 158–167) can be viewed as placing limits on the rights of people in relation to their property, these limits are constrained and reasonable.

The circumstances in which seizure can occur are clearly specified, and safeguards are provided against arbitrary deprivation of property. These safeguards include the provision of compensation for damage caused to property during the exercise of these powers. They are necessary for the effective investigation and enforcement of the RSNL while ensuring that affected parties have access to processes which safeguard their rights.

In addition to the seizure powers in the RSNL, section 31 of the Act gives a police officer the power to seize anything found in the possession of a rail safety worker who has been taken into custody for one or more of a limited number of alcohol and drug-related offences under the Act. The Act specifies that items seized must be returned when the worker ceases to be in custody, other than where an item is a seizable item under the *Crimes Act 1900*, part 10, or may be seized or retained under another law of the Territory.

Privilege against self-incrimination

It is acknowledged that the alcohol and drug testing framework established by the RSNL and supported by provisions in part 3 of the Bill will engage the privilege against self-incrimination. Under these provisions, rail safety workers will be required to provide samples of breath, oral fluid or blood for testing or analysis, and the results of those tests and analyses can be used in criminal proceedings against the worker. A failure or refusal to provide a sample may also be an offence. The exclusion of the privilege against self-incrimination in the context of alcohol and drug testing is considered to be reasonable and proportionate limitation of rights, given the known safety risks associated with the use of these substances in the heavy transport sector, including rail. Essentially, it is a condition of employment as a rail safety worker that work is to be undertaken without the presence of alcohol or prescribed drugs in the worker's body and that this condition will be enforced through a program of workplace testing. The provisions in the RSNL and the Bill give legal force to this workplace safety requirement.

However, the results from alcohol and drug tests are not admissible as evidence in other contexts and cannot be used for other purposes: see section 129 of the RSNL.

The RSNL also contains certain other protections for information obtained or disclosed under the law, including protections for training safety recordings: sections 131 and 132.

There is a specific requirement in section 154 of the RSNL to produce documents and answer questions, in relation to which the privilege against self-incrimination is abrogated: see section 155. However, the answer or information so provided is not then admissible against the person in civil or criminal proceedings, other than proceedings for giving false or misleading information or documents. This restriction does not extend to information or documents derived from the answers provided by the person.

This limitation on the privilege against self-incrimination is also considered reasonable and proportionate for achieving the purposes of the rail safety law, as it is essential that the Regulator is able to gain access to all relevant information about an actual or potential safety breach so that problems are identified and remedial action can be taken.

Right to liberty and security of person.

Under s.18(1) of the HR Act everyone has the right to liberty and security of person – in particular no-one may be arbitrarily arrested or detained.

The alcohol and drug testing provisions may engage the right to freedom of movement in that a rail safety worker may be required to be detained for a short period to submit to an alcohol and or drug test. This is considered not an unreasonable or disproportionate limitation on the defendant's right to liberty particularly, when measured against the public interest in ensuring that people who carry out rail safety work do so in a safe and reliable manner. The power is not exercised on an arbitrary basis; it arises only in the context of testing rail safety workers either as part of the rail operator's ongoing testing program or following an accident. Rail safety workers are fully aware that alcohol and drug testing forms an integral part of their employment conditions. For these reasons, the engagement of the right is considered proportionate and reasonable for achieving the purposes of the Bill.

Children in the criminal process

Section 20 of the HR Act, requires an accused child be treated in a way that is appropriate for a person of the child's age who has not been convicted, while section 11(2) provides that every child has the right to the protection needed by the child because of being a child.

It is not uncommon for apprenticeships in rail safety work to be available to people younger than 18 years of age. Apprentices who are under 18 and who therefore technically come within the definition of child will be subject to the operation of the alcohol and drug testing provisions of this Bill. Like all other rail safety workers, when an apprentice is engaged the apprentice would be informed of his or her legal obligations in regard to the performance of his or her duties, including the requirements relating to alcohol and drug testing.

The alcohol and drug provisions are essentially a workplace safety measure, intended to prevent alcohol and drug misuse. Applying these provisions, and the associated enforcement powers, in relation to rail safety workers who are under 18 is essential for achieving the objectives of the Act and is therefore considered to be a reasonable limitation of rights.

Climate change

Climate change impacts have been considered and no impacts have been identified.

Clause Notes

Part 1 Preliminary

Clause 1 Name of Act

This clause provides that the title of this Act is the *Rail Safety National Law (ACT) Act 2014*.

Clause 2 Commencement

This clause provides that the Act will come into operation on a day fixed by the Minister by written notice. Notes included in the clause refer to certain commencement provisions in the *Legislation Act 2001* which are relevant to this commencement provision.

Clause 3 Dictionary

This clause clarifies that the dictionary at the end of the Act is part of the Act and definitions in the dictionary apply also to the local application provisions of this Act.

Clause 4 Terms used in Rail Safety National Law (ACT)

This clause provides that a term used in the local application provisions of the Act and also in the *Rail Safety National Law (ACT)* set out in the schedule to the *Rail Safety National Law (South Australia) Act 2012* (SA) have the same meanings in those provisions as they have in the *Rail Safety National Law (ACT)* (to the extent that the context or subject matter does not otherwise indicate).

Clause 5 Notes

This clause clarifies that a note included in the local provisions of this Act is explanatory and not part of those provisions.

Part 2 Application of Rail Safety National Law

This part provides for the adoption of the RSNL as a Territory law, and variously provides for the non-application of certain Territory laws to the Rail Safety National Law (ACT), or to the Regulator. The purpose is to ensure that the national scheme can operate in a consistent manner across participating jurisdictions. The part also includes definitions of certain generic terms used in the *Rail Safety National Law (ACT)*.

Clause 6 Application of Rail Safety National Law

This clause formally applies the RSNL, which is a schedule to the *Rail Safety National Law (South Australia) Act 2012* (SA), as a law of the Territory. The RSNL is a schedule to this Act and may be referred to as the *Rail Safety National Law (ACT)*.

Clause 7 Exclusion of Legislation Act

This clause provides that the Legislation Act does not apply to the *Rail Safety National Law (ACT)*. However, chapter 7 of the Legislation Act (Presentation, amendment and disallowance of subordinate laws and disallowable instruments) applies to a national regulation published on the NSW Legislation website as mentioned in section 265 (1) of the *Rail Safety National Law (ACT)*. This provides a period of Legislative Assembly review to ensure that national regulations are subject to the usual tabling and disallowance provisions of the Legislation Act.

In addition, clause 7 (5) provides that if a national regulation is published before the section commences, the regulation is taken to have been published on the day of commencement. The effect is to subject national regulations already made to the provisions of chapter 7, regardless of the fact that they have been made before commencement of the *Rail Safety National Law (ACT)*. These national regulations will thus be subject to the normal presentation, amendment and disallowance processes of the Assembly.

Further, by providing section 191 of the Legislation Act (Offences against 2 or more laws) applies to the *Rail Safety National Law (ACT)* the clause provides a ‘no double jeopardy’ provision which safeguards a person’s right not to be punished more than once for an offence against two or more ACT laws. That is, if an act or omission is an offence against the *Rail Safety National Law (ACT)* and is also an offence against a law of another participating jurisdiction, and the offender has been punished for the offence under the law of the other jurisdiction, the offender is not liable to be punished for the offence against the *Rail Safety National Law (ACT)*.

Clause 8 Exclusion of other territory Laws

This clause sets out which territory laws do not apply to the Regulator. The purpose is to ensure that the Rail Safety National Law scheme can operate consistently across participating jurisdictions. These oversight and accountability laws are excluded because South Australian oversight laws already apply to the Regulator.

The clause also explains that the excluded Acts do apply to a Territory entity exercising a function of the Regulator under the *Rail Safety National Law (ACT)*.

Clause 9 Meaning of generic terms for Rail Safety National Law (ACT)

This clause defines certain terms used in the *Rail Safety National Law (ACT)* in order to give them a particular meaning in this jurisdiction. Among the terms defined for the ACT’s purposes are the following: *court*, *emergency service*, *magistrate*, *Minister* and *police officer*. Throughout, the term ‘this jurisdiction’ refers to the ACT.

Part 3 Alcohol and drug testing

The national legislation contemplates a framework under which accredited rail operators are required to establish an alcohol and drug testing program for rail safety workers. The legislation essentially provides for certain minimum requirements for such programs, which are conducted by (or on behalf of), and funded by, the rail operators themselves. These alcohol and drug provisions are essentially a workplace safety measure, intended to prevent

alcohol and drug misuse, rather than a specific detection/enforcement framework such as the legislation that applies in the road transport area.

The head of power allowing the Regulator to test rail safety workers for the presence of a drug or alcohol is set out in the RSNL, part 3, division 9 (Drug and alcohol testing by Regulator). Details of the procedures to be followed are included in the application provisions of each of the participating jurisdictions to allow for local variations. Such variations include approval of testing equipment used in the ACT by police and hospitals, appointment of authorised people to conduct the tests, local processes relating to breath, blood and oral fluid sampling and evidentiary procedures.

This flexibility allows provisions in the *Road Transport (Alcohol and Drugs) Act 1977* which apply to offending ACT motor vehicle drivers to be adopted and applied in large part to rail safety workers. The advantage of this is that the potential for confusion and increased probability of errors in processing tests and samples is reduced as police, sample takers and analysts will follow substantially similar procedures under the road transport legislation and the rail safety law.

Division 3.1 Preliminary

Clause 10 Definitions—pt 3 and testing provisions

This clause defines key words and phrases used in this part and the testing provisions. Several definitions refer to concepts or terms used in the *Road Transport (Alcohol and Drugs) Act 1977*, consistent with the policy that a substantially similar process will apply under both legislative schemes.

Clause 11 Approval of analysts

This clause provides for the Minister to appoint analysts. The definition of “analyst” includes analysts appointed under this clause as well as analysts appointed under *the Road Transport (Alcohol and Drugs) Act 1977*.

Clause 12 Approval of laboratories

This clause provides for the Minister to approve laboratories. The definition of “approved laboratory” includes a laboratory approved under this clause as well as any laboratory approved under the *Road Transport (Alcohol and Drugs) Act 1977*.

Division 3.2 Procedures relating to testing and analyses

Subdivision 3.2.1 Alcohol—breath testing and analysis

Clause 13 Conduct of alcohol screening test

This clause provides for the conduct of alcohol screening tests under section 126 of the RSNL. Clause 13 (2) sets out the time frames for conducting screening tests following either a prescribed notifiable occurrence, or the time after a worker has stopped carrying out rail safety work.

Clause 14 Detention for breath analysis

The purpose of this clause is to authorise the detention for the purposes of breath analysis of a rail safety worker. It applies either where the worker has undertaken a screening test that shows the worker has the prescribed concentration of alcohol, or where the worker has refused or failed to undertake a screening test. This provision is based on section 11 of the *Road Transport (Alcohol and Drugs) Act 1977*. The person is regarded as being in custody for the duration of the analysis, including the time before the analysis while the instrument is prepared, because the person is not free to leave at that time.

Clause 14 (4) makes it clear that when the person is taken into custody for breath analysis, he or she may be taken to another place where there is an analysis instrument if such an instrument is not available at the place where the screening test was requested or conducted.

Clause 14 (5) provides clause 14 does not prevent an authorised officer who is not a police officer from carrying out a breath analysis under section 15. In these cases, the worker is not regarded as being in custody, since non-police authorised officers do not have custodial powers. However, a rail safety worker who does not submit to a requirement for a breath analysis may be committing an offence under section 126 of the RSNL.

Clause 15 Conduct of breath analysis

This clause sets out the way in which a breath analysis will be conducted, including the time frames that apply and the people who are qualified to conduct the analysis. This provision is partly based on section 12 of the *Road Transport (Alcohol and Drugs) Act 1977*.

Clause 16 Precautions for privacy—breath analysis

This clause requires an authorised person carrying out breath analysis for a rail safety worker to take all practicable steps to ensure that it is not readily apparent to members of the public that the breath analysis is being carried out. This requirement does not apply for breath analysis being carried out at a police station. This provision is based on section 13 of the *Road Transport (Alcohol and Drugs) Act 1977*.

Subdivision 3.2.2 Prescribed drugs—screening test and analysis

Clause 17 Conduct of drug screening test

This clause deals with drug screening tests for section 127 of the RSNL. It provides that only a police officer, or an authorised officer who is authorised to conduct such tests, may require a rail safety officer to undergo a drug screening test. A rail safety worker required to undergo a drug screening test must remain at the place where the screening test is being carried out for the time (not exceeding 30 minutes) reasonably necessary for the test to be completed. This requirement takes account of the fact that drug screening tests do not produce instantaneous results, and that it can take time both for the sample to be collected and for a clear result to be obtained.

The clause allows a police officer or authorised person to direct the rail safety worker to remain at that location for the test. This requirement to remain at that location for no more

than 30 minutes mirrors an equivalent requirement in the road transport legislation for the conduct of roadside alcohol and drug screening tests.

Clause 17 (4) contains time frames for the requirement to submit to a drug screening test. A worker cannot be required to submit to a test more than 8 hours after the worker is taken to hospital, after a prescribed notifiable occurrence, or after the worker has stopped carrying out rail safety work.

Clause 18 Detention for oral fluid analysis

This clause allows a police officer to take a rail safety worker who either has undertaken a drug screening test that shows that a prescribed drug is present in the worker's oral fluid, or who has failed to submit a drug screening test, into custody for oral fluid analysis.

If there is no oral fluid analysis instrument available at the place where the screening test was undertaken (or refused) the police officer may take the worker to another place for the oral fluid analysis.

Clause 18 (4) limits the period and purposes for which the worker may be held in custody under clause (2). The worker cannot be held in custody under this provision after he or she has been given an oral fluid analysis statement following an oral fluid analysis by a police officer operating an instrument, or if the time for requiring an analysis has expired. It is an important safeguard for human rights that the period and purposes for which detention is authorised are set out in the provisions that create the detention power.

Clause 18 (5) makes it clear that clause 18 does not prevent oral fluid analysis from being carried out by a non-police authorised person under other provisions of the Bill; these provisions do not engage custodial powers.

Clause 19 Conduct of oral fluid analysis—generally

This clause explains the time frames that apply for conducting an oral fluid analysis, and who is authorised to take a sample from a rail safety worker for oral fluid analysis.

This clause also provides for regulations to be made about the procedures for carrying out an oral fluid analysis using an oral fluid instrument and any circumstances in which the results from such an analysis must be disregarded. This provision is based on section 13E of the *Road Transport (Alcohol and Drugs) Act 1977*.

Clause 20 Oral fluid—sample taken by authorised person

This clause explains the process to be followed by an authorised person who is not a police officer for taking an oral fluid sample for analysis from a rail safety worker. Non-police authorised people will not conduct preliminary analysis of the sample using an oral fluid analysis instrument, so their role is essentially confined to that of collecting, sealing, and labelling the samples and arranging for their analysis by analysts at an approved laboratory.

Clause 21 Oral fluid—sample taken by police officer from worker in custody—preliminary analysis

This clause provides for a police officer who collects a sample of oral fluid from a rail safety worker under clause 19 to conduct an on-site preliminary analysis on a portion of the sample, using an oral fluid analysis instrument, with the remainder of the sample being sent to an approved laboratory for confirmatory analysis by an analyst. The police officer must give the worker an oral fluid analysis statement following the preliminary analysis. This provision is based on section 13E (5) and (6) of the *Road Transport (Alcohol and Drugs) Act 1977*.

Clause 22 Precautions for privacy—oral fluid analysis

This clause requires an authorised person carrying out an oral fluid analysis for a rail safety worker to take all practicable steps to ensure that it is not readily apparent to members of the public that the oral fluid analysis is being carried out. This requirement does not apply for breath analysis being carried out at a police station. This provision is based on section 13F of the *Road Transport (Alcohol and Drugs) Act 1977*.

Clause 23 Oral fluid—confirmatory analysis

This clause prescribes how a sample of a rail safety worker's oral fluid must be dealt with when being analysed to determine whether a prescribed drug is present in the oral fluid. The clause also specifies how long oral fluid samples must be stored for and provides a power for the tested worker to request that part of the stored sample be sent to a laboratory nominated for the worker to allow an independent analysis to be undertaken. This provision is based on section 13G of the *Road Transport (Alcohol and Drugs) Act 1977*.

Clause 24 Oral fluid analysis statement

This clause specifies that an oral fluid analysis statement must be provided to a rail safety worker whose oral fluid has been analysed by an analyst at an approved laboratory under clause 23 as soon as practicable after the analysis is carried out. The clause also prescribes the information that must be included in the oral fluid analysis statement. This provision is based on section 13G of the *Road Transport (Alcohol and Drugs) Act 1977*.

Subdivision 3.2.3 Alcohol and drugs—blood test

Clause 25 Conduct of blood test

This clause specifies the conditions under which a blood test may be taken under section 127 of the RSNL. It prescribes the timeframe within which the test may be taken, and who may take the sample.

Clause 26 Detention for blood test

This clause allows a police officer to take a rail safety worker, who has refused to submit to a blood test under section 127 of the RSNL, into custody for blood testing.

Only a sample taker (a doctor or a nurse) is authorised to carry out a blood test for section 127 of the RSNL. Blood tests are physically invasive procedures and it is essential that they are only carried out by appropriately skilled and qualified staff.

The time frames in which a blood test may be carried out are specified in clause 25 (3). A blood test cannot be carried out under this clause after these times have passed.

Clause 26 Detention for blood test

This clause authorises a police officer to take a rail safety worker into custody for the purposes of a having blood test at a hospital or sampling facility for section 127 of the RSNL.

The police officer who takes a rail safety worker into custody for a blood test must take the worker to the sampling facility or to hospital for the test as soon as practicable, and a sample taker must take the sample as soon as possible after the worker's arrival at the hospital or facility. The sample cannot be taken if more than 2 hours have passed since the worker arrived at the sampling facility or hospital. Samples must be taken by the sample taker in the presence of the police officer. The worker cannot be held in custody under this clause after a sample is taken, or if a sample has not been taken, after the time for taking a sample has expired.

Clause 27 Requirement to take blood test in hospital after prescribed notifiable occurrence

This clause applies to a rail safety worker who is injured as a result of a prescribed notifiable occurrence and who attends or is admitted to hospital within 8 hours.

A doctor or nurse who treats the rail safety worker is required to take a blood sample from the worker, and the rail safety worker is required to provide the sample in accordance with the directions of the sample taker. The note to this clause makes it clear that a failure by the rail safety worker to give the sample will be regarded as a failure to submit to a test for section 127 of the RSNL. The sample must be taken within 2 hours of the worker's arrival at hospital.

Clause 28 Taking blood samples

This clause sets out the processes for taking blood samples from rail safety workers, including the requirements for labelling, sealing and storing samples and arranging for their collection from the one-way box by an analyst.

Clause 29 Analysis of blood samples

This clause sets out the processes to be followed by an analyst in relation to the analysis of a blood sample taken from a rail safety worker under this part.

The analyst is required to arrange for the analysis of the sample to determine, so far as practicable, whether the prescribed concentration or alcohol or a prescribed drug was present in the sample. The analysis may also cover other substances if an authorised person has cause to believe that the rail safety worker has a substance other than alcohol or a prescribed drug in his or her body, and the authorised person requests the analyst to test for other substances.

The analyst must also ensure that a part of the sample sufficient for further analysis is protected and preserved for the specified period, so that if a request for independent analysis is made during that time that part will be available for that analysis. The clause then provides that a rail safety worker may ask that the preserved part of the blood sample be sent, at the worker's expense, to a laboratory specified by the worker. This provision is based on section 15A of the *Road Transport (Alcohol and Drugs) Act 1977*.

Clause 30 Blood analysis statement

This clause provides that a blood analysis statement must be provided to a rail safety worker whose blood has been analysed under clause 29 as soon as practicable after the analysis is carried out. The clause also sets out the information that must be included in the blood analysis statement. This provision is based on section 15B of the *Road Transport (Alcohol and Drugs) Act 1977*.

Subdivision 3.2.4 Alcohol and drug testing and analysis—miscellaneous

Clause 31 Power to search rail safety worker in custody

This clause gives a police officer power to search a rail safety worker who has been taken into custody under this part, and to take possession of anything found in the worker's possession and to keep anything so seized while the worker is in custody. Although this power is a limitation on the right to privacy, it is essential to protect the safety of the tested person, sample takers and other people who carry out tests, the police officers who hold the tested worker in custody and other people at police stations and sampling facilities. This is particularly the case where a rail safety worker is impaired by alcohol and/or prescribed drugs and is uncooperative with testing requirements, as the risk of harm to self and others increases in that situation. . Giving police the power to remove items that can be used to harm others or to self-harm is an essential preventative power and is a reasonable limitation on rights. This provision is based on section 18C of the *Road Transport (Alcohol and Drugs) Act 1977*.

Clause 32 Keeping of samples—request by DPP

This clause allows the Director of Public Prosecutions to request that a preserved sample from a blood or oral fluid test, that would otherwise exceed the time limit for which such a sample can be stored under clause 29, be kept until a proceeding against a rail safety worker has been decided. This provision is based on section 16C of the *Road Transport (Alcohol and Drugs) Act 1977*.

Clause 33 Destruction of samples

This clause provides that the preserved part of a sample of blood or oral fluid must be destroyed after the end of the period for which the sample must be kept. This provision is based on section 16D of the *Road Transport (Alcohol and Drugs) Act 1977*.

Division 3.3 Offences—alcohol and drug testing and analysis

Clause 34 Failure to submit to alcohol screening test or breath analysis

This clause provides that where an authorised person requires a rail safety worker to submit to an alcohol screening test or a breath analysis, and the worker fails to comply with the requirement or a reasonable direction in relation to the requirement, the worker is taken to have committed an offence against section 126 of the RSNL. The purpose of this provision is to make it clear that non-compliance by a rail safety worker with the breath testing provisions under this part will be an offence against section 126 (3) of the RSNL.

The rail safety worker may have a defence if the worker proves that the refusal or failure was based on medical grounds.²

Clause 35 Failure to submit to drug screening test, oral fluid analysis

This clause provides that where an authorised person requires a rail safety worker to submit to a drug screening test or oral fluid analysis, and the worker fails or refuses to submit or to comply with a reasonable direction in relation to the test or analysis, the worker is taken to have committed an offence under section 127 (3) of the RSNL.

The rail safety worker may have a defence if he or she proves that the refusal or failure was based on medical grounds.³

Clause 36 Failure to stay for drug screening test

This clause applies where a rail safety worker is required to submit to a drug screening test under section 127 of the RSNL and fails to stay at the place where the test is being carried out for the time (not exceeding 30 minutes) reasonably necessary for the test to be completed. The clause makes it clear that the worker is taken to commit the offence under section 127 (3) of the RSNL if he or she fails to stay while the test is completed.

Clause 37 Failure to submit to blood test etc

This clause provides that where a rail safety worker fails or refuses to comply with a blood testing requirement under section 127 of the RSNL, or to give a sample in hospital under clause 25, or behaves in a way that makes it impossible for a doctor or nurse to take a sample under clause 27, the rail safety worker is taken to have committed an offence against section 127 of the RSNL.

The rail safety worker may have a defence if he or she proves that his or her refusal or failure to provide a sample was based on medical, religious or other conscientious grounds.⁴

² The Criminal Code does not apply to offences under the RSNL or to this Bill. Accordingly, the ordinary principles of criminal law will apply in relation to establishing this defence.

³ The Criminal Code does not apply to offences under the RSNL or to this Bill. Accordingly, the ordinary principles of criminal law will apply in relation to establishing this defence.

⁴ The Criminal Code does not apply to offences under the RSNL or to this Bill. Accordingly, the ordinary principles of criminal law will apply in relation to establishing this defence.

Division 3.4 Evidence

Subdivision 3.4.1 Application—div 3.4

Clause 38 Application—div 3.4

This clause explains that it applies to court proceedings. The purpose of this clause is to establish a framework relating to evidence about alcohol and drug testing, including the use of certificate evidence in legal proceedings arising under the Rail Safety National Law. The use of evidentiary certificates can expedite legal proceedings and reduce costs for all parties by facilitating the proof of essential facts (usually facts that involve a degree of technical or objective verification) that are not contested by the parties.

Subdivision 3.4.2 Evidentiary certificates

Clause 39 Evidentiary certificate—authorised person—alcohol-related test

This clause allows an authorised person to give an evidentiary certificate about a breath analysis for a rail safety worker. It describes the matters that may be included on the evidentiary certificate. As clause 38 makes clear, an evidentiary certificate is admissible whether or not it includes every matter that may be addressed by the certificate – it is not mandatory to address every matter listed in clause 39.

Clause 40 Evidentiary certificate—authorised person—drug-related test

This clause allows an authorised person to give an evidentiary certificate about a drug or alcohol related oral fluid or blood test, where the authorised person has required a rail safety worker to give a sample of the worker's oral fluid or blood for analysis. It is the certificate that would be used by an authorised person (including a police officer) where a sample is taken for oral fluid analysis by instrument, or where blood is taken for laboratory analysis – for that reason, not every element listed in clause 40 will be applicable in every case.

Clause 41 Evidentiary certificate—sample taker

This clause allows a sample taker to give an evidentiary certificate about the steps taken in collecting a blood sample from a rail safety worker for the RSNL.

Clause 42 Evidentiary certificate—blood sample not taken by sample taker

This clause allows a sample taker to give an evidentiary certificate to detail the reasons for not taking a sample from a rail safety worker when a sample would otherwise be required to be taken under the RSNL or application law. The sample taker may give an opinion as to whether the taking of the sample would or would not be detrimental to the worker's health; or whether a sample had or had not been taken from the worker previously.

Clause 43 Evidentiary certificates—analysts

This clause allows an analyst to give an evidentiary certificate about matters relating to the analysis of a sample under the RSNL and the Bill, including the analyst's status as an analyst, the condition of the sample, the steps followed in the analysis and the results.

Subdivision 3.4.3 Other provisions about evidence

Clause 44 Meaning of *this Act*—subdiv 3.4.3

This clause explains that the term *this Act* means part 3 of the Bill and the testing provisions of the RSNL.

Clause 45 Effect of noncompliance—analysis of breath or blood

This clause explains the effect of non-compliance with the procedural requirements of the rail safety testing provisions, when a court is hearing a charge for an offence against section 128 of the RSNL, relating to a breath analysis or a blood analysis. It provides that the court must dismiss the charge unless the court is satisfied that despite the failure to comply, the result obtained for the rail safety worker would have been the prescribed concentration. This provision is based on section 42 of the *Road Transport (Alcohol and Drugs) Act 1977*.

Clause 46 Effect of noncompliance—analysis of oral fluid

This clause explains the effect of non-compliance with the procedural requirements of the rail safety testing provisions, when a court is hearing a charge for an offence against section 128 of the RSNL relating to an oral fluid analysis. It provides that the court must dismiss the charge unless the court is satisfied that despite the failure to comply, the analysis would have indicated the presence of a prescribed drug in the worker. This provision is based on section 42A of the *Road Transport (Alcohol and Drugs) Act 1977*.

Clause 47 Effect of noncompliance—failure to give sample of breath

This clause explains the effect of non-compliance with the procedural requirements of the rail safety testing provisions, when a court is hearing a charge for an offence against section 126 (3) of the RSNL in relation to a rail safety worker's failure to submit to breath analysis. It provides that the court must dismiss the charge unless the court is satisfied that, despite the failure to comply, the result obtained for the rail safety worker would have been the prescribed concentration. This provision is based on section 42B of the *Road Transport (Alcohol and Drugs) Act 1977*.

Clause 48 Effect of noncompliance—failure to give sample of oral fluid

This clause explains the effect of non-compliance with the procedural requirements of the rail safety testing provisions, when a court is hearing a charge for an offence against section 127 (3) of the RSNL in relation to a failure by a rail safety worker to submit to oral fluid analysis. It provides that the court must dismiss the charge unless the court is satisfied that despite the failure to comply, the analysis would have indicated the presence of a prescribed drug in the worker. This provision is based on section 42C of the *Road Transport (Alcohol and Drugs) Act 1977*.

Clause 49 Oral evidence about evidentiary certificate

This clause requires that notice must be given to the Regulator when a rail safety worker requires the attendance in court of a person who made an evidentiary certificate to give oral evidence about the matters contained in the certificate. The purpose of this requirement is to give the Regulator sufficient time to contact the witness and arrange for his or her attendance on the relevant day.

Clause 50 Evidence about presence of alcohol and prescribed drugs

This clause makes it clear that when a court is dealing with an offence under section 128 of the RSNL, it may consider evidence relating to the concentration of alcohol in a rail safety worker's breath based on the results of an analysis carried out under part 3 and the testing provisions, or results from a blood analysis carried out at an approved laboratory that are certified by an analyst. Similarly, the court may have regard to evidence about the presence of a prescribed drug in a worker's oral fluid or blood having regard to the results of an oral fluid analysis carried out under part 3 or the testing provisions, or from the analysis of a sample of the worker's blood under clause 29.

Division 3.5 Miscellaneous

Clause 51 How alcohol concentration may be expressed

This clause explains how the amount of alcohol in a person's breath or blood is to be expressed when a sample is analysed. The concentration alcohol is to be expressed in terms of the number of grams of alcohol per 100mL of blood or 210L of breath respectively. There is a direct correlation between the concentration of alcohol in 100mL of blood and 210L of breath.

Clause 52 Protection of police officers and medical staff

This clause provides liability from legal action for good faith actions by police officers and medical staff for actions relating to the testing provisions, including actions arising from the worker's detention for testing. This clause provides that the Territory indemnifies sample takers in relation to any damages arising from the taking of samples.

Part 4 Miscellaneous

Clause 53 Provision of information and assistance to Regulator

This clause provides that a person exercising a function under the Act or the RSNL is authorised to provide the Regulator with information or assistance that is reasonably required by the Regulator to exercise its functions. Clause 53 (2) authorises the disclosure of information by the Regulator to someone else for the exercise of the Regulator's functions under this Act or the RSNL.

Clause 54 Regulation-making power

This clause provides a general regulation making power for this Act. Subclause 54 (2) also provides that a regulation may modify a national regulation.

Part 5 Consequential Amendment

Clause 55 Crimes Act 1900, new section 187 (2) (c) and (d)

This clause includes amendments to section 187 of the Crimes Act 1900 and is consequential on the enactment of the *Rail Safety National Law (ACT) Act 2014*.

These amendments have the effect that police procedures for dealing with certain offences against the rail safety national law (particularly offences relating to conducting rail safety work while having the prescribed concentration of alcohol or while a prescribed drug is present) will be the same as those applying to certain similar offences under the road transport legislation (particularly similar offences under the *Road Transport (Alcohol and Drugs) Act 1977*).

The purpose of these amendments to section 187 (2) is to exclude the application of Part 1C of the Commonwealth Crimes Act, which contains procedural requirements in relation to the investigation of offences and questioning of suspects, from the offences or in the circumstances mentioned in section 187 (2). By way of background, the policy rationale for excluding Part 1C from road transport offences was that the volume of the offences, the absence of a fault element for many such offences (and in some cases the transitory nature of the evidence to be collected) would result in significant delays for drivers who are detected committing offences and divert policing resources from other tasks.

Part 10 Transitional

Clause 120 Transitional regulations

Clause 120 enables the Executive to make regulations dealing with transitional matters. The clause contains two different regulation-making powers. Clause 100 (1) allows the making of a regulation to deal with any transitional matter that arises as a result of the enactment of this Bill.

Clause 120 (2) enables the making of a regulation that modifies the Act. A regulation under this clause may only modify part 10 of the Act, and only if the Executive is of the opinion that the part does not adequately or appropriately deal with a transitional issue. A provision of this kind is an important mechanism for achieving the proper objectives, managing the effective operation, and eliminating transitional flaws in the application of the Act in unforeseen circumstances by allowing for flexible and responsive (but limited) modification by regulation.

Clause 120 (3) gives a regulation under subclause (2) full effect according to its terms. A provision of part 10 of the Act modified by regulation will operate in the same way (in relation to another provision of the Act or any other territory law) as if it were amended by an Act, and in accordance with established principles of statutory interpretation. The subclause is not expressed, and does not intend, to authorise the making of a regulation limiting future enactments of the

Legislative Assembly. Also, any modification by regulation of part 5 of the Act has no ongoing effect after the expiry of that part.

Clause 121 Expiry—pt 10

Clause 121 provides for the expiry of part 10 two years after commencement of the clause.

Dictionary

This defines key words and phrases used in the Act.

Schedule Rail Safety National Law

Clause 1 Short title

This clause provides that this Law may be referred to as the *Rail Safety National Law* (the RSNL).

Clause 2 Commencement

This clause states that the RSNL will commence as provided by the application of this Act.

Clause 3 Purpose, objects and guiding principles of Law

This clause sets out the purpose, objects and guiding principles of the RSNL.

Clause 4 Interpretation

This clause sets out the definitions used in the RSNL.

Clause 5 Interpretation generally

This clause provides for schedule 2 of the RSNL to set out the interpretation provisions that apply to the RSNL.

Clause 6 Declaration of substance to be drug

This clause provides for the declaration by responsible Ministers of substances as drugs for the purposes of the RSNL.

Clause 7 Railways to which this Law does not apply

This clause sets out railways that are not covered by the RSNL.

Clause 8 Meaning of rail safety work

This clause sets out the meaning of rail safety work.

Clause 9 Single national entity

This clause provides that the Legislative Assembly, in applying the RSNL in the ACT, does so with the same intention as other participating jurisdictions, that is, to create a single national entity to regulate rail safety, namely the Office of the Rail Safety National Regulator (ONRSR or the Regulator). The powers and functions of the Regulator are discussed in part 2 below.

Clause 10 Extraterritorial operation of Law

This clause provides for the extraterritorial operation of the RSNL to the extent allowable.

Clause 11 Crown to be bound

This clause clarifies the extent to which the RSNL binds the Crown.

Part 2 Office of the National Rail Safety Regulator

Part 2 provides a framework for the administration of the RSNL. It sets out the role of ‘responsible Ministers’ in giving policy directions to the Regulator and for the approval of specified guidelines, and provides for the exercise of functions generally. The part provides for the establishment of the Regulator and sets out its general powers including the power to enter into agreements with a state or territory for the provision of services, and specifies the Regulator’s main functions. It establishes the governing board for the Regulator and the

board's functions. The appointment of the board members is by the South Australian Minister on the unanimous recommendation of responsible Ministers. Part 2 also sets out standard procedural provisions for the conduct of meetings and establishes the National Rail Safety Regulator Fund to be administered by the Regulator.

The part includes provisions for other planning and accountability matters. Annual reports must be prepared and given to the responsible Ministers, and tabled in the Parliaments of each participating jurisdiction and the Commonwealth. A number of South Australian 'oversight laws' are applied to the Regulator and the Board. The South Australian laws do not, however, apply to a State or Territory entity exercising functions under the RSNL either in their own right or through agreements or delegation. The local application provisions of the Bill exclude a number of Territory laws in the application to the Regulator and Board.

Division 1 Establishment, functions, objectives, etc

Clause 12 Establishment

This clause establishes the Office of the National Rail Safety Regulator as a body corporate. ONRSR would represent the Crown of each participating jurisdiction, but would not thereby become a Crown agency or instrumentality as such.

Clause 13 Functions and objectives

Sets out the functions and objectives of ONRSR.

Clause 14 Independence of ONRSR

Provides that except as otherwise provided, ONRSR is not subject to Ministerial direction in the exercise of its functions or powers.

Clause 15 Powers

Sets out the powers of ONRSR.

Division 2 Office of the National Rail Safety Regulator

Subdivision 1 Constitution of ONRSR

Clause 16 Constitution of ONRSR

Sets out the membership of ONRSR.

Subdivision 2 National Rail Safety Regulator

Clause 17 Appointment of Regulator

Provides for the appointment of a person as the National Rail Safety Regulator.

Clause 18 Acting National Rail Safety Regulator

Provides for the appointment of an Acting National Rail Safety Regulator.

Clause 19 Functions of Regulator

Sets out the functions of the National Rail Safety Regulator. The Regulator's functions include being the chief executive of ONRSR and an act of the Regulator will be taken to be an act of ONRSR.

Clause 20 Power of Regulator to obtain information

Gives the Regulator the power to obtain information that will assist in monitoring or enforcing compliance with the RSNL. The Regulator may require information or documentation to be provided by serving written notice if the Regulator has reasonable grounds to believe that the person is capable of giving information, providing documents or giving evidence in relation to a possible contravention of the RSNL or that will assist monitoring or enforcing compliance with the RSNL.

If the Regulator is unable to obtain the information and documentation, it has power to require a person to attend before the Regulator to give either oral or written evidence and to produce documents. It is an offence to disobey without reasonable excuse. If required to attend, the person may attend with a legal practitioner. The abrogation of privilege against self-incrimination in clause 155 below does not apply to this clause. In addition, clause 245 provides (generally) that nothing in the RSNL requires a person to produce a document that would disclose information, or otherwise provide information, that is the subject of legal professional privilege.

Subdivision 3 Non-executive members

Clause 21 Appointment of non-executive members

Provides for the appointment of non-executive members of ONRSR.

Subdivision 4 Miscellaneous provisions relating to membership

Clause 22 Vacancy in or removal from office

Sets out when the office of a member of ONRSR becomes vacant or may be removed.

Clause 23 Member to give responsible Ministers notice of certain events

Sets out that a member of ONRSR must notify the Minister of the member's bankruptcy or conviction of an offence.

Clause 24 Extension of term of office during vacancy in membership

Provides that a member's term of office may be extended until a vacancy is filled.

Clause 25 Members to act in public interest

Provides that members of ONRSR must act in the public interest.

Clause 26 Disclosure of conflict of interest

Provides that members of ONRSR must give notice of any conflict of interest.

Division 3 Procedures

Clause 27 Times and places of meetings

Provides that meetings are to be held in order to conduct the business of ONRSR.

Clause 28 Conduct of meetings

Sets out the requirements for the conduct of ONRSR meetings.

Clause 29 Defects in appointment of members

Provides that ONRSR business is not affected by irregularity in the appointment of a member.

Clause 30 Decisions without meetings

Provides for decisions of ONRSR without a meeting.

Clause 31 Common seal and execution of documents

Sets out provisions for the use of the common seal of ONRSR.

Division 4 Finance

Clause 32 Establishment of Fund

Establishes the National Rail Safety Regulator Fund (the Fund).

Clause 33 Payments into Fund

Provides for payments into the Fund.

Clause 34 Payments out of Fund

Provides for payments out of the Fund.

Clause 35 Investment of money in Fund

Allows for investment of funds and requires records to be kept.

Clause 36 Financial management duties of ONRSR

Sets out the duties of ONRSR in relation to its financial management.

Division 5 Staff

Clause 37 Chief executive

Provides that the Regulator is the chief executive of ONRSR.

Clause 38 Staff

Provides for the employment of staff by ONRSR.

Clause 39 Secondments to ONRSR

Provides for the secondment of staff to ONRSR from government agencies.

Clause 40 Consultants and contractors

Provides that ONRSR may engage contractors and consultants.

Division 6 Miscellaneous

Clause 41 Regulator may be directed to investigate rail safety matter

Provides that the Minister may direct the Regulator to investigate or provide information or advice about a rail safety matter.

Clause 42 National Rail Safety Register

Provides that the Regulator must establish and maintain the National Rail Safety Register and sets out what is to be included in the Register. The Register will contain details of a person's

accreditation or registration and associated details including enforcement activities which have been undertaken in respect of the accredited or registered person.

While most information will relate to corporations, this may not always be the case. In any event, the provision engages the right to privacy because it allows publication of information. However, the right is not limited. The rail industry is considerably regulated including securing community safety and service standards. The collection, retention and publication of relevant information are an aspect of this system of regulation.

Clause 43 Annual report

Requires the Regulator to provide an annual report to the responsible Ministers and sets out the requirements for the report.

Clause 44 Other reporting requirements

Provides that the national regulations may stipulate other reporting requirements.

Clause 45 Delegation

Provides ONRSR with the power to delegate its functions or powers.

Part 3 Regulation of rail safety

Division 1 Interpretation

Clause 46 Management of risks

Provides that safety duties imposed by the RSNL are to eliminate or minimise risks to safety so far as reasonably practicable.

Clause 47 Meaning of reasonably practicable

Sets out the meaning of 'reasonably practicable' in relation to duties of safety.

Division 2 Occupational health and safety and railway operations

Clause 48 Relationship between this Law and OHS legislation

Clause 48 explains the relationship between the RSNL and occupational health and safety legislation. That is, occupational health and safety legislation prevails to the extent of any inconsistency.

Clause 49 No double jeopardy

Clause 49 provides that where an act or omission constitutes an offence under the national law and under occupational health and safety legislation, the offender is not liable to be punished twice in respect of the offence.

Division 3 Rail safety duties

Subdivision 1 Principles

Clause 50 Principles of shared responsibility, accountability, integrated risk management, etc

Provides that rail safety is the responsibility of rail transport operators, rail safety workers and others who work on, with or supply rolling stock or rail infrastructure.

Clause 51 Principles applying to rail safety duties

Sets out the principles that apply to duties under the RSNL.

Subdivision 2 Duties

Clause 52 Duties of rail transport operators

Sets out the rail safety duties of rail transport operators.

Clause 53 Duties of designers, manufacturers, suppliers etc

Sets out the rail safety duties of designers, manufacturers and suppliers and others involved in things used as or in connection with rail infrastructure or rolling stock.

Clause 54 Duties of persons loading or unloading freight

Sets out the rail safety duties of persons loading or unloading freight from rolling stock.

Clause 55 Duty of officers to exercise due diligence

Provides that officers of a person who has a duty or obligation under the RSNL must exercise due diligence to ensure the person complies with that duty or obligation and sets out the meaning of 'due diligence'.

Clause 56 Duties of rail safety workers

Sets out the duties of rail safety workers carrying out rail safety work.

Subdivision 3 Offences and penalties

Clause 57 Meaning of *safety duty*

Sets out the meaning of safety duty for the purposes of the subdivision.

Clause 58 Failure to comply with safety duty—reckless conduct—Category 1

Sets out what is a 'category 1' offence in relation to a breach of a safety duty.

Clause 59 Failure to comply with safety duty—Category 2

Sets out what is a 'category 2' offence in relation to a breach of a safety duty.

Clause 60—Failure to comply with safety duty—Category 3

Sets out what is a 'category 3' offence in relation to a breach of a safety duty.

Division 4 Accreditation

Subdivision 1 Purpose and requirement for accreditation

Clause 61 Purpose of accreditation

Sets out the purpose for accreditation.

Clause 62 Accreditation required for railway operations

Sets out the accreditation requirements for a person carrying out railway operations.

Clause 63 Purposes for which accreditation may be granted

Sets out the purposes for which a rail transport operator may be granted accreditation.

Subdivision 2 Procedures for granting accreditation

Clause 64 Application for accreditation

Sets out the application process and requirements for accreditation.

Clause 65 What applicant must demonstrate

Sets out what an applicant for accreditation must show.

Clause 66 Regulator may direct applicants to coordinate applications

Provides that applicants may have to coordinate the preparation of applications for accreditation for rail safety reasons.

Clause 67 Determination of application

Sets out the process for granting accreditation and for imposing restrictions and conditions on accreditation.

Subdivision 3 Variation of accreditation

Clause 68 Application for variation of accreditation

Provides for an accredited person to apply for the variation of the accreditation.

Clause 69 Determination of application for variation

Provides for the determination of an application for variation of accreditation.

Clause 70 Prescribed conditions and restrictions

Provides that a varied accreditation is subject to any conditions and restrictions prescribed by the national regulations.

Clause 71 Variation of conditions and restrictions

Provides that an accredited person may apply to the Regulator to vary or revoke any conditions or restrictions on the accreditation.

Clause 72 Regulator may make changes to conditions or restrictions

Gives the Regulator the power to vary or revoke a condition of accreditation at any time and sets out the process for so doing.

Subdivision 4 Revocation, suspension or surrender of accreditation

Clause 73 Revocation or suspension of accreditation

Provides that the Regulator may revoke or suspend a person's accreditation in particular circumstances.

Clause 74 Immediate suspension of accreditation

In the case of an immediate and serious risk to safety the Regulator may suspend an accreditation immediately.

Clause 75 Surrender of accreditation

Sets out the manner in which a person may surrender his or her accreditation.

Subdivision 5 Miscellaneous

Clause 76 Annual fees

Provides for the payment of accreditation fees.

Clause 77 Waiver of fees

Gives the Regulator the power to waive or refund fees.

Clause 78 Penalty for breach of condition or restriction

Provides that it is an offence to breach a condition or restriction of accreditation that applies under part 3.

Clause 79 Accreditation cannot be transferred or assigned

Provides that it is not possible to transfer or assign an accreditation.

Clause 80 Sale or transfer of railway operations by accredited person

Provides for the waiver by the Regulator of compliance with certain requirements of Part 3 in relation to the application for accreditation by a person proposing to purchase railway operations of an accredited person.

Clause 81 Keeping and making available records for public inspection

Requires that current notices of accreditation or exemptions or other prescribed documents must be available for inspection.

Division 5 Registration of rail infrastructure managers of private sidings

Subdivision 1 Exemptions relating to certain private sidings

Clause 82 Exemption from accreditation in respect of certain private sidings

Provides for the exemption from accreditation for railway operations carried out by a rail infrastructure manager in a private siding.

Clause 83 Requirement for managers of certain private sidings to be registered

Provides that a rail infrastructure manager of a private siding that is connected with, or has access to, the railway of an accredited person or another private siding, must be registered in relation to that private siding.

Subdivision 2 Procedures for granting registration

Clause 84 Application for registration

Sets out the application process for the registration of a rail infrastructure manager in relation to a private siding.

Clause 85 What applicant must demonstrate

Sets out what the Regulator must be satisfied of before granting registration to an applicant.

Clause 86 Determination of application

Sets out the process for the determination of an application for registration and the imposition of conditions and restrictions.

Subdivision 3 Variation of registration

Clause 87 Application for variation of registration

Provides that a registered person may apply to the Regulator for the variation of registration at any time, and sets out the process required.

Clause 88 Determination of application for variation

Sets out the process for determining an application for the variation of registration.

Clause 89 Prescribed conditions and restrictions

Provides that registration as varied is subject to any conditions or restrictions prescribed by the national regulations.

Clause 90 Variation of conditions and restrictions

Provides for the application by a registered person for the variation or revocation of conditions or restrictions of registration.

Clause 91 Regulator may make changes to conditions or restrictions

Provides that the Regulator may vary, revoke or impose new conditions or restrictions on the registration of a registered person.

Subdivision 4 Revocation, suspension or surrender of registration

Clause 92 Revocation or suspension of registration

Provides that the Regulator may suspend or revoke registration of a registered person in certain circumstances.

Clause 93 Immediate suspension of registration

Provides that registration may be suspended immediately by the Regulator if there is an immediate and serious risk to safety.

Clause 94 Surrender of registration

Provides that a person may surrender his or her registration and sets out the process required.

Subdivision 5 Miscellaneous

Clause 95 Annual fees

Provides for fees prescribed by the national regulations to be paid by a registered person.

Clause 96 Waiver of fees

Provides that the Regulator may waive or refund fees.

Clause 97 Registration cannot be transferred or assigned

Provides that it is not possible to transfer or assign registration.

Clause 98 Offences relating to registration

Sets out the offences in relation to registration including breach of a condition or restriction of registration.

Division 6 Safety management

Subdivision 1 Safety management systems

Clause 99 Safety management system

Requires a rail transport operator to have a safety management system in relation to the railway operations for which he or she is required to be accredited. Sets out the requirements for that safety management system.

Clause 100 Conduct of assessments for identified risks

Sets out the manner in which a rail transport operator must make an assessment of risks for the purposes of the safety management system.

Clause 101 Compliance with safety management system

It is an offence for a rail transport operator to fail to comply with the operator's safety management system.

Clause 102 Review of safety management system

A rail transport operator must review the safety management system in accordance with the national regulations.

Clause 103 Safety performance reports

Requires a rail transport operator to give the Regulator a safety performance report in relation to the operator's railway operations.

Clause 104 Regulator may direct amendment of safety management system

Provides that the Regulator may direct a person to amend the person's safety management system.

Subdivision 2 Interface agreements

Clause 105 Requirements for and scope of interface agreements

Sets out the requirements for an interface agreement between 2 or more rail transport operators or a rail transport operator and 1 or more road managers to manage risks to safety.

Clause 106 Interface coordination—rail transport operators

Requires a rail transport operator to identify and assess risks to safety arising from the operator's railway operations due to the operations of any other rail transport operator. Provides for entering into an interface agreement in order to manage those risks.

Clause 107 Interface coordination—rail infrastructure and public roads

Requires a rail infrastructure manager to identify and assess risks to safety arising from railway operations carried out on the manager's rail infrastructure in relation to a public road or any rail or road crossing that is part of a public road. Provides for entering into an interface agreement with a road manager in order to manage those risks.

Clause 108 Interface coordination—rail infrastructure and private roads

Requires a rail infrastructure manager to identify and assess risks to safety arising from railway operations carried out on the manager's rail infrastructure due to the existence of any

rail or road crossing that is part of the road infrastructure of a private road. Provides for entering into an interface agreement with the road manager in order to manage those risks.

Clause 109 Identification and assessment of risks

Provides for the manner of identification and assessment of risks by rail transport operators, rail infrastructure managers or road managers.

Clause 110 Regulator may give directions

Provides for the Regulator to give directions in certain circumstances in relation to the entering into of an interface agreement by various parties. The Regulator may, in the absence of an interface agreement, determine the arrangements that are to apply in relation to the management of identified risks to safety.

Clause 111 Register of interface agreements

Provides that a rail transport operator or road manager must keep a register of any interface agreements to which it is a party, or any arrangements determined by the Regulator to apply under clause 110.

Subdivision 3 Other safety plans and programs

Clause 112 Security management plan

Requires a rail transport operator to have a security management plan in relation to the operator's railway operations and sets out the requirements for that plan.

Clause 113 Emergency management plan

Requires a rail transport operator to have an emergency management plan in relation to the operator's railway operations and sets out the requirements for that plan.

Clause 114 Health and fitness management program

Requires a rail transport operator to prepare and implement a health and fitness program for rail safety workers who carry out rail safety work in relation to the operator's railway operations. The program must comply with requirements prescribed by the national regulations.

Clause 115 Drug and alcohol management program

Requires a rail transport operator to prepare and implement a drug and alcohol management program for rail safety workers who carry out rail safety work in relation to the operator's railway operations. The program must comply with requirements prescribed by the national regulations.

Clause 116 Fatigue risk management program

Requires a rail transport operator to prepare and implement a program for the management of fatigue of rail safety workers who carry out rail safety work in relation to the operator's railway operations. The program must comply with requirements prescribed by the national regulations.

Subdivision 4 Provisions relating to rail safety workers

Clause 117 Assessment of competence

Requires a rail transport operator to ensure that a rail safety worker carrying rail safety work is competent to do so. Sets out the process for assessing that competence.

Clause 118 Identification of rail safety workers

Requires a rail safety worker to carry identification that allows for the checking of training or competence by a rail safety officer.

Subdivision 5 Other persons to comply with safety management system

Clause 119 Other persons to comply with safety management system

Requires persons, other than employees carrying out railway operations in relation to rail infrastructure or rolling stock of a rail transport operator, to comply with the operator's safety management system.

Division 7 Information about rail safety etc

Clause 120 Power of Regulator to obtain information from rail transport operators

Gives the Regulator the power to obtain certain information from rail transport operators. Any engagement of the right to privacy is neither unlawful nor arbitrary. The operator is required to only provide information in connection with compliance, enforcement and national regulatory activities under the statutory scheme.

Division 8 Investigating and reporting by rail transport operators

Clause 121 Notification of certain occurrences

Requires a rail transport operator to provide information about a notifiable occurrence that happens on or in relation to the operator's railway premises or operations.

Clause 122 Investigation of notifiable occurrences

Regulator may require an operator to investigate a notifiable occurrence or other occurrences that have endangered safety.

Division 9 Drug and alcohol testing by Regulator

This division gives the Regulator the power to conduct an alcohol and drug testing regime. Such a testing scheme is vital, given the clear evidence that the use of drugs and alcohol can have adverse effects on the capacity of people to undertake tasks properly and safely, and ensuring compliance with alcohol and drug standards is an important means of protecting the safety of the travelling public, the community and workers in connection with railway operations in the ACT.

These provisions may engage the right to a fair hearing, rights in criminal proceedings, privacy, protection from medical treatment without consent and freedom of movement. Any limitations on these rights are reasonable and justified. A full explanation of the potential human rights issues associated with the alcohol and drug testing provisions have been outlined earlier in this Explanatory Statement.

Clause 123 Testing for presence of drugs or alcohol

Provides that a rail safety worker may be tested for the presence of drugs and alcohol in accordance with the RSNL and the application Act.

Clause 124 Appointment of authorised persons

Provides that the Regulator may appoint authorised persons in relation to drug and alcohol testing.

Clause 125 Identity cards

Requires authorised persons to have identity cards.

Clause 126 Authorised person may require preliminary breath test or breath analysis

Provides for an authorised person to require a rail safety worker to submit to a preliminary breath test or breath analysis.

The application Act and regulations made under it may prescribe the manner in which a preliminary breath test or breath analysis is to be conducted under the RSNL. As outlined above, part 3 of the Bill sets out the alcohol and drug testing provisions that will apply in the Territory.

Clause 127 Authorised person may require drug screening test, oral fluid analysis and blood test

Provides for an authorised person to require a rail safety worker to submit to a drug screening test, oral fluid analysis or blood test. The application Act and regulations made under it may prescribe the manner in which they are conducted.

Clause 128 Offence relating to prescribed concentration of alcohol or prescribed drug

Sets out the offences for a rail safety worker in relation to undertaking rail safety work while there is the prescribed concentration of alcohol present in his or her blood, or a prescribed drug present in his or her oral fluid or blood or is under the influence of drugs or alcohol.

Clause 128(3) provides that it is a defence to a charge relating to the presence of a prescribed drug in a person's oral fluid or blood if the person proves that he or she did not knowingly consume the prescribed drug. The effect is that the evidential onus of proof is reversed (as specifically stated in the provision, the accused must provide evidence). The evidence the accused must give is to be assessed on the balance of probabilities and will be within the particular knowledge of the accused.

Clause 129 Oral fluid or blood sample or results of analysis etc not to be used for other purposes

Restricts the use of samples of oral fluid or blood or other forensic material collected for drug and alcohol testing for the purposes of the RSNL. Samples must not be used for a purpose other than that contemplated by the RSNL or the Bill, in connection with the control or management of any work or activity associated with railway operations, or for the purpose of disciplinary proceedings against a rail safety worker.

Division 10 Train safety recordings

Clause 130 Interpretation

Defines the meaning of *train safety recording*.

Clause 131 Disclosure of train safety recordings

Provides for restrictions on the disclosure of rail safety recordings, thus protecting the right to privacy. Train safety recordings must not be published or communicated other than in the course of an inquiry or investigation into an accident or incident or in connection with specified classes of criminal or civil proceedings or when otherwise permitted by law (including under the RSNL).

Clause 132 Admissibility of evidence of train safety recordings in civil proceedings

This clause provides further limitations on use of train safety recordings in civil proceedings, in that leave of the court is required to admit the evidence in proceedings. The provision therefore engages and protects the right to privacy. Any limitations which may exist (if, for example, leave of the court is given to admit recordings in civil proceedings) are reasonable and demonstrably justifiable.

Division 11 Audit of railway operations by Regulator

Clause 133 Audit of railway operations by Regulator

Provides for the audit of the railway operations of a rail transport operator by the Regulator.

Part 4 Securing compliance

Division 1 Guiding principle

Clause 134 Guiding principle

Sets out the guiding principles in relation to the enforcement of the RSNL.

Division 2 Rail safety officers

Clause 135 Appointment

Provides for the appointment of rail safety officers by the Regulator.

Clause 136 Identity cards

Requires rail safety officers to have identity cards.

Clause 137 Accountability of rail safety officers

Sets out requirements for the accountability of rail safety officers.

Clause 138 Suspension and ending of appointment of rail safety officers

Provides that the Regulator may suspend or terminate the appointment of a rail safety officer.

Division 3 Regulator has functions and powers of rail safety officers

Clause 139 Regulator has functions and powers of rail safety officers

Provides that the Regulator has the functions and powers of a rail safety officer under the RSNL, and a reference to a rail safety officer includes a reference to the Regulator.

Division 4 Functions and powers of rail safety officers

Clause 140 Functions and powers

Sets out the functions and powers of rail safety officers.

Clause 141 Conditions on rail safety officers' powers

The powers of a rail safety officer are subject to any conditions set out in his or her instrument of appointment.

Clause 142 Rail safety officers subject to Regulator's directions

Provides that the Regulator may give directions to a rail safety officer in the exercise of his or her powers.

Division 5 Powers relating to entry

Subdivision 1 General powers of entry

Clause 143 Powers of entry

Provides rail safety officers with powers of entry to premises, and powers that may be exercised on entry.

The powers of entry in this clause and clause 145 below may be exercised in respect of railway premises which include premises (including an office, building or housing) used in connection with the carrying out of railway operations. A rail safety officer may also enter a place that adjoins railway premises if entry is required urgently for the purpose of dealing with a railway accident or incident. Entry may be made without consent.

Clause 144 Notification of entry

Provides that notification of entry by a rail safety officer may not be required.

Clause 145 General powers on entry

Sets out the general powers of a rail safety officer on entry to a place. Clause 145 (3) provides that a rail safety officer has the power to direct relevant persons to give reasonable help to the officer so that he or she can effectively exercise powers under the national law, including the powers of search and inspection. A person must comply with those requirements unless the person has a reasonable excuse for failing to comply.

Clause 146 Persons assisting rail safety officers

Persons assisting a rail safety officer may accompany the officer on entering a place.

Clause 147 Use of electronic equipment

Provides that equipment present at a place of entry may be used by a rail safety officer in order to access information found.

Clause 148 Use of equipment to examine or process things

Provides that a rail safety officer may bring equipment to a place in order to examine or process things found at the place entered in order to determine if they may be seized.

Clause 149 Securing a site

Sets out the powers of an authorised officer (a rail safety officer or police officer) to secure a site to protect evidence. An authorised officer may take all reasonable steps to secure the perimeter of a site at railway premises for the purpose of protecting evidence that might be relevant for compliance and investigative purposes. It is an offence to enter or remain, without the permission of an authorised officer, at a site the perimeter of which is secured. A person must not enter or remain at a site the perimeter of which has been secured under that section without the permission of an authorised officer. An authorised officer must not unreasonably withhold permission.

However, that does not apply in circumstances where a person enters or remains to ensure the safety of persons, to remove deceased persons or animals, to move a road vehicle or its wreckage to a safe place and to protect the environment from significant damage or pollution.

Subdivision 2 Search warrants

Clause 150 Search warrants

Sets out procedures and requirements for search warrants.

Clause 151 Announcement before entry on warrant

Provides that an announcement is required before entering a place on a warrant.

Clause 152 Copy of warrant to be given to person with control or management of place

Requires a copy of a warrant to be given to the person in charge of a place.

Subdivision 3 Limitation on entry powers

Clause 153 Places used for residential purposes

Sets out limitations on the power of entry in relation to residential premises. It provides that entry to residential premises may only be made with the consent of the person with control or management of the premises, under a search warrant or for the sole purposes of gaining access to suspected railway premises but only if the rail safety officer believes that no reasonable alternative access is available and at a reasonable time.

The ability to enter residential premises without warrant or consent is very limited. Entry must be for the sole purposes of gaining access to suspected railway premises if the rail safety officer believes that no reasonable alternative access is available and the access is at a reasonable time would be exceptional and may be balanced against the paramount need to secure rail safety.

Subdivision 4 Specific powers on entry

Clause 154 Power to require production of documents and answers to questions

Provides rail safety officers with powers to require any person in or on rail premises to produce any relevant documents in that person's custody, or to which that person has access. The person can also be required to say who has custody of or access to a document and to answer any questions put to the person by the officer.

A person must comply with those requirements unless the person has a reasonable excuse for failing to comply.

Clause 155 Abrogation of privilege against self-incrimination

Provides that a person cannot refuse to answer a question or give information on the grounds of self-incrimination. For that reason, the provisions engage the right not to be compelled to incriminate oneself.

The primary purpose of the abrogation of the privilege against self-incrimination in the national law is to ensure that rail safety officers have adequate powers to inquire into and to monitor compliance with the statutory obligations imposed on those who carry out railway operations.

The need to maintain rail safety and to prevent rail accidents by ensuring that statutory requirements are adhered to is an essential purpose of transport and other safety scheme legislation. For that reason, the provisions ensure that information, documents and evidence which support rail safety officers and the national regulator in those functions can be obtained albeit by coercive means.

Clause 155 (2) provides immunity to persons who have been compelled to provide incriminating information or a document. The answer to a question or information or a document provided by the person is not admissible in evidence in criminal proceedings or in any civil proceeding for a penalty, other than in proceedings in respect of the provision of false information. This is called direct use immunity.

The direct use immunity ensures that a person remains protected when the answer to a question or the provision of information or documentation leads to a chain of enquiry and to evidence that might otherwise incriminate the person. Although the abrogation of the privilege may be said to limit the rights against self-incrimination, any limitation is demonstrably justified. There are no less restrictive means reasonably available to achieve the purpose of the limitation. The only permission to use answers or information derived from a person in later proceedings is in relation to the falsity of an answer.

The provision advances the underlying objective of community and rail safety as well as promoting the maintenance of and continuous improvement in the risk management of rail safety.

Clause 156 Warning to be given

Provides that a rail safety officer must give a person certain warnings before requiring a person to answer a question or provide information.

Clause 157 Power to copy and retain documents

Gives a rail safety officer the power to copy and retain documents.

Subdivision 5 Powers to support seizure

Clause 158 Power to seize evidence etc

Gives a rail safety officer the power to seize anything that he or she reasonably believes may be evidence of an offence against the RSNL.

Clause 159 Directions relating to seizure

Provides that, in order to seize something, a rail safety officer may give certain directions to a person who has control of it. A person may be given a direction under that provision in respect of a seized thing to take it to a specified place and, if necessary, to remain in control of it at the specified place for the period specified in the direction. The person must comply with that direction unless the person has a reasonable excuse.

Clause 160 Rail safety officer may direct a thing's return

Provides that a rail safety officer may also give directions in relation to the return of something.

This power, and the power in clause 159, are necessary to enable rail safety officers to properly fulfil their functions of compliance and enforcement relating to the maintenance and improvement of rail safety.

Clause 161 Receipt for seized things

Provides that a receipt is to be provided for anything seized.

Clause 162 Forfeiture of seized things

Provides for the forfeiture of things seized in certain circumstances.

Clause 163 Return of seized things

Provides that a person may apply to the Regulator for the return of a thing that has been seized.

Clause 164 Access to seized thing

Provides that a person may be given access by a rail safety officer to something that has been seized.

Division 6 Damage and compensation

Clause 165 Damage etc to be minimised

Provides that in the exercise of a power under the RSNL, a rail safety officer must take reasonable steps to cause as little damage, detriment and inconvenience as is practicable.

Clause 166 Rail safety officer to give notice of damage

Provides for a rail safety officer to give notice of any damage to a thing in exercising a power under the RSNL.

Clause 167 Compensation

Provides that a person may apply for compensation from the Regulator for any loss or expense incurred due to the exercise of a power under part 4, division 5 of the RSNL.

Division 7 Other matters

Clause 168 Power to require name and address

Provides that a rail safety officer may require a person to give his or her name and residential address in certain circumstances. Although this clause may engage the right to privacy, the

gathering, recording, publication and transfer of such information is neither unlawful nor arbitrary, and so any limitation on this right is reasonable and proportionate.

Clause 169 Rail safety officer may take affidavits

Gives rail safety officers the authority to take an affidavit.

Clause 170 Attendance of rail safety officer at inquiries

Provides that a rail safety officer may participate in an inquiry in relation to an incident involving rail safety.

Clause 171 Directions may be given under more than 1 provision

Provides for a rail safety officer to be able to give one or more directions in relation to an exercise of power.

Division 8 Offences in relation to rail safety officers

Clause 172 Offence to hinder or obstruct rail safety officer

Provides that it is an offence to hinder or obstruct a rail safety officer in the performance of his or her duties.

Clause 173 Offence to impersonate rail safety officer

Provides that a person must not impersonate a rail safety officer.

Clause 174 Offence to assault, threaten or intimidate rail safety officer

Provides that it is an offence to assault, threaten or intimidate a rail safety officer.

Part 5 Enforcement measures

Division 1 Improvement notices

Clause 175 Issue of improvement notices

Provides for the issue of improvement notices by a rail safety officer in certain circumstances.

Clause 176 Contents of improvement notices

Sets out the required contents of an improvement notice.

Clause 177 Compliance with improvement notice

Requires a person issued with an improvement notice to comply with the notice.

Clause 178 Extension of time for compliance with improvement notices

Allows for an extension of time in order to comply with an improvement notice.

Division 2 Prohibition notices

Clause 179 Issue of prohibition notice

Provides for the issue of a prohibition notice by a rail safety officer in certain circumstances which involve an immediate risk to safety.

Clause 180 Contents of prohibition notice

Sets out the required contents of the prohibition notice.

Clause 181 Compliance with prohibition notice

Requires a person to comply with a prohibition notice or direction under this division.

Division 3 Non-disturbance notices

Clause 182 Issue of non-disturbance notice

Provides that a rail safety officer may issue a non-disturbance notice to a person with the control or management of a railway premises in order to facilitate the exercise of his or her powers under the RSNL.

Clause 183 Contents of non-disturbance notice

Sets out the required contents of a non-disturbance notice.

Clause 184 Compliance with non-disturbance notice

Provides that a rail safety officer may issue a non-disturbance notice to a person with control or management of railway premises to preserve, or prevent the disturbance of, a site.

It is an offence not to comply without reasonable excuse.

Clause 185 Issue of subsequent notices

Provides that further notices may be issued if a rail safety officer considers it necessary.

Division 4 General requirements applying to notices

Clause 186 Application of Division

Provides that this Division applies to an improvement notice, prohibition notice or non-disturbance notice.

Clause 187 Notice to be in writing

Provides that a notice must be in writing and if given orally must be reduced to writing as soon as practicable.

Clause 188 Directions in notices

Provides that directions contained in a notice may refer to an approved code of practice and offer a person a choice of ways in which to remedy a contravention.

Clause 189 Recommendations in notice

Provides that an improvement notice or a prohibition notice may include recommendations.

Clause 190 Variation or cancellation of notice by rail safety officer

Provides that a rail safety officer may make minor changes to a notice.

Clause 191 Formal irregularities or defects in notice

Provides that irregularities in a notice will not invalidate the notice.

Clause 192 Serving notices

Sets out provisions for the service of notices.

Division 5 Remedial action

Clause 193 When Regulator may carry out action

Provides that the Regulator may take remedial action to make a situation or premises safe where a person fails to take reasonable steps to comply with a prohibition notice.

Clause 194 Power of Regulator to take other remedial action

Provides that the Regulator may take remedial action where the person with the control or management of premises cannot be found and thus no prohibition order could be issued.

Clause 195 Costs of remedial or other action

Provides that reasonable costs of remedial action may be recovered by the Regulator.

Division 6 Injunctions

Clause 196 Application of Division

Provides that this Division applies to an improvement notice, a prohibition notice or a non-disturbance notice.

Clause 197 Injunctions for non-compliance with notices

Provides that the Regulator may apply to the court for an injunction in relation to a notice.

Division 7 Miscellaneous

Clause 198 Response to certain reports

Provides that in response to certain reports, the Regulator may give directions in a notice to a rail transport operator to install safety or protective systems, devices, equipment or appliances in relation to rail infrastructure or rolling stock, as specified in the notice. Sets out the requirements for such a direction.

Clause 199 Power to require works to stop

Sets out provisions to ensure the safety or operational integrity of a railway in relation to works being carried out near a railway.

Clause 200 Temporary closing of railway crossings, bridges etc

Provides that an authorised officer may close temporarily a railway crossing, bridge, subway or other structure for crossing over or under a railway, if there is an immediate threat to safety.

Clause 201 Use of force

Provides that in exercising a power to enter railway premises or do anything in or on railway premises, a rail safety officer must not use more force than is reasonably necessary.

Clause 202 Power to use force against persons to be exercised only by police officers

Provides that force against a person must not be used by a person who is not a police officer.

Part 6 Exemptions

Division 1 Ministerial exemptions

Clause 203 Ministerial exemptions

Provides that the Minister may grant exemptions from the RSNL after consultation with the Regulator.

Division 2 Exemptions granted by Regulator

Subdivision 1 Interpretation

Clause 204 Interpretation

Provides that this division applies to specified provisions of the RSNL.

Subdivision 2 Procedures for conferring exemptions

Clause 205 Application for exemption

Provides for a rail transport operator to apply to the Regulator for an exemption from a particular provision of the RSNL.

Clause 206 What applicant must demonstrate

Sets out what an applicant for an exemption must demonstrate before an exemption may be granted by the Regulator.

Clause 207 Determination of application

Sets out the provisions for the determination of an application for an exemption by the Regulator.

Subdivision 3 Variation of an exemption

Clause 208 Application for variation of an exemption

Provides that a rail transport operator may apply to the Regulator for a variation of an exemption.

Clause 209 Determination of application for variation

Provides for the determination of an application for the variation of an exemption by the Regulator.

Clause 210 Prescribed conditions and restrictions

Provides that an exemption granted by the Regulator that is varied is subject to any conditions or restrictions prescribed by the national regulations.

Clause 211 Variation of conditions and restrictions

Provides that a rail transport operator who has been granted an exemption may apply to the Regulator for the variation of a condition or restriction imposed on the exemption.

Clause 212 Regulator may make changes to conditions or restrictions

Provides that the Regulator may at any time vary or revoke a condition or restriction imposed on an exemption, or impose a new condition or restriction.

Subdivision 4 Revocation or suspension of an exemption

Clause 213 Revocation or suspension of an exemption

Gives the Regulator the power to suspend or revoke an exemption in certain circumstances.

Subdivision 5 Penalty for breach of condition or restriction

Clause 214 Penalty for breach of condition or restriction

It is an offence for a rail transport operator to contravene a condition or restriction of an exemption granted by the Regulator.

Part 7 Review of decisions

Clause 215 Reviewable decisions

Sets out the decisions made under the RSNL that are reviewable, and who is eligible to apply for a review.

Clause 216 Review by Regulator

Sets out the process that applies in respect of a reviewable decision made by the Regulator.

Clause 217 Appeals

Provides for an appeal to the court in respect of certain decisions.

Part 8 General liability and evidentiary provisions

Division 1 Legal proceedings

Subdivision 1 General matters

Clause 218 Period within which proceedings for offences may be commenced

Sets out the period in which proceedings for an offence may be commenced.

Clause 219 Multiple contraventions of rail safety duty provision

Provides that 2 or more contraventions of a rail safety duty arising out of the same factual circumstances may be charged as a single offence or as separate offences.

Clause 220 Authority to take proceedings

Provides that certain legal proceedings will first require the approval of the Minister or the Regulator.

Subdivision 2 Imputing conduct to bodies corporate

Clause 221 Imputing conduct to bodies corporate

Provides for certain conduct to be imputed to bodies corporate.

Subdivision 3 Records and evidence

Clause 222 Records and evidence from records

Provides that the Regulator may sign a certificate that certifies as to matters required to be recorded in the National Rail Safety Register for the purposes of legal proceedings.

Clause 223 Certificate evidence

Provides for the Regulator, a rail safety officer or a police officer to provide a certificate as to any matter that appears in certain records, that is admissible as evidence in court proceedings.

Clause 224 Proof of appointments and signatures unnecessary

Provides that it is not necessary to prove appointments or signatures.

Division 2 Discrimination against employees

Clause 225 Dismissal or other victimisation of employee

Provides that it is an offence for an employer to victimise an employee who has assisted or made a complaint in relation to a breach or alleged breach of an Australian rail safety law.

Division 3 Offences

Clause 226 Offence to give false or misleading information

Provides that it is an offence to give false or misleading information or documents.

Clause 227 Not to interfere with train, tram etc

Provides that it is an offence to interfere with rolling stock, rail infrastructure or equipment of a rail transport operator.

Clause 228 Applying brake or emergency device

Provides that it is an offence to apply a brake or emergency device on a train or tram or on railway premises without a reasonable excuse.

Clause 229 Stopping a train or tram

Provides that it is an offence to stop a tram or train without reasonable excuse.

Division 4 Court-based sanctions

Clause 230 Commercial benefits order

Provides for a court to make a commercial benefits order on the application of the prosecutor or the Regulator if a person is found guilty of an offence.

Clause 231 Supervisory intervention order

Provides for a court to make a supervisory intervention order on the application of the prosecutor or the Regulator if a person is found guilty of an offence and the court considers the person to be a systematic and persistent offender against the rail safety laws.

Clause 232 Exclusion orders

Provides for a court to make an exclusion order on the application of the prosecutor or the Regulator if a person is found guilty of an offence and the court considers the person to be a systematic and persistent offender against the rail safety laws.

Part 9 Infringement notices

Clause 233 Meaning of infringement penalty provision

Sets out the meaning of an *'infringement penalty provision'*.

Clause 234 Power to serve notice

Provides the Regulator with the power to serve an infringement notice on a person who has breached an infringement penalty provision.

Clause 235 Form of notice

Sets out the requirements for an infringement notice.

Clause 236 Regulator cannot institute proceedings while infringement notice on foot

Provides that the Regulator must not institute proceedings in relation to a breach for which an infringement notice has been served and is current.

Clause 237 Late payment of penalty

Provides for payment of an infringement penalty after the time for payment has expired.

Clause 238 Withdrawal of notice

Provides that the Regulator may withdraw an infringement notice at any time.

Clause 239 Refund of infringement penalty

Provides that if an infringement notice is withdrawn by the Regulator, any infringement penalty paid must be refunded.

Clause 240 Payment exiates breach of infringement penalty provision

Provides that if an infringement penalty is paid and a notice has not been withdrawn, then no proceedings can be taken in respect of the alleged breach.

Clause 241 Payment not to have certain consequences

Provides that payment of an infringement penalty is not to be taken to be an admission of liability for the purpose of any proceedings instituted in respect of the breach.

Clause 242 Conduct in breach of more than 1 infringement penalty provision

Provides that if a person's conduct constitutes a breach of 2 or more infringement penalty provisions, an infringement notice may be served in relation to the breach of any 1 or more of those provisions. However, a person is liable to pay no more than one infringement penalty in respect of the same conduct.

Part 10 General

Division 1 Delegation by Minister

Clause 243 Delegation by Minister

Provides that the Minister may delegate a function or power of the Minister under the RSNL.

Division 2 Confidentiality of information

Clause 244 Confidentiality of information

Provides for the protection of confidential information.

Division 3 Law does not affect legal professional privilege

Clause 245 Law does not affect legal professional privilege

Provides that information or documents that are subject to legal professional privilege are protected.

Division 4 Civil liability

Clause 246 Civil liability not affected by Part 3 Division 3 or Division 6

Provides that nothing in part 3, division 3 (Rail safety duties) or division 6 (Safety management) affects civil proceedings.

Clause 247 Protection from personal liability for persons exercising functions

Provides that certain persons exercising a function under the RSNL are protected from personal liability for things done or omitted in good faith. Any liability attaches instead to ONRSR.

Clause 248 Immunity for reporting unfit rail safety worker

Provides certain health professionals with immunity for providing information that discloses a rail safety worker as unfit to carry out rail safety work.

Division 5 Codes of practice

Clause 249 Approved codes of practice

Provides that responsible Ministers may approve a code of practice for the purposes of the RSNL.

Clause 250 Use of codes of practice in proceedings

Provides that an approved code of practice may be used in proceedings for an offence against the RSNL as evidence of whether or not a duty or obligation has been complied with.

Division 6 Enforceable voluntary undertakings

This Division contains provisions relating to enforceable voluntary undertakings. These may engage the right to a fair trial, particularly because it is an offence to breach an undertaking that has been given.

An undertaking may only be withdrawn or varied with the written agreement of the Regulator. However, the provision of an undertaking is a matter of free choice for the person giving it and does not constitute an admission of guilt. In addition, enforcement of that breach is a matter for the court. The court may make a variety of orders including requiring the person to comply with the undertaking, discharging the undertaking or making any other order that the court considers appropriate in the circumstances.

Clause 251 Enforceable voluntary undertaking

Provides that the Regulator may accept a written rail safety undertaking in relation to a contravention or alleged contravention of the RSNL (other than for a category 1 offence).

Clause 252 Notice of decisions and reasons for decision

Provides that the Regulator must give notice and reasons of the Regulator's decision to accept or reject an undertaking and must publish a notice of the decision to accept a rail safety undertaking and the reasons for doing so.

Clause 253 When a rail safety undertaking is enforceable

Provides when a rail safety undertaking accepted by the Regulator becomes enforceable.

Clause 254 Compliance with rail safety undertaking

Provides that it is an offence for a person to fail to comply with a rail safety undertaking made by that person.

Clause 255 Contravention of rail safety undertaking

Provides that the Regulator may apply to the court for enforcement of a rail safety undertaking.

Clause 256 Withdrawal or variation of rail safety undertaking

Provides that a person who has made a rail safety undertaking may, with the written agreement of the Regulator, withdraw or vary the undertaking.

Clause 257 Proceedings for alleged contravention

Provides that no proceedings for a contravention or alleged contravention of the RSNL may be brought against a person if there is a rail safety undertaking in effect in relation to that contravention. A rail safety undertaking may be accepted by the Regulator in relation to proceedings that have not been finalised, in which case the proceedings are to be discontinued.

Division 7 Other matters

Clause 258 Service of documents

Sets out the procedures for service.

Clause 259 Recovery of certain costs

Provides for the recovery by the Regulator from a rail transport operator of the reasonable costs of inspection of railway infrastructure, rolling stock or railway premises, other than an inspection under part 3, division 11 (Audit of railway operations by Regulator).

Clause 260 Recovery of amounts due

Provides that fees, charges and other amounts payable under the RSNL may be recovered a debt due to the Regulator.

Clause 261 Compliance with conditions of accreditation or registration

Provides that a person who complies with a condition or restriction of accreditation or registration, will be taken to have complied with the RSNL.

Clause 262 Contracting out prohibited

Prohibits the ability for a contract or agreement to exclude, limit or modify the operation of the RSNL or any duty under the RSNL.

Division 8 Application of certain South Australian Acts to this Law

Clause 263 Application of certain South Australian Acts to this Law

Sets out the application of certain South Australian Acts to the RSNL and provides that the national regulations may modify these Acts for the purposes of the RSNL.

Division 9 National regulations

Clause 264 National regulations

Sets out provisions in relation to the making of the national regulations.

Clause 265 Publication of national regulations

Provides that the national regulations are to be published on the NSW legislation website.

Schedule 1 National regulations

This Schedule sets out the matters in relation to which the national regulations may be made.

Schedule 2 Miscellaneous provisions relating to interpretation

This Schedule sets out provisions governing the interpretation of the RSNL. These provisions are necessary due to the disapplication of the *Acts Interpretation Act 1915* (SA).