Transport Infrastructure Amendment Bill 2004

Explanatory Notes

General Outline

Short Title

The short title of the Bill is the *Transport Infrastructure Amendment Bill 2004*.

Policy Objectives of the Legislation

The objective of the Transport Infrastructure Amendment Bill 2004 is to amend provisions in the *Transport Infrastructure Act 1994* (TIA) dealing with the investigation of railway incidents to adopt a scheme that facilitates the identification of the causes and contributing factors that led to those incidents.

To encourage full and open co-operation on the part of witnesses, rail investigations and inquiries will focus on establishing the truth and will not be designed to apportion blame to any individual or to assist in any criminal or civil proceedings arising from the incident.

Reasons for the Bill

The TIA allows investigation of rail incidents to be undertaken by Rail Safety Officers (RSO). It also allows for the Minister to establish a Board of Inquiry about any serious rail incident.

The aim of these investigations and inquiries is to establish as accurately as possible the cause or causes of any rail incident so that lessons can be learnt and rail safety improved in the future.

It is vital that the RSOs and Boards of Inquiry be able to conduct investigations in a blame-free environment. This will help ensure the free-flow of safety information.

To achieve this requires legislative amendments to provide the necessary authority for investigators and immunity protection for witnesses to ensure

that the causes and contributing factors to the incident are properly identified in the interests of rail safety in this state.

Achieving the Objectives

The *Transport Infrastructure Act 1994* is to be amended to provide:

- self-incrimination will not be an excuse for refusing to comply with a requirement made by an RSO (for example, a requirement to answer a question);
- any evidence given by a person in response to a requirement from an RSO, or any further information or material subsequently obtained as a result of that evidence, can not be used against that person in any criminal or civil proceedings relating to the incident;
- any evidence given by a person to a Board of Inquiry, or any further information or material subsequently obtained as a result of that evidence, can not be used against that person in any criminal or civil proceedings relating to the incident;
- when making a requirement of a person, an RSO must advise the person:
    - it is an offence to not comply with the requirement unless the person has a reasonable excuse;
    - it is not a reasonable excuse that complying with the requirement might tend to incriminate the person or make them liable to a penalty; and
    - any evidence obtained under the requirement, and any further evidence derived directly or indirectly from that evidence, is not admissible in any civil or criminal proceeding against the individual;
- strict limitations on the use and disclosure of 'restricted information' (including witness statements);
- draft and final investigation reports are not admissible in proceedings other than coronial investigation/inquests;

The Coroners Act 2003 is amended for consistency with amendments to the TIA. The *Freedom of Information Act 1992* is also amended to provide that evidence collected during a rail investigation or inquiry is not subject to disclosure under that Act.

Administrative Costs

It is not anticipated that the proposed amendments will incur any additional administrative costs.

Fundamental Legislative Principles

Amendments within clauses 5 and 7 of the Bill may infringe s.4(3)(f) of the *Legislative Standards Act 1992* (LS Act). Traditionally, removing the privilege against self incrimination should only be contemplated when it is more important to know the facts leading to the contravention than to prosecute the contravention. In this particular circumstance, this is clearly the case for persons required to provide information relating to a rail safety investigation. The justification for this approach is balanced by providing the immunity protection to preclude any information gathered being used in any judicial proceeding. These amendments may also infringe s.4(3)(h) of the LS Act by providing immunity from criminal, civil and administrative proceedings. Without this immunity, however, the ability to determine all of the factors that led to a rail safety incident and the subsequent implementation of any actions necessary to ensure rail safety is improved would be significantly inhibited.

Amendments within clause 9 of the amendment Bill which provide for the retrospective commencement of provisions within the Bill infringe s.4(3)(g) of the LS Act. The legislative deficiencies corrected by this amendment Bill became apparent following the diesel tilt train derailment which occurred on 16 November 2004, and the subsequent commencement of an investigation into the incident. These amendments will ensure that all of the investigative procedures in this case are afforded the protection of these amendments. This approach is justified to give benefit to the greater good of Queenslanders to make our rail system as safe as possible.

Consultation

The proposed amendments have been supported by the Department of the Premier and Cabinet, the Department of Justice and Attorney-General, the Queensland Police Service, and the Australian Transport Safety Bureau.

Notes on Provisions

Part 1 – Preliminary

Short Title

Clause 1 states that the short title of the Act is to be the *Transport Infrastructure Amendment Act 2004.*

Part 2 – Amendment of Transport Infrastructure Act 1994

Clause 2 states that this Act amends the *Transport Infrastructure Act 1994* (TIA).

Clause 3 inserts a new division 1AA (sections 213A and 213B) into chapter 7, part 6 of the TIA. Chapter 7, part 6 of the TIA deals with the reporting of and investigation into railway incidents.

Section 213A(1) states the objects of part 6. These are:

a) the reporting of incidents on or involving a railway; and

b) the investigation of or inquiry into incidents on or involving a railway including:

   (i) investigations or inquiries independent of an accredited person for the railway; and

   (ii) investigations or inquiries conducted to find out the cause of incidents and to make recommendations about improvements to safety of transport by rail.

Section 213A(2) specifies that the following are not objects of part 6:

a) to apportion blame to individuals for incidents on or involving a railway;

b) to provide the way to decide the liability of any individual in relation to an incident on or involving a railway;

c) to help in court proceedings between parties, except as expressly provided by this part;

d) to allow any adverse inference to be drawn from the fact that an individual is involved in an investigation or inquiry under this part.

Section 213B contains definitions for part 6. A number of new terms are required as a result of these amendments and are defined for this part of the Act.

Clause 4 amends subsection (4) of section 216 of the TIA and inserts new subsections (5) to (8). The amendment to section 216(4) clarifies that the RSO must provide a report of the results of an investigation (RSO report). The new subsection (5) requires the chief executive to give the Minister a copy of the RSO report within 14 days after receiving the report, and subsection (6) requires the Minister to table a copy of the RSO report in the Legislative Assembly within 14 days after receiving the report. Subsections (7) and (8) provide that an RSO report, or any draft or interim RSO report is not admissible in evidence in any civil or criminal proceeding, but any type of RSO report is admissible in a coronial procedure.

Clause 5 amends section 217 of the TIA. Currently, under section 217, an RSO investigating a railway incident can make certain requirements of a person. For example, under section 217(4) the RSO may require a person to answer questions relevant to the incident. This provision has been amended to ensure that an RSO can require information from persons they reasonably believe necessary for the purposes of the investigation, instead of only those who were reasonably suspected to be at or near the scene of the incident. Under the existing section 217(9) a person must comply with such a requirement unless they have a reasonable excuse. The section is silent on whether it is a reasonable excuse for a person to not comply with a requirement if to do so might tend to incriminate the person.

Section 217(9A) makes it clear that it is not a reasonable excuse for a person to fail to comply with a requirement of an RSO on the basis that complying with the requirement might tend to incriminate the person or make the person liable to a penalty.

Importantly, however, subsections 217(9B) and (9C) provide that specified evidence given by a person in response to a requirement by an RSO is not admissible in a civil or criminal proceeding. Further, any information or thing obtained as a direct or indirect result of evidence is also not admissible.

Section 217(9D) clarifies that subsection (9C) does not prevent primary or derived evidence from being admitted in evidence in criminal proceedings about the falsity or misleading nature of the primary evidence.

Existing section 217(10) is omitted and a new subsection inserted. This provision ensure that an RSO, when making a requirement of an individual under section 217, aside from a warning that it is an offence for failing to comply with the requirement unless they have a reasonable excuse, the RSO must also advise the person that it is not a reasonable excuse that complying with the requirement might tend to incriminate the individual or make them liable to a penalty, and anything obtained under the requirement, either directly or indirectly, is not admissible in evidence against the individual in any civil or criminal proceeding.

Clause 6 amends section 220 of the TIA. Section 220(5) prevents a report or any draft or interim report of the board of inquiry from being admissible in evidence in any civil or criminal proceeding. However Section 220(6) specifies that subsection (5) does not affect the admissibility of any type of report in a coronial procedure.

Clause 7 amends section 235 of the TIA. The amendment to section 235(1) will clarify that a person will not be excused from answering a question or producing a document or other thing to a board of inquiry on the ground that to do so might make the person liable to a penalty. This reflects current drafting practice.

The existing section 235(2) has been redrafted to specify the evidence that is not admissible against an individual in any civil or criminal proceeding. This is specified as being any answer given at the inquiry by the individual, and any document or other thing produced at the inquiry by the individual and the fact of that production, in response to a requirement under this division. This evidence is called "primary evidence" (s.235(2)(a)). The effect of subsection 2(b) is that any information, or document or other thing obtained as a direct or indirect result of the primary evidence is also not admissible in evidence against an individual in any civil or criminal proceeding. This evidence is called "derived evidence".

Section 235(3) makes clear, however, that primary or derived evidence of an answer or the production of a document or thing may be admitted in criminal proceedings about the falsity or misleading nature of the primary evidence.

The redrafted section 235 reflects provisions contained in the Commonwealth's *Transport Safety Investigation Act 2003,* including granting an immunity for derived evidence.

Clause 8 inserts a new Division 4 into chapter 7, part 6 of the TIA. This new Division deals with protection of particular information and inserts new sections 239AA to 239AH.

Section 239AA provides for limitations on the disclosure etc of restricted information (see definition in new section 213B). This section sets out the circumstances in which information can be disclosed and sets out the necessary offence provisions for non-compliance with these provisions.

Section 239AB allows the chief executive to disclose restricted information if the chief executive considers that the disclosure is necessary or desirable for the purposes of safety of transport by rail. However subsection (2) makes it clear that personal information can only be disclosed in circumstances prescribed in a regulation. Subsection (3) defines the term 'personal information'.

Section 239AC provides that the chief executive must give restricted information to the coroner, if a coroner requests or requires the chief executive to do so.

Section 239AD states that the chief executive may authorise someone other than a relevant person (defined in new section 239AE) to have access to restricted information (defined in new section 213B) if the chief executive considers that it is necessary or desirable to do so.

Section 239AE inserts a new Division 5 dealing with relevant persons and a meaning of the term 'relevant person'.

Section 239AF provides that the chief executive may issue a certificate stating that a stated person who is or has been a relevant person (as defined in new section 239AE) is involved, or has been involved, in an investigation or inquiry about a stated incident.

Section 239AG provides that a person who is or has been a relevant person (as defined in new section 239AE) is not obliged to provide evidence relating to an incident if the chief executive has issued a certificate under section 239AF for the person in relation to the incident. Section 239AG(2) provides that a relevant person is not compellable to give an expert opinion (defined in new subsection (4)) in any civil or criminal proceeding in relation to safety of transport by rail. However, this section does not apply to an inquiry or coronial inquest.

Clause 9 inserts a new Part 4 in Chapter 18 of the TIA. Chapter 18 deals with further transitional provisions for the Act.

Section 531 deals with statements about derailments made by a relevant employee to an RSO before the commencement of this section. This

section ensures that any primary or derived evidence, obtained by an RSO as part of the investigation into the derailment of the tilt train operated by Queensland Rail on or about 16 November 2004 at Berajondo, is not admissible in evidence against the employee in any civil or criminal proceeding. However, this does not apply in any criminal proceedings about the falsity or misleading nature of the primary evidence, and also has no effect on its use or admissibility of a report in a coronial procedure.

Clause 10 amends Schedule 6 (Dictionary) of the TIA. A number of new terms are required to be defined as a result of the amendments within this bill and are inserted in this clause.

Part 3 – Amendment of Coroners Act 2003

Clause 11 states that this part amends the *Coroners Act 2003*.

Clause 12 amends section 52 by inserting a new subsection (1)(e) to provide for the inclusion of information that was given to the coroner under the TIA, section 239AC. This amendment is complementary to other amendments within this bill which allow for the provision of information to a coronial procedure.

Part 4 – Amendment of Freedom of Information Act 1992

Clause 13 states that this part amends the *Freedom of Information Act 1992*.

Clause 14 inserts new part 9 which deals with transitional provisions for the *Transport Infrastructure Amendment Act 2004*. This part clarifies that this Act does not apply to any document obtained, received,or brought into existence, by an RSO as part of an investigation into the derailment of the tilt train operated by Queensland Rail on or about 16 November 2004. These provisions apply whether or not the RSO was carrying out an investigation at any relevant time.

Clause 15 amends Schedule 1 which deals with secrecy provisions giving exemption. This clause inserts a reference to the TIA, chapter 7 part 6, division 4.