

RAIL COMPANY BILL 2009

NOTES ON CLAUSES

- Clause 1 The Short Title of the Act is the *Rail Company Act 2009*.
- Clause 2 The Act commences on Royal Assent.
- Clause 3 This Clause outlines the purpose of the Act which is to provide authority to establish a new State-owned Company to own and operate rail services in Tasmania. The Company must also act as nominee for the Crown under the Business Sale Agreement if required. The Act will also provide for the transfer of assets, liabilities and contracts between the Company and the Crown and also the transfer of employees from the Crown to the Company. Finally, the members may sell all or part of the Company at some time in the future.
- Clause 4 This Clause defines terms that are used in the Act to aid in ensuring their correct interpretation.
- Clause 5 This clause provides the Minister for Infrastructure with authority to form a company limited by shares, incorporated under the *Corporations Act 2001* (Commonwealth).
- The purpose of the company is to acquire, own and operate a rail business in Tasmania.
- Clause 6 The three principal objectives for the Company are to:
- operate efficiently and effectively;
 - operate in accordance with sound commercial practice; and
 - maximise its returns to the State.
- Clause 7 The Company's Constitution must incorporate the principal objectives of the Company and must be consistent with the Act.
- Clause 8 This Clause provides for the Company to have two members, one being the portfolio Minister (presently the Minister for Infrastructure) and the other being the Treasurer. In the event that the Treasurer is also the portfolio Minister, the second member will be another Minister determined by the portfolio Minister.

- Clause 9 The members of the Company are to hold the shares of the Company in trust for the Crown and must not acquire shares for their own benefit.
- Any shares acquired in contravention of this clause are still considered to be held in trust for the Crown although the Crown will not be liable for any cost incurred in their acquisition.
- Clause 10 Subject to agreement between the Company and its members, further shares can be issued to the members in exchange for:
- money appropriated by Parliament;
 - the transfer of assets in accordance with a transfer notice; or
 - any other consideration agreed to between the Company and the members.
- Clause 11 The Company established by the Act, or a subsidiary of the Company, does not represent the Crown and is not exempt from any rates, tax, duty or impost under any law because it is owned by the Crown, unless expressly provided for in legislation.
- Further, the Crown is not responsible for any liability or obligation of the Company or a subsidiary, except where the Treasurer has provided a guarantee or indemnity as provided for in section 14 of the Act.
- Clause 12 The auditor appointed for the Company and any subsidiaries is the Auditor-General.
- Clause 13 The Company and any subsidiaries may only borrow from the Tasmanian Public Finance Corporation, unless the Treasurer approves alternative arrangements.
- Clause 14 The Company or a subsidiary of the Company may make a written request to the Treasurer to provide a guarantee or indemnity in relation to the repayment of any loan or the performance of an obligation (monetary or otherwise).
- Any guarantee or indemnity provided may cover any interest and other charges payable that relate to the loan or obligation being guaranteed, and is subject to any conditions that the Treasurer specifies.
- The Treasurer is to use money provided by Parliament to make any payments required as a result of a guarantee or indemnity provided under this section.
- This section applies irrespective of whether the loan or obligation was entered into in Tasmania or elsewhere.

- Clause 15 The Company and any subsidiaries of the Company are subject to the guarantee fee arrangements established under Division 1, Part 11 of the *Government Business Enterprises Act 1995* as if the Company was a Government Business Enterprise specified in Schedule 3 of that Act, and the subsidiaries are a subsidiary as defined in that Act.
- Further, any Treasurer's Instructions issued under the Government Business Enterprises Act that relate to guarantee fees apply to the Company and its subsidiaries.
- Clause 16 The Company and any subsidiaries of the Company are subject to the income tax equivalent arrangements as if the Company was a Government Business Enterprise specified in Schedule 2 of that Act, and the subsidiaries are a subsidiary as defined in that Act.
- Further, any Treasurer's Instructions issued under the Government Business Enterprises Act that relate to income tax equivalents apply to the Company and its subsidiaries.
- Clause 17 The Company and any subsidiaries are prohibited from establishing a superannuation scheme, but may contribute to superannuation schemes complying with Commonwealth superannuation law.
- Contributions to a superannuation scheme relating to employees must not exceed the employer contribution rate specified in the *Public Sector Superannuation Reform Act 1999* (that is, 9 per cent).
- Clause 18 The Company and any subsidiaries must comply with any requirement imposed by the Treasurer under section 5(1) of the *Financial Agreement Act 1994* in relation to implementing the financial agreement entered into between Tasmania, the other states and territories and the Commonwealth.
- Clause 19 It is the responsibility of the members of the Company to ensure that the appointed Board of Directors collectively has the skills and experience necessary for the Company to achieve its stated objectives.
- Appointment of directors must occur in accordance with the Constitution of the Company.

- Clause 20 The members' Statement of Expectation is an important governance document for the Company. The members will provide the Board with a statement of expectations as soon as practicable once the Company is incorporated.
- The statement of expectations contains the members' view for the Company's strategic priorities and sets out the expectations of the members for the performance of the Company and any subsidiaries.
- The members may amend or replace the statement of expectations but must consult the Board when preparing or amending the statement.
- Clause 21 Like all other Government businesses, the Board is to submit a corporate plan to the members each financial year, which will be prepared in the context of the statement of expectations provided to the Board by the members. The Company must operate consistent with its corporate plan.
- Clause 22 The Board is responsible for ensuring that the members are provided with up to date copies of the constitution of the Company and any subsidiary.
- The Board must also provide the members with annual financial statements and reports consistent with those required under the Corporations Act.
- For public accountability, the Minister must table the documents in Parliament within seven sitting days of receiving them.
- Clause 23 The members can direct the Company to perform activities that are in the public interest that may not be in the Company's financial best interests (community service obligations). The members can also direct the Company to cease performing such an activity, or to cease performing any activity that the members do not consider to be in the public interest.
- A direction made under this section must be provided to the Company in writing, and the Company must comply with a direction.
- The Company is entitled to receive compensation if it satisfies the members that it has or will be financially disadvantaged by its compliance with a direction issued under this section. The amount of any compensation will be determined by the Treasurer.

Clause 24 The Company is to act as the nominee of the Crown for the purposes of the Business Sale Agreement if the Crown requests it to do so.

If the Company is the nominee of the Crown, any document prepared to effect the purchase of the rail operations and business under the Business Sale Agreement is exempt from any State tax or duty.

Clause 25 This clause deals with access and access fees in relation to those sections of the Melba Line which are not owned by the Company or the Crown. This is necessary as sections of the rail track do not lie within the rail corridor.

A number of terms that are used in this section are defined to aid in ensuring their correct interpretation.

If no access fee was payable for access to the relevant rail corridor when the Business Sale Agreement was executed, the owner can not impose an access fee for the use of the relevant rail corridor after that date.

If the owner or occupier was entitled to receive a fee for access to the relevant rail corridor as at the Agreement day, then the owner or occupier will be entitled to receive a reasonable fee from the Company or authorised rail operator after that day to allow access to the rail corridor.

The owner or occupier of a relevant rail corridor cannot prevent the use of or access to that rail corridor by the Company or an authorised rail operator.

Clause 26 In relation to the operation of a rail business in Tasmania, the Company can be exempted by regulations made under this Act from any Act or a provision of an Act that relates to railways.

A regulation referred to in this section may take effect on any day from the commencement of this Act, regardless of whether the day may be before, on or after the day on which the regulations are made.

Clause 27 This Clause provides for the transfer of rail infrastructure and related assets, liabilities and contracts between the Company and the Crown by way of a transfer notice published in the Gazette.

A transfer notice may include any terms and conditions necessary or incidental to the transfer.

The transfer takes effect on the day or days specified in the notice, whether the day may be before, on or after the day on which the transfer notice is published.

Any assets transferred under a transfer notice are taken to be transferred without the need for any other instrument, but subject to any conditions specified in the notice.

Any liabilities that are transferred become the liabilities of the transfer recipient, but subject to any conditions specified in the notice.

The transferor is no longer a party to any contracts specified in the transfer notice, unless the notice specifically provides otherwise. Once the transfer takes effect, the transfer recipient is taken to have made any specified contracts, in place of the transferor, regardless of any contrary provision in a specified contract.

The Minister has discretion to either amend or revoke a transfer notice.

A notice of transfer is not a statutory rule.

State tax is not payable in respect to any document which is prepared to give effect to a notice of transfer.

Clause 28 The terms “transferring asset”, “transferring contract”, and “transferring liability” refer to the assets, contracts and liabilities specified in a transfer notice.

From the transfer day, unless the transfer notice provides otherwise, any reference to the transferor is taken where appropriate to be a reference to the transfer recipient and any legal obligation arising from legal proceedings, court judgments, contracts or acts or omissions by or related to the transferor is taken where appropriate to be instead a reference to, or legal obligation of, the transfer recipient.

On the transfer day the transferor is discharged from any obligations relating to a transferring liability.

Despite the foregoing, a transfer notice may limit the extent of the transfer of responsibilities to the transfer recipient, or the discharge of obligations of the transferor.

- Clause 29 If there is any doubt as to what rail infrastructure and related assets, liabilities or contracts are transferred under a transfer notice, the Minister can determine the matter and his decision is final and binding.
- Clause 30 This clause provides that State Service employees and officers may be transferred to the Company under a transfer notice.
- A State Service employee or officer must have agreed in writing to the transfer of his or her employment.
- Each employee specified in a transfer notice will become an employee of the Company, and cease to be a State Service employee or officer, on the transfer day and their entitlements and conditions are preserved.
- Unless the transfer notice provides otherwise, a transferred employee is not entitled to any compensation because of the change of employer or changes to their position description, title, role or duties.
- The transferred employee's service with the Crown will be considered to be service with the Company.
- The Company may determine a position description, title, role or duties for the transferred employee, which may differ from those related to the employee's service with the Crown.
- There is nothing to prevent an award, industrial agreement or law altering the terms of employment of a transferred employee after their transfer to the Company.
- Clause 31 Where a transferred employee was subject to the superannuation scheme provided by the *Retirement Benefits Act 1993* immediately prior to their transfer, the Company, or any subsidiary, may participate in that superannuation scheme in respect of the transferred employee.
- In relation to superannuation, the Company or any subsidiary must comply with any requirement or instruction issued by the Minister responsible for the administration of the *Retirements Benefits Act 1993*.
- Clause 32 The long service leave entitlements of a transferred employee who was an employee for the purposes of the *Long Service Leave (State Employees) Act 1994* immediately prior to their transfer, are preserved while they are employed by the Company.

- Clause 33 Where the Crown retains ownership of the Company, through shares held in trust by the members, those members of the Company, acting jointly, that is the Treasurer and Minister, have the power to:
- sell their shareholding in the Company;
 - require the Company to sell its shareholding in any subsidiary;
 - require the Company to sell all or any of its assets; or
 - require a subsidiary, through a direction of the parent Company, to sell all or any of its assets.
- Any direction or requirement made under this section must be made in writing.
- Clause 34 The members may direct the Company, or require the Company to direct a subsidiary, to take all reasonable steps to facilitate a sale of the Company or any of its assets.
- A direction or requirement must be in writing and the Company and any subsidiary must comply with the notice.
- The clause allows the Board and chief executive officer of the Company and any subsidiary to do anything necessary or convenient to ensure compliance with a direction or requirement.
- Clause 35 Where an employee of the Company or any subsidiary is subject to a superannuation scheme under the *Retirement Benefits Act 1993* and either:
- the Company is to be sold; or
 - an asset of the Company is to be sold and as a consequence the employee's employment will transfer to the new owner;
- the Minister administering the *Retirement Benefits Act 1993* must declare the sale agreement to be a prescribed arrangement under the *Retirement Benefits Regulations 2005*.
- This ensures that the employee's superannuation entitlements continue to be operative as if the employee was still employed by the Crown.
- Clause 36 In the case of any sale under section 33, this clause provides a method for calculating the period of service, expressed in years, of an employee for long service purposes under any Act, award or agreement, where the *Long Service Leave (State Employees) Act 1994* applies to that employee immediately before the sale day.

- Clause 37 The proceeds of any sale of the Company or its assets as directed by the members will be paid into the Consolidated Fund.
- Clause 38 This Clause provided that any act or omission in good faith that arises because of this Act does not invalidate or terminate any contract, instrument or obligation. Nor does any act or omission give rise to any right or remedy by a party to a contract or instrument.
- Further, any act or omission does not constitute: a breach of contract or other instrument; a civil or criminal wrong; or a breach of confidence.
- Clause 39 In order to avoid confusion regarding the overlapping application of laws, in the event that a provision of this Act is inconsistent with the concurrent application of the Corporations Act, that provision will be declared to be a displacement provision for the purposes of section 5G of that Act.
- Clause 40 For the purposes of the Commonwealth *Trade Practices Act 1974* and the *Competition Policy Reform (Tasmania) Act 1996*, this Act authorises the Minister, by order published in the Gazette, to approve a contract or a class of contracts that relates to a sale under section 33.
- An order under this section is not a statutory rule.
- Clause 41 The Minister has the power to delegate any of his powers or functions under the Act, except for the power of delegation itself.
- Clause 42 The Governor may make regulations relating to this Act. Without limiting their generality, such regulations may provide for:
- a dispute resolution process in relation to access to rail track not owned by the Company or the Crown;
 - arrangements for employees affected by a transfer of employment related to this Act, or a sale of the Rail Company established by the Act;
 - deregistration of the Company or a subsidiary under the Corporations Act of the Commonwealth;
 - offences and penalties for contravention of the regulations; and
 - savings or transitional provisions including provisions for the transfer of employees to a transfer recipient and related matters.
- Clause 43 The Act is administered by the Minister for Infrastructure, with the Department of Infrastructure, Energy and Resources being the responsible department.

- Clause 44 This Act and any associated regulations may be repealed, rescinded and revoked by the Governor on the recommendation of the responsible Minister.
- The Act and any associated regulations will be repealed and rescinded if the shares in the Company are sold, or if the Company is deregistered.
- Clause 45 Provides for consequential amendments to other legislation as detailed in Schedule 1.
- Schedule 1 The *Tasmanian Public Finance Corporation Act 1985* is amended as provided for in Schedule 1, to include in the definition of “participating authority” a reference to a company, or a subsidiary of that company, formed under *section 5 of the Rail Company Act 2009*, while the Company remains owned by the Crown.