

RAILWAYS ACT 2005

EXPLANATORY NOTES

COMMENTARY ON SCHEDULES

Schedules 1 and 2 Background

191. *Schedules 1 and 2* allow for the transfer, abolition or reallocation of the Strategic Rail Authority's functions and also of its property, rights and liabilities.

Schedule 1 - Transfer etc. of functions of the Strategic Rail Authority

192. This schedule deals with the transfer or abolition of the Strategic Rail Authority's functions.
193. *Paragraphs 1 to 10* transfer from the SRA to the ORR all functions relating to consumer protection conditions attached to licences and licence exemptions. As a result there is no longer a need for the distinction drawn by the 1993 Act between consumer protection and other conditions.
194. *Paragraphs 11 to 26, 29 – 33, and 35* transfer to the Secretary of State and, where appropriate, the Scottish Ministers, functions which are currently with the Strategic Rail Authority. The functions relate to railway facilities, access and franchise agreements, the operator of last resort duty, enforcement conditions, the code of practice for the protection of disabled rail users, the registers kept for the purposes of functions under the 1993 Act, the Rail Passengers' Council, the power to require information from licence holders and concessionary travel.
195. *Paragraphs 27, 28, 34 and 36* abolish functions of the SRA by removing legislative references to it. The SRA functions abolished in paragraphs 27, 28 and 34 relate to railways administration orders, the enforcement of consumer protection provisions in operating licences, and the penalty fares regime. In addition paragraph 36 removes SRA powers to provide rail services, secure the provision of substitute bus and taxi services and make railway byelaws.
196. In relation to Paragraph 32 the Rail Passengers' Council is currently the responsibility of the Strategic Rail Authority. It has powers to sponsor and to direct the body and is in receipt of its annual reports. Following the dissolution of the Strategic Rail Authority sponsorship of the Rail Passengers' Council will pass to the Secretary of State.

Schedule 2: Transfer schemes

197. This Schedule contains further provisions governing Transfer Schemes made under Sections 1 and 12. Provision is for powers to be given to the Secretary of State and the Scottish Ministers to transfer property, rights and liabilities for two different purposes:
- (i) the power to move the SRA's property, rights and liabilities in connection with its abolition; and
 - (ii) the power to move franchise assets at the end of the franchise term.

*These notes refer to the Railways Act 2005 (c.14)
which received Royal Assent on 7 April 2005*

Only the Secretary of State has power to make Transfer Schemes for the first of these purposes.

198. Paragraphs 1 and 2 set out how a Transfer Scheme may specify or identify property, rights and liabilities to be transferred. They also provide when the Scheme may come into force and define what may be transferred under a Scheme. A Transfer Scheme may include the transfer of property, rights and liabilities which could not be transferred by other arrangements (such as by contract). It may also provide that rights and interests which might otherwise be created, terminated or changed as a consequence of Transfer Scheme or anything relating to it shall only be enforceable to the extent that the Scheme provides that it is enforceable. Because this latter type of provision may affect the rights of third parties, there is provision in Paragraph 10 which sets out circumstances in which third parties may be paid compensation in relation to this.
199. Paragraphs 3 and 4 allow the maker of the Transfer Scheme to modify the property, rights and liabilities to which it relates and to place obligations on transferees and transferors in connection with the Transfer Scheme.
200. Paragraph 5 provides that Transfer Schemes made under this Act shall have the effect of vesting property, rights and liabilities in the transferee without the need for any further formalities. This would mean, for example, that legal title in any registered freehold land which is transferred by a Scheme is vested in the transferee without the need for there to be a transfer document executed by the transferor, as would ordinarily be required in relation to a sale of land.
201. Paragraph 6 contains provisions which enable persons making Transfer Schemes to transfer the ability to progress and operate a railway project from one person to another. The provision permits both the transfer of the relevant property rights and the transfer of any statutory powers or duties the transferor may have in relation to that property. Railway projects routinely require statutory rights and powers, and these are usually provided in Orders made under the Transport and Works Act 1992.
202. Paragraph 8 allows the transferor and transferee to modify a transfer scheme by agreement after it has come into force. Where the agreement would relate to a contract of employment or adversely affect the interests of a third party, the agreement will only be valid if the relevant employee or third party is party to it.
203. Paragraph 9 contains provision for continuity of employment rights for employees of the transferor who become, by virtue of a Transfer Scheme, employees of the transferee. Paragraph 9 also provides safeguards in relation to the pensions' entitlements of employees transferred under a transfer scheme. Its effect is to provide that any of those employees who are currently entitled (by virtue of paragraph 8 of Schedule 11 to the 1993 Act) to continue to participate in the Railways Pension Scheme will not lose that entitlement by virtue of the transferee employer not being engaged in the "railway industry" (as defined in Schedule 11 of that Act) for those purposes. Transferred employees will also be deemed to have continuity of employment for those purposes, as well as more generally, and, where applicable, for the purposes of continuing to be a "protected person" under that Schedule and of continuing in consequence to benefit from the safeguards applying to the pension provision required for such persons.
204. Paragraph 9 also provides that where a person's employment is transferred by a transfer scheme to a transferee employer, the transfer itself will not be regarded as giving rise to a dismissal for the purposes of Part 11 of the Employment Rights Act 1996. Part 11 of the Employment Rights Act 1996 makes provision in relation to redundancy payments.
205. Paragraph 10 provides the circumstances in which compensation may be payable to third parties as a result of provisions in the Transfer Scheme. This Paragraph only applies to Transfer Schemes made under section 1, not to Schemes made under section 12.

206. **Paragraph 11** provides a power for the person making a Transfer Scheme to require the transferor and transferee to provide him with the information which he needs in order to be able to make the Scheme. The transferor and transferee may be subject to fines if they do not comply with a request for information.

Schedule 3: Transfer of safety functions

207. **Paragraph 1** sets out those purposes of Part 1 of the 1974 Act for which the ORR will be responsible. These are termed the "railway safety purposes" and are defined in sub-paragraphs (1)-(3) and (7). Sub-paragraph (4) provides a power for the Secretary of State, through regulations, to modify the definition of the railway safety purposes. This power is subject to the negative resolution procedure (sub-paragraph (6)) and would allow for the inclusion or exclusion of certain transport systems from the definition of railway safety purposes in line with the development of those systems or the regulatory regime.
208. **Paragraph 2** makes provision in relation to the duties of the ORR with respect to railway safety purposes, which in the most part replicate those of the HSC as set out at sections 11(1) and (2) and sections 50(1), (2) and (3) of the 1974 Act.
209. **Paragraph 3** amends the 1974 Act such that HSC no longer has responsibility for those railway safety functions conferred on the ORR by virtue of paragraph 2.
210. **Paragraph 4** confers on the ORR the power to authorise a person to investigate and make a special report in respect of the railway safety purposes. Paragraph 5 concerns transitional provisions in this regard and allows the ORR to assume responsibility for the furtherance of any special report or investigation previously directed or authorised by HSC (under s.14(2)(a) of the 1974 Act) which is ongoing at the time of transfer. The ORR's powers do not extend to the directing of an inquiry in respect of the railway safety purposes, as the Rail Accident Investigation Branch has been established for these purposes. Furthermore, the Secretary of State will retain his prerogative powers to call an inquiry should he see fit to do so. However, paragraph 6 necessarily provides for the ORR to assume responsibility for any inquiry which has been formally commenced by HSC at the time of transfer.
211. **Paragraph 7** provides that agency agreements may be made between the ORR and the Secretary of State enabling the ORR to perform in connection with the carrying out of its safety functions those functions of the Secretary of State. It also provides for similar agreements to be made between the ORR and a government department or other public authority that the Secretary of State may deem appropriate. These powers correspond to that at s.13(1)(b) of the 1974 Act.
212. **Paragraph 8** provides that agency agreements may be made between the ORR and a government department or other public authority for the department or authority to perform, as the ORR may consider appropriate, certain safety functions of the ORR on its behalf. This power corresponds to that at s.13(1)(a) of the 1974 Act.
213. **Paragraph 9** restricts HSC from issuing codes of practice (under s.16 of the 1974 Act) in so far as they relate exclusively to the safety of the railways and other guided transport systems.
214. **Paragraph 10** places a duty on the ORR and the HSC to enter into an agreement with each other for the purposes of co-operation and the exchange of information in relation to the carrying out of safety functions. It provides that the ORR will not be bound by guidance issued by the HSC.
215. **Paragraph 11** provides the ORR with the power to serve a notice, with the Secretary of State's consent, requiring a person to furnish it with any information it needs for the discharge of its safety functions. Paragraph 11(8) makes it an offence for a person to contravene a requirement imposed by a notice under the paragraph or to use disclosed

*These notes refer to the Railways Act 2005 (c.14)
which received Royal Assent on 7 April 2005*

information otherwise than for the purposes of the ORR's safety functions. These powers correspond to those of HSC at s.27 of the 1974 Act.

216. [Paragraph 12](#) provides for the Secretary of State to make regulations to provide for a levy to be paid to the ORR in respect of railway safety activities undertaken by it.
217. [Paragraph 13](#) removes the statutory requirement for consultation with HSC in the making of regulations by the Secretary of State, so far as they are made for or in connection with the railway safety purposes.

Schedule 4: Reviews by ORR of access charges and licence conditions

218. [Paragraph 2](#). This paragraph broadens the scope of an access charges review so that this must include licence conditions for example in relation to the desired outputs (such as safety, capacity and reliability) of the railway, and the timing of the next review and the circumstances in which this could be brought forward.
219. It also requires the ORR to give notice of its proposal to undertake an access charges review giving at least four weeks in urgent cases (and subject to consultation), and otherwise three months.
220. The Secretary of State and the Scottish Ministers are required as appropriate to provide within the notice period information about what they want to be achieved (i.e. their desired output specification) for railway activities and the public finance available. They may at the same time suggest when the next access charges review should be undertaken and the circumstances in which it would be appropriate to bring this forward. The notice can be extended or withdrawn by the ORR and Ministers may also notify the ORR that previously supplied information remains valid.
221. Ministers may revise the information they had provided if the ORR finds as a review of access charges progresses that the desired output specification cannot be achieved within the public financial resources. If such a revision still does not match desired outputs with resources there is a requirement to repeat the process once. It also gives an explicit obligation for the ORR to consider whether an access charges review would result in any adverse consequences for operators, and to have regard to any resulting need for mitigation or compensation.
222. The ORR must conduct a review of access charges (which engages its general duties under s4 of the 1993 Act) in a manner that it considers is most likely to secure what Ministers seek (as revised) within the public financial resources notified.
223. Where the ORR considers that the public financial resources are not sufficient to meet Ministers' desired output specifications despite revisions made by them, the ORR will determine how much of what is wanted by Ministers should be achieved using the available resources.
224. [Paragraph 4](#). This provision requires the ORR, before consulting more widely on its review conclusions, to consult Ministers on the linked proposed modifications to licences dealing with output requirements for which Ministers had provided information.
225. [Paragraphs 5 to 10](#). These provisions relate to what happens if the ORR's access review conclusions give rise to objections. In considering any revised review notice the ORR must also endeavour to achieve what Ministers want (as revised) within the public financial resources notified. The information that Ministers supplied must be provided by the ORR to the Competition Commission to accompany any reference or to assist the Commission in considering vetoing or making changes. Where the ORR proposes to make changes following a Competition Commission report, or subsequently modifies its proposals Ministers may, within a specified period of time, revise the information they supplied. The ORR must then consider the revised information before making the changes and include it with any notice to the Competition Commission.

226. **Paragraph 11.** This is a transitional provision that covers the situation where the ORR has given a review notice of its conclusions before the revised access charges review procedures set out in Schedule 4 come into force. Where there are objections to that notice, any new review notice or reference to the Competition Commission may or may not follow the new procedures set out in this Schedule at the ORR's discretion.

Schedule 5: Rail Passengers' Council established by s.19(1)

227. **Schedule 5** sets out various constitutional provisions, including accounting, remuneration, finance, status and procedure, that will apply to the RPC in its new form as a statutory corporation.
228. **Paragraph 2** sets the requirements for the remuneration of members. These apply in all cases except for the London Transport Users' Committee and the London member of the RPC. This committee and Council member are the responsibility of the London Assembly. The terms and conditions of their appointments are for the London Assembly to determine and to provide after consultation with the Secretary of State.
229. **Paragraphs 3-5.** Provide for the remuneration of staff. Previously RPC staff were classified as Strategic Rail Authority staff. As an independent body corporate the RPC will be responsible for its own staff, including their terms and conditions.
230. **Parts 3 and 4.** Under existing arrangements the RPC's sponsor, the Strategic Rail Authority, holds the status of body corporate. The RPC's budgeting arrangements have been a matter for the Authority. The RPC will now take on the body corporate status. The provisions set out in Parts 3 and 4 provide the process by which the RPC will be funded by Government grants and operate to a financial framework.

Schedule 6: Functions retained by London Transport Users' Committee

231. The duties, powers and role of the London Transport Users' Committee (LTUC) go beyond mainline passenger rail services. But their role in respect of rail is drawn from their position as the Rail Passengers' Committee for the Greater London area, under section 2 of the 1993 Act. With the dissolution of the regional committee network the Rail Passengers' Committees are being abolished. LTUC is sponsored by the London Assembly and not the Secretary of State. The Assembly were not seeking to remove rail from LTUC's remit, and it is therefore appropriate that LTUC should have new powers in respect of railways to replace the powers which it will be losing by virtue of the repeal of Rail Passengers' Committee functions under this Act. Schedule 6 provides for the continuation of LTUC's existing duties, powers and responsibilities to represent users of services in the London railway area.

Schedule 7: Consultations under Part 4

232. This schedule sets out how the consultation on a closure proposal required under sections 22 to 31 should be carried out. This schedule will apply to the beginning of the consultation, but thereafter the consultation will be governed by the relevant part of the closures guidance.
233. It requires the body carrying out the consultation, either a NA or RFA, to publish a notice in two successive weeks in local newspapers available in the area affected by the proposals as well as in national newspapers. The minimum consultation period is 12 weeks, in line with the Cabinet Office Code of Practice on consultations.
234. The Schedule lists bodies that are statutory consultees that include bodies representing the interests of railway passengers. The Secretary of State also has a power to designate bodies as representing the interests of railway passengers subject to the negative resolution procedure.

Schedule 8: Proposals to discontinue excluded London services

235. This Schedule sets out closure procedures which apply to excluded London services as defined in section 25 which are designated under that section as services to which Schedule 8 applies. At present, these are principally services operated by Transport for London, that is London Underground, Docklands Light Railway and Croydon Tramlink. The procedures in this schedule are similar to those for qualifying London services in Schedule 5 to the 1993 Act.
236. This Schedule only applies where the operator initiates the proposal. There is a 6 week consultation. The London Transport User Committee has a duty to consider objections to the proposals and make a report to the Mayor on hardship that might arise. The Mayor takes the final decision on whether the closure should be allowed. For those involving services wholly or partly outside Greater London, for example the western end of the London Underground Metropolitan line, he has a duty to consult local authorities in the areas affected.

Schedule 9: Bye-laws by railway operators

237. *Paragraph 1* of this Schedule defines the circumstances where, in relation to any bye-laws, the appropriate national authority means the Secretary of State or the Scottish Ministers.
238. *Paragraph 2* sets out the penalties for contravening the bye-laws and provides for maximum fines not exceeding level 3 on the standard scale (currently £1000).
239. *Paragraph 3* provides that, before bye-laws come into force, they must have been confirmed by the appropriate national authority.
240. *Paragraph 4* requires the operator to give notice of his intention to make bye-laws. The manner in which the notice is published must be approved by the appropriate national authority. The operator must allow a specified time for representations to be made about the bye-laws to the appropriate national authority, and must consider such representations before seeking confirmation of the proposed bye-laws.
241. *Paragraph 5* enables the appropriate national authority to confirm the bye-laws (with or without modification) and fix the date for their coming into force, or refuse to confirm them.
242. *Paragraph 6* sets out how the bye-laws are to be made publicly available.
243. *Paragraph 7* ensures that production of a certified, printed copy of the bye-laws is sufficient evidence in any legal proceedings of the existence and validity of those bye-laws.
244. *Paragraph 8* provides that railway operators have the power to amend or revoke any bye-laws which they make, and that the Secretary of State and the Scottish Ministers are, separately, able to revoke bye-laws for which they are the appropriate national authority by order.

Schedule 10: Taxation provisions relating to transfer schemes

245. This Schedule makes provision for the consequences for taxation of the various transfer schemes and transfers for which the Act provides. The effect is, very broadly, to remove tax consequences which flow from the way the transfers are effected by schemes made under the Act. Similar provisions were made for previous reorganisations – for example, in Schedule 26 to the Transport Act 2000 (c.38).
246. The provisions reflect the different nature of different transfers:
- *Part 1* deals with transfers under section 1 from the SRA and other publicly owned bodies to a national authority which is not liable to tax;

*These notes refer to the Railways Act 2005 (c.14)
which received Royal Assent on 7 April 2005*

- *Part 2* deals with transfers under section 1 from the SRA and other publicly owned bodies to a publicly owned body which is (in principle at least) liable to tax;
- *Part 3* deals with transfers under section 12 which may be between two privately owned companies each of which is liable to tax;
- *Part 4* deals with points which apply to transfer schemes generally.

Schedule 11: Miscellaneous amendments of 1993 Act

247. *Paragraph 2.* Section 9(3) of the 1993 Act currently permits the Secretary of State and the ORR to include a condition when granting a operating licence which requires the licence holder to provide information or documents which the Secretary of State or the ORR need to carry out their functions under Part 1 of the 1993 Act. This amendment provides that such a condition may in future also cover information or documents which are required in relation to the exercise of functions under Part 4 of this Act (network modifications). This reflects the fact that the closure provisions in Part 1 of the 1993 Act are repealed by the Act, and replaced with the network modification provisions in Part 4 of the Act.
248. *Paragraph 3.* References in section 17 and 19 to a person operating a railway facility "on behalf of the Secretary of State" are, following the amendments to these sections in Schedule 1 Paragraph 12, to be construed as references to a person operating a railway facility under an agreement or arrangement with either the Secretary of State or the Scottish Ministers where the Secretary of State or the Scottish Ministers have a duty or power to secure the operation of that facility. This amendment provides that the relevant duty or power may exist in either Part 1 of the 1993 Act or in Part 4 of the Act. This reflects the fact that the closure provisions in Part 1 of the 1993 Act are repealed by the Act, and replaced with the network modification provisions in Part 4 of the Act.
249. *Paragraph 4.* This paragraph revises section 30 of the 1993 Act to take account of the Network Modification sections in Part 4 of the Act that replace the closure provisions in section 37 to 49 of the 1993 Act.
250. *Paragraph 5.* This paragraph amends section 50 of the 1993 Act so that the Secretary of State and the Scottish Ministers are excluded from liability for breach of statutory duty arising from Part 1 of the 1993 Act in place of the SRA. This reflects the revised procedures for Network Modifications in the Act.
251. *Paragraph 6.* This provision enables the Secretary of State and the Scottish Ministers to enter into agreements and arrangements under which they give undertakings as to the exercise of their functions relating to rail franchising, where they do so for the purpose of encouraging investment in railways.
252. *Paragraph 7.* This paragraph revises section 55 of the 1993 Act to take account of the Network Modification sections in Part 4 of the Act that replace the closure provisions in sections 37 to 49 of the 1993 Act. It also contains minor corrections to the definition of "final order" in section 55(10) and a reference to a penalty notice in section 57F(1).
253. *Paragraph 9.* This paragraph amends the provisions in the 1993 Act governing the ability of the Secretary of State to provide financial assistance in relation to companies in railways administration. In particular, it provides that the Secretary of State may give an indemnity to a railways administrator (and certain persons connected with him) in respect of liabilities, loss and damage incurred in the exercise of his functions. It also provides that the Secretary of State may direct the relevant company in railways administration to repay sums which are paid under the terms of such an indemnity, except where the payment was made under the indemnity to cover a liability of the railways administrator to that company. Section 49, which inserts a new section 64A into the 1993 Act to give the Scottish Ministers similar financial assistance powers, also permits such indemnities to be given.

*These notes refer to the Railways Act 2005 (c.14)
which received Royal Assent on 7 April 2005*

254. *Paragraph 10.* This paragraph amends the duty of the ORR to maintain a public register under section 72 of the 1993 Act. The purpose of these amendments is to ensure that the ORR duties are appropriate in view of the repeal of the closure provisions in the 1993 Act and their replacement with the network modification provisions in Part 4 of the Act.
255. *Paragraph 11.* This paragraph amends the duty to maintain a public register which, by virtue of Schedule 1 Paragraph 30 of the Act, shall transfer from the SRA to the Secretary of State. The purpose of these amendments is to ensure that the duties are appropriate in view of the repeal of the closure provisions in the 1993 Act and their replacement with the network modification provisions in Part 4 of the Act.
256. *Paragraph 12(a)* refers to definitions in the 1993 Act inserted by section 48(1) and schedule 13(4) of this Act.
257. *Paragraph 12(b)* replaces the existing definition of bus substitution service in section 45(2) of the 1993 Act.
258. *Paragraph 13.* These amendments to section 136 of the 1993 Act provide that the Secretary of State and the Scottish Ministers are the competent authority for the purposes of the railways financial status regulations (Council Regulation (EEC) No 1192/69 on common rules with respect to the financial status of railway undertakings). They also provide that the Secretary of State, the Scottish Ministers, the NAW and Passenger Transport Executives are, where appropriate, the competent authority for the purposes of the public service obligations regulations (Council Regulation (EEC) No 1191/69 on public service obligations in transport, as amended by Council Regulation (EEC) No 1893/91).
259. *Paragraph 14* ensures that whenever the Scottish Ministers exercise the powers that the Act gives them to make secondary legislation by means of regulations or an order under the 1993 Act the secondary legislation is made by means of a Statutory Instrument. It also gives the Scottish Ministers the ability to make incidental, supplemental, consequential or transitional provisions in the relevant Statutory Instrument in relation to the subject matter of the order or regulations. This is so as to ensure that the Scottish Ministers have sufficient flexibility to implement their regulations or orders in the most practicable way. This amendment to section 143 of the 1993 Act also gives the Scottish Ministers the discretion to use their powers to apply orders and regulations only in certain cases or to apply them differently depending on the case in question. These provisions are intended to give the Scottish Ministers a reasonable degree of flexibility to exercise their relevant powers in a way that reflects the reality of the situation rather than being unduly constrained by the narrow interpretation of the power they are exercising. These provisions already apply to the Secretary of State under section 143 of the 1993 Act. The paragraph also provides that enforcement orders made under section 55 by the Secretary of State and the Scottish Ministers are not subject to the requirements of section 143, and do not have to be made by statutory instrument.
260. *Paragraph 15* amends section 145 of the 1993 Act, which provides for a general prohibition on the disclosure of information which relates to the affairs of any individual or business and which has been obtained under that Act. The amendments relate to the exceptions to the general prohibition.
261. The amendments in sub-paragraph (1) are intended to ensure that the exceptions are extended so as to cover the disclosure of information which is made for the purpose of assisting the Secretary of State or the Scottish Ministers in the exercise of their railways functions (including, but not limited to, their statutory functions under the 1993 Act, the Transport Act 2000, and this Act). The intention behind extending the exception in this way is to ensure that the Secretary of State and the Scottish Ministers can receive information which will help them to exercise their railway functions, notwithstanding the general prohibition on disclosing sensitive information obtained under the 1993 Act.

*These notes refer to the Railways Act 2005 (c.14)
which received Royal Assent on 7 April 2005*

262. The amendment in sub-paragraph (2) is a consequential amendment resulting from the abolition of Rail Passengers' Committees in section 19.