

CROSSRAIL ACT 2008

EXPLANATORY NOTES

COMMENTARY ON SECTIONS AND SCHEDULES

Railway matters

Section 22: Objective of ORR in relation to Crossrail

69. *Section 22(1)* provides that the objectives in section 4(1) of the Railways Act 1993 (which are the components of a general duty) shall, in relation to the Office of Rail Regulation (“ORR”), be treated as including the objective of facilitating the construction of Crossrail. *Section 22(2)* requires the ORR to consult the Secretary of State about the exercise of its duty in section 4(1) of the 1993 Act as modified by section 22(1).
70. *Section 22(3) and (4)* enable the Secretary of State to specify by order when section 22 ceases to have effect. This power is provided as there may be ambiguity concerning precisely when the construction phase of the Crossrail project should be regarded as having been completed. Such an order must be laid before Parliament after being made but is not subject to annulment.

Section 23: Duty of ORR to publish reports

71. *Section 23(1) and (2)* require the ORR to publish a report on two matters from time to time and also at any time that the Secretary of State requires. The first potential subject-matter of such a report is what the ORR has done or proposes to do to further its objective of facilitating the construction of Crossrail (the objective arising under section 22). The second matter is how the ORR has exercised or proposes to exercise its functions in connection with the operation of passenger services that make use of the principal Crossrail tunnel.
72. *Section 23(3)* provides that the ORR shall have regard to such a report where relevant in the exercise of any of its functions.
73. *Section 23(5) and (6)* provide for the termination of the requirement to report when the Secretary of State specifies by order, which must be laid before Parliament but is not subject to annulment. This provision enables the otherwise open-ended requirement to report to be brought to a close, as a point may be reached when it will cease to serve a useful purpose.

Section 24: Licensing

74. *Section 24* temporarily disapplies the requirement for either a licence, or a licence exemption, under the Railways Act 1993 which would otherwise exist in respect of any network constructed using Act powers, and in respect of any train being used on such a network. This disapplication lasts until the Secretary of State gives notice of his determination that the network is ready for commercial use. Before newly constructed track is open for commercial use, it is possible that use will be made of it for construction

purposes or for testing, and this section removes the need for a licence in respect of such operations.

Section 25: Award of Crossrail franchises to public-sector operators

75. *Section 25* disapplies the prohibition in section 25 of the Railways Act 1993 on public sector operators being a franchisee in respect of passenger railway services. It therefore allows a public sector operator to be a franchisee under a franchise agreement in two circumstances. The first circumstance is where the franchise agreement relates wholly or mainly to services that use the principal Crossrail tunnel. This enables ancillary services to be grouped with a Crossrail service in a public sector operation. The second circumstance is where the franchise agreement relates wholly or mainly to services that operate on at least part of the Crossrail route where such services are likely to be subject to substantial disruption because of Crossrail construction. Substantial disruption to services is determined by reference in particular to the frequency of disruption, the duration of the period during which services are disrupted and the severity of the likely disruption.

Section 26: Disapplication of franchising and access exemptions

76. *Section 26(1)* and *(2)* allow the Secretary of State, by means of an order, to revoke or amend certain exemptions granted under the Railways (Heathrow Express) (Exemptions) Order 1994 (“the Heathrow Express Order”). The Secretary of State also has the power to impose, or make more onerous, conditions attaching to the relevant exemptions. The relevant exemptions which may be removed are those which disapply the ORR’s role of approving or directing the entry into access contracts for railway facilities (“access exemptions”), and the exemption preventing services on that track from being franchised.
77. *Section 26(3)* applies to track, stations and facilities where the relevant access exemption contained in the Heathrow Express Order is ended under subsection (1). In such circumstances the Secretary of State may, by means of an order, make provision for treating as void any access contract permitting use of that facility. Exceptions to this provision can also be made in the order, thus enabling a particular contract to continue in existence when others are terminated.
78. *Section 26(4)* provides that the powers granted under subsections (1) and (3)(a) in respect of the Heathrow Express Order and relating to access exemptions and access contracts shall only be exercisable for the purposes of facilitating Crossrail passenger services.
79. *Section 26(5)* provides that the powers granted under subsections (1) and (3)(a) in respect of the Heathrow Express Order and relating to the exemption from the franchising regime shall only be exercisable for the purpose of facilitating Crossrail passenger services or enabling the franchising of services to Heathrow.
80. *Section 26(6)* provides that an order under this section shall be made by statutory instrument subject to annulment by resolution of either House of Parliament.

Section 27: Closures

81. *Section 27* disapplies the closure provisions of the Railways Act 2005 where any such closure is required in connection with construction or maintenance of the Crossrail works, or as a consequence of Crossrail passenger services. The disapplication does not apply to Crossrail services or facilities themselves.

Section 28: Key system assets

82. Section 216(1)(b) of the Greater London Authority Act 1999 requires the consent of Transport for London before the creation of any interest in, or rights over, any assets

designated as “key system assets”. Such key system assets are designated as such either in, or in respect of, London Underground Limited’s Public Private Partnership agreements. *Section 28(1)* and *(2)* disapply section 216(1)(b) of the 1999 Act – and hence disapply the requirement for Transport for London’s consent – where the creation of such interests or rights would facilitate the construction or operation of Crossrail. The construction and operation of Crossrail may interact with, or have an effect on, the London Underground.

Section 29: Power to designate persons as “protected railway companies”

83. *Section 29(1)* and *(2)* allow the Secretary of State, with the consent of the private sector company concerned, by order to provide that such company be treated as a protected railway company for the purposes of the Railways Act 1993. Such a company must be the manager of a railway facility that is contained in or associated with the principal Crossrail tunnel.
84. The effect of a company being treated as a protected railway company is to engage sections 59 to 65 of the Railways Act 1993 in respect of that company. These provisions enable the Secretary of State to apply to a Court for a “railway administration order” in respect of an insolvent protected railway company, or to intervene (and apply for such an order) during the voluntary winding up or insolvency proceedings of such a company. The purposes of railway administration orders are to secure the transfer to another company of an undertaking so that relevant railway operations may be continued, and to secure the continuation of such railway operations pending a transfer.
85. *Section 29(3)* provides that an order under the above subsection shall be subject to annulment by a resolution of either House of Parliament.

Section 30: Duty to co-operate

86. *Section 30(1)* provides a mechanism for the nominated undertaker to require others to co-operate with him during the construction, maintenance and operation of Crossrail, by entering into an agreement to deal with a problem relating to a railway asset. This provision reflects the fact that Crossrail will interact with the existing railways, both overland and underground.
87. *Section 30(2)* provides a reciprocal mechanism for the benefit of any controller of a railway asset (most likely an owner or operator of track) affected by the construction, maintenance or operation of Crossrail.
88. *Section 30(3)* provides for the terms of any such agreements to be agreed between the parties, or else referred to arbitration (for which arbitration section 31 makes provision).
89. *Section 30(5)* provides that the mechanisms arising under subsections (1) and (2) do not apply where the matter requiring resolution is under the (statutory or contractual) jurisdiction of the Office of Rail Regulation.

Section 31: Arbitration after referral under section 30(3)

90. *Section 31* sets out a mechanism for the arbitration of any disputes under section 30(3).
91. *Section 31(3)* allows the Secretary of State, who is required to be notified that a dispute has been referred to arbitration, to direct the arbitrator as to the results that are to be achieved, so far as reasonably practicable, by the agreement for which the terms are to be determined under the arbitration. In doing so the Secretary of State is confining the arbitrator’s jurisdiction.
92. *Section 31(6)* clarifies what the arbitrator must do: *Section 31(7)* clarifies how he must carry out his functions.

Section 32: Arbitration under section 30(3): multiple proceedings

93. *Section 32* sets out the arrangements to apply in the case of multiple arbitrations under section 30, allowing those proceedings to be consolidated or held concurrently.
94. *Section 32(2)* means that any group of hearings to be consolidated must consist of section 30(3) proceedings and arbitral proceedings relating to one or more such set of proceedings.

Section 33: Transfer of functions relating to works

95. *Section 33(1)* provides for the Secretary of State, if he acquires any land from a railway operator for the purposes of Crossrail and on that land there are works authorised by statute, to, by means of an order, transfer to him or to the nominated undertaker, any statutory power or duty relating to the works previously exercisable by the railway operator. This section simply allows any statutory powers or duties to be transferred with the land acquired.
96. *Section 33(2)* allows the Secretary of State, by means of an order, to provide for the further transfer to himself or to a nominated undertaker of any power or duty transferred under this section.
97. *Section 33(3)* allows the Secretary of State, if a railway operator acquires any land from the Secretary of State on which there are Crossrail works, to, with the consent of the railway operator concerned, by order transfer any duty under the Act relating to the works.

Section 34: Application of section 122 of the Railways Act 1993

98. *Section 34* is designed to make the defence of statutory authority that is available under section 122 of the Railways Act 1993, and is relevant to actions for nuisance etc, available in circumstances where the licensing requirement under the 1993 Act does not apply because of section 24. This is necessary because section 122 only applies where the operator of the relevant railway asset has a licence, or the benefit of a licence exemption, under the 1993 Act.

Section 35: Application of other railway legislation

99. *Section 35* brings into effect Schedule 11, which contains provisions dealing with the application of railway legislation to Crossrail.