

**EXPLANATORY MEMORANDUM TO
THE RAILWAYS ACT 2005 (COMMENCEMENT NO. 7, TRANSITIONAL AND
SAVING PROVISIONS)
ORDER 2006**

2006 No. 2911 (C. 102)

1. This explanatory memorandum has been prepared by the Department for Transport and is laid before Parliament by Command of Her Majesty.

2. Description

The Railways Act 2005 (Commencement No. 7, Transitional and Saving Provisions) Order 2006 (the “Order”) commences various provisions of the Railways Act 2005 (“the 2005 Act”). The Order also makes transitional and saving provisions.

3. Matters of special interest to the Joint Committee on Statutory Instruments or the Select Committee on Statutory Instruments

3.1 None.

4. Legislative Background

4.1 The Order is made under the 2005 Act to commence certain provisions in that Act. The provisions to be commenced by the Order are those which apply certain general duties to the Secretary of State, the Scottish Ministers and the Welsh Assembly, those provisions in Part 4 of the 2005 Act which commence the network modification provisions and those which make consequential amendments to legislation which are necessary to take account of the abolition of the Strategic Rail Authority (“SRA”). Other minor and consequential provisions are also commenced.

4.2 The transitional and saving provisions (which are subject to negative resolution procedure) are necessary in order to complete the consideration of those closure proposals which have been submitted to the SRA (or proposed by it) under the 1993 Act prior to 1st December 2006. They are also necessary to preserve conditions subject to which the Secretary of State has previously permitted a closure to proceed, and to allow such conditions to be varied.

5. Extent

This instrument applies to Great Britain.

6. European Convention on Human Rights

Mr Tom Harris, Parliamentary Under-Secretary of State at the Department for Transport, has made the following statement regarding Human Rights:

In my view the provisions of the Railways Act 2005 (Commencement No. 7, Transitional and Saving Provisions) Order 2006 are compatible with the Convention rights.

7. Policy background

7.1 The provisions to be commenced modify section 4(3A) of the 1993 Act which applies general duties specified in section 4(1) to (3) of the 1993 Act to certain functions undertaken by the Secretary of State. These general duties will now apply to network modification functions undertaken by the Secretary of State. The provisions also apply these duties to functions undertaken by the Scottish Ministers in relation to improving, providing or developing railway facilities, or network modification and to functions undertaken by the National Assembly for Wales in relation to network modification.

7.2 Network modifications are the discontinuance of services, the closure of passenger networks and the closure of stations. Part 4 of the 2005 Act provides that a proposal to close a network or station or discontinue a service may be made by its operator or the person funding it. Under the Act, an appropriate body – normally the proposer – must conduct a public consultation and an assessment as to whether the proposal meets criteria set out in closures guidance. Such a proposal must be referred to the Office of Rail Regulation (“ORR”) who must issue a notice, a “closure ratification notice”, before the closure is allowed to proceed. If certain conditions are not met the ORR must issue a “closure non-ratification notice” and the closure will not be allowed to proceed. The Secretary of State or Scottish Ministers are generally under duties to ensure the continued operation of services, networks or stations if the operator ceases provision before the ORR has issued a notice or if the ORR issues a notice that does not allow a closure to proceed.

7.3 Schedules 7 and 8 of the 2005 Act are also brought into force. These contain the procedures which must be followed for proposals to close or make minor modifications to certain railway services, networks or stations of specified descriptions. The Order also brings into force provisions making minor and consequential amendments (including those consequential on the abolition of the SRA).

7.4 The transitional and saving provisions apply to all proposals for a closure which have been made to the SRA prior to 1st December 2006. In the case of closure proposals made by the SRA, the transitional provisions apply where notice of such closure has been published by 1st December 2006. After 1st December 2006 (on which date it is expected the SRA will be abolished) the Secretary of State will perform all functions relating to closure proposals which were previously performed by the SRA. These functions will be exercised under the 1993 Act which, although otherwise repealed by this Order, will continue to have effect with modifications for the purpose of determining such closure proposals. Those functions include forming an initial opinion as to whether the closure should proceed and if so, publishing relevant notice of proposed closures. It also includes securing compliance with conditions imposed as a condition of permitting a closure to proceed and securing provision of a service where it is decided the closure should not proceed. These provisions also provide for the Secretary of State to decide any determinations outstanding at that date as to whether a closure is a minor closure.

7.5 Additionally, the saving provisions preserve conditions of closure which have been imposed prior to 1st December 2006 and those imposed where a closure has been permitted under the transitional provisions. Such conditions may be varied by the Secretary of State in accordance with section 46 of the 1993 Act. The Secretary of State may continue to make orders under section 55 of the 1993 Act for securing compliance with conditions to which a closure is subject. He may also continue to make such orders to ensure compliance with closure restrictions. Closure restrictions are restrictions placed on an operator which prevent it from proceeding with a proposed closure after it has given notice to the SRA that it proposes to close a railway service, network or station, or an experimental passenger service.

7.6 The Department for Transport consulted informally with the Scottish Executive about the policy to which the Order gives effect. It also consulted on that policy with the SRA as part of its obligation to consult the SRA before abolishing it.

8. Impact

8.1 A separate Regulatory Impact Assessment (“RIA”) has not been prepared for this instrument as it has no impact on business, charities or voluntary bodies. However, a regulatory impact assessment was carried out for the 2005 Act and the relevant portions are appended to this explanatory memorandum¹.

8.2 It is hoped that the transitional provisions will avoid unnecessary costs to private sector operators which might otherwise be incurred in having to re-submit closure proposals, although no assessment has been made of any such savings.

8.3 The impact on the public sector is that it will require the Department for Transport to perform those functions of the SRA which remain to be carried out in relation to closure proposals which were made before 1st December. This work will be carried out within the existing resources of the Department for Transport.

9. Contact

Ian McBrayne at the Department for Transport Tel: 020 7944 3280 or e-mail: ian.mcbrayne@dft.gsi.gov.uk can answer any queries regarding the instrument.

¹ The only figure which has changed in the RIA is the figure for the number of franchises let by the Government. There are now 20 franchises, not 25.

Appendix

Extract from the Regulatory Impact Assessment for the Railways Act 2005

Network modifications

1. Title of Proposal

Revising railway closure procedures

2. Purpose and intended effect of measure

(i) Objective

The objective is to revise the current arrangements for discontinuing passenger services, closing parts of the network, stations or light maintenance depots (LMDs) to take account of policy changes arising from 'The Future of Rail' and to make the arrangements simpler, while continuing to protect passengers interests.

(ii) Background

Current statutory closure arrangements are set out in the Railways Act 1993 as amended by the Transport Act 2000 (the Act). They apply to the discontinuance of passenger railway services, and the closure of all or parts of networks, stations or LMDs (together 'facilities') used in connection with passenger services. Operators generally initiate closure proposals. The Strategic Rail Authority (SRA) then assesses them. Where the SRA does not reject the proposal, an 8 week consultation is held, following provisions set out in the Act. Any objections to the closure are considered by the Regional Rail Passengers Committee, who have a statutory duty to prepare a report on passenger hardship arising from the closure for the Secretary of State, within 12 weeks of the end of the consultation period.

The SoS then considers this report, as well as the SRA's views and the operator's reasons for making the proposal in reaching a decision on whether the closure should be allowed. The SoS can attach conditions to his decision, including requiring the SRA to ensure provision of bus substitution services. The SoS can subsequently vary the conditions, except for those relating to bus substitution services. Where the SRA proposes to vary these, effectively the whole procedure is followed again including consultation and a report on passenger hardship by the RRPC.

There is a general need to refine and simplify arrangements. In addition and more importantly, "The Future of Rail" contains a number of proposals that means the above procedures need to be revised. These are:

- The proposed arrangements whereby Passenger Transport Executives can reduce rail services as part of a transport strategy for their area and use any savings to fund other transport modes. The current statutory closure arrangements act as a barrier to PTEs making the most of this arrangement.
- The clear role of the public sector as a specifier and funder of railway outputs provided by private sector companies. In addition to the SoS, in future this will also include the Scottish Executive, Welsh Assembly Government, PTEs/PTAs and TfL. As part of this role, public sector funders should be able to initiate closure proposals
- The winding up of SRA and RRPCs, who both have a key role in existing arrangements.

(iii) Risk assessment

Doing nothing is not an option in these circumstances given the proposals to wind up the SRA and RRPC in 'A Future for Rail'. The SRA and RRPC have key roles in the current arrangements which have to be changed.

3. Options

As mentioned above, 'Doing nothing' is not an option in this case because two of the organisations with key roles in the current closure procedures, the Strategic Rail Authority and Regional Rail Passenger Committees, are being wound up. A new approach to railway closures is therefore required.

- *Option 1: 'Non-statutory guidelines'*

One option would be to repeal completely existing statutory arrangements, and replace these by non-statutory guidelines that public sector specifier/funders or operators could follow if they wished to discontinue services or close parts of the network, stations or LMDs, for example covering consultation requirements and notice periods. This would provide a much simpler system. But it would remove all statutory protection to passengers provided by the statutory nature of the current arrangements so would not meet the objectives of the measure.

- *Option 2: 'Limited statutory framework'*

As a variant on the above, it would be possible to have some statutory provision relating to closures, for example a statutory minimum notice period before a closure could occur, similar to that used for local bus services, but within a predominantly non-statutory framework as outlined above. This would simplify arrangements and it should also allow the policy changes from the Future of Rail to be accommodated. The drawback is that protection to passengers would be reduced considerably compared with the current statutory procedure.

- *Option 3: 'Revised statutory framework'*

A third option is to maintain a statutory framework but to revise it comprehensively through primary legislation to address the policy changes arising from 'The Future of Rail'. Within this, there is a wide variety of sub-options about how the procedures might work, which organisations should perform which functions etc. This option would maintain a good degree of protection for passengers, while reducing time and complexity compared to the current arrangements.

Option 3 would give public sector funders the power to initiate closure procedures, as well as operators. The proposer of a closure will have to undertake an assessment of its costs and benefits compared to keeping the services, network or station open. The Secretary of State and Scottish Ministers will have a statutory duty to publish guidance on how this will be carried out. The proposer will also have to undertake a 12 week consultation on the assessment, including a number of statutory consultees. The ORR decide if the closure proposal is in line with guidance provided by the Secretary of State and Ministers, and that the consultation has been carried out appropriately. If it is satisfied on these points, the closure can proceed.

4. Sectors affected

Public sector funders of the railway will play an increased role in the new arrangements.

The rail industry will also be affected as it is already by the existing closure arrangements. In particular the proposals relate directly to Network Rail, as operator of the main heavy rail network and main stations, and Passenger Train Operating Companies who provide passenger services and operate other stations.

5. Benefits

- *Economic*

Option 3 will help firmly and clearly implement the policies in 'The Future of Rail', in particular those relating to better decision making. The approach will allow PTEs to make better decisions about

transport services in their areas and to use their funding more flexibly to deliver greater transport benefits, and will also give a greater role to the Scottish Executive and Welsh Assembly in initiating closure procedures in their respective countries. The requirement to undertake an assessment of all costs and benefits of a proposal, rather than just passenger hardship, should also lead to better decision making and allocation of resources. The new arrangements are also simpler and less time consuming than the existing ones, leading to resource savings. All these factors should lead to economic benefits, although it is not possible to quantify them.

Benefits would also arise from options 1 and 2. Effectively removing the statutory closure procedures would produce a far simpler and less time consuming process. But it is not clear that this would lead to better decision making as it would not require an assessment of costs and benefits following statutory guidelines.

Under option 3, Scottish Ministers' far greater role in relation to railways in the Act and from the Future of Rail White Paper, means they are most likely to identify new organisations to designate as 'railway funding authorities' relating to the railway in Scotland including certain cross border services.

- *Environmental and Social*

There are no impacts from any of the options

6. Costs

- *Economic*

The cost of options 1 and 2 would be the substantial reduction in protection of passenger interests that a statutory framework such as option 3 would provide. Not having a statutory framework might also reduce the certainty with which the Future of Rail reforms could be implemented through options 1 and 2.

Option 3 will require those making closure proposals, public sector funders and rail operators, to undertake an assessment of costs and benefits from closure proposals. This may put some additional cost on those making proposals compared to current arrangements where the assessment is more limited and it is carried out by Regional Rail Passenger Committees (RRPCs) rather than public sector funders or operators. The Secretary of State and Scottish Ministers on behalf of operators making proposals and as public sector funders would also be required to carry out consultations, which the SRA do under present arrangements. But the outcome of this should be better, more robust and transparent decision making.

Should the discontinuance of a service or closure of part of a network proposed by the public sector funder be allowed by the ORR, there would then need to be a separate discussion between the funder, TOC or Network Rail to adjust their funding. This could include consideration of any compensation to TOCs or Network Rail as a result of lost revenues arising from the closure, while taking into account cost savings. Compensation might also be payable to third parties affected by the closure, for example Freight Operating Companies. However, the Government has no plans for a programme of discontinuing passenger services or closing parts of networks or stations.

- *Environmental and Social*

There are no impacts from any of the options

7. Equity and fairness

It might be argued that removing the statutory requirement to consider passenger hardship arising from closure proposals could disadvantage passengers and reduce the weight given to their views. But the proposed approach will continue to provide protection to passengers by taking the effects on passengers fully into account through the assessment of the proposal, carried out under guidance provided by the Secretary of State and Scottish Ministers. It is also proposed that passenger representative bodies would be statutory consultees for any closure proposals.

8. Consultation with small business: Small Firms' Impact Test

Train Operating Companies and Network Rail are private sector firms and will be directly affected by the proposals above, as they are by the current statutory closure procedures. But none of these are classified as 'small firms' so this test is not appropriate.

9. Competition Assessment

The main market for passenger rail services, including all but the largest stations, operates through 25 franchises let by Government, usually following a competitive tender. Franchises are for geographically discrete areas with generally very limited scope for competition between services operated by different franchises.

There are also a small number of non-franchised rail services operators. These may compete with franchised services.

Network Rail is the monopoly supplier of the main rail network and also operates the 11 largest stations. It has no competitors but is subject to independent economic regulation by the Office of Rail Regulation. NR does not compete with providers of franchised or non-franchised rail services.

The revised closure procedures outline above will replace the current ones. They will apply to operators of franchised services, non franchised services, rail networks and stations, as the current arrangements do, in broadly the same way. The revised procedures should also simplify the existing ones. Therefore it is not anticipated that the revised closure procedures will have an impact on competition in the railway industry.

10. Enforcement and Sanctions

ORR will have power to attach conditions to its view that a proposal meets the criteria in the Secretary of State or Scottish Ministers guidance.

11. Monitoring and Review

It would be appropriate for the Department of Transport, Scottish Executive and other interested organisations to review how the proposed option is working after a number of closure proposals have been taken through it.

12. Consultation

- Within government, detailed discussions have been held with ORR, HM Treasury, the Scottish Executive, Welsh Assembly Government, Transport for London and the Strategic Rail Authority.
- Public Consultation: None

13. Summary and Recommendation

The revised statutory framework in option 3 above best meets the objectives of the proposal. This is expected to produce benefits from better decision making and a simpler process. There may be some additional costs for public sector funders and operators from the fuller assessment process and statutory consultation process. Under the current arrangements, much of this cost would have been borne by the SRA or Regional Rail Passenger Councils. But such costs will be greatly outweighed by the benefits.

14. Declaration

I have read the regulatory impact assessment and I am satisfied that the benefits justify the costs

Signed

Date 8th April, 2005

Tony McNulty MP, Minister for Transport, Department for Transport