

Passed by both Houses



New South Wales

# Freight Rail Corporation (Sale) Bill 2001

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*I certify that this PUBLIC BILL, which originated in the LEGISLATIVE ASSEMBLY, has finally passed the LEGISLATIVE COUNCIL and the LEGISLATIVE ASSEMBLY of NEW SOUTH WALES.*

*Clerk of the Legislative Assembly.  
Legislative Assembly,  
Sydney, , 2001*



New South Wales

## **Freight Rail Corporation (Sale) Bill 2001**

Act No , 2001

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An Act to provide for the sale of the business undertaking of the Freight Rail Corporation; and for other purposes.

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*I have examined this Bill, and find it to correspond in all respects with the Bill as finally passed by both Houses.*

*Chairman of Committees of the Legislative Assembly.*

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Clause 1            Freight Rail Corporation (Sale) Bill 2001

Part 1             Preliminary

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**The Legislature of New South Wales enacts:**

## **Part 1 Preliminary**

### **1 Name of Act**

This Act is the *Freight Rail Corporation (Sale) Act 2001*.

### **2 Commencement**

This Act commences on a day or days to be appointed by proclamation.

### **3 Definitions**

(1) In this Act:

***assets*** means any legal or equitable estate or interest (whether present or future and whether vested or contingent) in real or personal property of any description (including money), and includes securities, choses in action and documents.

***business undertaking*** of FreightCorp means all the assets, rights and liabilities of FreightCorp.

***excluded undertaking*** means any assets, rights or liabilities of the business undertaking of FreightCorp that are excluded from sale under this Act pursuant to section 9.

***exercise*** a function includes perform a duty.

***FreightCorp*** means the Freight Rail Corporation constituted under the *Transport Administration Act 1988*.

***FreightCorp's purchaser*** means:

- (a) when the sale of FreightCorp is under Part 3 (Sale method 1—direct transfer of undertaking to purchaser)—the purchaser to whom the assets, rights and liabilities that comprise the business undertaking of FreightCorp are transferred under that Part, or
- (b) when the sale of FreightCorp is under Part 4 (Sale method 2—conversion to company and sale of company to purchaser)—the purchaser to whom the shares in the sale company are transferred under that Part, or

- (c) when the sale of FreightCorp is under Part 5 (Sale method 3—transfer of undertaking to company and sale of company to purchaser)—the purchaser to whom the shares in the sale company are transferred under that Part.

***function*** includes a power, authority or duty.

***instrument*** means an instrument (other than this Act) that creates, modifies or extinguishes rights or liabilities (or would do so if lodged, filed or registered in accordance with any law), and includes any judgment, order or process of a court.

***liabilities*** means all liabilities, debts and obligations (whether present or future and whether vested or contingent).

***Ministerial Holding Corporation*** means the Ministerial Holding Corporation constituted by section 37B of the *State Owned Corporations Act 1989*.

***rights*** means all rights, powers, privileges and immunities (whether present or future and whether vested or contingent).

***special lease*** means any lease or sublease of property forming part of the business undertaking of FreightCorp that the Treasurer declares by order in writing to be a special lease for the purposes of this Act.

- (2) Notes in the text of this Act do not form part of this Act.

#### **4 Validation**

Any act, matter or thing done before the commencement of a provision of this Act that would have been validly done had the provision been in force at the time it was done is (to the extent of any invalidity) validated.

## **Part 2 Sale of FreightCorp**

### **5 Options for method of sale**

- (1) The business undertaking of FreightCorp may be sold to a purchaser in accordance with this Act in any of the following ways, as determined by the Treasurer:
  - (a) by sale of that business undertaking to the purchaser in accordance with Part 3,
  - (b) by conversion of FreightCorp to a company and sale of that company by transfer of the shares in the company to the purchaser, as provided by Part 4,
  - (c) by transfer of the business undertaking to a company and sale of that company by transfer of the shares in the company to the purchaser, as provided by Part 5.
- (2) FreightCorp's purchaser can only be:
  - (a) National Rail Corporation Limited, or
  - (b) a purchaser of the shares in National Rail Corporation Limited, or
  - (c) a related body corporate (within the meaning of the *Corporations Law*) of a purchaser of the shares in National Rail Corporation Limited.
- (3) A reference in this Act to the sale of FreightCorp is a reference to the sale of the business undertaking of FreightCorp in accordance with this Act.

### **6 Powers of FreightCorp to participate in sale**

- (1) FreightCorp has and may exercise such functions as may be necessary or convenient for facilitating the sale of FreightCorp.
- (2) FreightCorp has and may exercise such additional functions for or in connection with facilitating the sale of FreightCorp as the Treasurer may from time to time direct by order in writing.
- (3) The functions conferred by this section are in addition to any other functions that FreightCorp has apart from this section. Those other functions do not limit or prevent the exercise by FreightCorp of the functions conferred by this section.

**7 Directions to FreightCorp concerning participation in sale**

- (1) The Treasurer may give directions to FreightCorp for or in connection with facilitating the sale of FreightCorp, and FreightCorp must comply with any such direction.
- (2) The power to give directions to FreightCorp under this section extends to directions with respect to the way in which FreightCorp is to conduct its business and other affairs following the entering into of any agreement in connection with the sale of FreightCorp.
- (3) In the exercise of any functions conferred on FreightCorp by or under this Act, FreightCorp is subject to the control and direction of the Treasurer.

**8 Negotiations for sale**

- (1) Negotiations may be conducted for or in connection with the sale of FreightCorp.
- (2) Negotiations may be conducted with any person.
- (3) Negotiations may be conducted before, on or after the sale.

**9 Parts of business undertaking may be excluded from sale**

- (1) The Treasurer may by order in writing exclude assets, rights and liabilities of the business undertaking of FreightCorp from sale under this Act.
- (2) The Treasurer may by order in writing transfer any assets, rights or liabilities excluded from sale under this Act to the Crown, the Ministerial Holding Corporation or any other public authority. Schedule 1 (Transfer of assets, rights and liabilities) applies to such an order.
- (3) The Treasurer may, by further order under this section, further transfer any assets, rights or liabilities previously transferred under this section.

**10 Auditor-General authorised to communicate information regarding FreightCorp**

- (1) The Treasurer may, in connection with the sale of FreightCorp, approve of the communication by the Auditor-General to an authorised person on such terms and conditions as the Treasurer thinks fit of any matter or thing that has come to the knowledge of the Auditor-General in respect of FreightCorp.



- (2) Any communication by the Auditor-General in accordance with the Treasurer's approval is authorised by this section, and is not prevented by section 38 (Secrecy) or any other provision of the *Public Finance and Audit Act 1983*.
- (3) An authorised person who acquires information as a result of the operation of this section must not make a record of the information or divulge the information to any other person, except:
- (a) for or in connection with the proper exercise of the authorised person's functions as an authorised person, or
  - (b) in accordance with the approval of the Treasurer.

Maximum penalty: 100 penalty units.

- (4) In this section:

***authorised person*** means:

- (a) any person exercising functions under this Act, and
- (b) any person engaged to exercise functions in connection with the sale of FreightCorp, and
- (c) the holder of any office that is nominated for the purposes of this section by the Treasurer by notification in writing to the Auditor-General, and
- (d) a potential purchaser, and any person acting for or on behalf of a potential purchaser in connection with the sale of FreightCorp.

***potential purchaser*** means a person indicated by the Treasurer by notification in writing to the Auditor-General as a person who is or may become FreightCorp's purchaser.

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## **Part 3 Sale method 1—direct transfer of undertaking to purchaser**

### **11 Agreements for sale**

- (1) The Treasurer is authorised to enter into agreements for or in connection with the sale of the business undertaking of FreightCorp to a purchaser and for that purpose the Treasurer may act for and on behalf of FreightCorp.
- (2) Any such agreement may be entered into for the purposes of this section before, on or after the sale.
- (3) Section 52A (Contracts for sale of land) of the *Conveyancing Act 1919* does not apply to a contract for the sale of land that is entered into for the purposes of this section.

### **12 Orders for transfer of assets, rights and liabilities**

The Treasurer may by order in writing transfer to the purchaser any assets, rights and liabilities that comprise the business undertaking of FreightCorp. Schedule 1 (Transfer of assets, rights and liabilities) applies to such an order.

### **13 Excluded undertaking**

For the purposes of this Part, the business undertaking of FreightCorp does not include an excluded undertaking.

### **14 Special leases**

- (1) A special lease:
  - (a) is excluded from sale under this Act, and
  - (b) may not be transferred under this Act, and
  - (c) remains vested in FreightCorp.
- (2) The Treasurer may, for and on behalf of FreightCorp, grant a sublease or sub-sublease of property that is the subject of a special lease to:
  - (a) FreightCorp's purchaser, or
  - (b) a related body corporate of FreightCorp's purchaser, or

- (c) a person to whom FreightCorp's purchaser transfers the whole or a substantial part of the assets, rights and liabilities transferred to FreightCorp's purchaser under this Act.
- (3) The Treasurer may determine the terms and conditions on which a sublease or sub-sublease is to be granted under this section.
- (4) Duty under the *Duties Act 1997* is not chargeable in respect of a sublease or sub-sublease granted under this section.
- (5) A term of a sublease or sub-sublease of property that is the subject of a special lease, being a term with respect to any of the following matters, has effect despite any law or rule to the contrary:
  - (a) conditions under which the sublease or sub-sublease may be terminated,
  - (b) application of security,
  - (c) rent repayment and the retention of rent by the State,
  - (d) continuance of the sublease or sub-sublease, including the obligation to pay rent, despite unforeseen circumstances,
  - (e) amounts payable in the event of a breach of the sublease or sub-sublease,
  - (f) the liability of the sublessor or sub-sublessor.
- (6) In this section, *related body corporate* has the same meaning as in the *Corporations Law*.

#### **15 Dissolution or conversion of FreightCorp after sale**

- (1) On the repeal of section 19G (Establishment of FRC as statutory State owned corporation) of the *Transport Administration Act 1988* FreightCorp ceases to be a State owned corporation under the *State Owned Corporations Act 1989* and:
  - (a) is dissolved, unless paragraph (b) applies, or
  - (b) is converted to a corporation sole constituted by the Treasurer if the business undertaking of FreightCorp immediately before the repeal of section 19G includes any special lease.
- (2) On the dissolution or conversion of FreightCorp by this section, any assets, rights and liabilities of FreightCorp become the assets, rights and liabilities of the Crown, except any special lease or any sublease or sub-sublease of the property to which a special lease applies.

- (3) The Treasurer may, by order in writing, transfer to the Ministerial Holding Corporation or any other public authority any assets, rights or liabilities that become assets, rights or liabilities of the Crown under this section. Schedule 1 (Transfer of assets, rights and liabilities) applies to such an order.
- (4) A person who, immediately before the dissolution or conversion of FreightCorp under this section, held office as a director of FreightCorp:
- (a) ceases to hold office as such on the dissolution or conversion of FreightCorp, and
  - (b) is not entitled to any remuneration or compensation because of the loss of that office.
- (5) If FreightCorp is converted to a corporation sole:
- (a) it has and may exercise such functions as may be necessary or convenient to enable it to exercise its rights and discharge its obligations under or in connection with a special lease or any sublease or sub-sublease of the property to which a special lease applies, and
  - (b) section 43A (General audit of former statutory bodies) of the *Public Finance and Audit Act 1983* applies as if FreightCorp had been abolished, and
  - (c) the corporation sole is taken for all purposes (including the rules of private international law) to be a continuation of, and the same legal entity as, FreightCorp as it existed before its conversion to a corporation sole.

Clause 16                      Freight Rail Corporation (Sale) Bill 2001

Part 4                              Sale method 2—conversion to company and sale of company to purchaser  
Division 1                        Conversion of FreightCorp to company

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## **Part 4 Sale method 2—conversion to company and sale of company to purchaser**

### **Division 1                      Conversion of FreightCorp to company**

#### **16 Treasurer may direct conversion**

- (1) The Treasurer may direct FreightCorp to convert to a company limited by shares for the purposes of the sale of the business undertaking of FreightCorp under this Part.
- (2) The company to which FreightCorp is converted is referred to in this Part as the *sale company*.
- (3) A reference in this Part to *the conversion* is a reference to the registration of FreightCorp pursuant to this Part as a company limited by shares under the *Corporations Law*.

#### **17 Steps to be taken prior to conversion**

- (1) The Treasurer's direction for conversion of FreightCorp authorises the transfer of FreightCorp's incorporation under the *Corporations Law* in accordance with the direction.
- (2) FreightCorp must, in accordance with the terms of the Treasurer's direction:
  - (a) apply under the *Corporations Law* to be registered as a company limited by shares under that Law, and
  - (b) apply under that Law for the reservation of a name as the name of the sale company, and
  - (c) do such other things for the purposes of effecting the registration of FreightCorp as a company limited by shares as the Treasurer directs.
- (3) FreightCorp is authorised to exercise such functions as may be necessary or convenient for the purposes of this section.

**18 Shareholding in sale company**

Until the shares in the sale company are transferred to FreightCorp's purchaser under this Part:

- (a) the shareholders in the sale company hold their shares for and on behalf of the State, and
- (b) the Treasurer may act for or on behalf of the shareholders in connection with their rights, privileges, benefits, duties, liabilities and obligations as holders of shares in the sale company.

**19 Continuity of FreightCorp and construction of references to FreightCorp**

- (1) Without limiting any other provision of this Act or the *Corporations Law*, the sale company is taken for all purposes (including the rules of private international law) to be a continuation of, and the same legal entity as, FreightCorp (as it existed before the conversion).
- (2) After the conversion, a reference in any other Act or in any other instrument made under any Act or in any other document of any kind to FreightCorp (or the Freight Rail Corporation) is to be read as (or as including) a reference to the sale company, unless it is required by this Act to be read as a reference to some other person because it relates to an excluded undertaking.

**20 Continuity of contracts and arrangements**

- (1) Without limiting any other provision of this Act or the regulations, the sale company is, on and after the conversion, entitled to the benefit of, and taken to be a party to, any contract or arrangement entered into by FreightCorp with any person and having force immediately before the conversion.
- (2) This section is subject to the operation of Schedule 1 (Transfer of assets, rights and liabilities).

**21 Effect of conversion on FreightCorp**

- (1) Immediately after the conversion:
  - (a) FreightCorp ceases to be a State owned corporation under the *State Owned Corporations Act 1989*, and

Clause 21	Freight Rail Corporation (Sale) Bill 2001
Part 4	Sale method 2—conversion to company and sale of company to purchaser
Division 1	Conversion of FreightCorp to company

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- (b) section 19G (Establishment of FRC as statutory State owned corporation) of the *Transport Administration Act 1988* ceases to have effect.
- (2) A person who, immediately before the conversion, held office as a director of FreightCorp:
  - (a) ceases to hold office as such on the conversion, and
  - (b) is not entitled to any remuneration or compensation because of the loss of that office.
- (3) This section does not prevent a person who held office as a director or FreightCorp immediately before the conversion from holding office as a director of the sale company.

## **22 Orders for transfer of assets, rights and liabilities**

- (1) The Treasurer may by order in writing transfer from the sale company to the Ministerial Holding Corporation or any other public authority any assets, rights and liabilities that comprised the business undertaking of FreightCorp immediately before the conversion.
- (2) An order under this section may only be made while all the issued shares in the sale company are held for and on behalf of the State.
- (3) Schedule 1 (Transfer of assets, rights and liabilities) applies to an order under this section.

## **Division 2 Management of sale company before sale**

### **23 Division applies while State holds shares in sale company**

This Division applies during any period after the conversion when the issued shares in the sale company are held for and on behalf of the State.

### **24 Ministerial control of sale company**

- (1) The board of directors of the sale company is, in the exercise of its functions, subject to the control and direction of the Treasurer.
- (2) Neither the enactment of this section nor the exercise of the Treasurer's powers under this section constitutes the Treasurer as a director of the sale company or a person who participates in the management of the sale company.

- (3) A director of the sale company is not personally liable in any civil or criminal proceedings (including proceedings for a breach of any duty under the *Corporations Law*) for anything done or omitted for the purpose only of complying with a direction of the Treasurer under this section.

## **25 Status of sale company**

- (1) The sale company is an agency through which the State carries out the activity of providing freight rail services, and for that purpose it is a public authority of the State.
- (2) However, the sale company:
- (a) is not, and does not represent, the State except by express agreement with the Treasurer, and
  - (b) is not exempt from any rate, tax, duty or other impost imposed by or under any law of the State merely because it is a company in which the shares are held for and on behalf of the State, and
  - (c) cannot render the State liable for any debts, liabilities or obligations of the sale company, unless this Act or any other Act or law otherwise expressly provides.

## **26 Application of certain provisions of State Owned Corporations Act 1989 to sale company**

The following provisions of the *State Owned Corporations Act 1989* apply to the sale company as if it were a State owned corporation (with or without any modification prescribed by the regulations):

- (a) such of the provisions of Part 4 (Accountability) as are prescribed by the regulations,
- (b) section 20R (Memorandum and articles of subsidiaries) but only in relation to the provisions contained in clauses 2 and 3 (2) of Part 2 of Schedule 7 to that Act,
- (c) section 36 (Application of other Acts),
- (d) any other provision prescribed by the regulations.



Clause 27	Freight Rail Corporation (Sale) Bill 2001
Part 4	Sale method 2—conversion to company and sale of company to purchaser
Division 3	Sale of company

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## **Division 3      Sale of company**

### **27    Agreement for sale**

The Treasurer may enter into and carry out on behalf of the State an agreement for the sale of the business undertaking of the sale company to a purchaser by means of the sale of the shares in the sale company.

### **28    Transfer of shares**

The Treasurer is authorised to transfer the shares in the sale company held for and on behalf of the State to the purchaser in accordance with the terms of the agreement entered into under this Division and to enter into and carry out agreements for the transfer of shares to the purchaser.

### **29    Changes to constitution prior to sale**

- (1) The Treasurer is authorised to take steps before the transfer of shares under this Division to make alterations and additions to the constitution of the sale company (being alterations and additions contemplated by the agreement under this Division) whether or not some or all of them may be inconsistent with the requirements of this Act or the *State Owned Corporations Act 1989*.
- (2) Any such inconsistent alterations and additions may only be made so as to take effect on or after the transfer of shares.

### **30    No government guarantees**

The obligations of the sale company are not guaranteed by the State.

### **31    Exemptions from State taxes**

- (1) State tax is not payable in relation to any of the following matters, or anything done because of, or for a purpose connected with or arising out of, any of the following matters:
  - (a) the disposal of shares in the sale company pursuant to an agreement under this Part and the purchase of those shares pursuant to such an agreement, or
  - (b) the application by FreightCorp under this Act for registration as a company or for the reservation of its name, or

- (c) any other matter related to the conversion of FreightCorp into a company under this Part, or
  - (d) such other matters in connection with the operation of this Part as may be prescribed by the regulations.
- (2) In this section:

***State tax*** means application or registration fees, duty under the *Duties Act 1997* or any other tax, duty, fee or charge imposed by any Act or law of the State, other than the *Corporations Law*.

Clause 32            Freight Rail Corporation (Sale) Bill 2001

Part 5                Sale method 3—transfer of undertaking to company and sale of company  
to purchaser

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## **Part 5 Sale method 3—transfer of undertaking to company and sale of company to purchaser**

### **32 Treasurer may form or acquire company**

- (1) For the purpose of the sale of FreightCorp, the Treasurer may, on behalf of the State:
  - (a) form a company limited by shares, so that all the issued shares in the company are held by the State, or
  - (b) acquire shares in a company limited by shares, so that all the issued shares in the company are held by the State.
- (2) The company is referred to in this Part as the *sale company*.

### **33 Agreements for sale of business undertaking to sale company**

- (1) The Treasurer is authorised to enter into agreements for or in connection with the sale of the business undertaking of FreightCorp to the sale company and for that purpose the Treasurer may act for and on behalf of FreightCorp.
- (2) Any such agreement may be entered into for the purposes of this section before, on or after the sale.
- (3) Section 52A (Contracts for sale of land) of the *Conveyancing Act 1919* does not apply to a contract for the sale of land that is entered into for the purposes of this section.

### **34 Orders for transfer of assets, rights and liabilities**

- (1) The Treasurer may by order in writing transfer to the sale company any assets, rights and liabilities that comprise the business undertaking of FreightCorp.
- (2) The Treasurer may by order in writing transfer to FreightCorp any assets, rights and liabilities transferred to the sale company by an order under subsection (1), but an order under this subsection may only be made while all the issued shares in the sale company are held by the State.
- (3) Schedule 1 (Transfer of assets, rights and liabilities) applies to an order under this section.

**35 Special provision for special leases**

- (1) A special lease:
  - (a) is excluded from sale under this Act, and
  - (b) may not be transferred under this Act, and
  - (c) remains vested in FreightCorp.
- (2) The Treasurer may, for an on behalf of FreightCorp, grant a sublease or sub-sublease of property that is the subject of a special lease to:
  - (a) FreightCorp's purchaser, or
  - (b) a related body corporate of FreightCorp's purchaser, or
  - (c) a person to whom FreightCorp's purchaser transfers the whole or a substantial part of the assets, rights and liabilities transferred to FreightCorp's purchaser under this Act.
- (3) The Treasurer may determine the terms and conditions on which a sublease or sub-sublease is to be granted under this section.
- (4) Duty under the *Duties Act 1997* is not chargeable in respect of a sublease or sub-lease granted under this section.
- (5) A term of a sublease or sub-sublease of property that is the subject of a special lease, being a term with respect to any of the following matters, has effect despite any law or rule to the contrary:
  - (a) conditions under which the sublease or sub-sublease may be terminated,
  - (b) application of security,
  - (c) rent repayment and the retention of rent by the State,
  - (d) continuance of the sublease or sub-sublease, including the obligation to pay rent, despite unforeseen circumstances,
  - (e) amounts payable in the event of a breach of the sublease or sub-sublease,
  - (f) the liability of the sublessor or sub-sublessor.
- (6) In this section, *related body corporate* has the same meaning as in the *Corporations Law*.

Clause 36                      Freight Rail Corporation (Sale) Bill 2001

Part 5                            Sale method 3—transfer of undertaking to company and sale of company to purchaser

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### **36    Dissolution or conversion of FreightCorp after sale**

- (1) On the repeal of section 19G (Establishment of FRC as statutory State owned corporation) of the *Transport Administration Act 1988* FreightCorp ceases to be a State owned corporation under the *State Owned Corporations Act 1989* and:
  - (a) is dissolved, unless paragraph (b) applies, or
  - (b) is converted to a corporation sole constituted by the Treasurer if the business undertaking of FreightCorp immediately before the repeal of section 19G includes any special lease.
- (2) On the dissolution or conversion of FreightCorp by this section, any assets, rights and liabilities of FreightCorp become assets, rights and liabilities of the Crown, except any special lease or any sublease or sub-sublease of the property to which a special lease applies.
- (3) The Treasurer may, by order in writing, transfer to the Ministerial Holding Corporation or any other public authority any assets, rights or liabilities that become assets, rights or liabilities of the Crown under this section. Schedule 1 (Transfer of assets, rights and liabilities) applies to such an order.
- (4) A person who, immediately before the dissolution or conversion of FreightCorp under this section, held office as a director of FreightCorp:
  - (a) ceases to hold office as such on the dissolution or conversion of FreightCorp, and
  - (b) is not entitled to any remuneration or compensation because of the loss of that office.
- (5) If FreightCorp is converted to a corporation sole:
  - (a) it has and may exercise such functions as may be necessary or convenient to enable it to exercise its rights and discharge its obligations under or in connection with a special lease or any sublease or sub-sublease of the property to which a special lease applies, and
  - (b) section 43A (General audit of former statutory bodies) of the *Public Finance and Audit Act 1983* applies as if FreightCorp had been abolished, and

- (c) the corporation sole is taken for all purposes (including the rules of private international law) to be a continuation of, and the same legal entity as, FreightCorp as it existed before its conversion to a corporation sole.

**37 Agreement for sale of company**

The Treasurer may enter into and carry out on behalf of the State an agreement for the sale of the business undertaking of the sale company to a purchaser by means of the sale of the shares in the sale company.

**38 Transfer of shares**

The Treasurer is authorised to transfer the shares in the sale company held by the State to the purchaser in accordance with the terms of the agreement entered into under this Part and to enter into and carry out agreements for the transfer of shares to the purchaser.

**39 Excluded undertaking**

For the purposes of this Part, the business undertaking of FreightCorp does not include an excluded undertaking.

**40 No government guarantees**

The obligations of the sale company are not guaranteed by the State.

**41 Exemptions from State taxes**

- (1) State tax is not payable in relation to any of the following matters or anything done because of, or for a purpose connected with or arising out of, any of the following matters:

- (a) the issue of shares in the sale company to the State, the disposal of those shares by the State and the purchase of those shares from the State, or
- (b) such other matters in connection with the operation of this Part as may be prescribed by the regulations.

- (2) In this section:

*State tax* means application or registration fees, duty under the *Duties Act 1997* or any other tax, duty, fee or charge imposed by any Act or law of the State, other than the *Corporations Law*.

## Part 6 Results of sale

### 42 Transfer of staff (sale method 1 or 3)

- (1) When the sale of FreightCorp is under Part 3 (Sale method 1—direct transfer of undertaking to purchaser), the employees of FreightCorp immediately before the sale date are transferred on the sale date to the employment of FreightCorp’s purchaser and FreightCorp’s purchaser is their *new employer* for the purposes of this section.
- (2) When the sale of FreightCorp is under Part 5 (Sale method 3—transfer of undertaking to company and sale of company to purchaser), the employees of FreightCorp immediately before the sale date are transferred to the employment of the sale company and the sale company is their *new employer* for the purposes of this section.
- (3) On the transfer of an employee’s employment under this section the following provisions apply:
  - (a) the employee ceases to be an employee of FreightCorp and becomes an employee of the new employer on the same terms and conditions of employment as applied to the employee immediately before the transfer of employment, and those terms and conditions are to continue to have effect until varied either by agreement or otherwise in accordance with law,
  - (b) the continuity of the employee’s contract of employment is taken not to have been broken by the transfer of employment, and service of the employee with FreightCorp (including service that is taken to be service with FreightCorp) is taken for all purposes to be service with the new employer,
  - (c) without limiting paragraph (b), the employee retains any rights to sick leave, annual leave or long service leave accrued or accruing immediately before the transfer (except accrued leave for which the employee has, on ceasing to be an employee of FreightCorp, been paid the money value in pursuance of any other entitlement of the employee),
  - (d) the employee is not entitled to receive any payment or other benefit (including in the nature of severance pay or redundancy compensation) merely because the employee ceased to be an employee of FreightCorp as a result of the transfer of employment.

- (4) Nothing in relevant industrial laws prevents payment of the monetary value of annual leave or long service leave if the payment is in lieu of an entitlement to that leave accrued by a person as an employee of FreightCorp before the transfer of the employee's employment under this section and the payment is made in connection with the sale of FreightCorp. The *Industrial Relations Act 1996*, the *Long Service Leave Act 1955* and the *Annual Holidays Act 1944* are **relevant industrial laws**.

- (5) In this section:

**sale date** means the date notified by the Treasurer by notice published in the Gazette as the sale date for the purposes of this section.

**Note.** When the sale of FreightCorp is under Part 4 (Sale method 2—conversion to company and sale of company to purchaser), no provision for the transfer of staff is required because the sale company to which FreightCorp is converted is the same legal entity as FreightCorp, and existing staff simply continue as staff of the same entity.

#### **43 Sale of sale company (sale method 2 or 3) does not affect rights of staff**

- (1) On the sale of the sale company under Part 4 or 5, each member of staff of the sale company continues to be a member of staff of the sale company (despite the change of ownership) on the same terms and conditions of employment as applied to the member of staff immediately before the sale. Those terms and conditions are to continue to have effect until varied either by agreement or otherwise in accordance with law.
- (2) Neither the contract of employment nor the period of employment of each member of the staff concerned is taken to have been broken by the sale of the sale company (or otherwise by the operation of this Act) for the purposes of any law, award or agreement relating to the employment of that member of staff.
- (3) Without limiting this section, this Part does not affect any accrued rights that the member of staff concerned had immediately before the sale in relation to any kind of leave.

#### **44 Superannuation arrangements for FreightCorp employees**

Schedule 2 has effect.



Clause 45            Freight Rail Corporation (Sale) Bill 2001

Part 6                Results of sale

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**45   Proceeds of sale**

- (1) The proceeds of the sale of FreightCorp are to be paid into the Consolidated Fund.
- (2) There may be deducted from any proceeds of sale before payment into the Consolidated Fund such amount as the Treasurer approves to meet the expenses reasonably incurred in connection with the operation of this Act.

## Part 7 Miscellaneous

### 46 Effect of Corporations Act 2001

- (1) After the commencement of the *Corporations Act 2001* of the Commonwealth, a reference in this Act to the *Corporations Law* is to be read as a reference to the *Corporations Act 2001* of the Commonwealth.
- (2) The sale FreightCorp is an *excluded matter* for the purposes of section 5F (Corporations legislation does not apply to matters declared by State or Territory law to be excluded matter) of the *Corporations Act 2001* of the Commonwealth.

### 47 Protection of contractual and other obligations

- (1) This section applies to the following:
  - (a) the operation of this Act (including any notice or order under this Act and anything done or omitted to be done under or for the purposes of this Act),
  - (b) the sale or proposed sale of FreightCorp as authorised by this Act,
  - (c) an agreement, guarantee or other arrangement or transaction, entered into or carried out under this Act or for purposes connected with this Act,
  - (d) a disclosure of information made for the purposes of the sale or proposed sale of FreightCorp as authorised by this Act.
- (2) None of the matters or things to which this section applies are to be regarded:
  - (a) as a breach of confidence, or
  - (b) as a breach of contract or other instrument or as requiring any act to be done under an instrument, or
  - (c) as giving rise to any right or remedy by a party to an instrument, or as causing or permitting the termination of an instrument, or
  - (d) as an event of default under an instrument, or
  - (e) as giving rise to a breach of or an offence against a provision of an Act that prohibits or restricts the disclosure of information.

**48 Compensation not payable**

- (1) Compensation is not payable by or on behalf of the State:
- (a) because of the enactment or operation of this Act, or for any consequence of that enactment or operation, or
  - (b) because of any statement or conduct relating to the enactment of this Act.

- (2) In this section:

*compensation* includes damages or any other form of monetary compensation.

*conduct* includes any act or omission, whether unconscionable, misleading, deceptive or otherwise.

*operation of this Act* includes the operation of any notice or order under this Act and any agreement entered into under or for the purposes of this Act.

*statement* includes a representation of any kind:

- (a) whether made verbally or in writing, and
- (b) whether negligent, false, misleading or otherwise.

*the State* means the Crown within the meaning of the *Crown Proceedings Act 1988*, and includes FreightCorp or an officer, employee or agent of the Crown or of FreightCorp.

**49 Act binds Crown**

This Act binds the Crown in right of New South Wales and, in so far as the legislative power of Parliament permits, the Crown in all its other capacities.

**50 Certificate evidence**

A certificate purporting to be signed by the Treasurer or a prescribed officer certifying that an order specified or referred to in the certificate is an order made by the Treasurer under a specified provision of this Act is admissible in evidence in any legal proceedings and is evidence of the matters certified.

**51 Proceedings for offences**

Proceedings for an offence under this Act may be dealt with summarily before a Local Court constituted by a Magistrate sitting alone.

**52 Regulations**

- (1) The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.
- (2) In particular, the regulations may contain provisions of a savings or transitional nature consequent on the enactment of this Act or anything done under or for the purposes of this Act. Any such provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later date.
- (3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as:
  - (a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or
  - (b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.

**53 Consequential amendment of Acts**

Each Act specified in Schedule 3 is amended as set out in that Schedule.

## **Schedule 1    Transfer of assets, rights and liabilities**

(Sections 9, 12, 15, 22, 34 and 36)

### **1    Definitions**

In this Schedule:

*transfer order* means an order to which this Schedule applies under section 9, 12, 15, 22, 34 or 36.

*transferee* means the body from whom any assets, rights or liabilities are transferred by a transfer order.

*transferor* means the body to whom any assets, rights or liabilities are transferred by a transfer order.

### **2    Determinations by Treasurer as to assets, rights and liabilities of FreightCorp**

For the purposes of the making of a transfer order, the Treasurer may determine whether or not particular assets, rights or liabilities comprise the business undertaking of FreightCorp at a particular time, and such a determination is conclusive as to the matters determined.

### **3    Vesting of assets, rights and liabilities in transferee**

- (1) When any assets, rights or liabilities are transferred by a transfer order, the following provisions have effect (subject to the transfer order):
  - (a) the assets vest in the transferee by virtue of this clause and without the need for any conveyance, transfer, assignment or assurance,
  - (b) the rights and liabilities become, by virtue of this clause, the rights and liabilities of the transferee,
  - (c) all proceedings relating to the assets, rights or liabilities pending by or against the transferor are taken to be proceedings pending by or against the transferee,
  - (d) any act, matter or thing done or omitted to be done in relation to the assets, rights or liabilities by, to or in respect of the transferor is (to the extent that the act, matter or thing has any force or effect) taken to have been done or omitted by, to or in respect of the transferee,

- (e) a reference in any Act, in any instrument made under any Act or in any document of any kind to the transferor or a predecessor of the transferor is (to the extent that it relates to those assets or liabilities but subject to the regulations), to be read as, or as including, a reference to the transferee.
- (2) No attornment to the transferee by a lessee from the transferor is required.

#### **4 Terms and conditions of vesting**

A transfer order may be made on such terms and conditions as are specified in the order.

#### **5 Consideration for vesting**

A transfer order may specify the consideration for which a transfer to which it applies is made and the value or values at which assets, rights or liabilities are transferred.

#### **6 Date of transfer**

A transfer order takes effect on the date it is made or on such other date as may be specified in the order.

#### **7 Transfer of interests in land**

- (1) A transfer order may transfer an interest in respect of land vested in the transferor without transferring the whole of the interests of the transferor in that land.
- (2) If the interest transferred is not a separate interest, the order operates to create the interest transferred in such terms as are specified in the order.
- (3) This clause does not limit any other provision of this Schedule.

#### **8 Confirmation of vesting**

- (1) The Treasurer may by order in writing confirm a transfer of particular assets, rights or liabilities by operation of this Schedule.
- (2) Such an order is evidence of that transfer.

**9 Certification to registration authorities**

(1) In this clause:

*registration authority* means a person or body that has functions under any law in connection with the keeping of a register in respect of assets, rights or liabilities.

(2) The transferee under a transfer order may lodge with a registration authority a certificate certifying as to such information as may reasonably be required by the registration authority to enable the registration authority to exercise any function of the authority arising in connection with the transfer of any asset, right or liability pursuant to the transfer order.

(3) Such a certificate is to be accepted and acted upon by the registration authority and, despite any other law, the registration authority is not entitled to require that the information concerned be provided to it in any particular form or in any particular manner.

(4) No fee or charge is payable by the transferee to a registration authority for or in respect of the exercise of any function by the registration authority in connection with the transfer of an asset, right or liability by a transfer order.

**10 Evidence of orders and certificates**

A document purporting to be a transfer order or an order or certificate given under a provision of this Schedule is, unless the contrary is established, taken to be such an order or certificate and to have been properly made or given.

**11 Exemption from duty**

Duty under the *Duties Act 1997* is not chargeable in respect of:

- (a) a transfer of assets, rights or liabilities by operation of this Schedule, or
- (b) anything certified by the Minister as having been done in consequence of such a transfer (for example, the transfer or registration of an interest in land).

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## Schedule 2 Superannuation arrangements for FreightCorp employees

(Section 44)

### 1 Persons to whom Schedule applies

This Schedule applies to a person who is or was, at any time before the staff transfer date, a member of or contributor to an FTC scheme or an STC scheme as an employee of FreightCorp.

### 2 Interpretation

(1) In this Schedule:

**AFMC** means the Axiom Funds Management Corporation established by the *Superannuation (Axiom Funds Management Corporation) Act 1996*.

**EIS Scheme** means the Electricity Industry Superannuation Scheme established under a trust deed entered into by the Treasurer and Energy Industries Superannuation Scheme Pty Ltd, as trustee.

**FTC scheme** means a superannuation fund or superannuation scheme established or constituted under any of the following Acts:

- (a) *First State Superannuation Act 1992*,
- (b) any other Act declared under section 5 of the *Superannuation Administration Act 1996* to be an Act for the purposes of this definition.

**LGS Scheme** means the Local Government Superannuation Scheme established under a trust deed entered into by the Treasurer and LGSS Pty Ltd, as trustee, pursuant to section 127 of the *Superannuation Administration Act 1996*.

**SAC** means the Corporation constituted under the *Superannuation Administration Authority Corporatisation Act 1999*.

**STC scheme** means a superannuation fund or superannuation scheme established or constituted under any of the following Acts:

- (a) *Police Regulation (Superannuation) Act 1906*,
- (b) *Superannuation Act 1916*,
- (c) *Local Government and Other Authorities (Superannuation) Act 1927*,



- (d) *Transport Employees Retirement Benefits Act 1967,*
  - (e) *New South Wales Retirement Benefits Act 1972,*
  - (f) *Public Authorities Superannuation Act 1985,*
  - (g) *State Public Service Superannuation Act 1985,*
  - (h) *State Authorities Superannuation Act 1987,*
  - (i) *State Authorities Non-contributory Superannuation Act 1987.*
- (2) Expressions used in this Schedule have the same meaning as in the *Superannuation Administration Act 1996.*

### **3 Superannuation entitlements of FreightCorp employees**

- (1) The Treasurer may approve of a person to whom this Schedule applies remaining a member of or contributor to an FTC Scheme or STC Scheme, or may by order in writing transfer the person from an FTC scheme or STC scheme to:
- (a) the LGS Scheme or the EIS Scheme, or
  - (b) another superannuation scheme (whether or not established under an Act) that is designated by the Treasurer for the purposes of this clause by order in writing, being a scheme that the Treasurer is satisfied provides benefits equivalent to those provided by the FTC Scheme or STC Scheme from which the person is transferred.
- (2) A superannuation scheme to which a person is transferred under this clause is referred to in this Schedule as *the new scheme* and the person is referred to in this Schedule as a *transferred person*.
- (3) The Treasurer is to take all necessary steps to ensure the effectual application of the new scheme to and in respect of transferred persons and generally to facilitate superannuation coverage of transferred persons by the new scheme that is equivalent to their superannuation coverage under the schemes from which they were transferred.
- (4) For that purpose, the Treasurer may enter into arrangements with the trustee of the new scheme, including arrangements for the amendment of any relevant trust deed.
- (5) The trustee of the new scheme is authorised and required to take all necessary steps to facilitate the transfer to the new scheme of transferred persons and to facilitate superannuation coverage of transferred persons by the new scheme that is equivalent to their superannuation coverage under the schemes from which they were

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transferred. The trust deed for the new scheme is to be amended accordingly as the Treasurer directs and for that purpose is taken to provide for its amendment in such manner as the Treasurer directs.

- (6) Section 127 of the *Superannuation Administration Act 1996* does not limit or otherwise affect the operation of this clause and in particular does not prevent the transfer of transferred persons to the LGS Scheme or the EIS Scheme or another scheme under this clause, or the superannuation coverage of transferred persons by the LGS Scheme or EIS Scheme or another scheme under this clause.

#### **4 Regulations**

- (1) Regulations may be made for or with respect to the transfer of a person to whom this Schedule applies from an FTC scheme or an STC scheme to the new scheme in accordance with a direction of the Treasurer under this Schedule.
- (2) In particular regulations may be made for or with respect to:
- (a) the transfer of assets and liabilities of an FTC scheme or an STC scheme, in respect of a transferred person, to the new scheme,
  - (b) the transfer of assets and liabilities within an FTC scheme or STC scheme, or between any such schemes, from any reserve in respect of the employer or former employer of a transferred person to the Crown's reserve,
  - (c) the payment of pensions and other benefits in respect of former members of, or former contributors to, an FTC scheme or an STC scheme under the new scheme,
  - (d) the funds and reserves to be established in respect of the new scheme,
  - (e) the preservation or deferral of benefits of transferred persons,
  - (f) the entitlements, rights and obligations of a member of, or contributor to, an FTC scheme or an STC scheme as a transferred person under the new scheme,
  - (g) providing for the resolution, by a prescribed authority or person, of all or any prescribed class of disputes concerning the entitlements, rights and obligations of a transferred person under the new scheme,
  - (h) the provision of services in relation to the new scheme by SAC or AFMC (or its successors), or both,

- (i) the deeming of employers to be no longer employers under an FTC scheme or an STC scheme where all the relevant employees are transferred from the FTC scheme or the STC scheme to the new scheme.
- (3) A regulation made under this Schedule has effect despite any provision of an Act under which an FTC scheme or an STC scheme is constituted.

#### **5 Mobility between new scheme and public sector schemes**

- (1) A transferred person has a right (a *transfer option*) to transfer from the new scheme to an STC scheme of which the person was previously a member or to which the person previously contributed if:
  - (a) (after the person's transfer to the new scheme) the person transfers employment from an employer who is responsible for the payment of benefits in respect of the new scheme to a prescribed public sector employer, and
  - (b) the person meets the eligibility requirements of regulations made under this clause.
- (2) Regulations may be made for or with respect to eligibility to exercise a transfer option, and for or with respect to:
  - (a) prescribing public sector employers for the purposes of this clause, and
  - (b) defining, for the purposes of this clause, the circumstances in which a transfer of employment is taken to have occurred, and
  - (c) prescribing or providing for the determination of the manner and form in which, and the time within which, a transfer option may be exercised, and
  - (d) prescribing or providing for the determination of the terms and conditions on which membership of the scheme to which a person transfers under a transfer option is available, and
  - (e) the transfer of assets and liabilities (relating to the person concerned) of the scheme from which a person is transferred under a transfer option to the scheme to which the person is so transferred, and

- (f) the rights and obligations of a person exercising a transfer option, and of any associated beneficiaries, in respect of the person's membership of or contributions to the scheme from which the person is transferred under the option, and in particular:
    - (i) the preservation or deferral of a benefit in that scheme, and
    - (ii) the calculation of any benefit so preserved or deferred, and
    - (iii) the payment of any such benefit to the scheme to which the person is transferred, and
  - (g) providing for the resolution, by a prescribed authority or person, of all or any prescribed class of disputes concerning the entitlements or obligations of a person exercising a transfer option or any associated beneficiary and arising under the scheme from which the person is transferred under the option.
- (3) Regulations under this clause that make provision for or with respect to preserving or deferring a benefit in the scheme from which a person exercising a transfer option is transferred may provide for the payment of such a benefit in spite of any minimum qualifying period of membership or of making contributions, or other limitation prescribed by that scheme, that would otherwise prevent or restrict the preservation or deferral of benefits in it.
  - (4) Regulations under this clause with respect to a transfer option may confer the option on an employee whose transfer of employment that gives rise to the transfer option took place before the regulation takes effect.
  - (5) This section has effect despite any provision of an Act under which an STC scheme is constituted or of the trust deeds constituting the new scheme.

## **Schedule 3 Consequential amendment of Acts**

(Section 53)

### **3.1 First State Superannuation Act 1992 No 100**

#### **Schedule 1 Employers**

Omit “Freight Rail Corporation” from Part 1 of Schedule 1.

### **3.2 Rail Safety Act 1993 No 50**

#### **Section 9 Act binds Crown**

Omit “Freight Rail Corporation,” from section 9 (2).

### **3.3 State Authorities Non-contributory Superannuation Act 1987 No 212**

#### **Schedule 1 Employers**

Omit “Freight Rail Corporation” from Part 1 of Schedule 1.

### **3.4 State Authorities Superannuation Act 1987 No 211**

#### **Schedule 1 Employers**

Omit “Freight Rail Corporation” from Part 1 of Schedule 1.

### **3.5 State Owned Corporations Act 1989 No 134**

#### **Schedule 5 Statutory SOCs**

Omit “Freight Rail Corporation”.

### **3.6 Superannuation Act 1916 No 28**

#### **[1] Schedule 3 List of employers**

Omit “Freight Rail Corporation” from Part 1 of Schedule 3.

#### **[2] Schedule 26, Part 1 Public Authorities**

Omit “Freight Rail Corporation”.

### **3.7 Transport Administration Act 1988 No 109**

#### **[1] Section 3 Definitions**

Omit the definition of *Freight Rail Corporation* in section 3 (1).

#### **[2] Section 3 (1), definition of “Rail Corporation”**

Omit “Freight Rail Corporation or”.

#### **[3] Section 8A National Rail Corporation (Agreement) Act 1991**

Omit “, Rail Infrastructure Corporation and Freight Rail Corporation”.  
Insert instead “and Rail Infrastructure Corporation”.

#### **[4] Section 19C Establishment of RIC as statutory State owned corporation**

Omit “(and FRC) as statutory State owned corporations” from the note to section 19C.

Insert instead “as a statutory State owned corporation”.

**[5] Division 3 of Part 2A**

Omit the Division.

**[6] Section 19O Board of directors of FRC**

Omit the section.

**[7] Section 19Q Shareholders of Rail Corporations**

Omit the section.

**[8] Section 19R Chief Executive Officer**

Omit section 19R (1) (b).

**[9] Schedule 7 Savings, transitional and other provisions**

Insert at the end of clause 2 (1):

*Freight Rail Corporation (Sale) Act 2001* (but only in relation to amendments to this Act)

**[10] Long title**

Omit “Freight Rail Corporation,”.