

Transport Administration Amendment (New South Wales and Commonwealth Rail Agreement) Bill 2004

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to amend the *Transport Administration Act 1988* (the **Principal Act**) to:

- (a) enable Rail Infrastructure Corporation (**RIC**) and the State Rail Authority (**SRA**) and other rail authorities to lease or licence to Australian Rail Track Corporation Ltd (**ARTC**) (a private corporation owned by the Commonwealth Government), for a period of up to 60 years, with the approval of the Minister for Transport Services, railway lines predominantly used to transport freight or country railway lines used to transport freight and for non-electrified railway passenger services, and
- (b) enable associated agreements to be entered into, with the approval of the Minister, for the construction by ARTC of additional freight lines and facilities and with respect to the secondment of staff to ARTC, and
- (c) enable the lease, licence and sale to ARTC of associated rail infrastructure facilities, and
- (d) confer on ARTC the rights and responsibilities of a rail infrastructure owner in respect of the leased or licensed railway lines, and
- (e) enable RIC, Rail Corporation New South Wales (**RailCorp**) and the SRA to enter into an agreement with ARTC, with the approval of the Minister, for or with respect to the management by ARTC of other railway lines predominantly used to transport freight or country railway lines used to transport freight and for non-electrified railway passenger services, and
- (f) make other consequential amendments and provision of a savings and transitional nature.

The proposed Act also makes consequential amendments to other Acts and a regulation.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 is a formal provision that gives effect to the amendments to the *Transport Administration Act 1988* set out in Schedule 1.

Clause 4 is a formal provision that gives effect to the amendments to the Acts and regulation set out in Schedule 2.

Schedule 1 Amendment of Transport Administration

Act 1988 No 109

ARTC arrangements

Schedule 1 [13] inserts proposed Part 8A (ARTC arrangements) into the Principal Act. The proposed Part contains the following provisions:

Proposed Division 1 (Preliminary)

Proposed section 88A defines terms used in the proposed Part, including **rail authority** which means RailCorp, RIC, the SRA, Transport Infrastructure Development Corporation or any other person or body prescribed by the regulations. A **freight line** means a railway line that is part of the NSW rail network and that is predominantly used for freight services or freight services and passenger services on non-electrified railway lines.

Proposed Division 2 (Arrangements between rail authorities and ARTC)

Proposed section 88B enables a rail authority, with the approval of the Minister, to lease to ARTC, or grant a licence to ARTC with respect to, land used for proposed freight lines, land providing access to them, such additional land as ARTC may request that is required in connection with rail operations and all or any related rail infrastructure facilities (an **ARTC lease or licence**). A rail authority may, with the approval of the Minister, also enter into an arrangement with ARTC for the purpose of ARTC constructing proposed freight lines and associated facilities or other rail infrastructure facilities and other arrangements with respect to ancillary or incidental matters. A lease or licence may provide for rights relating to intellectual property. The total maximum term of any lease or licence of land or facilities is to be 60 years.

Proposed section 88C enables a rail authority, with the approval of the Minister, to enter into an agreement or other arrangement with ARTC for or with respect to the management by ARTC of freight lines not subject to an ARTC lease or licence. The total maximum term of any such agreement or arrangement in relation to a freight line is to be 60 years.

Proposed section 88D enables a rail authority, with the approval of the Minister, to enter into an agreement or other arrangement with ARTC for the provision by a rail authority to ARTC of transition support services in connection with an ARTC arrangement.

Proposed section 88E makes it clear that a rail authority may sell movable plant, machinery, equipment, stores and consumables to ARTC.

Proposed section 88F provides that a lease, licence, agreement or other arrangement entered into under the proposed Part (an **ARTC arrangement**) has effect despite the requirements for consent under any other arrangement.

Proposed section 88G severs the title to rail infrastructure facilities subject to an ARTC lease or licence or situated on land subject to an ARTC lease or licence, or rail infrastructure facilities installed or established by ARTC for the purposes of an ARTC lease or licence, from that of the land on which they are situated so they may be dealt with as separate personal property. Station facilities owned by RailCorp, RIC or the SRA that are situated on land subject to an ARTC lease or licence are also taken to be severed from the land and may be so dealt with. The proposed section does not affect the title to land and rail infrastructure facilities or station facilities subject to an existing lease by the rail authority when an ARTC lease or licence is entered into.

Proposed section 88H confers on ARTC the functions of holding, managing, maintaining and establishing rail infrastructure facilities subject to an ARTC arrangement. It also enables ARTC to own and sell or otherwise dispose of such rail infrastructure facilities in accordance with any such arrangement.

Proposed section 88I enables the Minister, by order in writing, to transfer assets, rights and liabilities of a rail authority or a subsidiary of a rail authority to ARTC. Any such assets, rights and liabilities may be further transferred to a rail authority or other government bodies. Transfers of both kinds may be only in relation to assets, rights or liabilities concerning, or relating to, an ARTC arrangement or proposed arrangement and with ARTC's consent or in accordance with an ARTC arrangement. On termination of an ARTC arrangement, the Minister may order that ARTC rail infrastructure facilities, and related assets, rights or liabilities, be transferred to a rail authority, a State owned corporation, the Crown or any other person or body acting on behalf of the Crown. Certain limitations are placed on transfers of assets, rights or liabilities relating to rail infrastructure facilities used by ARTC for both the purposes of an ARTC arrangement and for other business purposes.

Proposed Division 3 (Rail services, access and infrastructure obligations)

Proposed section 88J imposes on ARTC a duty to maintain the linear continuity

of railway lines affected by, or subject to, an ARTC arrangement.

Proposed section 88K imposes on ARTC an obligation to provide persons with access under any current NSW rail access undertaking to the part of the NSW rail network for which it is a rail infrastructure owner. It also enables a rail authority to authorise ARTC to act as its agent or to provide it with other services in relation to the sale of access to parts of the NSW rail network and enables infrastructure disputes involving ARTC to be dealt with under the *Independent Pricing and Regulatory Tribunal Act 1992*.

Proposed section 88L provides that an ARTC arrangement may provide for the conferral on ARTC of responsibility for network control for those parts of the NSW rail network for which it is a rail infrastructure owner.

Proposed section 88M prohibits ARTC from selling or otherwise dealing with land or rail infrastructure facilities subject to an ARTC lease or licence, or rail infrastructure facilities it installs or establishes in or on land subject to an ARTC lease or licence, in a way that affects, or is likely to affect, the linear continuity of railway lines affected by, or subject to, an ARTC arrangement. It also prohibits the assignment or mortgaging by ARTC of all or any of its interests in an ARTC arrangement. It makes it clear that ARTC may grant other security interests over its rights in an ARTC arrangement, but with limitations. A transaction that contravenes the proposed section is, to the extent it contravenes it, void.

Proposed section 88N relieves a rail authority from any obligation to be accredited under the *Rail Safety Act 2002* for railway operations that ARTC carries out instead of the rail authority under an ARTC lease or licence and makes it clear that ARTC is the responsible operator under that Act.

Proposed section 88O provides that both ARTC and a rail authority are to hold a licence under the *Protection of the Environment Operations Act 1997* in relation to railway systems activities carried out by them on the same land.

Proposed section 88P confers on ARTC the functions of an owner under the *Heritage Act 1977* in relation to land or rail infrastructure facilities the subject of an ARTC lease or licence and requires ARTC to keep a heritage register in relation to any such land or facilities.

Proposed section 88Q enables ARTC to be treated as a public authority under the *Threatened Species Conservation Act 1995* in relation to land or rail infrastructure facilities the subject of an ARTC lease or licence for the purposes of recovery plans or threat abatement plans.

Proposed section 88R enables regulations to be made under the *Environmental Planning and Assessment Act 1979* in relation to activities related to rail infrastructure facilities, including the requirements to be met in relation to the environmental assessment of and consultation about any such activities, if ARTC is prescribed as a public authority for the purposes of Part 5 of that Act.

Proposed Division 4 (Prohibition on vertical integration)

Proposed section 88S prohibits ARTC, an associate of ARTC or any successor of ARTC or any associate of a successor of ARTC, from providing rail freight services or passenger services for reward or with respect to the NSW rail network, while any ARTC arrangement is in force. The Minister may, by order in writing, direct a person contravening the prohibition not to engage in that conduct. The Minister may approve of the provision of services that would otherwise contravene the proposed section.

Proposed section 88T enables the Supreme Court, on the application of the Minister, to grant an injunction to restrain a person from engaging in conduct that constitutes or would constitute a contravention of proposed section 88S. The Supreme Court may also grant an interim injunction in a matter.

Proposed Division 5 (Staffing arrangements)

Proposed section 88U enables a rail authority, with the approval of the Minister, to enter into an agreement with ARTC for or with respect to the use of members of staff of the rail authority for the purposes of an ARTC arrangement. Any such agreement may provide for the temporary placement of members of staff with ARTC and enable ARTC to exercise the rail authority's functions for or with respect to staff (other than dismissal).

Proposed section 88V provides for the temporary placement of members of staff of a rail authority with ARTC, either voluntarily or by direction of the chief executive of the rail authority in accordance with an agreement (**temporary members of staff of ARTC**). A temporary placement may be ended at any time by direction of the chief executive of the rail authority.

Proposed section 88W makes it clear that a temporary placement may be for a specified period or an indefinite period.

Proposed section 88X deems ARTC to be the employer of a temporary member of staff of ARTC for the purposes of employer obligations under the *Rail Safety Act 2002*.

Proposed section 88Y confers on ARTC the functions and liabilities of an employer in relation to a temporary member of staff of ARTC for the purposes of employer obligations under the *Occupational Health and Safety Act 2000*, and other employer liability legislation, and makes it clear that obligations under that legislation are not imposed on the rail authority that is the employer of the member of staff. The proposed section makes it clear that a rail authority, and its directors or persons concerned in its management, are not liable for offences under that legislation arising out of an act or omission of a temporary member of staff of ARTC in the course of or that are connected with that temporary placement.

Proposed section 88Z makes it clear that the Crown (other than a rail authority) is not vicariously liable for the acts or omissions of a temporary member of staff of ARTC by operation of the *Law Reform (Vicarious Liability) Act 1983*.

Proposed section 88ZA provides for the making of regulations for the purposes of workers compensation legislation to treat ARTC as an employer and to confer functions of employers under that legislation, in respect of temporary members of staff of ARTC, on ARTC or the transferring rail authority, or both. It also enables other requirements of that legislation to be modified, as well as the application of provisions under that legislation relating to certain common law damages to damages claims against ARTC or the transferring rail authority, or both.

Proposed section 88ZB makes it clear that temporary members of staff of ARTC remain members of staff of the rail authority and do not become employees of ARTC.

Proposed Division 6 (State taxes)

Proposed section 88ZC enables the regulations to provide that State tax is not payable in respect of any matter or thing, or classes of matters or things, prescribed by the regulations and done by a rail authority or ARTC in connection with an ARTC arrangement or proposed ARTC arrangement or for the purposes of proposed Part 8A or the proposed Act. Regulations may also be made to exclude liability for land tax or rates.

Proposed section 88ZD provides that rail authorities and ARTC are not, because of an agreement or arrangement entered into for the purposes of proposed Division 5, part of the same group for pay-roll tax purposes.

Proposed Division 7 (Effect of Part)

Proposed section 88ZE makes it clear that proposed Part 8A (except where it provides otherwise) does not limit or affect any other function that a rail authority has or prevent it from entering into any other transaction with ARTC

or any other person.

Proposed section 88ZF makes it clear that the operation of the proposed Part and the proposed Act or disclosures of information for such purposes, do not constitute a breach of confidence, or of a contract or other instrument and do not give rise to any right or remedy by a party to an instrument or a right to terminate an instrument or to an offence prohibiting or restricting the disclosure of information.

Proposed section 88ZG prevents compensation from being payable by the State because of the enactment or operation of the proposed Part or proposed Act or any statement or conduct relating to the proposed Part or proposed Act.

Schedule 1 [1] inserts definitions for the purposes of the proposed Part.

Schedule 1 [6] requires prior written consent to be given by ARTC to a notice moving land that is subject to an ARTC lease or licence to or from the metropolitan rail area. ARTC must not unreasonably withhold its consent.

Schedule 1 [2]–[4], [7]–[12], [19]–[21] and [103] make consequential amendments.

Conferral of functions on ARTC of rail infrastructure owner

Schedule 1 [5] makes ARTC a rail infrastructure owner for the purposes of the Principal Act in relation to rail infrastructure facilities that are subject to an ARTC lease or licence. The effect of this is that the provisions of the Act applying to rail infrastructure owners, for example, provisions relating to maintaining disused railway lines, closure of railway lines, level-crossings, bridges and the power to give rail access undertakings, will apply to ARTC.

Schedule 1 [14] makes it clear that entering an ARTC arrangement is not an event that triggers the provisions relating to closure of railway lines.

Schedule 1 [15] inserts proposed section 99AA which prohibits a rail infrastructure owner from severing, or failing to maintain, a connection between any part of the NSW rail network for which it is such an owner and any other part of the NSW rail network without the consent of the owner of the other part of the NSW rail network.

Schedule 1 [17] extends to ARTC the obligation to act in accordance with the current NSW rail access undertaking. **Schedule 1 [16]** makes a consequential amendment.

Schedule 1 [18] removes, in the case of ARTC, the requirement not to give, or vary or remove, a rail access undertaking without the approval of the Minister and the concurrence of the Premier.

Rights relating to railway buildings, land and rail infrastructure facilities

Schedule 6A of the Principal Act currently sets out the rights and obligations of rail authorities that own rail infrastructure facilities and other rail authorities that own the land on which rail infrastructure facilities are situated. As a result of the proposed Act, land, buildings and rail infrastructure facilities may be owned by any of different rail authorities and ARTC. The proposed Schedule amends Schedule 6A to set out the rights of each such separate owner to access to another owner's land, rail infrastructure facilities or buildings (as the case requires) for appropriate purposes, for example, maintenance, and also extends the existing rights in the Schedule to each owner as is required.

Schedule 1 [23] defines expressions used in Schedule 6A, including *building owner*, *infrastructure owner*, *railway land owner* and *owner*.

Schedule 1 [24] and [25] change references in Schedule 6A to “an operator building” and “operator land” to “a railway building” and “railway land”, respectively.

Schedule 1 [26] makes it clear that certain provisions of Schedule 6A will not apply to the extent that an ARTC arrangement expressly provides that all or any of those provisions do not apply.

Schedule 1 [27] and [28] omit unnecessary provisions.

Schedule 1 [29] provides for the transfer to RailCorp and RIC of rail infrastructure facilities moved from the country rail area to the metropolitan rail area or from the metropolitan rail area to the country rail area, respectively. Any such transfer is subject to any interests of the Transport Infrastructure Development Corporation.

Schedule 1 [30] makes any power of ARTC to sell or deal with rail infrastructure facilities it owns subject to proposed Part 8A.

Schedule 1 [31]–[94] and [96]–[102] apply the rights and obligations in Schedule 6A in the following manner:

(a) the power of another owner to enter railway land to inspect, operate, repair and do other things to rail infrastructure facilities is extended to the owners of railway buildings for those purposes and is also extended to enable infrastructure owners to enter buildings owned by others for the same purposes,

(b) provisions relating to entry on to railway land of another owner under a certificate of authority and setting out the functions that may be carried out in relation to rail infrastructure facilities are extended to the owners of railway buildings and are also extended to enable infrastructure owners to enter buildings owned by others in the same way to carry out the same functions,

(c) additional provisions are inserted to enable ARTC to enter adjacent railway land to construct, extend or expand rail infrastructure facilities on railway land, but only in accordance with an ARTC lease or licence,

(d) provisions relating to the issue of certificates of authority are extended to building owners,

(e) the requirements to give notice of entry, and the exemption in emergency situations, is extended to building owners,

(f) the scheme for compensation to a railway land owner for damage incurred as a result of functions being exercised under the Schedule is extended to permit compensation to a building owner and an owner of adjacent land and a building owner who enters land is to be subject to the same obligations as a rail infrastructure owner,

(g) the covenant that currently applies to railway land owners in respect of rail infrastructure facilities owned by others and installed on their land is extended to railway buildings on their land and owned by others, so that the obligations not to destroy or damage the facilities, to notify of proposed works or a proposed sale and not to place objects in or near them that might interfere with rail operations will apply to railway buildings.

The rights to require breaches to be remedied and to compensation are also extended in respect of railway buildings,

(h) an additional obligation to reinstate loss of support to rail infrastructure facilities or railway buildings is imposed on a railway land owner,

(i) the right of a rail infrastructure owner to obtain compensation from a railway land owner for loss or damage resulting from activities carried out without consent that result in destruction of, damage to or interference with rail infrastructure facilities is extended to activities affecting railway buildings,

(j) procedures relating to resolution of disputes with respect to Schedule 6A by the Minister are extended to building owners. In the case of disputes involving ARTC, the dispute may be referred to arbitration rather than to the Minister,

(k) regulations may be made with respect to obligations of all owners to enter into a memorandum of understanding concerning the management of

certain railway land,

(l) an owner of railway land, rail infrastructure facilities or a railway building may refuse entry to an officer of a public or local authority who is otherwise entitled to enter the land or building under another Act or law, if of the opinion that it is necessary to do so in the interests of public safety or the safety of another officer or other persons.

Schedule 1 [95] inserts proposed clauses 13A, 13B and 13C in Schedule 6A to the Principal Act. Proposed clause 13A enables rail infrastructure facilities to be acquired by RailCorp or RIC and applies the notice and compensation provisions applicable to the acquisition of land under the *Land Acquisition (Just Terms Compensation) Act 1991* to such acquisitions. Proposed clause 13B confers on the owner of station facilities the right to access them for the purposes of carrying out its railway operations. Proposed clause 13C sets out reciprocal limitations on compensation and obligations of roads authorities and rail authorities when accessing each other's land.

Schedule 1 [104] makes ARTC a rail authority for the purposes of Schedule 6B to the Principal Act, which sets out the rights of rail authorities in respect of the acquisition of land for underground rail facilities, compensation for damage to such facilities and rights of support and protection of such facilities.

Schedule 1 [105] confers on a rail authority that manages or controls an underground rail facility the same rights to require removal of a structure or object in contact with or near an underground rail facility and to obtain compensation for loss or damage caused by its placement.

Other amendments

Schedule 1 [22] corrects a wrong cross reference.

Schedule 1 [106] enables savings and transitional regulations to be made as a consequence of the enactment of the proposed Act.

Schedule 1 [107] inserts savings and transitions provisions consequent on the enactment of the proposed Act.

Schedule 1 [108] removes the requirement for Ministerial consent to a lease entered into by the SRA of more than 5 years, if it is an ARTC arrangement authorised under proposed Part 8A.

Schedule 1 [109] enables RIC, with the consent of the Minister, to act as an agent of the SRA without obtaining the consent of the SRA.

Schedule 2 Amendment of other Acts and regulation

Schedule 2.1 [1] amends the *Conveyancing Act 1919* to add leases or licences of land under an ARTC arrangement, and transfers, conveyances, subleases, variations or mortgages of those interests, to transactions that are not required to refer to an existing lot before they can be registered. In addition, the amendment has the effect that any such lease or licence is not included as a subdivision, and therefore as development, for the purposes of the *Environmental Planning and Assessment Act 1979*.

Schedule 2.1 [2] amends the *Conveyancing Act 1919* to enable easements in gross to be created by bodies that are not the Crown or authorities constituted by an Act for rail infrastructure purposes. This will include ARTC.

Schedule 2.2 amends the *Conveyancing (General) Regulation 2003* to enable ARTC to create an easement without a dominant tenement for rail infrastructure purposes.

Schedule 2.3 amends the *Essential Services Act 1988* to make it clear that the transportation of freight (including the provision of rail infrastructure for that purpose) is an essential service for the purposes of that Act. The effect of this is that the provisions of that Act may be invoked to prevent a cessation, interruption, reduction or insufficiency in that service.