

RAILWAYS ACT 2005

EXPLANATORY NOTES

COMMENTARY ON SECTIONS AND SCHEDULES

Part 2: Public Sector Funding Authorities for Railways

Assisting and securing the provision of services

Section 6: Financial assistance etc. from the Secretary of State

47. *Section 6* provides a power for the Secretary of State to give financial assistance for any railway purpose. The assistance may take the form of grants, loans, guarantees or investments, and may be subject to such terms and conditions as the Secretary of State thinks fit. For the purposes of section 6 the term railway is deemed to have its "wider meaning". This term is defined by section 81(2) of the 1993 Act and covers a railway, tramway or transport system which uses another mode of guided transport but which is not a trolley vehicle system. The terms "guided transport", "railway", "tramway" and "trolley vehicle system" are defined by section 67(1) of the Transport and Works Act 1992.
48. This section is similar to section 211 of the Transport Act 2000 (which is repealed by section 58 of and Schedule 13 to the Act) which enables the Strategic Rail Authority to provide financial assistance for railway purposes. It is intended that the Secretary of State's power will be used in particular:
- to provide financial support to train operators under franchise agreements; and
 - to provide financial support to Network Rail for the provision of rail infrastructure.

Where the support is in respect of services operated under a franchise agreement, it may only be given in accordance with the terms of that franchise agreement. The purpose of this provision is to ensure transparency, so that the provisions of a franchise agreement, which have to be published on a public register, under section 73 of the 1993 Act, cannot be amended by a private side agreement.

49. The section also replaces a power in section 17 of the Ministry of Transport Act 1919 which covers some of the same subject matter as this section and is superseded by it.

Section 7: Notification of assistance from Secretary of State for freight services, Section 9: Notification of assistance from the Scottish Ministers for freight services and Section 11: Notification of assistance from Welsh Assembly for freight services

50. Under the Transport Act 2000, the SRA has sole power (under section 211) to make or modify financial assistance schemes aimed at securing the provision, improvement or development of rail freight. The SRA must inform both the Scottish Ministers and National Assembly of Wales of these schemes (under section 249). The Scottish Ministers have the sole power to apply these schemes in Scotland and the National Assembly of Wales and SRA have joint powers to do so in Wales. These provisions of the Transport Act 2000 are repealed by this Act.

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51. Under *sections 8 and 10* of this Act, the Scottish Ministers and National Assembly of Wales will have new powers to make and modify schemes of this kind themselves. The sections to which this note relates seek to encourage the co-ordination of such schemes, given that rail freight activities may cross the borders between England, Wales and Scotland.
52. *Section 7* requires the Secretary of State to notify the Scottish Ministers and National Assembly of Wales of any new or modified schemes. Sections 9 and 11 impose reciprocal duties on the Scottish Ministers and NAW to notify the Secretary of State of their own new or modified schemes.
53. *Section 6(4)* requires the Secretary of State to have regard to the desirability of acting consistently with anything notified to him by either the Scottish Ministers under section 9 or the NAW under section 11. *Sections 8(6) and 10(9)* require the Scottish Ministers and National Assembly of Wales respectively to have the same regard to anything notified to them by the Secretary of State under section 7.

Section 8: Franchising and financial assistance in relation to Scotland

54. *Section 8(1)-(9)* provides a power, based on section 211 of the Transport Act 2000, for the Scottish Ministers to provide financial assistance in connection with "Scottish services". Similar provisions apply to the Secretary of State under section 6 and to the NAW under section 10. This power applies to both freight and passenger services.
55. *Section 8 (1)* enables the Scottish Ministers to provide financial assistance to any franchisee where the Ministers are party to a franchise agreement. They can provide financial assistance to buy services from the franchisee, including both Scotland-only services and cross border services. They can also provide financial assistance to the franchisee for any other purpose in relation to such services. This might include the provision of new passenger facilities, such as a station or the re-opening of a disused line, or improvements to existing facilities.
56. *Section 8(2)* enables the Scottish Ministers to provide financial assistance otherwise than under a franchise agreement for "Scottish purposes". It will enable them to provide funding to a wide range of parties, so as to develop the railway services within Scotland and cross-border services.
57. *Section 8 (3)* defines the meaning of "Scottish purposes" for the purposes of section 8 (2).
58. *Section 8 (4)* clarifies what may constitute the provision of financial assistance by the Scottish Ministers for the purposes of section 8.
59. *Section 8 (5)* gives the Scottish Ministers the discretion to enter into agreements and other arrangements to provide financial assistance to any party under Section (1) or (2) on whatever such terms and conditions they think appropriate.
60. *Section 8 (6)* relates to section 7 (notification of assistance from the Secretary of State for freight services). It obliges the Scottish Ministers to consider whether or not, in providing financial assistance in relation to freight services, the effect is consistent with any scheme relating to the provision of grants for freight facilities that the Secretary of State has notified to them. The section does not require the Ministers to act in accordance with the Secretary of State's scheme.
61. *Section 8(7)* clarifies the way in which the Scottish Ministers may enter into agreements or other arrangements under Section 8(2) to provide financial assistance in respect of franchised services. This clarification is needed because Section 8(2) gives the Scottish Ministers a wide power, which enables them to provide assistance outside the terms of a franchise agreement. The clarification is that where the Scottish Ministers enter into an agreement or arrangement with a "relevant person" they may only do so under the terms of a franchise agreement. This is intended to ensure transparency in relation to

franchise agreements, which are public documents, kept on the public register. Section 8(7) ensures that the Scottish Ministers only enter into agreements with franchisees etc. which relate to franchised services where those agreements are entered into in accordance with the franchise agreement.

62. *Section 8 (8)* defines the meaning of a "relevant person" for the purposes of section 8 (7) as a franchisee, franchise operator, or employee, agent or independent contractor of the franchisee or franchise operator.
63. *Section 8 (9)* defines the meaning of "Scottish service", "facilities" and "railway" for the purposes of section 8. For the purposes of section 8 the term "railway" is deemed to have its "wider meaning". This term is itself defined by section 81(2) of the 1993 Act and means a railway, tramway or transport system which uses another mode of guided transport but which is not a trolley vehicle system. The terms "guided transport", "railway", "tramway" and "trolley vehicle system" are defined by section 67(1) of the Transport and Works Act 1992.

Section 10: Franchising and financial assistance in relation to Wales

64. *Section 10(1)* provides that the Secretary of State must consult the NAW before issuing an invitation to tender for or, where he does not invite tenders, entering into a franchise agreement under which the services to be provided are or include "Welsh services". "Welsh services" is defined in section 56 and means railway passenger services which start in Wales, end in Wales or otherwise make at least one scheduled call in Wales. The franchise agreements in question would include, but would not be limited to, those which are the subject of section 10(2).
65. *Section 10(2)* provides for the Secretary of State and the NAW to be joint parties to a passenger rail franchise that provides services that are or include "Wales-only services". "Wales-only services" is defined in section 56 and means services that both start and end in Wales and do not make any other scheduled calls outside Wales, and have not been excluded from the definition by an order made by the Secretary of State. In practice this means the current Wales and Borders franchise which is operated by Arriva Trains Wales, since this is the only franchise which at present provides or includes Wales-only services. The Secretary of State will not be able to enter into a franchise agreement that falls within the scope of this section on his own with a franchisee; he may only do so if the NAW joins with him as a co-signatory to the agreement. In future the franchise agreements referred to in section 10(2) could include a different franchise to the current Wales and Borders franchise, or more than one franchise, if they provided Wales-only services. As mentioned in the notes to section 1, it is intended that the SRA interest in the franchise agreement with Arriva Trains Wales will be transferred to the Secretary of State and the NAW jointly.
66. *Section 10(3)-(12)* provides a power for the NAW to provide financial assistance connected with Welsh services. This power is based on section 211 of the Transport Act 2000. Similar provisions apply to the Secretary of State under section 6 and the Scottish Ministers under section 8.
67. *Section 10(3)* enables the NAW to provide financial assistance to any franchisee where the NAW is a party to the franchise agreement. The NAW can provide financial assistance to buy services from the franchisee which operate to, from or within Wales. It can also provide financial assistance to the franchisee for any other purpose in relation to such services. This might include the provision of new passenger facilities, such as a station or the re-opening of a disused line, or improvements to existing facilities. The NAW's power under this section is not limited to franchises it is a party to for the purposes of section 10(2). It will be possible for the Secretary of State to invite the NAW to be party to other franchise agreements that provide services that make scheduled calls in Wales. In addition, it will be possible for the Assembly to be a party to a franchise agreement with the Scottish Ministers if the Scottish Ministers and NAW agreed that

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the Assembly should provide financial assistance to secure a service between Wales and Scotland under a Scottish franchise.

68. *Section 10(4)* enables the NAW to provide financial assistance otherwise than under a franchise agreement for "Welsh purposes". It will enable the NAW to provide funding, so as to develop the railway serving Wales, to a wide range of parties, such as Network Rail, freight operators and other third parties. In addition, subject to section 10(10), it will enable NAW to provide financial assistance to franchisees where the NAW is not a party to the relevant franchise agreement.
69. *Section 10(5)* defines the meaning of "Welsh purposes" for the purposes of section 10(4).
70. *Section 10(6)* enables the NAW to make payments to the Secretary of State or the Scottish Ministers in relation to their respective roles as "operator of last resort". This role arises under amended section 30 of the 1993 Act when a franchise that either of them has let ends and is not replaced with another franchise agreement. Where the NAW secured services as a party to the franchise agreement in question it will be able to provide the necessary financial assistance for those services to continue to be provided.
71. *Section 10(7)* clarifies what may constitute the provision of financial assistance by the NAW for the purposes of section 10.
72. *Section 10(8)* gives the NAW the discretion to enter into agreements and other arrangements to provide financial assistance to any party under section 10(3) or (4) on whatever such terms and conditions it thinks appropriate.
73. *Section 10(9)* relates to section 7 (notification of assistance from the Secretary of State for freight services). It obliges the NAW to consider whether or not, in providing financial assistance in relation to freight services the effect is consistent with any scheme relating to the provision of grants for freight facilities that the Secretary of State has notified to it. The section does not require the NAW to act in accordance with the Secretary of State's scheme.
74. *Section 10(10)* clarifies the way in which the NAW may enter into agreements or other arrangements under Section 10(4) to provide financial assistance in respect of franchised services. This clarification is needed because Section 10(4) gives NAW a wide power, which enables it to provide assistance outside the terms of a franchise agreement. The clarification is that where the NAW enters into an agreement or arrangement with a franchisee, franchise operator, or employee, agent or independent contractor of the franchisee or franchise operator (a "relevant person") it may only do so under the terms of a franchise agreement. This is intended to ensure transparency in relation to franchise agreements, which are public documents, kept on the public register. Section 10(10) ensures that NAW only enters into agreements with franchisees etc. which relate to franchised services where those agreements are entered into in accordance with the franchise agreement.
75. *Section 10(12)* defines the meaning of "facilities" and "railway" for the purposes of section 10. For the purposes of section 10 the term "railway" is deemed to have its "wider meaning". This term is itself defined by section 81(2) of the 1993 Act and means a railway, tramway or transport system which uses another mode of guided transport but which is not a trolley vehicle system. The terms "guided transport", "railway", "tramway" and "trolley vehicle system" are defined by section 67(1) of the Transport and Works Act 1992.

Section 12: Transfer schemes at end of franchising agreements

76. *Section 12* provides for the making of a Transfer Scheme when a franchise agreement terminates (for whatever reason) to transfer the relevant franchise assets (as defined in section 12(8)). Under section 27 of the 1993 Act, the SRA has power to designate property, rights and liabilities as "franchise assets" under a franchise agreement.

These "franchise assets" are important to the operation of the franchised services, and accordingly section 27 provides that franchise assets may not be disposed of by the franchise operator without the consent of the SRA. Schedule 1 of this Act amends section 27 so that these functions will be exercised in future by the Scottish Ministers in relation to Scottish franchise agreements, and by the Secretary of State in relation to other franchise agreements.

77. *Section 12* is primarily intended for use where a franchise agreement is terminating, and a new franchisee is taking over from the existing franchisee. The Secretary of State or the Scottish Ministers, as appropriate, may make a Transfer Scheme for the transfer of the franchise assets from the old franchise company to the new franchise company. The old franchise company will be paid for the franchise assets in accordance with the terms of its franchise agreement.
78. However, there may be circumstances in which a franchise agreement terminates but is not replaced with a new franchisee. This may happen, for example, where the franchise agreement terminates and the services have to be provided under amended section 30 of the 1993 Act by the Secretary of State or the Scottish Ministers as "operator of last resort". In order to enable the Secretary of State or the Scottish Ministers (or a company owned by one or both of them) to discharge the duty to act as operator of last resort, it is necessary for the franchise assets to be transferred to them. Section 12(2) makes provision for this.
79. *Section 57(3) and (4)* explains the meaning of companies which are "wholly owned" and "jointly owned" for the purposes of this Act. Section 12(2) uses these terms.

Passenger Transport Executives

Section 13: Railway functions of Passenger Transport Executives

80. *Subsection (1)* provides that the Secretary of State must consult a Passenger Transport Executive in England before issuing an invitation to tender for or, where he does not invite tenders, entering into a franchise agreement which includes services where that Passenger Transport Executive have an interest.
81. *Subsection (2)* defines the services in which a Passenger Transport Executive has an interest. These are railway passenger services within a PTE's area or railway passenger services to or from a PTE area.
82. *Subsection (3)* enables a Passenger Transport Executive in England to enter into arrangements with the Secretary of State whereby the PTE can make payments to the Secretary of State that relate to railway passenger services, station services or bus substitution services provided within the PTE's area and/or the Secretary of State can use his powers in relation to those services within the PTE's area in a particular way. This would for example enable the parties to agree for the Secretary of State to secure additional railway passenger services under the franchise agreement which the PTE would fund. "Bus substitution service" is defined in Schedule 11 Paragraph 11(b) of the Act.
83. *Subsection (4)* enables Passenger Transport Executives in England to enter into agreements directly with Train Operating Companies who are rail franchisees and franchise operators in connection with railway passenger services and related station services within the PTE's area.
84. *Subsection (5)* specifies that Passenger Transport Executives in England need to obtain the approval of the Secretary of State before entering into agreements with franchisees or franchise operators (or anyone who proposes to be one). This requirement applies whether the PTE is relying on its powers under subsection (4) or any of its other powers (such as its general powers under section 10 of the Transport Act 1968 (c.73)).

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85. *Subsection (6)* enables the Secretary of State to give approval to agreements for the purposes of subsection (5) under either a general approval (approving a class of agreements such as agreements relating to a specified issue) or a specific approval (for a particular individual agreement). It also enables the Secretary of State to withdraw any approval which he may give in relation to an agreement at any stage up to the point that the agreement is entered into.
86. *Subsection (7)* confirms that the agreements that a Passenger Transport Executive in England may, with the approval of the Secretary of State, enter into include rail franchise agreements which comprise or which include services within their passenger transport area.
87. *Subsection (8)* specifies that the Secretary of State and a Passenger Transport Executive in England must provide information to each other which has been reasonably requested by the other for the purposes of undertaking their functions with respect to railways or railway services. Subsection 8(b) provides that this duty is limited to a duty to share information which the disclosing body may lawfully disclose (i.e., the information is not covered by a contractual or statutory prohibition on disclosure).

Section 14: Repeals and savings relating to Passenger Transport Executives

88. *Subsection (1)* specifies the sections of the Transport Act 1968 and the 1993 Act that are to be repealed in relation to PTEs.
89. *Subsection (2)* provides that Passenger Transport Executives which are party to franchise agreements at the time when this section is brought into force may continue to be a party to those franchise agreements.
90. *Subsection (3)* provides that subsection (2) and sections 13(4) and 13(7) of this Act must be disregarded if there are provisions within the relevant franchise agreement that enable any person to amend that agreement in such a way as to cause a Passenger Transport Executive to cease to be a party to that agreement. It also provides that a Passenger Transport Executive must comply with all directions that the Secretary of State gives to them pursuant to which they will cease to be a party to a franchise agreement.
91. *Subsection (4)* contains a transitional provision that notwithstanding the repeals in this Act and the provisions of section 14, section 34(17) of the 1993 Act (c.43) shall continue to have effect in relation to any franchise agreement to which a PTE is party before the commencement of this section. In addition any other provision that affects the meaning of section 34(17) will continue in force for the purposes of this section. Section 34(17) is a dispute resolution provision for franchise agreements to which the SRA and PTEs are party, and provides that disputes may be referred by either body to the Secretary of State, who may give such directions to the SRA and the PTE with respect to the franchise agreement as he may think fit.
92. *Subsection (5)* provides that, if the provisions of subsection (4) are used, any references to the Strategic Rail Authority are to have effect as references to the Secretary of State where the interest in the franchise agreement has been transferred to the Secretary of State.

London

Section 15: Duty of Secretary of State and Transport for London to co-operate

93. *Section 15* replaces various references in section 175 of the Greater London Authority Act 1999 (the GLA Act) to the SRA with references to the Secretary of State. The revised section 175 provides a duty on the Secretary of State and Transport for London (TfL) to co-operate. In addition it amends section 175 so that the Secretary of State must consult TfL before issuing an invitation to tender (or when entering a franchise

agreement for which an ITT has not been issued) for railway passenger services to, from or within London. TfL and the Secretary of State also have a reciprocal duty to share with the other information relating to certain transport functions. Section 175 as amended also allows TfL to enter into arrangements with the Secretary of State in relation to railway services to, from or within London and for payments to be made by TfL to the Secretary of State in respect of them.

Section 16: Relaxation of contractual restrictions on Transport for London

94. *Section 16* repeals section 201 of the GLA Act, which places restrictions on the type of agreements that TfL can enter into which involve the provision of railway services by licensed operators on the national network. This section provides instead for a prohibition on TfL entering into agreements with rail franchisees without the consent of the Secretary of State. Certain agreements (those in respect of the grant of a use of a railway facility) are excluded from this prohibition.

Section 17: Membership of Transport for London

95. *Section 17* amends the GLA Act to change the membership of the TfL board. It increases the maximum membership of TfL from fifteen to seventeen (or, where the Mayor is a member, from fourteen to sixteen). It also requires the Mayor to ensure that two additional TfL board members represent the interests of people living, working and studying in areas outside Greater London that are served by railway passenger services in respect of which TfL exercises functions, and to consult the relevant regional planning bodies before making relevant these board appointments.

Provision of service by provider of last resort

Section 18: Qualification of duty in respect of services funded by others

96. *Section 18* limits the circumstances in which, if a franchise ends and is not replaced with another franchise, the relevant franchising authority is required to continue to provide the services as the "operator of last resort". The "operator of last resort" function is in section 30 of the 1993 Act (which is amended by this Act). The limitation is that the operator of last resort need not provide services that were funded under the franchise agreement in question by the NAW, a PTE or TfL if it believes that that party will not supply it with the necessary funds. The section gives the operator of last resort the discretion to decide not to provide the services if he believes the funding will not be forthcoming - i.e. before he falls short of the necessary funding. The relevant franchising authority, and therefore operator of last resort, for the purposes of this section is the Secretary of State for franchises in England and Wales, or the Scottish Ministers for Scottish franchises.