

**NOT For LOAN**

Libraries & Information  
Department of Justice

## **COMMITTEE STAGE NOTES**

### **GOVERNMENT RAILWAYS (ACCESS) AMENDMENT BILL 2000**

**HON MINISTER FOR TRANSPORT**

## **CLAUSE 1**

### **Short title**

This Act may be cited as the *Government Railways (Access) Amendment Act 2000*.

---

### **EXPLANATION**

This clause formally titles the Act.

## CLAUSE 2

### Commencement

(1) This Act comes into operation on the day on which the amendments to the *Government Railways (Access) Act 1998* that are made by the *Rail Freight System Act 2000* come into operation.

(2) Sections 6 and 8 come into operation immediately after the commencement of the provisions of the *Rail Freight System Act 2000* that amend sections 15 and 20 of the *Government Railways (Access) Act 1998*.

---

### EXPLANATION

This clause provides for the amendments to be made at the same time other amendments to the *Government Railways (Access) Act 1998* are made by the *Rail Freight System Act 2000*.

Exceptions are sections 6 and 8 which must come after as they are amendments on top of the amendments being proposed by the *Rail Freight System Act 2000*.

### **CLAUSE 3**

#### **The Act amended**

The amendments in this Part are to the *Government Railways (Access) Act 1998*.

---

#### **EXPLANATION**

This clause formally identifies the Act to be amended.

## CLAUSE 4

### Long title amended

The long title is amended by deleting “designating an official” and inserting instead —  
“ **establishing an office** ”.

---

### EXPLANATION

This clause amends the long title of the *Government Railways (Access) Act 1998* to reflect that an office will be established to monitor, enforce and administer the Access Code’s implementation.

## CLAUSE 5

### Section 3 amended

Section 3 is amended by deleting the definition of “Regulator” and inserting instead the following definition —

“**Regulator**” means the Regulator appointed under section 13 and, except in sections 13(2), 15 and 19, includes a person acting under section 19B.

---

### EXPLANATION

This clause inserts a new definition of the Regulator into the *Government Railways (Access) Act 1998*, which takes into account the new provisions in relation to the Regulator that are inserted by amendments set out further below.

## CLAUSE 6

### Part 3 Division 1 replaced

Part 3 Division 1 is repealed and the following Division is inserted instead —

“

#### **Division 1 — Office of Western Australian Independent Rail Access Regulator**

##### **13. Western Australian Independent Rail Access Regulator**

- (1) An office of the Western Australian Independent Rail Access Regulator is established.
- (2) The Regulator is to be appointed by the Governor.
- (3) The office of Regulator is not an office in the Public Service and is not to be included in the Senior Executive Service provided for by the *Public Sector Management Act 1994*.
- (4) The Regulator is to be the chief employee under the *Public Sector Management Act 1994* of the entity that includes the Regulator while it is a public sector body under that Act.

##### **14. Appointment of Regulator**

- (1) When there is a vacancy or impending vacancy in the office of Regulator, the Minister is required to —
  - (a) inform the Commissioner of that vacancy or impending vacancy; and
  - (b) request the Commissioner to act under this section to enable the filling of that vacancy or impending vacancy.
- (2) On receiving the request, the Commissioner is to invite the Minister to inform the Commissioner of any matters that the Minister wishes the Commissioner to take into account in nominating a person or persons suitable for appointment to the office of Regulator.
- (3) The Commissioner is to notify the vacancy or impending vacancy in such manner as the Commissioner thinks sufficient to enable suitably qualified persons to apply for appointment.
- (4) The Commissioner is to cause applicants to be examined, but

nothing in this section requires the examination of all applicants.

- (5) To assist in the examination of applicants, the Commissioner is to form a selection panel that is to be chaired by the Director General of Transport and is to include at least 2 other persons chosen by the Commissioner.
- (6) The Commissioner may seek advice from such sources as the Commissioner considers relevant and may invite such other persons as the Commissioner thinks fit to assist him or her to decide on the person or persons suitable for appointment to the office of Regulator, and any person so invited may sit on the selection panel when it is examining applicants and may take part in the deliberations of the Commissioner on the matter.
- (7) If the Commissioner decides on a person or persons suitable for appointment to the office of Regulator, the Commissioner is to nominate that person or those persons and forward to the Minister the name or names of the person or persons nominated, together with full particulars of the qualifications of that person or those persons.
- (8) If the Minister accepts the person, or one of the persons, nominated by the Commissioner, the Minister is to recommend to the Governor that the person accepted be appointed.
- (9) If the Minister rejects the person, or both or all of the persons, nominated by the Commissioner, the Minister may request the nomination of another person by the Commissioner and is to deal with any further nomination as if it were made under subsection (7).
- (10) If the Commissioner does not nominate any person suitable for appointment or a nomination or further nomination by the Commissioner is rejected, the Minister —
  - (a) may recommend to the Governor that —
    - (i) in the absence of a nomination by the Commissioner, a named person; or
    - (ii) a named person other than a person nominated by the Commissioner,  
as the case requires, be appointed to the office of Regulator; and
  - (b) is to cause notice of the making of that recommendation,



together with the reasons for recommending the named person, to be published in the *Gazette* as soon as practicable.

(11) In this section —

“**Commissioner**” means the Commissioner for Public Sector Standards under the *Public Sector Management Act 1994*;

“**Director General of Transport**” means the Director General of Transport under the *Transport Co-ordination Act 1966*.

#### 15. Term of office

The Regulator is to be appointed for a term of office of not less than 3 years and not more than 5 years and is, on the expiration of a term of office, eligible for reappointment.

#### 16. Resignation

- (1) The Regulator may resign from office by a signed notice of resignation addressed to the Minister.
- (2) A resignation takes effect on the day on which notice is received by the Minister or on a later day specified in the notice.

#### 17. Suspension of Regulator

- (1) If the Governor is satisfied that the Regulator —
  - (a) is physically or mentally incapable of performing the functions of office;
  - (b) has shown incompetence or neglect in performing those functions; or
  - (c) has been guilty of misbehaviour,  
the Governor may suspend the Regulator from office.
- (2) In subsection (1)(c) —

“**misbehaviour**” includes conduct that renders the Regulator unfit to hold office as Regulator whether or not the conduct relates to any function of the office.

#### 18. Removal of Regulator

- (1) After being suspended from office under section 17 the Regulator is entitled to be restored to office unless —

- (a) a statement of the grounds of suspension is laid before each House of Parliament during the first 7 sitting days of that House following the suspension; and
  - (b) each House of Parliament, during the session in which the statement is so laid, and within 30 days of it being so laid, passes an address praying for the removal of the Regulator from office.
- (2) If the Regulator —
- (a) is suspended from office under section 17; and
  - (b) is not restored to office under subsection (1), the office of Regulator becomes vacant.

## **19. Remuneration and conditions of office**

- (1) The remuneration and allowances and, subject to this Part, the other conditions of office of the Regulator are to be determined by the Governor.
- (2) Subsection (1) has effect subject to the *Salaries and Allowances Act 1975* if that Act applies to the Regulator.
- (3) The remuneration and allowances and conditions of office of the Regulator must not be varied while the Regulator is in office so as to become less favourable to the Regulator.

### **19A. Oath of office**

- (1) Before beginning to perform the functions of office, the Regulator is to take an oath or make an affirmation that he or she will perform those functions faithfully and impartially.
- (2) The oath or affirmation is to be administered by a Judge.

### **19B. Acting Regulator**

- (1) The Governor may appoint a person to act in the office of Regulator under this section and a person so appointed has, while so acting, all the functions of the Regulator.
- (2) A person appointed under subsection (1) may act in the office of the Regulator —
  - (a) if the Regulator is temporarily unable to perform official duties;

- (b) if the Regulator is suspended from office under section 17;
  - (c) if the office of the Regulator is temporarily vacant; or
  - (d) in relation to a particular matter, if the Regulator is disqualified from acting in relation to that matter.
- (3) Subject to this Part, the terms and conditions of appointment of the person appointed under subsection (1) are to be as determined from time to time by the Governor.
- (4) A person acting under subsection (1) for the reason mentioned in subsection (2)(d) may perform functions of the Regulator in relation to the matter for which he or she is appointed even though the Regulator is at the same time performing other functions of the office.
- (5) An act or omission of a person acting under subsection (1) is not to be questioned on the ground that the occasion for his or her acting had not arisen or had ceased.

”  
”

---

## EXPLANATION

This clause inserts a new Part 3 Division 1 into the *Government Railways (Access) Act 1998*, to provide for the establishment of the office of the Western Australian Independent Rail Access Regulator. These provisions are based on the model used for the office of the Western Australian Independent Gas Pipelines Access Regulator established under the *Gas Pipelines Access (Western Australia) Act 1998*.

The Regulator's independence is established by the new section 13. The Regulator is to be appointed by the Governor and the office of Regulator is not an office in the Public Service. These provisions replace the former arrangement whereby the Rail Access Regulator was the Director General of Transport.

The Regulator may only be removed if he/she is first suspended by the Governor on the grounds set out in the proposed new section 17(1) followed by the passing of an address praying for the removal of the Regulator from office by both Houses of State Parliament.

## CLAUSE 7

### Heading to Part 3 Division 2 replaced

The heading to Part 3 Division 2 is deleted and the following heading is inserted instead —

“ **Division 2 — Functions** ”.

---

### EXPLANATION

This clause replaces the heading to Part 3 Division 2 of the *Government Railways (Access) Act 1998*.

## CLAUSE 8

### Section 20 replaced by sections 20, 20A, 20B, and 20C

Section 20 is repealed and the following sections are inserted instead —

“

#### 20. Functions of Regulator

- (1) The Regulator —
  - (a) is responsible for monitoring and enforcing compliance by railway owners with this Act and the Code; and
  - (b) also has the functions given by particular provisions of this Act and the Code.
- (2) The Regulator may exercise the powers given by this Part for the purpose of performing his or her functions under this Act and the Code, and may do all things that are necessary or convenient to be done for or in connection with the performance of those functions.
- (3) Without limiting subsection (2), the powers given by this Division extend to financial information relating to a railway owner's own use of railway infrastructure to which the Code applies.
- (4) In performing functions under this Act or the Code, the Regulator is to take into account —
  - (a) the railway owner's legitimate business interests and investment in railway infrastructure;
  - (b) the railway owner's costs of providing access, including any costs of extending or expanding the railway infrastructure, but not including costs associated with losses arising from increased competition in upstream or downstream markets;
  - (c) the economic value to the railway owner of any additional investment that a person seeking access or the railway owner has agreed to undertake;
  - (d) the interests of all persons holding contracts for the use of the railway infrastructure;
  - (e) firm and binding contractual obligations of the railway owner and any other person already using the railway infrastructure;

- (f) the operational and technical requirements necessary for the safe and reliable use of the railway infrastructure;
- (g) the economically efficient use of the railway infrastructure; and
- (h) the benefit to the public from having competitive markets.

#### **20A. Independence of Regulator**

- (1) Except as provided in subsection (2), the Regulator, is independent of direction or control by the Crown or any Minister or officer of the Crown in the performance of the Regulator's functions.
- (2) The Minister may give directions in writing to the Regulator to the extent allowed by subsection (3), and the Regulator is to give effect to any such direction.
- (3) Directions under subsection (2) may relate only to general policies to be followed by the Regulator in matters of administration, including financial administration.
- (4) Nothing in this section affects the operation of section 8(2) of the *Public Sector Management Act 1994*.
- (5) Within 14 days after a direction is given under subsection (2), the Regulator is to cause the text of the direction to be published in the *Gazette*.
- (6) The text of a direction given under subsection (2) is to be tabled in both Houses of Parliament not later than 14 sitting days of the day on which the direction was given and included in the annual report submitted by the Regulator under section 66 of the *Financial Administration and Audit Act 1985*.

#### **20B. Delegation**

The Regulator may by instrument delegate the performance of any function, not including the power given by this section, to a person who is, in the Regulator's opinion, competent to perform that function.

#### **20C. Conflict of interest**

- (1) The Regulator must inform the Minister in writing of—
  - (a) any direct or indirect interest that the Regulator has or acquires in any business, or in any body corporate

carrying on business, in Australia or elsewhere; or

- (b) any other direct or indirect interest that the Regulator has or acquires that conflicts or may conflict with the Regulator's duties.

Penalty: \$10 000.

- (2) The Minister may —
  - (a) direct the Regulator to resolve a conflict between a direct or indirect interest and a duty of the Regulator in relation to a particular matter; and
  - (b) if the conflict is not resolved to the Minister's satisfaction, disqualify the Regulator from acting in relation to the matter.

---

## EXPLANATION

This clause inserts a new Part 3 Division 2 into the *Government Railways (Access) Act 1998*, setting out the Regulator's functions. Other than section 20(4), these functions do not differ from the functions given to the Regulator in Part 3, Divisions 1 and 2 of the existing *Government Railways (Access) Act*.

Section 20(4) sets out matters that the Regulator is to take into account in performing its functions under the Access Act or the Access Code. These are the matters required to be taken into account in Clause 6(4)(i) of the Competition Principles Agreement, and facilitate consistency in the interpretation of the access regime by reflecting the matters required to be taken into account by the Arbitrator.

New Section 20A further provides for the independence of the Regulator. Section 20A(1) expressly states that the Regulator is independent of directional control by the Crown or any Minister or Officer of the Crown in performing its functions. The Minister may only give the Regulator directions relating to general policies to be followed by the Regulator in matters of administration, including financial administration.

The Regulator's independence is further strengthened by the requirement in section 20C of the Regulator to inform the Minister of any direct or indirect interest he/she has or acquires in any business or body corporate carrying on business, in Australia or elsewhere or any other direct or indirect interest that the Regulator has or acquires that conflicts or may conflict with the Regulator's duties. The Regulator is liable to a \$10,000 penalty for breach of this requirement. In addition, the Regulator may be directed by the Minister to resolve a conflict or, if a conflict is not resolved to the Minister's satisfaction, the Minister is empowered to disqualify the Regulator from acting in relation to the matter.

## CLAUSE 9

### Part 3 Divisions 3 to 5 inserted

After Part 3 Division 2 the following Divisions are inserted —

“

#### Division 3 — Staff and consultants

##### 23A. Staff

Public service officers are to be appointed or made available under Part 3 of the *Public Sector Management Act 1994* to enable the Regulator to perform his or her functions.

##### 23B. Consultants

The Regulator may engage persons under contracts for services to provide such professional, technical or other assistance as the Regulator considers necessary for the performance of his or her functions.

##### 23C. Use of government staff and facilities

- (1) The Regulator may, by arrangement with the relevant employer, make use, either full-time or part-time, of the services of any officer or employee —
  - (a) in the Public Service;
  - (b) in a State agency or instrumentality; or
  - (c) otherwise in the service of the Crown in right of the State, other than an officer or employee of a party to an access agreement.
- (2) The Regulator may, by arrangement with the department, agency or instrumentality, make use of any facilities of —
  - (a) a department of the Public Service; or
  - (b) a State agency or instrumentality, that is not a party to an access agreement.
- (3) An arrangement under subsection (1) is to provide, without limiting its other provisions, that while the Regulator is making use of the services of an officer or employee —
  - (a) the Regulator has authority to control and supervise the



officer to the exclusion of any person who would normally have any such authority; and

- (b) the salary and allowances of the officer are to be paid out of moneys available to the Regulator for that purpose.
- (4) Subject to subsection (3), an arrangement under subsection (1) or (2) is to be made on such terms as are agreed to by the parties to the arrangement.

#### **Division 4 — Financial provisions**

##### **23D. Bank account**

- (1) The Regulator is to have an account at a bank approved by the Treasurer.
- (2) The account is to be called the “Western Australian Independent Rail Access Regulator Account”.
- (3) The account is to be —
  - (a) credited with all funds received by, made available to, or payable to the Regulator, including moneys appropriated by Parliament; and
  - (b) charged with all expenditure incurred under this Part to enable the functions of the Regulator to be performed, including the remuneration and allowances referred to in section 19.

##### **23E. Borrowing from Treasurer**

The Regulator may borrow from the Treasurer such amounts as the Treasurer approves and on such terms and conditions relating to repayment and payment of interest as the Treasurer imposes.

##### **23F. Application of *Financial Administration and Audit Act 1985***

- (1) The provisions of the *Financial Administration and Audit Act 1985* regulating the financial administration, audit and reporting of statutory authorities apply to and in respect of the Regulator and the Regulator's operations.
- (2) Despite subsection (1), any requirement under the Treasurer's Instructions (issued under section 58 of the *Financial Administration and Audit Act 1985*) that the Regulator prepare performance indicators is to be limited to the Regulator's

management functions (including financial management).

- (3) Despite subsection (1), section 42 of the *Financial Administration and Audit Act 1985* does not apply in respect of the Regulator, but the expenditure that may be incurred under this Part in any one financial year is limited to the amount specified by the Minister under this subsection for that year.

### Division 5 — General

#### 23G. Immunity

- (1) No personal liability attaches to —
  - (a) the Regulator;
  - (b) a person acting under section 19B;
  - (c) a delegate of the Regulator; or
  - (d) a person acting under the direction or authority of the Regulator, for an act or omission in good faith in the performance, or purported performance, of official functions.
- (2) A liability that would, but for subsection (1), lie against a person, lies instead against the Crown.

---

#### EXPLANATION

This clause inserts a new Part 3 Division 3 (staff and consultants of the Regulator) into the *Government Railways (Access) Act 1998*. The new sections provide for the use of staff, consultants, and government staff and facilities by the Regulator, as well as other administrative and financial matters: the Regulator's bank account; borrowings from the Treasurer and the application of the *Financial Administration and Audit Act 1985*.

The new Part 3 Division 5 confers personal immunity from liability upon the Regulator, an Acting Regulator, the Regulator's delegates and persons acting under the direction or authority of the Regulator. Instead, any such liability lies against the Crown.

These amendments are required now that the Regulator is an independent office rather than the Director General of Transport.

## CLAUSE 10

### *Constitution Acts Amendment Act 1899* amended

Schedule V to the *Constitution Acts Amendment Act 1899*\* is amended in Part 1 Division 2 by inserting after the item relating to the Western Australian Independent Gas Pipelines Access Regulator the following item —

“

Western Australian Independent Rail Access Regulator appointed under section 13 of the *Railways (Access) Act 1998*. †

”

[\* *Reprinted as at 22 January 1997.*  
*For subsequent amendments see 1998 Index to Legislation of Western Australia, Table 1, p. 53 and Act No. 26 of 1999.*]

”

---

## EXPLANATION

This clause amends the *Constitution Acts Amendment Act 1899* so as to preclude a person from holding the office of the Western Australia Independent Rail Access Regulator and being a member of State or Federal Parliament.

## CLAUSE 11

### *Financial Administration and Audit Act 1985* amended

Schedule 1 to the *Financial Administration and Audit Act 1985*\* is amended by inserting in the appropriate alphabetical position the following —

“ Western Australian Independent Rail Access Regulator. ”.

[\* *Reprinted as at 10 January 1997.*  
*For subsequent amendments see 1998 Index to Legislation of Western Australia, Table 1, p. 91, and Act No. 26 of 1999.*]

†

”.

---

## EXPLANATION

This clause amends the *Financial Administration and Audit Act 1985* so that the Western Australian Independent Rail Access Regulator will constitute a “statutory authority” for the purposes of the FAAA.

## CLAUSE 12

### *Parliamentary Commissioner Act 1971* amended

Schedule 1 to the *Parliamentary Commissioner Act 1971*\* is amended by inserting in the appropriate alphabetical position the following —

“

The Western Australian Independent Rail Access Regulator  
appointed under section 13 of the *Railways (Access) Act 1998*.

”

[\* Reprinted as at 20 January 1997. †  
For subsequent amendments see 1998 Index to Legislation of Western  
Australia, Table 1, p. 182.]

”

---

## EXPLANATION

This clause amends the *Parliamentary Commissioner Act 1971* such that it does not apply to the Regulator.