

Legislative Council—No 135

As received from House of Assembly and read a first time, 13 October 2009

South Australia

Rail Commissioner Bill 2009

A BILL FOR

An Act to establish the Rail Commissioner; to make related amendments to the *Railways (Operations and Access) Act 1997* and the *TransAdelaide (Corporate Structure) Act 1998*; and for other purposes.

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The Parliament of South Australia enacts as follows:

Part 1—Preliminary

1—Short title

This Act may be cited as the *Rail Commissioner Act 2009*.

2—Commencement

- 5 This Act will come into operation on a day to be fixed by proclamation.

3—Interpretation

- (1) In this Act, unless the contrary intention appears—

Commissioner means the Rail Commissioner established under this Act;

council means a council constituted under the *Local Government Act 1999*;

- 10 *passenger transport service* means a service consisting of the carriage of passengers for a fare or other consideration (including under a hire or charter arrangement or for consideration provided by a third party);

- 15 *road* means any street, road, thoroughfare, terrace, court, lane, alley, cul-de-sac, or place commonly used by the public, or to which the public are permitted to have access, and includes a part of a road;

road maintenance authority means an authority responsible for the care, control and maintenance of a road;

roadwork means—

- 20 (a) the construction of a road; or
(b) the maintenance or repair of a road; or
(c) the alteration of a road; or
(d) the construction of drains and other structures for the drainage of water from a road; or
(e) the installation of fences, railings, barriers or gates; or
25 (f) the installation, maintenance or alteration of traffic islands or parking bays; or
(g) the improvement of a road, including (for example)—
(i) landscaping and beautification; or

- (ii) installation of road lighting; or
- (h) the installation of amenities or equipment on or adjacent to a road for the use, enjoyment or protection of the public; or
- (i) the installation of signs on or adjacent to a road for the use or benefit of the public; or
- (j) any work in connection with a road;

traffic control device means a sign, signal, marking, structure or other device or thing, to direct or warn traffic on, entering, or leaving, a road, and includes a traffic cone, barrier, structure or other device or thing to wholly or partially close a road or part of a road.

- (2) Unless the contrary intention appears, an expression used in this Act has the same meaning as in the *Rail Safety Act 2007*.

Part 2—Rail Commissioner

Division 1—Establishment of Rail Commissioner

4—Establishment of Rail Commissioner

- (1) There is to be a *Rail Commissioner*.
- (2) The Rail Commissioner—
 - (a) is a body corporate; and
 - (b) has perpetual succession and a common seal; and
 - (c) is capable of suing and being sued; and
 - (d) is an instrumentality of the Crown and holds property on behalf of the Crown; and
 - (e) has the functions assigned by or under this or any other Act; and
 - (f) has the powers necessary or expedient for, or incidental to, the performance of the Commissioner's functions (including the power to enter into contracts), together with such other powers conferred by or under this or any other Act.

5—Appointment etc of Rail Commissioner

- (1) The Rail Commissioner will be constituted by a person appointed from time to time by the Governor for the purpose.
- (2) The person appointed under subsection (1) will be appointed for a term not exceeding 5 years, and on terms and conditions determined by the Governor.
- (3) The Governor may appoint 1 or more persons as the Governor thinks fit to be a deputy of the person appointed under subsection (1), and a person so appointed may act as the Rail Commissioner in appropriate cases.
- (4) At the expiration of a term of appointment, a person appointed under this section will be eligible for reappointment.

- (5) The Governor may remove a person appointed under this section from office—
- (a) for misconduct; or
 - (b) for incapacity to perform satisfactorily the Commissioner's functions; or
 - (c) for material contravention of, or failure to comply with, the requirements of this or any other Act.
- (6) The office of the Rail Commissioner becomes vacant if the Commissioner—
- (a) dies; or
 - (b) completes a term of office and is not reappointed; or
 - (c) resigns by written notice to the Minister; or
 - (d) is disqualified from managing corporations under Chapter 2D Part 2D.6 of the *Corporations Act 2001* of the Commonwealth; or
 - (e) is removed from office under subsection (5).
- (7) On the office of the Rail Commissioner becoming vacant, a person may be appointed in accordance with this section to the vacant office.

6—Ministerial direction

- (1) The Rail Commissioner is subject to the direction of the Minister.
- (2) A direction of the Minister under this section must be given in writing.
- (3) The Minister must, within 6 sitting days after giving a direction to the Rail Commissioner under this section, have copies of the direction laid before both Houses of Parliament.
- (4) If the Minister gives a direction under this section, the Rail Commissioner must cause a statement of the fact that the direction was given to be published in its next annual report.

Division 2—Functions

7—Functions

- (1) The functions of the Rail Commissioner are as follows:
 - (a) to construct railways, railway tracks and associated track structures;
 - (b) to manage, commission, maintain, repair, modify, install, operate or decommission rail infrastructure;
 - (c) to commission, maintain, repair, modify, install, operate or decommission rolling stock;
 - (d) to operate or move, or cause the operation or movement of, rolling stock on a railway by any means (including for the purposes of constructing or restoring rail infrastructure);
 - (e) to move, or cause the movement of, rolling stock for the purposes of operating a railway service;
 - (f) to act as a rail transport operator for railway operations carried out by the Commissioner;

- (g) to hold accreditation (if successful application is made) under the *Rail Safety Act 2007* as a rail transport operator in relation to railway operations carried out, or proposed to be carried out, by the Commissioner;
- 5 (h) to enter into agreements or arrangements relating to the management of risks associated with railway operations (including where rail infrastructure interfaces with roads);
- (i) to operate passenger transport services by train or tram;
- (j) to hold accreditation (if successful application is made) under the *Passenger Transport Act 1994* to operate passenger transport services by train or tram;
- 10 (k) to enter into service contracts relating to the operation of passenger transport services under Part 5 of the *Passenger Transport Act 1994*;
- (l) to carry out any other function conferred on the Commissioner by the Minister.
- (2) The Rail Commissioner's functions include the carrying out of design work, roadwork
15 and any other necessary or associated work relating to the Commissioner's functions.

Division 3—Special powers

8—Power to enter, inspect, etc railway premises etc

- (1) The Rail Commissioner or a person authorised by the Commissioner may, for the
20 purposes of this Act, enter railway premises or any other land or premises to perform any of the following functions:
- (a) survey or take levels of the premises or land;
- (b) probe, bore or sink holes or pits on or in the premises or land or otherwise examine the soil structure of the premises or land;
- 25 (c) set out the line of work the Commissioner proposes to undertake under this Act;
- (d) do any other thing necessary for the performance of the functions or the exercise of the powers of the Commissioner under this Act.
- (2) The powers under this section are exercisable only at a reasonable time of the day and
30 on giving reasonable written notice (being not less than 1 day) to the owner of the premises or land.
- (3) Notice under subsection (2) may be given—
- (a) by post addressed to the owner at the home or place of business of the owner;
or
- 35 (b) to any person apparently over the age of 16 years at the home or place of business of the owner.
- (4) The Rail Commissioner or a person authorised by the Commissioner must, if exercising powers under this section in relation to railway premises, comply with the reasonable directions of the owner of the premises as to any safety requirements.
- (5) If an owner of premises or land suffers loss or damage as a result of the exercise of the
40 powers under this section, the owner is entitled to compensation.

(6) The amount of any compensation will be determined in accordance with section 29 of the *Land Acquisition Act 1969* as if the Rail Commissioner had entered or temporarily occupied the premises or land as an Authority under Part 5 of that Act.

(7) In this section—

5 **owner**—

(a) in relation to railway premises—means the person holding accreditation under the *Rail Safety Act 2007* as the rail transport operator in relation to those railway premises;

10 (b) in relation to land or other premises—means a person having an estate or interest (legal or equitable) in the land or land constituting the premises (including a person having an easement, right, power or privilege over, affecting, or in connection with, such land).

9—Power to acquire land etc

(1) The Rail Commissioner may—

15 (a) subject to the approval of the Minister—acquire by agreement or compulsory process any land or interest in land for the purposes of carrying out railway operations, establishing or maintaining rail infrastructure or any other purpose connected with this Act; and

Examples—

20 The powers of acquisition might be used (for example) for any of the following purposes:

(a) the erection or installation of plant or equipment for rail infrastructure or rolling stock;

25 (b) the storage of plant, equipment or material used in connection with rail infrastructure or rolling stock;

(c) the relocation of residents or businesses displaced by the exercise of any of the Rail Commissioner's powers.

30 (b) subject to the approval of the Minister—sell, transfer, lease or otherwise deal with or dispose of any land or interest in land vested in the Commissioner; and

(c) remove or cut back any tree or other vegetation on or overhanging rail infrastructure.

(2) The *Land Acquisition Act 1969* applies in relation to the compulsory acquisition of land under subsection (1).

35 (3) Subject to subsection (4), the *Development Act 1993* does not apply in relation to land acquired under this Act.

(4) Subsection (3) does not apply—

40 (a) in a case that involves development in relation to a State heritage place in the circumstances contemplated by paragraph (e) of the definition of **development** under the *Development Act 1993* (on the basis that the *Development Act 1993* will only apply insofar as is relevant to the State heritage place); or

- (b) in a case that falls within the ambit of regulations (if any) made for the purposes of this paragraph.

10—Power to carry out works

- (1) The Rail Commissioner may, subject to the approval of the Minister, carry out such works as the Commissioner thinks fit in relation to—
 - (a) the construction, commissioning and maintenance of rail infrastructure, including—
 - (i) the carrying out of associated roadworks; and
 - (ii) the installation, maintenance, alteration, operation or removal, or causing the installation, maintenance, alteration, operation or removal, of a traffic control device on, above or near a road; and
 - (iii) the erection, construction, laying down, making, alteration or removal of buildings, structures, notices or signs, over, under, along, across, or adjacent to, a road; and
 - (b) the operation or management of rolling stock; and
 - (c) the establishment, maintenance, extension, alteration or discontinuance of any passenger transport service; and
 - (d) any other function of the Commissioner.
- (2) The Rail Commissioner must make good any damage to a road arising from works carried out under this section.
- (3) Subject to subsection (4), the Rail Commissioner must, in relation to a proposal that involves disturbing the surface of a road, or that otherwise relates to a road—
 - (a) inform the relevant road maintenance authority of the proposal at least 28 days before the proposed commencement of any work; and
 - (b) give the relevant road maintenance authority a reasonable opportunity to consult with the Commissioner in relation to the matter; and
 - (c) ensure that proper consideration is given to the views of the road maintenance authority.
- (4) In a case of emergency, the Rail Commissioner need only comply with subsection (3) to such extent as is practicable in the circumstances.
- (5) The provisions of the *Road Traffic Act 1961* apply in relation to a traffic control device installed, maintained, altered or operated under this section as if the Rail Commissioner were a road authority authorised under Part 2 of that Act to install, maintain, alter or operate the device.

11—Power to close or limit use of railways

- (1) The Rail Commissioner may, subject to the approval of the Minister—
 - (a) close a railway temporarily or permanently; or
 - (b) limit the use of a railway temporarily or permanently,for the purposes of railway operations carried out by the Commissioner.

- (2) The Rail Commissioner may, in order to give effect to a closure or limitation under this section, give directions to a rail transport operator who uses the railway.
- (3) A rail transport operator must not contravene a direction under subsection (2).
Maximum penalty: \$50 000.
- 5 (4) No liability is incurred by the Crown or the Rail Commissioner as a result of the exercise of powers under this section.

Division 4—Miscellaneous

12—Staff

- (1) The Rail Commissioner's staff consists of—
- 10 (a) Public Service employees assigned to assist the Commissioner; and
(b) any person appointed under subsection (3).
- (2) The Minister may, by notice in the Gazette—
- (a) exclude Public Service employees who are members of the Rail
Commissioner's staff from specified provisions of the *Public Sector*
15 *Management Act 1995*; and
(b) if the Minister thinks that certain provisions should apply to such employees instead of those excluded under paragraph (a)—determine that those provisions will apply,
and such a notice will have effect according to its terms.
- 20 (3) The Rail Commissioner may, with the consent of the Minister, appoint staff for the purposes of this Act.
- (4) The terms and conditions of employment of a person appointed under subsection (3) will be determined by the Governor and such a person will not be a Public Service employee.
- 25 (5) The Rail Commissioner may, with the approval of the Minister, under an arrangement with the relevant body, make use of the staff, equipment or facilities of—
- (a) an administrative unit of the Public Service; or
(b) an agency or instrumentality of the Crown.

13—Delegation

- 30 (1) The Rail Commissioner may delegate any of the Commissioner's functions or powers (other than the power to delegate) to a particular person or to the person for the time being performing particular duties or holding or acting in a particular position.
- (2) A function or power delegated under this section may, if the instrument of delegation so provides, be further delegated.
- 35 (3) A delegation under this section—
- (a) must be in writing; and
(b) may be conditional or unconditional; and
(c) is revocable at will; and

(d) does not prevent the Rail Commissioner from acting in any matter.

14—Conflict of interest

- 5
- (1) The person constituting the Rail Commissioner, or a deputy or delegate of the Commissioner, must inform the Minister in writing of—
- (a) any direct or indirect interest that the person 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 person has or acquires that conflicts or may conflict with the functions of the Commissioner.
- 10
- (2) The person constituting the Rail Commissioner, or a deputy or delegate of the Commissioner, must take steps to resolve a conflict or possible conflict between a direct or indirect interest and the person's functions in relation to a particular matter, and, unless the conflict is resolved to the Minister's satisfaction, the person is disqualified from acting in relation to the matter.
- 15
- (3) This section does not apply if the interest is as a result of the supply of goods or services that are available to members of the public on the same terms and conditions.
- (4) A failure to comply with this section does not affect the validity of an act or decision of the Rail Commissioner, deputy or delegate.

15—Common seal and execution of documents

- 20
- (1) The common seal of the Rail Commissioner must not be affixed to a document except in pursuance of a decision of the Commissioner, and the affixing of the seal must be attested by the signature of the Commissioner.
- 25
- (2) The Rail Commissioner may, by instrument under the Commissioner's common seal, authorise an employee of the Commissioner (whether nominated by name or by office or title) or any other person to execute documents on behalf of the Commissioner subject to conditions and limitations (if any) specified in the instrument of authority.
- (3) Without limiting subsection (2), an authority may be given so as to authorise 2 or more persons to execute documents jointly on behalf of the Rail Commissioner.
- 30
- (4) A document is duly executed by the Rail Commissioner if—
- (a) the common seal of the Commissioner is affixed to the document in accordance with this section; or
- (b) the document is signed on behalf of the Commissioner by a person or persons in accordance with an authority conferred under this section.
- 35
- (5) Where an apparently genuine document purports to bear the common seal of the Rail Commissioner, it will be presumed in any legal proceedings, in the absence of proof to the contrary, that the common seal of the Commissioner has been duly affixed to that document.

Part 3—Miscellaneous

16—Precedence over roads

- 5 (1) Subject to any pre-existing contract, agreement, understanding or undertaking with a road maintenance authority, the construction, commissioning and maintenance of rail infrastructure takes precedence over roadwork.
- (2) The Rail Commissioner may, subject to the approval of the Minister, close a road temporarily or permanently for the purposes of railway operations carried out by the Commissioner.
- 10 (3) The *Roads (Opening and Closing) Act 1991* applies in relation to the permanent closure of a road under subsection (2), subject to such modifications as may be prescribed by the regulations.
- (4) The Rail Commissioner may, subject to the approval of the Minister, by notice in writing, require a council to construct or reconstruct a portion of road within the area of the council so as to conform with the construction, reconstruction or maintenance of rail infrastructure within the council area.
- 15 (5) A council must comply with a notice under subsection (4).

17—Inconsistency of by-laws

20 If a by-law made by a council is inconsistent with this Act or a regulation made under this Act, this Act or the regulation prevails and the by-law is, to the extent of the inconsistency, invalid.

18—Regulations

- (1) The Governor may make such regulations as are contemplated by, or necessary or expedient for the purposes of, this Act.
- 25 (2) Without limiting the generality of subsection (1), the regulations may—
- (a) be of general or limited application; and
- (b) make different provision according to the persons, things or circumstances to which they are expressed to apply; and
- (c) provide for the granting by the Minister of conditional or unconditional exemptions from provisions of this Act; and
- 30 (d) provide that any matter or thing is to be determined, dispensed with, regulated or prohibited according to the discretion of the Minister, the Rail Commissioner or another prescribed authority; and
- (e) fix penalties not exceeding \$10 000 for breaches of the regulations.

Schedule 1—Related amendments and transitional provisions

Part 1—Preliminary

1—Amendment provisions

5 In this Schedule, a provision under a heading referring to the amendment of a specified Act amends the Act so specified.

Part 2—Amendment of *Railways (Operations and Access) Act 1997*

2—Insertion of Part 2 Division 3

After section 11 insert:

10 **Division 3—Operations over roads**

12—Rights in relation to roads

- 15
- (1) Despite any other law, an operator may, with the Minister's consent—
- (a) install, maintain and operate railway infrastructure;
 - (b) extend, alter or replace any railway infrastructure,
on, over, under, along or across a road.
- (2) For the purposes of subsection (1), the Minister may give his or her consent on such conditions as the Minister thinks fit.
- (3) A person who contravenes or fails to comply with a condition imposed under subsection (2) is guilty of an offence.
Maximum penalty: \$100 000.
- (4) Despite any other law, an operator may—
- (a) operate a railway service; or
 - (b) carry out an authorised activity,
25 on, over, under, along or across a road.
- (5) For the purposes of subsection (4), an *authorised activity* is an activity for 1 or more of the following purposes:
- (a) to run railway rolling stock on railway infrastructure;
 - (b) to carry out maintenance work on railway infrastructure;
 - (c) to repair or replace any railway infrastructure;
 - (d) to remove or decommission any railway infrastructure.
- 30

- (6) An operator must make good any damage to a road arising out of the exercise of a power under subsection (1) or (4).

Maximum penalty: \$100 000.

- (7) In this section—

road means any street, road, thoroughfare, terrace, court, lane, alley, cul-de-sac, or place commonly used by the public, or to which the public are permitted to have access, and includes a part of a road.

13—Maintenance

- (1) An operator—

(a) must maintain any road on which it places fixed railway infrastructure, whether placed over, under, along or across that road before or after the commencement of this Division, to the extent that the fixed railway infrastructure, or any railway service operated on the fixed railway infrastructure, causes or contributes to the deterioration of the road; and

(b) must keep in good condition and repair—

(i) so much of a road that lies between the rails of any railway track owned or operated by the operator; and

(ii) so much of a road that lies within the prescribed distance beyond the rails on each side of any railway track owned or operated by the operator.

Maximum penalty: \$100 000.

- (2) In this section—

prescribed distance means, in relation to any railway track, 1 metre or such other distance as may be reasonably necessary to allow a smooth crossing of the railway by vehicles normally crossing at that place;

road includes a track or other place commonly used by vehicles.

13A—Power to close roads temporarily

(1) Despite any other law, an operator may, with the Minister's consent, temporarily close a road to enable or facilitate the performance of the work in connection with the operation of this Division.

(2) For the purposes of subsection (1), the Minister may give his or her consent on such conditions as the Minister thinks fit.

(3) A person who contravenes or fails to comply with a condition imposed under subsection (2) is guilty of an offence.

Maximum penalty: \$100 000.

- (4) In this section—

road means a road within the meaning of section 12 or 13.

13B—Immunity

No liability attaches to the Crown by virtue of the fact that the Minister has granted a consent under this Division.

3—Insertion of Schedule 1

5 After section 68 insert:

Schedule 1—Transitional provision

1—Transitional provision

(1) Railway infrastructure placed on, over, under, along or across a road before the commencement of this clause—

10 (a) will be taken to have been validly constructed (without the need for any further consent or other form of authorisation and despite any other Act or law); and

(b) will, from the commencement of this clause, be subject to the operation of Part 2 Division 3.

15 (2) In this clause—

road means a road within the meaning of section 12 or 13.

Part 3—Amendment of *TransAdelaide (Corporate Structure) Act 1998*

4—Amendment of section 3—Interpretation

20 Section 3—after the definition of *director* insert:

road means any street, road, thoroughfare, terrace, court, lane, alley, cul-de-sac, or place commonly used by the public, or to which the public are permitted to have access, and includes a part of a road.

5—Insertion of sections 16A and 16B

25 After section 16 insert:

16A—Power to carry out works

(1) TransAdelaide may, with the approval of the Minister, carry out such work as TransAdelaide thinks fit in relation to the establishment, maintenance, extension or alteration of infrastructure reasonably required or warranted for the provision or operation of a passenger transport service by TransAdelaide.

30 (2) In the exercise of a power under this section, TransAdelaide may—

(a) carry out building or structural work; and

(b) erect, construct, lay down, make, alter or remove buildings, structures, notices or signs,

35 over, under, along, across, or adjacent to, a road.

- 5
- (3) TransAdelaide must make good any damage to a road arising from works carried out under this section.
- (4) Subject to subsection (5), TransAdelaide must, in relation to a proposal that involves disturbing the surface of a road, or that otherwise relates to a road—
- 10
- (a) inform the relevant road maintenance authority of the proposal at least 28 days before the proposed commencement of any work; and
- (b) give the relevant road maintenance authority a reasonable opportunity to consult with TransAdelaide in relation to the matter; and
- (c) ensure that proper consideration is given to the views of the road maintenance authority.
- 15
- (5) In a case of emergency, TransAdelaide need only comply with subsection (4) to such extent as is practicable in the circumstances.
- (6) In addition, infrastructure placed on, over, under, along or across a road before the commencement of this section will be taken to have been validly constructed (without the need for any further consent or other form of authorisation and despite any other Act or law).

20

16B—Immunity

No liability attaches to the Crown by virtue of the fact that the Minister has granted a consent under this Part.

Part 4—Transitional provision

6—References to Rail Commissioner

25

A reference to the Rail Commissioner in a statutory instrument or any other kind of instrument, or a contract, agreement or other document, made or entered into before the commencement of Part 2 of the Act will have effect as if it were a reference to the Rail Commissioner established under that Part.