

12 MAY 2006

GLASGOW AIRPORT RAIL LINK BILL (“THE BILL”)

STRATHCLYDE PARTNERSHIP FOR TRANSPORT (“THE PROMOTER”)

PAPER ON RAILWAY REGULATION

INTRODUCTION

1. The purpose of this paper is to outline the current and transitional arrangements for railway regulation in respect of:
 - a. responsibility for rail network and infrastructure;
 - b. railway safety;
 - c. train operation and timetabling; and
 - d. fares setting.
2. Recent changes in responsibility for railways in Scotland and changes in the railway regulation framework that are in the process of being implemented as a consequence of the Railways Act 2005 are also highlighted.

RECENT AND CURRENT CHANGES IN RAILWAY REGULATION

3. The railway industry has recently undergone substantial structural alteration. On 19 January 2004, the Secretary of State for Transport announced a review of the rail industry throughout Britain. The purpose of the review was to develop proposals for a simplified structure and organisation for Britain’s railways. The outcome of the review, agreed jointly in relation to Scotland between Scottish and UK Ministers, resulted in proposals outlined in a White Paper entitled ‘The Future of Rail’ published on 15 July 2004. Those proposals requiring primary legislation by the Westminster Parliament were given effect to by the Railways Act 2005 (“the 2005 Act”). Further changes

within the legislative competence of the Scottish Ministers were given effect by The Transfer of Rail Functions to Scottish Ministers Order in November 2005. This transferred to Scottish Ministers the powers of Strathclyde Passenger Transport Executive (SPTX), in the extended Passenger Transport area, to specify rail services and enter into and manage and monitor a franchise agreement .

4. The transfer¹ on 16 October 2005 of new rail powers to the Scottish Ministers marked the most significant transfer of powers since devolution. The powers will allow the Scottish Ministers to:
 - determine the long term future for rail in Scotland;
 - manage and monitor the performance of the rail franchise, with responsibility for securing future franchise agreements ensuring services meet passengers needs (which transfer took place in November 2005 in relation the exercise of those powers within the extended Strathclyde Passenger Transport area); and
 - fund and specify Scottish rail infrastructure, through the ORR, ensuring all parts of the rail system are integrated.

RESPONSIBILITY FOR RAIL NETWORK AND INFRASTRUCTURE

Network Rail

5. Network Rail is a company limited by guarantee, which owns the majority of Britain's rail network and its associated infrastructure. It operates under a network licence issued by the Secretary of State for Transport and administered and enforced by the Office of Rail Regulation (about which more information is provided below). Network Rail is accountable to its members and is regulated by the Office of Rail Regulation. It is also accountable to its customers and funders through industry agreements and licence conditions, which include requirements to operate in accordance with best practice in a timely, efficient and economical manner. It must also satisfy the reasonable requirements of the train operators and funders in respect of the quality and capability of the network.
6. Network Rail has overall responsibility for operating the network, including leading industry planning, setting a robust national timetable taking cognisance of all operators contractual requirements and directing service recovery. As the holder of the network licence , Network Rail is responsible for all aspects of the infrastructure from design through to maintenance for the assets it owns or will own, with safety as a main consideration. Network Rail publishes design standards, known collectively as the Network Rail Group and Company

¹ By virtue of Part 1 of and Schedules 1 and 2 to the Railways Act 2005.

Standards, which detail how all work on the railway network must be carried out. All work including design and construction must comply with the relevant standards and this compliance is ensured through a multi-stage review and approvals process. Investment in third party enhancements to the rail network is regulated by conditions within the network licence and by the Office of Rail Regulation's Policy Framework for Investments and template agreements.

Office of Rail Regulation

7. The Office of Rail Regulation ("the ORR") was established on 5 July 2004 by the Railways and Transport Safety Act 2003 ("the 2003 Act") and replaced the former Office of the Rail Regulator.

8. The ORR's primary function is to oversee Network Rail's stewardship of the rail network, to ensure that it cares for the network and keeps to the conditions of its network licence. The ORR also licenses operators of railway assets, approves agreements for access by operators to track, stations, and light maintenance depots, and enforces domestic competition law. As a result of the 2005 Act, the ORR also became the railway safety regulator on 1 April 2006. More information is provided below about the transfer of safety functions to the ORR.

9. Prior to the enactment of the 2005 Act, the Secretary of State set the overall policy for Britain's railways and provided guidance to the Strategic Rail Authority ("the SRA"), which was a statutory Non-Departmental Public Body which reported to the UK Parliament and the Department for Transport. The 2005 Act abolished the SRA and transferred its strategic and financial functions to the Secretary of State (as regards England and Wales) and to the Scottish Ministers (as regards Scotland). The ORR will now receive and must have regard to general guidance from the Scottish Ministers on Scottish railway matters. Furthermore the Scottish Ministers, through the ORR, will specify the network outputs and the priorities that Network Rail will be tasked with delivering in Scotland. The consumer protection functions of the former SRA have also passed to the ORR.

RAILWAY SAFETY

Current Changes – Transfer of Responsibility for Rail Safety

10. Until 1 April 2006, the Health and Safety Commission ("HSC") and its operational arm, the Health and Safety Executive ("HSE") regulated almost all the risks to health and safety arising from railway activities in the UK, including

both the general requirements that apply to all work activities and specific law relating to railway operations.²

11. The former policy functions of the HSC in respect of “railway safety purposes” were transferred to the ORR with effect from 1 April 2006³. (“Railway safety purposes” means the proper construction and safe operation of rail transport systems, locomotives, rolling stock or other vehicles used on such systems).

12. Other provisions in the 2005 Act have already come into force, such as the ORR’s acquiring responsibility for:
 - a. providing advice and assistance to the Secretary of State, the Welsh Assembly and the Scottish Ministers;
 - b. promoting improvements in railway service performance;
 - c. protecting the interests of rail users; and
 - d. conditions in operator licences covering consumer protection (transferred from the SRA).

13. In addition, the Health and Safety (Enforcing Authority for Railways and Other Guided Transport Systems) Regulations 2006 (made under the 2005 Act) transferred responsibility for the enforcement of railway-specific and general railway health and safety provisions from the HSE to the ORR on 1 April 2006. Transitional provisions are contained within the Regulations. However in practice it is understood that HMRI and its personnel have been transferred from the HSE to the ORR and will now exercise their responsibility for enforcing health and safety law⁴ in respect of operational railways from within the ORR .

14. The Health and Safety (Enforcing Authority for Railways and Other Guided Transport Systems) Regulations 2006 were founded on the following principles:
 - a. the ORR will take enforcement responsibility for all rail activities previously undertaken by the HSE, unless overriding reasons exist for it not to do so;
 - b. there will be a single railway industry enforcing authority as far as possible, minimising the need for rail duty holders to deal with both the ORR and the HSE;
 - c. the lead authority for any part of the rail industry will be determined by the expertise within the ORR and HSE and in accordance with the principal risk involved in a particular case;

² Both the HSC and the HSE are non-departmental public bodies, accountable to the Secretary of State for Work and Pensions.

³ By virtue of Section 2 of and Schedule 3 to the Railways Act 2005.

⁴ See paragraph 24 below.

- d. A Memorandum of Understanding will be agreed between ORR and HSE (and this has indeed now been done⁵).
15. The ORR has created a new Safety Policy Directorate, which will develop rail safety policy, options and recommendations, either in terms of investment or legislation, with the overall objective of improving rail safety. The ORR will be required to provide advice to funders, such as the Scottish Ministers, on safety-related options in order to deliver high-level objectives of Government.
16. Prior to April 2006 the HSC took advice from the Rail Industry Advisory Committee. The ORR have proposed to establish an equivalent Advisory Committee, post-transfer of safety functions, comprising a similar stakeholder membership to the RIAC, e.g. senior representation from trade unions, industry and passenger representatives.
17. Post-transfer of safety functions, the ORR will continue to work closely with the HSC and HSE on general health and safety standards and proposals for regulations, to ensure proper recognition of aspects of safety specific to railways, as well ensuring a consistent approach to regulation by each organisation. This working relationship is set down in a Memorandum of Understanding between the organisations⁶.

Health and Safety- legal regimes

18. Prior to April 2006, there were three main aspects to the health and safety legal framework as it applied to the railways:
- Health and Safety at Work etc Act 1974;
 - Approvals Regime;
 - Safety Case Regime.
19. The Railway and Other Guided Transport System (Safety) Regulations (“the ROGS Regulations”), which came into force on 10 April 2006, will replace the Safety Case Regime⁷ and the ROTS scheme (within the Approvals Regime⁸) by a system of safety authorisations. Transitional provisions in the ROGS

⁵ At the time of writing this was available on, for example, the ORR’s website at www.rail-reg.gov.uk/upload/pdf/279.pdf

⁶ At the time of writing this was available on, for example, the ORR’s website at www.rail-reg.gov.uk/upload/pdf/279.pdf

⁷ Operated under the Railways (Safety Case) Regulations 2000, as amended by the Railways (Safety Case) (Amendment) Regulations 2003. These Regulations will all be revoked by the ROGS Regulations on 1 October 2006 (see The Railway and Other Guided Transport System (Safety) Regulations 2006, Regulation 34 and Schedule 7).

⁸ Operated under the Railways and Other Transport Systems (Approval of Works, Plant and Equipment) Regulations 1994. These Regulations will be revoked by the ROGS Regulations on 1 October 2006 (see The Railway and Other Guided Transport System (Safety) Regulations 2006, Regulation 34 and Schedule 7).

Regulations apply, with the intention that the Safety Case Regime and the ROTS scheme will be phased out on or by 1 October 2006⁹.

20. The ROGS Regulations are intended to replace three existing sets of rail safety regulations (on Safety Cases, safety critical work and approval of works, plant and equipment) with a single, coherent, proportionate set of regulations developed to implement the EU Railway Safety Directive¹⁰, to reflect 'Better Regulation' considerations, and to implement outstanding recommendations made by Lord Cullen following the Ladbroke Grove Inquiry.¹¹

Health and Safety at Work etc Act 1974

21. A basic principle of health and safety law at work is the principle that responsibility for health and safety rests with those who own, manage and work in the business undertaking that work. Employers have a duty to assess risks involved in the work and to manage them effectively, so far as is 'reasonably practicable'. This means following good practice whenever it is established and taking precautions up to the point where to do any more would be grossly disproportionate to the residual risk.

22. In terms of the application of the 1974 Act to railways, the role of the ORR (formerly the HSE) is now to secure proper control by 'dutyholders' of risks to the health and safety of employees, passengers and others who may be affected by the operation of railways. In relation to railway health and safety, the term 'dutyholders' means railway operators such as Network Rail, train operating companies such as First ScotRail in Scotland, EWS, and contractors, who all have responsibilities under health and safety law.

23. As the independent safety regulator, the ORR is now responsible for ensuring compliance with railway health and safety law and for taking enforcement action to ensure that those who have duties under the law are held accountable for any failures to comply with the law in safeguarding health and safety. Enforcement action could involve prosecution for serious contraventions of the law. Inspectors can also issue formal enforcement notices, which require action within specified timescales and serve prohibition notices to stop dangerous activities.

⁹ See for example "The Railway and Other Guided Transport System (Safety) Regulations 2006: Guidance on Regulations", Office of Rail Regulation, April 2006 (currently available at www.rail-reg.gov.uk/upload/pdf/283.pdf), paragraph 13 and Table 2.

¹⁰ Directive 2004/49/EC.

¹¹ The Ladbroke Grove Rail Crash Inquiry Report: Part 2, Health and Safety Commission, 2001.

24. Formerly part of the HSE (and now part of the ORR), Her Majesty's Railway Inspectorate (HMRI) promotes compliance with health and safety law.¹² Its duties include:

- assessing and approving rail safety cases;
- inspections and audits
- ensuring management systems are in place to control health and safety risks effectively
- mandatory inspection programmes, targeting areas of particular concern
- investigations of complaints and accidents;
- providing the guidance and support on legal obligations under the safety case and the approval process
- enforcement of the law through prosecution and the issuing of notices

Approvals Regime

25. The Approvals Regime applies to the approval of new and altered railway works, plant and equipment. HMRI has been involved in approvals work on the railways since 1840, as an independent authority aiming to ensure public confidence. At present, HMRI enforces the provisions of three different legal processes that control new and modified works on transport systems. These are:

- (i) **ROTS** (the Railways and Other Transport Systems (Approval of Works, Plant and Equipment) Regulations 1994 ("the ROTs Regulations"). These Regulations confirmed the continuing importance of the approval role of HMRI and extended the approvals regime to include, for the first time, approval of railway rolling stock. They also meant that railway operators (i.e. holders of a railway Safety Case) had to gain approval from the Health and Safety Executive via HMRI before bringing any new and altered railway works, plant and equipment into use. Between 10 April and 1 October 2006 the system of approvals under the ROTs Regulations will be replaced by a system of safety authorisations under the ROGS Regulations¹³.
- (ii) **Level crossings.** Almost all level crossing works require some form of approval either in accordance with the Level Crossings Act 1983 (as amended by the Level Crossings Regulations 1997) or under the ROGS Regulations (i.e. or under the ROTs Regulations prior to April 2006).
- (iii) **Railways (Interoperability) Regulations 2006.** These apply to new or upgraded railway subsystems in specific parts of the UK rail network that have been defined as part of the trans-European high-

¹² HMRI became part of the HSE in 1990, when transferred from the Department for Transport. It is now (with effect from 1 April 2006) part of the ORR- see paragraph 13 above.

¹³ See paragraph 19 above.

speed railway network¹⁴ and, for those parts, replace the ROTS Regulations with effect from 2 April 2006.

Safety Case Regime

26. The Railways (Safety Case) Regulations 2000, as amended in 2003¹⁵, required rail operators, such as Network Rail, the station operators and the train operators, to prepare a comprehensive Safety Case, to be accepted by the HSE, before the operator was allowed to operate their business. The HSE would not grant a licence to a railway operator without an accepted Safety Case or an exemption being in place. A 'Safety Case' was the legal document which set out how the rail operator proposed to manage and control the health and safety of staff and the public. This included the operator's contingency plans for dealing with emergencies and other abnormal situations and had to include:

- a safety policy and objectives
- a risk assessment
- safety management systems
- risk control measures

27. A Safety Case had to be continuously tested and reviewed to ensure that it reflected the management systems and control measures that the rail operator (as duty holder) had in place to control its health and safety risks effectively. HMRI Railway Inspectors checked compliance with Safety Cases as part of an overall strategy to help achieve compliance with health and safety law. If a rail operator failed to follow the processes set out in its Safety Case, inspectors could serve enforcement notices or prosecute. They can also require the rail operators to revise their Safety Case for operating on the network if necessary.

28. Between 10 April and 1 October 2006 the Safety Case Regime will be replaced by a system of safety authorisations under the ROGS Regulations¹⁶.

TRAIN OPERATION AND TIMETABLING

¹⁴ At present the sections of railway in Scotland designated as "high-speed" are the London Euston to Glasgow Central (West Coast Main Line), London Kings Cross to Edinburgh Waverley (East Coast Main Line), and Edinburgh Waverley to Carstairs Junction lines: see The Railways (Interoperability) Regulations 2006, Schedule 11.

¹⁵ The Railways (Safety Case) (Amendment) Regulations 2003.

¹⁶ See paragraph 19 above.

Train Operating Companies

29. A Train Operating Company (“TOC”) may provide passenger train services throughout Britain under a franchise agreement¹⁷. In order to operate a passenger train service a TOC must generally have:

- a franchise to provide the passenger services;
- a railway Safety Case approved by the HSE¹⁸;
- a licence to operate from the ORR; and
- access to the network via a Track Access Agreement with Network Rail.
- location specific Depot and Station Access Agreements

Licence To Operate

30. The Railways Act 1993, as amended, established a statutory licensing regime which regulates the operations of all railway assets, i.e. trains, stations, networks and light maintenance depots.

31. A network licence gives authority to a person to be an operator of a train being used on the network with the primary purpose of carrying passengers. A non-passenger licence gives authority to a person to be an operator of a train being used on the network for any purpose other than for carrying passengers.

Passenger Franchise

32. The Railways Act 2005, together with The Transfer of Rail Functions to Scottish Ministers Order 2005, provides that Scottish Ministers are responsible for letting, monitoring and managing Scottish franchises. The current Franchise Agreement, between the Scottish Ministers and First ScotRail, runs until at least October 2011 and aims to improve performance and customer satisfaction.

33. In order to meet these objectives, the Scottish Ministers set out in the Franchise Agreement the minimum level of service that the TOC must provide, known as the Service Level Commitment (“SLC”). The SLC outlines the parameters within which the timetable must be made and on an individual route basis specifies service characteristics, such as the level, frequency, maximum journey times and stopping patterns of railway passenger services. The TOC may operate additional services over and above the initial SLC subject to the approval of Transport Scotland which will then be incorporated into a revised SLC. Similar arrangements pertain for service reductions. Any such changes to service provision should be subject to consultation prior to approval.

¹⁷ e.g. (in Scotland) First ScotRail.

¹⁸ From 1 October 2006 a safety authorisation from the ORR under the ROGS Regulations will be required rather than a Safety Case- see paragraph 19 above.

34. The Scottish Ministers are now responsible for the monitoring role previously undertaken by the SRA and SPT, to ensure the contracted level of service; performance and other commitments are provided.

Track Access Agreements

35. The Railways Act 1993, as amended, provides the ORR with the power to oversee and control the consumption of the capacity of railway assets. A track access agreement (“TAA”) is an agreement between Network Rail and a TOC, which governs the rights and obligations in relation to access to the network. The TAA requires the approval of the ORR. If a TOC fails to achieve a satisfactory result by negotiation with Network Rail, the ORR has the power to compel Network Rail to enter into a contract on terms determined by the ORR. This power is designed to ensure fair access to the national rail network.

36. The TAA determines the rights of the TOC over:

- the number of train paths in any specified period
- timing (including departure and arrival times, clock-face requirements, first and last train paths, intervals between train paths, journey time and turnaround times);
- routing;
- specified equipment (including maximum length of train, route availability code and loading gauge); and
- calling pattern.

FARES SETTING

37. Fares Policy is the responsibility of Scottish Ministers. In terms of the Franchise Agreement the TOC is responsible for creating individual fares, within that overall policy and other constraints within the Franchise Agreement. The TOC’s Bid for the franchise will have been based on this policy. First Scotrail is entitled to submit a revised fares structure to Scottish Ministers for their consideration. If it is agreed, then the franchise change mechanism will be invoked and the financial impact of the proposal will be reflected in revised Franchise Payments. If the franchise is performing well it is worth noting that a percentage of the additional revenue raised will flow back to Transport Scotland.

Fares in an urban area normally consist of a single fare, which in this area have historically been mileage based plus a supplement to encourage the purchase of return and weekly tickets. In addition an off peak ticket offering at least a 20% discount on the peak fare is available for travel outwith the morning peak to encourage travel at times when there is spare capacity. All day tickets are valid for day of issue only to prevent fares evasion

Fares policy for this route could form part of the agreed Franchise Change to the Franchise Agreement that will be required.

