

[Act 2001 No 35]



New South Wales

## Freight Rail Corporation (Sale) Bill 2001

### Explanatory note

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

#### Overview of Bill

The object of this Bill is to provide for the sale of the Freight Rail Corporation (*FreightCorp*) jointly with the sale of National Rail Corporation Limited.

The sale of FreightCorp is to be by one of the following methods:

- (a) direct sale of the business undertaking of FreightCorp to a purchaser,
- (b) conversion of FreightCorp to a company and sale of the company to a purchaser,
- (c) transfer of the business undertaking of FreightCorp to a company incorporated on behalf of the State and sale of that company to a purchaser.

FreightCorp is currently a statutory State owned corporation under the *State Owned Corporations Act 1989*.

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## Outline of provisions

### Part 1 Preliminary

This Part contains the following formal provisions:

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

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

**Clause 3** defines certain words and expressions used in the proposed Act and provides that notes in the proposed Act do not form part of the proposed Act.

**Clause 4** validates (to the extent of any invalidity) any act, matter or thing done before the commencement of the proposed Act that would have been validly done under a provision of the proposed Act if that provision had been in force at the time the act, matter or thing was done.

### Part 2 Sale of FreightCorp

This Part sets out three methods by which the business undertaking of FreightCorp may be sold, and provides for matters necessary to arrange and conduct the sale. The *business undertaking* of FreightCorp is defined in clause 3 (1) as all the assets, rights and liabilities of FreightCorp.

**Clause 5** sets out three methods for sale, as specified in the Overview above, and requires that FreightCorp's purchaser be National Rail Corporation Limited, the purchaser of National Rail Corporation Limited or a related body corporate of the purchaser.

**Clause 6** provides FreightCorp with such functions as may be necessary or convenient for facilitating its sale, and with any additional functions that the Treasurer may direct FreightCorp to exercise for or in connection with facilitating the sale.

**Clause 7** empowers the Treasurer to give directions to FreightCorp for or in connection with facilitating its sale, and provides that FreightCorp must comply with any such direction.

**Clause 8** allows negotiations for or in connection with the sale to be conducted with any person, whether before, on or after the sale.

**Clause 9** empowers the Treasurer to exclude assets, rights and liabilities of the business undertaking of FreightCorp from the sale, and to transfer any assets, rights or liabilities excluded from the sale to the Crown, the Ministerial Holding Corporation or any other public authority.

**Clause 10** empowers the Auditor-General, with the approval of the Treasurer, to communicate any matter or thing that has come to the knowledge of the Auditor-General in respect of FreightCorp. Such communications may only be made to certain specified persons, including potential purchasers. There are restrictions on recording or divulging information acquired under this provision.

### **Part 3 Sale method 1—direct transfer of undertaking to purchaser**

This Part deals with the sale of FreightCorp by the sale of its business undertaking.

**Clause 11** authorises the Treasurer to enter into agreements for or in connection with the sale of the business undertaking of FreightCorp to a purchaser, and to act on behalf of FreightCorp for that purpose. Any such agreement may be entered into before, on or after the sale.

**Clause 12** empowers the Treasurer to transfer to the purchaser any assets, rights or liabilities that comprise the business undertaking of FreightCorp.

**Clause 13** provides that, for the purposes of the Part, the business undertaking of FreightCorp does not include any assets, rights or liabilities that the Treasurer has excluded from sale under clause 9.

**Clause 14** makes special provision for certain leases or subleases of property that the Treasurer declares to be special leases. A special lease cannot be transferred and remains the property of FreightCorp but the property concerned can be subleased or sub-subleased to the purchaser or a related body corporate of the purchaser or transferee from the purchaser.

**Clause 15** provides for the dissolution of FreightCorp following the sale of its business undertaking unless any special lease is held. If a special lease is held, FreightCorp is converted to a corporation sole constituted by the Treasurer with appropriate functions to enable it to exercise its functions under a special lease or associated sublease/sub-sublease. Any remaining assets, rights and liabilities of FreightCorp become assets, rights and liabilities of the Crown and may be transferred to the Ministerial Holding Corporation or to any other public authority.

## **Part 4 Sale method 2—conversion to company and sale of company to purchaser**

This Part deals with the sale of FreightCorp by conversion of FreightCorp to a company and sale of the company to a purchaser.

**Division 1 (Conversion of FreightCorp to company)** of Part 4 (clauses 16–22) deals with the conversion of FreightCorp to a company limited by shares under the *Corporations Law*.

**Clause 16** empowers the Treasurer to direct FreightCorp to convert to a company for the purposes of the sale of its business undertaking. The company to which FreightCorp is converted is referred to as the *sale company*.

**Clause 17** authorises the incorporation of FreightCorp for the purposes of the *Corporations Law*, and provides for FreightCorp to take the necessary steps to be registered as a company limited by shares under the *Corporations Law*.

**Clause 18** provides for the holding of shares in the sale company before the shares are transferred to the purchaser. Such shares are held for and on behalf of the State, and the Treasurer may act for or on behalf of the shareholders in connection with their shares in the sale company.

**Clause 19** provides that the sale company is taken to be a continuation of, and the same legal entity as, FreightCorp as it existed before the conversion. The clause also provides for the construction of references in other Acts, instruments or documents to FreightCorp or the Freight Rail Corporation.

**Clause 20** provides that the sale company continues to be a party to any contract or arrangement entered into by FreightCorp before the conversion that had force immediately before the conversion. The sale company has the same entitlements as FreightCorp under such a contract or arrangement.

**Clause 21** provides for FreightCorp to cease to be a State owned corporation immediately after it converts to the sale company.

**Clause 22** empowers the Treasurer, while all issued shares in the sale company are held for or on behalf of the State, to transfer any assets, rights and liabilities that comprised the business undertaking of FreightCorp to the Ministerial Holding Corporation or any other public authority.

**Division 2 (Management of sale company before sale)** of Part 4 (clauses 23–26) deals with the management of the sale company after its conversion from FreightCorp and before its sale to the purchaser.

**Clause 23** provides that the Division applies during any period after the conversion of FreightCorp when the issued shares in the sale company are held for or on behalf of the State.

**Clause 24** provides that the board of directors of the sale company is, in the exercise of its functions, subject to the control and direction of the Treasurer.

**Clause 25** provides that the sale company is an agent of the State, but (except as otherwise agreed or provided) does not represent the State, is not exempt from State rates, taxes, duties or imposts, and cannot render the State liable for any debts, liabilities or obligations.

**Clause 26** applies certain provisions of the *State Owned Corporations Act 1989* to the sale company, and provides for regulations under the proposed Act to apply (with or without modification) provisions of that Act to the sale company.

**Division 3 (Sale of company)** of Part 4 (**clauses 27–31**) deals with the process of selling the sale company to the purchaser.

**Clause 27** empowers the Treasurer to enter into an agreement to sell the business undertaking of the sale company by selling the shares in the sale company.

**Clause 28** authorises the Treasurer to transfer the shares in the sale company to the purchaser in accordance with the terms of the agreement.

**Clause 29** authorises the Treasurer to arrange alterations or additions to the constitution of the sale company that are contemplated by the agreement with the purchaser.

**Clause 30** provides that the obligations of the sale company are not guaranteed by the State.

**Clause 31** provides that State taxes are not payable in relation to certain specified matters, including the conversion of FreightCorp to the sale company and the disposal or purchase of shares in the sale company. The regulations may specify further matters.

## **Part 5 Sale method 3—transfer of undertaking to company and sale of company to purchaser**

This Part deals with the sale of FreightCorp by transfer of the business undertaking of FreightCorp to a company incorporated on behalf of the State and sale of that company to a purchaser.

**Clause 32** empowers the Treasurer on behalf of the State to form a company limited by shares or acquire all the issued shares in a company limited by shares (referred to as *the sale company*).

**Clause 33** authorises the Treasurer to enter into agreements for or in connection with the sale of the business undertaking of FreightCorp to the sale company and to act for and on behalf of FreightCorp for that purpose. Any such agreement may be entered into before, on or after the sale.

**Clause 34** empowers the Treasurer to transfer any assets, rights and liabilities that comprise the business undertaking of FreightCorp to the sale company. Any of the transferred assets, rights and liabilities may be transferred back to FreightCorp, but only while all the issued shares in the sale company are held by the State.

**Clause 35** makes special provision for certain leases or subleases of property that the Treasurer declares to be special leases. A special lease cannot be transferred and remains the property of FreightCorp but the property concerned can be subleased or sub-subleased to the purchaser or a related body corporate of the purchaser or transferee from the purchaser.

**Clause 36** provides for the dissolution of FreightCorp following the sale of its business undertaking unless any special lease is held. If a special lease is held, FreightCorp is converted to a corporation sole constituted by the Treasurer with appropriate functions to enable it to exercise its functions under a special lease or associated sublease/sub-sublease. Any remaining assets, rights and liabilities of FreightCorp become assets, rights and liabilities of the Crown and may be transferred to the Ministerial Holding Corporation or to any other public authority.

**Clause 37** empowers the Treasurer to enter into an agreement to sell the business undertaking of the sale company by selling the shares in the sale company.

**Clause 38** authorises the Treasurer to transfer the shares in the sale company to the purchaser in accordance with the terms of the agreement.

**Clause 39** provides that, for the purposes of the Part, the business undertaking of FreightCorp does not include any assets, rights or liabilities that the Treasurer has excluded from sale under clause 9.

**Clause 40** provides that the obligations of the sale company are not guaranteed by the State.

**Clause 41** provides that State taxes are not payable in relation to the issue of shares in the sale company to the State or the disposal or purchase of those shares. The regulations may specify further matters.

## Part 6 Results of sale

This Part deals with the employment of employees of FreightCorp after its sale, and the disposal of proceeds of the sale.

**Clause 42** provides that if the sale of FreightCorp is by sale method 1 (direct transfer of undertaking to purchaser), the employees of FreightCorp are transferred to the employment of the purchaser. If the sale of FreightCorp is by sale method 3 (transfer of undertaking to company and sale of company to purchaser), the employees are transferred to the employment of the sale company.

Transferred employees retain any rights to sick leave, annual leave or long service accrued before the transfer (unless the employee has been paid the money value of the accrued leave).

No provision is made for the case where the sale is by sale method 2 (conversion to company and sale of company to purchaser), because the sale company to which FreightCorp is converted is the same legal entity as FreightCorp, and staff of FreightCorp continue as staff of the same entity.

**Clause 43** provides that on the sale of the sale company under sale method 2 or 3, each staff member of the sale company continues to be a staff member of the sale company, despite the change in ownership, on the same terms and conditions of employment as applied to the staff member immediately before the sale.

**Clause 44** gives effect to Schedule 2, which provides for the transfer of FreightCorp employees from public sector superannuation schemes to the Local Government Superannuation Scheme or another superannuation scheme approved by the Treasurer. The Treasurer may also approve of transferred employees remaining with their current superannuation schemes.

**Clause 45** provides that proceeds of the sale of FreightCorp are to be paid into the Consolidated Fund, less any amount approved by the Treasurer to meet expenses reasonably incurred in connection with the operation of the proposed Act.

## Part 7 Miscellaneous

This Part deals with miscellaneous matters relating to the sale of FreightCorp and the operation of the proposed Act.

**Clause 46** provides for the replacement of the *Corporations Law* by the proposed *Corporations Act 2001* of the Commonwealth.

**Clause 47** prevents certain specified matters relating to the proposed Act and the sale of FreightCorp from giving rise to contractual, equitable or other obligations or civil or criminal liability.

**Clause 48** provides that the State is not liable to pay compensation because of the enactment or operation of the proposed Act, or for any consequence of that enactment or operation, or because of any statement or conduct relating to the enactment.

**Clause 49** provides that the proposed Act binds the Crown.

**Clause 50** provides that a certificate purporting to be signed by the Treasurer certifying that a particular order is an order of the Treasurer under the proposed Act is admissible in evidence in any legal proceedings as evidence of the matters certified.

**Clause 51** provides that proceedings for an offence under the proposed Act may be dealt with summarily before a Local Court constituted by a Magistrate.

**Clause 52** provides for the making of regulations, in particular regulations of a savings or transitional nature consequent on the enactment of the proposed Act.

**Clause 53** is a formal provision giving effect to the amendments to the Acts specified in Schedule 3.

## Schedules

**Schedule 1** contains provisions relating to the transfer of assets, rights and liabilities of FreightCorp.

**Schedule 2** makes provision for the superannuation entitlements of FreightCorp employees.

**Schedule 3** makes amendments to a number of Acts consequential on the enactment of the proposed Act.