MINISTERIAL REVIEW OF THE AUSTRALASIA RAILWAY (THIRD PARTY ACCESS) CODE

FINAL REPORT

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GLOSSARY OF TERMS

ABOVE-RAIL OPERATOR	A train operator
THE ACCC	Australian Competition and Consumer Commission
THE ACCESS ACT	*AustralAsia Railway (Third Party Access) Act 1999* (SA & NT)
ACCESS PROVIDER	A party providing, or able to provide, railway infrastructure services – sometimes referred to as a below-rail operator
ACCESS SEEKER	An Above-Rail Operator seeking access to the Railway
APT	Asia Pacific Transport – the Access Provider for the Railway
THE CODE	The AustralAsia Railway (Third Party Access) Code contained in the Access Act.
THE COMMISSION	The Essential Services Commission of South Australia, established under the ESC Act
DORC	Depreciated Optimised Replacement Cost
ESC ACT	*Essential Services Commission Act 2002*
THE RAILWAY	The AustralAsia Railway to which the Code applies, being the whole of the railway from (a point near) Tarcoola to its end in Darwin (essentially in the Port of Darwin)
RAILWAY INFRASTRUCTURE SERVICES	The services to which an Access Seeker may seek access, being services provided by railway infrastructure facilities (including railway track, signalling, train control and communications)
ROA ACT	*Railways (Operations and Access) Act 1997*
SOUTH AUSTRALIAN PORTS ACCESS REGIME	The Access Regime in Part 3 of the *Maritime Services (Access) Act 2000*.
SOUTH AUSTRALIAN RAIL ACCESS REGIME	The Access Regime in Parts 3 to 8 of the ROA Act.

EXECUTIVE SUMMARY

Third-party access to the AustralAsia Railway, which runs from Tarcoola to Darwin, is subject to the rail access regime set out in the AustralAsia Railway (Third Party Access) Code ("the Code").

The Commission has reviewed the Code in accordance with the Terms of Reference issued to it by the relevant Ministers pursuant to clause 50(1) of the Code. A key aspect of the review is that it was based on operational experience.

This Final Report sets out the recommendations of the Essential Services Commission of South Australia "(the Commission"). As is explained in the context of this report, the Commission would only recommend a change where the Commission considered it necessary to ensure the Code's continuing effectiveness in terms of its certification under Part IIIA of the Trade Practices Act.

The Commission has identified <u>no</u> such changes. This is principally because operational experience to date has not provided evidence to suggest a need for change.

The Commission does include observations on other possible changes to the Code that might generate some improvements, but which are not "necessary" in the context of certification. The possible changes referred to in the report are:

- deleting redundant clause 49(2)(d), concerning fees for inspection of registers, at a convenient time;
- deleting (or at a minimum correcting) the Worked Examples contained in the Schedule to the Code; and
- allowing the regulator to determine, from time to time, whether publication (e.g. web publication) of reference prices is warranted.

The Commission provides these observations for the information of the Ministers, but is not implying any particular obligation or urgency for such changes (though the Commission notes that its Worked Examples concerns are supported by operational experience).

1 INTRODUCTION

Third-party access to the AustralAsia Railway ("the Railway"), which runs from Tarcoola to Darwin, is subject to the rail access regime set out in the AustralAsia Railway (Third Party Access) Code ("the Code"), which is itself a Schedule to the *AustralAsia Railway (Third Party Access) Act 1999* (SA & NT) ("the Access Act").

The Code has been certified as an 'effective' State-based access regime in accordance with the principles set out in clauses 6(2)-6(4) of the Competition Principles Agreement[1] ("the clause 6 principles", in Appendix A) on the recommendation of the National Competition Council ("the NCC").[2][3]

The Code is under review pursuant to its clause 50(1), which is set out in Appendix B. This Final Report sets out the recommendations of the Essential Services Commission of South Australia "(the Commission").

1.1 The access regime

The Railway comprises both the recently constructed line from Alice Springs to Darwin and the pre-existing line between Alice Springs and Tarcoola. Operations on the 1,420 km section of the railway north of Alice Springs commenced on 15 January 2004.

The Code unbundles railway services (both freight and passengers) into:

- below-rail services (relating to the provision of track and associated infrastructure); and
- above-rail services (running rolling stock, or trains, on the below-rail infrastructure).

The Code regulates the provision of below-rail services only. It establishes a right for above-rail operators to negotiate access to the below-rail services of the Railway.

Asia Pacific Transport (APT) is the track operator and hence is the access provider for the Railway.

The Code sets out the rights and responsibilities of above-rail operators (access seekers) and the access provider (APT), and covers matters such as the negotiation process, dispute resolution, and the terms and conditions of access.

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1 The Competition Principles Agreement is one of the agreements comprising the National Competition Policy.

2 National Competition Council (NCC), 2000, *AustralAsia Railway Access Regime*, Final Recommendation, February 2000, Application for Certification under Section 44M(2) of the Trade Practices Act 1974.

3 Much background to the Code is contained in the reports, and submissions to, the National Competition Council published during the NCC's consideration of the draft access regime in 1999 and 2000. These, the NCC's final recommendation, and the Competition Principles Agreement can be accessed via: www.ncc.gov.au.

FreightLink is the main above-rail operator on the Railway and is a related party of APT.[4] The most notable other user of the railway is Great Southern Railway Ltd, operator of The Ghan passenger service between Adelaide and Darwin.

A very small number of other operators have also enquired about and purchased access to the railway for particular purposes. To date, there have been no access disputes.

1.2 Scope of the review

This review is conducted under clause 50(1) of the Code, which states that a joint Ministerial review[5] of "the operation of the Code" may be undertaken at any time, but at least:

- firstly, not later than 30 June in the third year of operations of the railway; and
- secondly, not later than 12 months before the expiration of the period for which the Commonwealth Minister has specified under section 44N of the *Trade Practices Act 1974* of the Commonwealth that the access regime, of which this Code is a part, is to remain in force.

Clause 50(1) of the Code does not specify the intended scope of any review of "the operation of the Code". Hence, the Ministers have some discretion in deciding the Terms of Reference for such reviews. The Ministers have provided the Terms of Reference for this review (see Box 1.1 opposite).

The Terms of Reference for this review state the general aim of the review to be of the effectiveness of the Code in facilitating access by users to the Tarcoola to Darwin railway. The specific matters nominated all involve an assessment of the "adequacy", "appropriateness", "reasonableness" and "effectiveness" of certain features of the Code, each of which was subject to some uncertainty at the time the NCC recommended the regime for certification.

The NCC's final recommendation was dependent upon there being a review of the Code after three years. In particular, the NCC stated:

> *The certification recommendation is for a relatively long period – an operational period of 27 years. This gives further certainty to the access provider. However, the rail line is yet to be built, there is no history to indicate how the access provider will manage its above and below rail businesses and a few of the Regime's approaches are unique. Such a long certification could see inappropriate elements in the Regime entrenched for the entire period. This increases uncertainty for rail operators.*
>
> *To rebalance these respective risks, the Regime now incorporates a comprehensive review three years after operations commence. This review will be public and conducted by the Northern Territory and South Australian Ministers, supported by the Regulator's assessment of the effectiveness of the Regime. This*

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4 APT has more recently announced that it intends to merge APT and FreightLink.

5 A clause 50(1) review by the Ministers is different to a clause 50(4) revenue review, which is done entirely by the regulator. The latter review is to determine whether the revenues from railway infrastructure services where no sustainable competitive prices exist are excessive, and is to be conducted first in the 10th year of operations of the railway, and thereafter every five years.

gives the Northern Territory and South Australian Governments an early opportunity to make the changes necessary to address any problems revealed through the first years of operations. (Final Report, p.1)

This review should provide an opportunity to make the changes necessary to ensure the continuing effectiveness of the Regime. (Final Report, p.31)

The Council considers that this early opportunity for public participation and scrutiny of the Regime, should alleviate concerns that the Regime will be inappropriately implemented and such implementation will be maintained throughout the [30 year] duration of the certification. (Final Report, p.97)

The specific provision to which the NCC refers is clause 50 of the Code.

Box 1.1 Terms of Reference

Pursuant to clause 50(1) of the AustralAsia Railway (Third Party Access) Code both the Minister in the Northern Territory and the Minister in South Australia having responsibilities for railways are required to review the operation of the Code not later than 30 June 2006.

The Ministers, when reviewing the operation of the Code, are to consider its effectiveness in facilitating access by users to the Tarcoola to Darwin railway. In particular the review is to consider:

- the adequacy of the Code provisions regarding the information to be given to an access seeker;
- the adequacy of the Code provisions regarding the policies to be developed and maintained by the access provider;
- the appropriateness of timeframes under the Code, particularly for the provision of information and notices required under the access negotiation and dispute resolution frameworks;
- the reasonableness of the Code provisions regarding any fees and charges payable;
- the adequacy of the Code provisions regarding the operation and consistency of pricing principles;
- the effectiveness of the Code provisions regarding dispute resolution processes; and
- the adequacy of the Code provisions regarding record keeping requirements.

In preparing the report any recommendations are to have regard to the requirements for certification under Part IIIA of the Trade Practices Act 1974.

In undertaking the review, the Ministers are to:

- follow the public consultation and reporting process set out in clause 50(3); and
- complete their report by 30 June 2006.

The relevant Ministers[6] commenced this review pursuant to clause 50(1)(a). In doing so the Ministers requested, pursuant to clause 50(2), that the Commission prepare certain reports as the basis for the Ministerial review. In particular, the Ministers asked the Commission to conduct the consultative process and to prepare Draft and Final Reports for the Ministers' consideration within the required timeframe.

The Commission released an Issues Paper on 17 February 2006. One submission was received, from the Australian Rail Track Corporation Ltd (ARTC). The Commission prepared a Draft Report in May 2005. One submission was received, from APT.

The review is distinguished from most other reviews conducted by the Commission in a number of respects:

- the review was conducted in accordance with the provisions of the Code; it was not an inquiry under the *Essential Services Commission Act 2002* (the ESC Act) (although in assisting with the review the Commission is fulfilling a function that calls upon the objectives of s. 6 of the ESC Act);
- the Commission was not undertaking a review of matters that are its specific responsibility as the regulator under the Code, with the content of the guidelines that have been issued being outside the review (although the framework provided by the Code for the making of such guidelines was within the scope of the review);
- as this is the Ministers' review, the final outcome of the review, including any recommendations, are those of the Ministers – noting that the Ministers are not bound to accept or adopt any recommendations that the Commission might propose to them; and
- submissions made are submissions to the Ministers, as well as to the Commission (hence all submissions are forwarded to both Ministers).

The Commission's view is that the expectations for this review, as embodied in the NCC's final recommendation, were to focus on the operational elements of the Code. The implication of this is that the review is not intended to consider the merits of the:

- objectives of the regime;
- scope of regulation, defined by reference to the infrastructure facilities that are subject to regulation under the regime; or
- form of regulation.

Instead, the review is intended to consider whether various elements of the Code provide the necessary support to, and effective implementation of, for example, the objectives of the regime, the scope of regulation and to the form of regulation. This occurs by considering the "rules" of the regime.

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6 The relevant Ministers are: in South Australia, the Minister for Transport and, in the Northern Territory, the Minister for the AustralAsia Railway.

The Commission also notes that, as this is a review of the operation of the Code, actual experience with the Code is the critical part of the assessment. In this context it is important to note that there:

- have been only a handful of access notifications to the Commission;
- has been no experience with disputes or arbitrations; and
- were no submissions to the Issues Paper made by above-rail operators.

Further, in line with the NCC's comments, the Commission adopted the perspective, in respect of "effectiveness", that it should recommend change only where it is necessary to ensure the Code's continuing effectiveness in terms of its Part IIIA certification. In doing so the Commission refers to the clause 6 principles.[7]

The Commission also includes observations on possible changes to the Code that might generate some improvements, but which are not "necessary" in the context of certification.

Following a brief description of the Code, the remainder of this report addresses each of the specific elements of the Terms of Reference in turn, as well as addressing other matters raised in the submissions. The Commission has adopted a common layout for its assessment of each element, except for the pricing principles discussion, the relative complexity of which warranted a modified approach.

[7] The Commonwealth and States have agreed to amend the clause 6 principles to include further pricing principles, as set out in the Council of Australian Governments (CoAG) *Competition and Infrastructure Reform Agreement*, 10 February 2006 (see www.coag.gov.au). This would affect future considerations of effectiveness, but does not require resubmission of already certified regimes. In any case, clause 1.3 of that Agreement provides that the Code will be taken to satisfy such changes.

2 THE CODE

2.1 Background to the Code

The Code provides a negotiate/arbitrate access regime. It was put together as part of the broader Railway project and reflects its nature and distinguishing characteristics, such as:

- The existing transport companies that provide freight services over the same route as the railway (or between the same destinations) are in competition with rail freight.
- On the transport corridor between Alice Springs and Darwin, rail is the new entrant. Since rail is the new mode competing with incumbent road, sea and air operators, any advantages of incumbency that exist in the freight market lie with these other modes.
- The 'greenfields' nature of the rail project sees the owners and operators of the railway bearing substantial demand risk, as the railway needs to win demand from alternative and incumbent modes of transport, such as sea, road and air. As a result, the railway starts with little revenue or profit in the early years, and may only make a profit after many years of operation. This position is different to other utilities and even other rail infrastructure providers built to serve an established market.
- The railway is owned and operated by the private sector on a Build, Own, Operate and Transfer (BOOT) basis. The concession period expires 50 years after construction. About $800 million in private sector equity and debt is invested in the project.
- Three Governments have also contributed importantly to making the railway financially viable. Government support for the project has been principally provided in the form of asset contributions. Thus the Commonwealth leased the existing Tarcoola-Alice Springs line to APT for a nominal rental for the duration of operation of the newly constructed Alice Springs-Darwin line and the South Australian, Northern Territory and Commonwealth Governments together funded $480 million worth of construction of the new railway. The Governments do not require a return on the capital invested in these contributed assets at any time during the concession period. They do, however, require the contributed assets to be returned to them at the end of the concession period along with the transfer of all project-funded assets.

2.2 Code objectives

Neither the Code, nor the Access Act, contain objectives or an objects clause. However, being an effective access regime suggests that the objectives of the Code are aligned with those underlying the clause 6 principles. In essence, the clause 6 principles:

- identify the type of infrastructure services that should be subject to access regulation; and
- establish principles that the regulatory framework should embody.

The NCC has described the overall goals of access regulation in the following terms: [8]

> *The application of an efficiency objective in access regulation has the following three broad components:*
>
> - *first, ensuring the efficient use of natural monopoly infrastructure, especially by denying infrastructure owners the opportunity to misuse market power (in either the market for these services or in related markets) by refusing access to and monopoly pricing infrastructure services;*
> - *second, facilitating efficient investment in natural monopoly infrastructure, especially by ensuring:*
>   - *infrastructure services are maintained and developed appropriately;*
>   - *infrastructure owners (and potential owners) earn sufficient returns to provide incentives for efficient investment; and*
>   - *incentives for inefficient development of competitive infrastructure and for inefficient investment in upstream and downstream activities (that is, overinvestment and underinvestment) are minimised; and*
> - *third, promoting competition in activities that rely on the use of the infrastructure service where competitive infrastructure services are not economically feasible.*

2.3 Key features of the Code

2.3.1 Negotiation framework

The Code establishes a right to negotiate access to the Railway. The Code follows a negotiate/arbitrate model, where parties first attempt to agree on an arrangement, with dispute resolution processes available if necessary.

Typically, a negotiate/arbitrate form of regulation is used where some combination of the following apply:

- the regulated service is subject to some contestability;
- there are few access seekers; and
- access seekers may have some countervailing power; and
- access seekers (and presumably the access provider) are sufficiently sophisticated to engage in commercial negotiations, that is:
  - they are typically businesses rather than households; and
  - they are sufficiently knowledgeable about the service in question (suggesting that it is a critical or significant input to their business).

To be effective, the negotiate/arbitrate form of regulation requires supporting structures that facilitate timely and effective commercial negotiations (including in relation to information disclosure) in the first instance – to maximise the likelihood of a reasonable negotiated outcome. It also requires supporting structures that facilitate timely and effective arbitration (ultimately), but still exposing the parties to

[8] National Competition Council, *The National Access Regime: A Guide to Part IIIA of the Trade Practices Act*, Part C Certification of Access Regimes, February 2003 p.11 – available from www.ncc.gov.au.

some risk in moving from negotiation to the arbitration – to ensure that arbitration is not sought as a matter of course.

The latter point is significant as the "light handed" and less costly nature of this form of regulation is largely as a result of the arbitration process being entered into only rarely. Once it is entered into, for the purposes of the dispute at hand, there may be little distinction between this form of regulation and direct price or revenue controls. Indeed, ideally, the arbitration phase of a negotiate/arbitrate regime is never activated, as the threat of arbitration should itself encourage the parties to resolve disputes.[9]

While commercial negotiation with dispute regulation can be a less intrusive and less costly form of regulation compared to direct forms, if the parties do not have appropriate incentives to reach agreement through commercial negotiation, in many cases the process can become overly protracted and costly with arbitration being resorted to as a matter of course by some parties.

2.3.2 Dispute resolution

Enforceable dispute resolution processes back access negotiations. The arrangements in the Code recognise that some issues may be small or time sensitive so that above-rail operators may not take them to arbitration, given the time and costs it involves. Without a less costly means of dispute resolution, many small or time sensitive disputes could go unresolved. This could discourage access.

The Code provides several levels of dispute resolution including:

- advice provided by the regulator on whether a negotiated outcome is consistent with the Code;
- voluntary conciliation by the regulator; and
- full arbitration.

2.3.3 Access prices

Access prices set under the Code are to be compatible with those generated by other complementary rail access regimes.

All prices for access are to be struck within a floor/ceiling band, set in accordance with efficient, forward looking costs. Where competition from non-rail freight is sufficient to discipline rail operators to minimise their costs and prices, the Code's "sustainable competitive" approach uses the price of the competitive non-rail freight as the starting point for calculating the rail access price between the floor/ceiling band. This ensures that access prices are based on competitive principles.

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[9] The Commission observed in its 2004 report: *Ports Access Review Final Report*, that this poses a challenge for an assessment of the merits of such regimes as low dispute levels could be indicative of both success and failure.

Further, the Code includes safeguards to ensure that monopoly rents are not built into access charges by periodically testing (by way of review) and, if necessary, adjusting those access prices vulnerable to monopoly pricing (priced under the floor/ceiling approach) to verify that the access provider is not earning an excessive return.

To ensure that all prices and the pricing review are based on appropriate estimates of costs:

- the Code provides that efficient forward looking costs must be used;
- cost definitions are to be consistent with those in other rail access regimes;
- the regulator is to develop guidelines on various aspects of calculating costs, including capital costs; and
- when developing capital costs guidelines, the regulator has the flexibility to consider the most appropriate way of taking into account the government-contributed assets and cash subsidies to the extent that this adjustment does not prevent the below-rail service provider from earning an appropriate return on its investment.

2.3.4 Time-path management

The quality of rail services can be just as important to the commercial potential of an above-rail operator's business as the prices paid. Therefore, the Code also recognises the importance of service quality, time-path allocation and reallocation policies and day-to-day train management. The access provider must develop policies on how it will manage these issues. These policies are to be consistent with guidelines developed by the regulator.

2.3.5 Safeguards against favouring the access provider's train operator

The Code provides safeguards against the below-rail service provider favouring its affiliated above-rail operations at the expense of other above-rail operators:

- the pricing approaches either automatically treat all above-rail operators equally (in the "sustainable competitive approach") or specifically provide for comparison with the prices of similar rail services (in the "floor/ceiling" approach);
- commercially-sensitive information cannot be disclosed to those with a conflict of interest or misused for commercial gain or in any other way not provided for by the Code; and
- the below-rail service provider must keep separate records for its above- and below-rail businesses, which increases transparency and reduces the risks that access charges will be inflated.

2.4 The Commission's role under the Code

Clause 5 of the Code appoints the Commission as the regulator under the Code.[10] Key features of the Commission's role are:

- the development and maintenance of various guidelines, including:
  - arbitrator pricing requirements;
  - access provider reference prices and service policies; and
  - access provider information reporting requirements;
- facilitating access negotiations and (with consent of the parties) settling access disputes;
- monitoring and enforcing compliance with the Code as well as periodically conducting, or assisting with, reviews (such as this one).

The Commission has made the following guidelines:[11]

- Railway Industry (Tarcoola-Darwin) Guideline No. 1: Access Provider Reference Pricing and Service Policies;
- Railway Industry (Tarcoola-Darwin) Guideline No. 2: Arbitrator Pricing Requirements (incorporating the Commission's regulated rate of return determination);
- Railway Industry (Tarcoola-Darwin) Guideline No. 3: Regulatory Information Requirements; and
- Railway Industry (Tarcoola-Darwin) Guideline No. 4: Compliance Systems and Reporting.

The Commission does not set prices for the use of the Railway. Prices are to be set by negotiation between access seekers and the access provider.

In the event of an access dispute, the Commission is to appoint an arbitrator, who will be called upon to "set" prices through the arbitration process. Note that the Commission itself will not be the arbitrator – the Code keeps separate the role of regulator and arbitrator.

The Commission makes the appointment pursuant to clause 16 of the Code. Noting ARTC's comments in its submission in respect of the potential role of the ACCC as an arbitrator where interface issues exist, the Commission observes that such an appointment is open to it under the Code (though it would be up to the ACCC to determine whether it could accept such an appointment).

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[10] Note that Clause 5 actually nominates the South Australian Independent Industry Regulator (SAIIR), which is the Commission's predecessor. Schedule 2 of the Essential Services Commission Act 2002 provides the appropriate succession arrangements.

[11] Each guideline is available from the Commission's website: www.escosa.sa.gov.au.

3 INFORMATION PROVISIONS

3.1 *The issues*

The Terms of Reference require assessment of:

the adequacy of the Code provisions regarding the information to be given to an access seeker

3.2 *Code provisions*

The Code provides for two types/sets of information to be given to an access seeker by the access provider.

Under clause 9(1), the access provider must, on application of any person, provide the person with information reasonably requested by the person about:

(a) the extent to which the access provider's railway infrastructure facilities are currently being used;

(b) technical details and requirements of the access provider, such as axle load data, clearance and running speeds;

(c) time-path allocation and reallocation policies for the railway;

(d) service quality and train management standards; and

(e) relevant prices and costs associated with railway infrastructure services provided by the access provider, prepared by the access provider for reference purposes in accordance with guidelines developed and published by the regulator.

Under clause 10(4), the access provider must, after receiving an access proposal (among other things):

(b) provide to the access seeker the name and contact details of any access holder whose rights under an existing access contract or award would be affected by implementation of the proposal; and

(c) provide to the access seeker an indication (even if only a preliminary indication) of the terms and conditions on which the access provider would be prepared to grant access or to make the variation.

These information provisions are intended to ensure that an access seeker is able to gather enough information:

- first, to consider, prepare and lodge a meaningful access proposal; and
- secondly, once any access proposal has been lodged, to embark on meaningful negotiations with the access provider and (where applicable) any access holders.

The purpose of such obligations is to reduce the risk that access will be deterred by a lack of information at early stages in the access negotiation process.

3.3 NCC Final Recommendation

The NCC was encouraged by the fact that the Code provided a basis upon which access seekers could obtain information both before the access seeker finalises its proposal (under clause 9(1)) and at an early stage in the access negotiation process (under clause 10(4)).

It was also assured that:

> *If the information provided is too little or irrelevant, this can now be examined during the Ministerial review after three years of operations. In the meantime, the Regulator can suggest what additional information needs to be provided. (Final Report, p.27)*

3.4 The nature of the problem

At issue is whether the obligations placed on the access provider are sufficient to ensure it gives access seekers the type of information they need to negotiate effectively. Were this not the case, the right for persons to negotiate access to a service provided by means of an infrastructure facility could be compromised.

3.5 The clause 6 principles

The relevant CPA criteria are those in clauses 6(4)(e) and 6(4)(m), namely:

> *(e) The owner of a facility that is used to provide a service should use all reasonable endeavours to accommodate the requirements of persons seeking access.*
>
> *(m) The owner or user of a service shall not engage in conduct for the purpose of hindering access to that service by another person.*

Together, these clauses are intended to ensure that the negotiation framework provides a solid environment in which negotiations are encouraged and are likely to produce outcomes similar to those expected in a competitive market.

The parties must be required to negotiate in a productive manner and the access regime should not contain any element that simply deters access. Among the obligations on the access provider is that it provides an access seeker (or a potential access seeker) with a similar level of information to that which would be available in the process of negotiating in a competitive market.

3.6 Comments and submissions received

ARTC conceded that it was not aware of the conduct of the access provider in relation to the appropriateness and sufficiency of information that may have been provided to any access seekers.[12] This mainly reflects ARTC's understanding that, since commencement of the Code, there has been no attempt to gain access to the Railway in order to operate

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12 ARTC submission p.11.

freight services in direct competition to FreightLink services, nor any tendering for freight business involving third-party operators in competition to FreightLink.[13]

> *…Given this, it could be expected that many aspects of the Code that were considered 'unusual' by the NCC and that the NCC had intended to be reviewed following the benefit of experience under the Code, may not have been fully tested, or even tested at all, in a competitive framework. As such, it is difficult for ARTC or any other third party to attest to experiences in seeking to access the Network.[14]*

Nevertheless, ARTC urged consideration of a requirement for:

> *… an information brochure to be made available to an industry participant, more importantly an access seeker, by the access provider. Providing up-front information to an access seeker will help simplify the process of proposing access and negotiating access.*
>
> *… Most jurisdictions now provide for significant and useful information to be made available on the access provider's website, which is an ideal technology for the conveyance of up-to-date relevant information.[15]*

3.7 The Commission's experience

In addition to the information requirements on the access provider in clauses 9(1) and 10(4) of the Code, the Commission is mindful that the Code provides:

- under clause 11, that the access provider should accommodate all the access seeker's reasonable requirements (including for further information);
- under clause 12B, that should the access seeker be unable to obtain the information it requires, it can direct the matter to the Commission for its decision on the reasonableness of the request.
- under clause 45A, in matters where the Commission is required to develop guidelines according to clause 9, such as time-path and service quality matters, it can give directions that the access provider must follow.

These provisions grant the Commission broad powers to influence the types of information being provided to access seekers by the access provider. As yet, the Commission has not had to exercise or test these powers.

3.8 Discussion and Recommendation

The Code's negotiation framework provides a clear platform on which negotiations can commence. The process starts with an approach by the access seeker, requesting information. In response, the access provider must then remit the specified information in a form that would be useful to an access seeker. During the negotiation process, the access seeker may also call on the Commission for advice or to verify that an element of

[13] The Commission notes that there has been third-party access activity in relation to the movement of military equipment.

[14] ARTC submission p.6.

[15] ARTC submission p.10.

the access provider's proposal is consistent with the Code. The Commission has considerable power to influence the type and timeliness of information being provided.

In these various respects, the Commission considers the Code to be as comprehensive as other rail access regimes. There is certainly no operational experience that suggests a need to extend the obligations on the access provider regarding the nature and types of information to be provided to access seekers. Therefore, the Commission does not recommend any changes as being necessary to the Code in this area.

4 POLICY PROVISIONS

4.1 The issues

The Terms of Reference require assessment of:

> *the adequacy of the Code provisions regarding the policies to be developed and maintained by the access provider*

4.2 Code provisions

9. Obligation of access provider to provide information about access

(1) *The access provider must, on application of any person, provide the person with information reasonably requested by the person about –*

…

(c) *time-path allocation and reallocation policies for the railway;*

(d) *service quality and train management standards; and*

…

(3) *The access provider must, for the purposes of subclause (1)*(c) *and* (d)*, develop and maintain time-path allocation and reallocation policies and service quality and train management standards in accordance with principles contained in guidelines developed and published by the regulator.*

12A. Protection of confidential information

(6) *The access provider must, in connection with the operation of this clause, develop and maintain policies to ensure that confidential information obtained by the access provider under this Division is not-*

(a) *used in any unauthorised way or for an unauthorised purpose; or*

(b) *provided to an unauthorised person.*

(7) *The access provider must provide a copy of a policy that applies under subclause (6) to the regulator, and to any other person who requests a copy from the access provider.*

The policies set out in clause 9(1) and required in clause 9(3) cover those dealing with time-path management and reallocation, service quality and train management standards. The essential character of such policies is typically to ensure transparency and fairness in Railway operations – with fairness considered in the context of non-discriminatory treatment of above-rail operators.

Following from the previous Chapter, such policies also support the information provision requirements and are intended to ensure that a potential access seeker is able to gather enough information to consider, prepare and lodge a meaningful access proposal. Clause 9(3) provides the Commission with a role in guiding the content of these policies.

The clause 12A confidentiality policy recognises that where a below-rail operator is affiliated with an above-rail operator (as is the case with APT and FreightLink), there may exist:

- a risk that sensitive information from other above-rail operators will flow to the affiliated above-rail operator; and/or
- the perception of such happening, to the point where potential access seekers are unwilling to pursue access.

Confidentiality provisions are intended to address both possibilities.

4.3 NCC Final Recommendation

Requirements for time-path and service quality standards were not included in the original draft of the Code as assessed by the NCC. However, these provisions were added in light of industry participants' submissions to the NCC[16]. The NCC was satisfied by the insertions.

The NCC report stressed the issue of information disclosure[17] in enabling effective access to the rail line: including time-path management, reallocation, service quality and day-to-day management. Under the regime as certified the access provider must disclose information relating to track use timetabling, network congestion management and network priority.

The NCC report noted the importance of time management and issues including the access provider's general allocation of policies, its approach to day-to-day management matters and its policies regarding transfer or reallocation of time paths between rail operators. The NCC noted[18] the risk of preferential treatment when the access provider is vertically integrated with an above-rail affiliate in terms of securing access to paths.

4.4 The nature of the problem

4.4.1 Time-path management and service quality

Time-path management (or train-path management) refers to the real-time management of trains, including the use of the Railway in accordance with scheduled train paths, prioritisation of train paths in event of out-of-course running, dealing with network blockages and recovery.

Rail access regimes typically require access providers to set out in advance a statement of policy covering the allocation of train paths, thus facilitating fair

16 National Rail Corporation, May 1999, *The Northern Territory/South Australia Access Regime for Rail Services*, Submission to the National Competition Council, 10 May 1999, p.8; Australian Rail Track Corporation (ARTC), May 1999, Submission to the National Competition Council, 4 May 1999, p.4.

17 NCC Final Recommendation, pp.3, 77-78.

18 NCC Final Recommendation, p.23.

treatment between above-rail operators and informing access seekers about the management of train paths.

Such policies can include information about the degree of utilisation of the railway in question, which helps access seekers determine whether the railway may be able to handle their needs, as well as setting out the processes by which the access provider intends to deal with capacity issues, such as assessing capacity, allocating capacity, transferring capacity and cancelling capacity.

Provision of such policies is particularly important with a vertically integrated operator given the risks (actual and perceived) referred to above.

Service quality information further informs the train-path management policy and can be used to demonstrate that services qualities offered are achievable and that service qualities being achieved are equitable.

Overall, the Code requirement to prepare such policies acknowledges the importance of service type and quality in railway access and the fact that the scope for variation in these areas is as significant an issue as price for an effective rail access regime.

4.4.2 Confidentiality

The access provider must maintain a policy that deals with its management of confidential information. The issue of confidentiality is important in any commercial environment, but particularly so with vertical integration as the scope may exist for an affiliated above-rail operator to gain a commercial advantage (whether deliberately or inadvertently).

The Code recognises the significance of this issue by making the disclosure and improper use of such information an offence, with substantial penalties attached (up to $100,000).

4.5 The clause 6 principles

The information contained in the relevant policies, and the confidentiality provisions, are relevant to subclauses 6(4)(a), (b), (e) and (m).

6(4) A State or Territory access regime should incorporate the following principles:

> *(a) Wherever possible third party access to a service provided by means of a facility should be on the basis of terms and conditions agreed between the owner of the facility and the person seeking access.*
>
> *(b) Where such agreement cannot be reached, Governments should establish a right for persons to negotiate access to a service provided by means of a facility.*
>
> *…*
>
> *(e) The owner of a facility that is used to provide a service should use all reasonable endeavours to accommodate the requirements of persons seeking access.*

...

(m) The owner or user of a service shall not engage in conduct for the purpose of hindering access to that service by another person

Subclauses 6(4)(a) and (b) relate to effective commercial negotiations. In the case of a railway, effective access negotiations will necessarily involve negotiation over the service being sought – hence the relevance of information about train-paths and service quality.

The preparation of train path and service quality information lends itself to subclause (e) as it demonstrates an endeavour to inform an access seeker about how it might be accommodated on the railway.

The preparation of train path and service quality information, and the management of confidential information, can also lend itself to subclause (m) as it contributes to the transparent treatment of all access seekers, reduces the possibility of preferential self-treatment and makes hindering less likely.

4.6 Comments and submissions received

ARTC commented that there should be a standard set of information that the access provider is required to make available, which should be provided for in the Code[19]. This needs to set out at the very minimum the base level of information necessary for an access seeker to prepare a proposal. ARTC also pointed to the range of technical and operational information that it publishes on its website.

4.7 The Commission's experience

The Commission's development of Guideline No. 1 (*Access Provider Reference Pricing and Service Policies*), established the parameters that the access provider must address in its development of the train-path and service quality guidelines. Key to those parameters are requirements for:

- non-discrimination between above-rail operators;
- acknowledgement of contractual rights; and
- consistency with equivalent ARTC policies to the extent possible under the Code.

APT has informed the Commission that it has largely adopted ARTC practices where possible.

The Commission has been provided with a copy of APT's confidentiality policy. The Commission has also instituted Guideline No. 4 (*Compliance Systems and Reporting*) which provides further assurance that the various policies are being applied as required. The Commission also notes that Guideline No. 4 includes provision for the Commission to audit the access provider's compliance in respect of these, or any other, obligations.

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19 ARTC submission p12

4.8 Discussion and Recommendation

The Commission's experience in this area is largely limited to its development of Guideline No. 1. Through that process the Commission experienced no significant limitation in respect of the Code – with the Commission having considerable discretion as to how the guideline was to be framed. The implication of this is that the Code also provides the Commission with discretion to modify its approach over time if necessary.

In the absence of any operational concerns arising, the Commission has not identified any changes that it should recommend in this area. However, the Commission is mindful that it should continue to evaluate the effectiveness of its guidelines over time to ensure that its discretions in this area (and others) continue to be applied appropriately. As such, the Commission intends to review its guidelines periodically.

5 TIMEFRAMES

5.1 *The issues*

The Terms of Reference requires assessment of:

> *the appropriateness of timeframes under the Code, particularly for the provision of information and notices required under the access negotiation and dispute resolution frameworks*

5.2 *Code provisions*

Under clause 10, access negotiations start with the access seeker submitting a proposal to the access provider. The access provider may, within 21 days, request further information. The access provider must, within 21 days, give details of the proposal to the regulator, any affected access holder and provide the affected access holder's details to the access seeker.

Under clause 13, an access dispute exists if (among other things) one of the parties fails to commence negotiations within 30 days of the response date (21 days after receiving a proposal).

Under clause 35, an award made by the arbitrator has effect 21 days after it is made unless the access seeker, before that time, elects not to be bound by it. An access seeker may, within 7 days after the making of an award, or such further time as the regulator may allow, elect not to be bound by the award by giving written notice of the election to the regulator. The regulator must, within 7 days after receiving a notice of election not to be bound by the award, notify the access provider and the other parties to the arbitration.

5.3 *NCC Final Recommendation*

On this issue, the NCC stated in its Final Recommendation that:

> *Access seekers who anticipate lengthy negotiations would be deterred from seeking access. …Given the proposed Ministerial Review after three years of operations and the Regulator's powers and functions, the Council considers that there are sufficient opportunities to develop and review trigger points for dispute resolution.*[20]

5.4 *The nature of the problem*

Lengthy negotiations increase costs for all parties. If the timelines placed on the parties are not sufficient to have negotiations proceed at an appropriate pace, it is unlikely that negotiations (and any dispute resolution) under the Code will produce outcomes similar to those expected in a competitive market. The time allowed should be sufficient to ensure negotiations, pursued with commitment, can be concluded without imposing undue costs on either parties.

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[20] NCC Final Recommendation, pp. 27-28.

5.5 The clause 6 principles

The most relevant CPA criteria are those in clauses 6(4)(e) and 6(4)(m), namely:

> *(e) The owner of a facility that is used to provide a service should use all reasonable endeavours to accommodate the requirements of persons seeking access.*
>
> *(m) The owner or user of a service shall not engage in conduct for the purpose of hindering access to that service by another person.*

Together, these clauses are intended to ensure that the negotiation framework provides a solid environment in which negotiations are encouraged and do not involve unreasonable costs on the parties involved.

To this end, the parties must be required to negotiate in a productive manner. The access regime should impose clear obligations on the access provider to be timely in negotiations, as well as provide a means by which the parties can resolve access disputes after allowing sufficient scope for bilateral negotiations.

5.6 Comments and submissions received

ARTC observed that the timeframes to apply to the negotiation framework in its access undertaking are reasonable and designed to bring about a successful conclusion to a negotiation. Its undertaking also recognises that a degree of flexibility is needed in view of the different types of proposals that can arise. ARTC proposed that consideration be given to creating greater consistency between the two jurisdictions in the timeframes adopted.[21]

5.7 The Commission's experience

The Commission is not aware that the negotiation timeframes in the Code have been a problem in any of the access negotiations that have taken place since the commencement of the Code. No access disputes have yet arisen, so the arbitration timeframes have not yet been tested. No access seeker has brought any concerns about the duration of negotiations to the attention of the Commission.

Were timeliness in any negotiations to become an issue, the Commission notes that, clause 12B of the Code allows it to intervene at any time in the negotiation period. In support, clause 14 allows the access seeker to request the Commission to refer the matter to conciliation or arbitration. The Commission has not yet had cause to exercise or test these various powers.

5.8 Discussion and Recommendation

Lengthy negotiations could discourage third-party access to the Railway. However, the Commission is not aware that the length of any access negotiations has been a cause for

21 ARTC submission p.11.

concern since the Code's commencement. Therefore, the Commission does not recommend any changes as being necessary to the Code in this area.

While ARTC is correct in saying that its undertaking is more prescriptive of the access negotiation timelines and trigger points than the Code, the Commission is not convinced that standardisation of the various timeframes between the two jurisdictions is necessary at this point. There are no "correct" timeframes for negotiations. Even in a competitive environment, it is hard to specify a timeframe for a commercial negotiation. As ARTC noted, a degree of flexibility is needed in view of the different types of proposals that can arise. The same goes with the differing nature of the rail infrastructure facilities involved.

The Commission has powers to ensure that the timeframes adopted by the access provider, access seeker and (where applicable) any access holders contribute to a framework that moves quickly towards agreement and so does not deter access. Should the access provider adopt practices that unduly lengthen negotiations, the Code empowers the Commission to intervene to rectify the situation.

6 FEES AND CHARGES

6.1 The issues

The Terms of Reference requires assessment of:

the reasonableness of the Code provisions regarding any fees and charges payable

6.2 Code provisions

9(2) The access provider may make a reasonable charge (to be determined on a basis decided or approved by the regulator) for providing information under this clause.

49. Prescribing of matters for purpose of Code

(1) Without limiting the generality of subclause (1), the Ministers may prescribe –

…

(d) provisions about the inspection of registers maintained under this Code (including about fees for such inspections).

The only charges referred to in the Code (other than access charges) are those that may be levied by an access provider for the provision of certain information.

The only fees referred to in the Code are those that may be set for the inspection of registers. No such fees have been prescribed, nor are there any applicable registers.

6.3 NCC Final Recommendation

There was no mention of fees and charges in the NCC Report.

6.4 The nature of the problem

Fees and charges, levied inappropriately, may deter access by creating a financial barrier. Where an access provider may levy such charges, they also present the possibility of discriminatory behaviour between treatment of an affiliate above-rail operator and other above-rail operators.

6.5 The clause 6 principles

Fees and charges are relevant to clauses 6(4)(e) and (m):

6(4)(e): The owner of a facility that is used to provide a service should use all reasonable endeavours to accommodate the requirements of persons seeking access.

6(4)(m): The owner or user of a service shall not engage in conduct for the purpose of hindering access to that service by another person.

In certain circumstances, charging for information could give rise to concerns about the accommodation being given to persons seeking access. That is not to say that an access

provider should not be permitted to charge, but does suggest caution with such a provision.

Exceptional misuse of a charging provision may also give rise to concerns over whether the behaviour amounted to hindering of access.

An imposed fee pursuant to clause 49(2)(d) could have similar effects, although the absence of registers suggests that this clause is redundant in any case.

6.6 Comments and submissions received

ARTC argued: [22]

> *A reasonable standard set of information that the access provider is required to make available should be provided for by the Code (or guidelines under the Code). This should, at the very least, represent the minimum necessary for an access seeker to prepare a proposal. The aim of regulation should be for any additional information that may be reasonably required to be minimised.*
>
> *Where additional information is required by the access seeker, ARTC has no issue with the access provider charging a fee for the information that would be capped at the incremental cost of providing the service. Care should be taken not to double-recover the cost of activities that would be recovered as a corporate overhead included in the ceiling.*

6.7 The Commission's experience

As yet the Commission has received no approaches from the access provider or access seekers in relation to charges for information, nor has it determined, in advance, a basis for charges for information.

The Commission dealt with the equivalent issue in its 2005 review of the South Australian Rail Access Regime.[23] In that review the Commission established pricing principles for information charges as follows:[24]

> *The reasonableness of a charge for information provided under s. 29 is to be assessed against the following principles:*
>
> *(a) The charge should not exceed the efficient cost of gathering and providing the necessary information.*
>
> *(b) The charge should be consistent with a competitive market for the provision of railway services.*
>
> *(c) The charge should not serve as a hindrance to access.*
>
> *(d) The charge should reflect the s. 30 non-discriminatory provision of information.*

[22] ARTC submission, p12.

[23] Section 29 of the *Railways (Operations and Access) Act 1997* contains a similar provision.

[24] ESCOSA, *South Australian Rail Access Regime*, Information Kit, October 2005, p.16, available from the Commission's website: www.escosa.sa.gov.au.

6.8 Discussion and Recommendation

The Commission recognises that there is a standard set of operational information that an access provider would need to develop for its own purposes, for the purposes of an affiliate above-rail operator and for the purposes of any other above-rail operators. In part this is the very information required in the policies specified in clause 9(1).

Such information should be generated in the ordinary course of business. As such it may seem incongruous for an access provider to charge for such information as this may give rise to the problem of double recovery as suggested by ARTC. It may also appear odd for an access provider, in the business of selling access, to charge potential customers in the course of their inquiring about access.

Other information will be more specific to an access request and will not be able to be generated until a specific request arrives. In such circumstances the merits of charging may be more apparent.

However, the Code is quite clear that charges may be levied. The Code also provides for the involvement of the regulator (either in response to an issue or in advance) in the setting of charges for information.

In the absence of any operational experience to suggest that this has been a problem for access, and noting the powers of the regulator in this area, it is not clear that the ability to charge should create any issue in relation to the regime’s certification.

The Code provides sufficient discretion for the Commission to manage the impact of charges for information. As such, the Commission does not recommend any change in this area.

The Commission notes that there may be merit in its providing guidance on an appropriate basis for charges for information – along the lines of that which it has provided for the South Australian Rail Access Regime.

The Commission observed above that there are no applicable registers in respect of fees under clause 49(2)(d). As such, clause 49(2)(d) appears to be redundant and would warrant deletion if the Code were otherwise being amended.

7 PRICING PRINCIPLES

Under the Code, there are two types of pricing rules:

- the Access Pricing Principles set out in the Schedule to the Code ("the Schedule"), to be observed by an arbitrator when settling an access dispute (the "***arbitrator pricing rules***"); and
- the requirements in clause 9(1)(e) of the Code, to be observed by the access provider when preparing and providing reference prices (the "***reference pricing rules***").

In neither case does the Commission determine or approve access prices. However, it has the power to develop and publish guidelines that must be observed by the arbitrator and access provider respectively.[25]

This chapter looks at both sets of pricing rules.

7.1 The issues

The Terms of Reference require assessment of:

> *"the adequacy of the Code provisions regarding the operation and consistency of pricing principles".*

In assessing the adequacy of the operation and consistency of the Code's pricing principles the main issue is whether the pricing principles are appropriately specified.

7.2 The clause 6 principles

The adequacy of any pricing principles involves judgment about whether – as specified – they are effective in achieving the objects (and objectives) of the legislation. As the Code itself does not contain an objects clause or objectives, the clause 6 principles would seem most relevant.

In their current form, the clause 6 principles do not specify pricing objectives. They do, however, provide some guidance on appropriate pricing outcomes. In the NCC's view:[26]

- clause 6(4)(i) provides that terms and conditions should strike a balance among a range of factors, including the legitimate business interests of the access provider, the interests of other parties, the efficient use of infrastructure and the public benefits arising from competitive markets; and
- the clauses 6(4)(a)–(c) model of commercial negotiation, supported by appropriate regulatory guidance, has as its objective delivering outcomes that mirror, as closely as possible, those that would be derived if the infrastructure service market was

[25] The Commission has published such guidelines, being Guideline Nos. 2 and 1 respectively, as listed in Chapter 2.

[26] NCC, *The National Access Regime: A Guide to Part IIIA of the Trade Practices Act*, Part C Certification of Access Regimes, February 2003, p.47 and 30 – available from www.ncc.gov.au.

effectively competitive — that is, outcomes that can generally be expected to lie within an efficient range.

In particular, clause 6(4)(i) requires as follows:

In deciding on the terms and conditions for access, the dispute resolution body should take into account:

(i) the owner's legitimate business interests and investment in the facility;

(ii) the costs to the owner of providing access, including any costs of extending the facility but not costs associated with losses arising from increased competition in upstream or downstream markets;

(iii) the economic value to the owner of any additional investment that the person seeking access or the owner has agreed to undertake;

(iv) the interests of all persons holding contracts for use of the facility;

(v) firm and binding contractual obligations of the owner or other persons (or both) already using the facility;

(vi) the operational and technical requirements necessary for the safe and reliable operation of the facility;

(vii) the economically efficient operation of the facility; and

(viii) the benefit to the public from having competitive markets.

Whether the Code's pricing principles are adequate therefore depends upon whether they are generally effective in achieving the above.

7.3 Arbitrator pricing rules

7.3.1 Code provisions

In the event of an access dispute, access prices are to be settled by an arbitrator appointed by the Commission.

Clause 23 of the Code provides that, on an arbitration under the Code, the access price is to be determined by an arbitrator applying the principles and methods – in more recent regulatory parlance, the rules – set out in the relevant parts of the Schedule. In effect, therefore, the Schedule contains the arbitrator pricing rules.

The Schedule distinguishes between services that are subject to 'sustainable competitive prices' and those that are not. Section 1(2) of the Pricing Schedule defines a sustainable competitive price to exist for a particular service when alternative modes of transport provide an effective constraint on access prices.

Role of competitive imputation pricing

Most notably, the arbitrator pricing rules provide that, where there is a sustainable competitive price, the access price payable to the access provider by

an access seeker for a railway infrastructure service is to be determined by the arbitrator as the competitive imputation access price.

The concept behind the 'competitive imputation pricing rule' approach is that access prices are effectively capped by prices set by competing transport modes. In this sense, the rule imitates the normal working of a competitive market where the price that a firm can charge is limited by the prices charged by competitors.[27]

The competitive imputation access price is arrived at by:

- first, estimating the price of providing carriage of a commodity between two points by some means other than rail (called the competitive rail line-haul price (CRLP)); and
- secondly, subtracting from the CRLP the incremental costs to the access provider of the above-rail service, being the costs that the access provider would avoid if the access seeker were to run its own trains.

Role of 'floor' and 'ceiling' on prices

There are two constraints on the competitive imputation pricing rule in the Schedule. These constraints also apply in the case where no sustainable competitive price exists.

(a) The access price should not fall below a floor represented by the incremental (below-rail) operating costs

The Schedule recognises that it would not be appropriate to have a pricing rule that forces the access provider to provide access at a price below the incremental (below-rail) cost of providing the service. Where there is a sustainable competitive price, this might arise for example where the alternative transport mode is very cheap. Requiring the access provider to provide services at prices below the incremental cost of using the railway infrastructure would jeopardise the owner's legitimate business interests and could compromise the safety and reliability of the facility were there insufficient incentive for maintenance expenditure.

To avoid this anomaly, the Schedule therefore incorporates a ***floor*** on the access price. This is based on the incremental below-rail costs.

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[27] The NCC noted that the Code's use of the competitive imputation pricing rule "…is an adaptation of the "efficient component pricing rule" (ECPR) approach. … It assumes that the access provider conducts downstream services and so has sufficient information to set a total price for the bottleneck service plus the downstream service. From this total it deducts the costs it avoids by not providing the downstream service. The residual price is then offered to any access seeker. Those that find it attractive must be more efficient than the access provider. The access provider receives the same return whether it provides the service to itself or to any other access seeker and therefore, should be indifferent as to whether it or a competitor provides the service." (NCC Final Recommendation, p.45.)

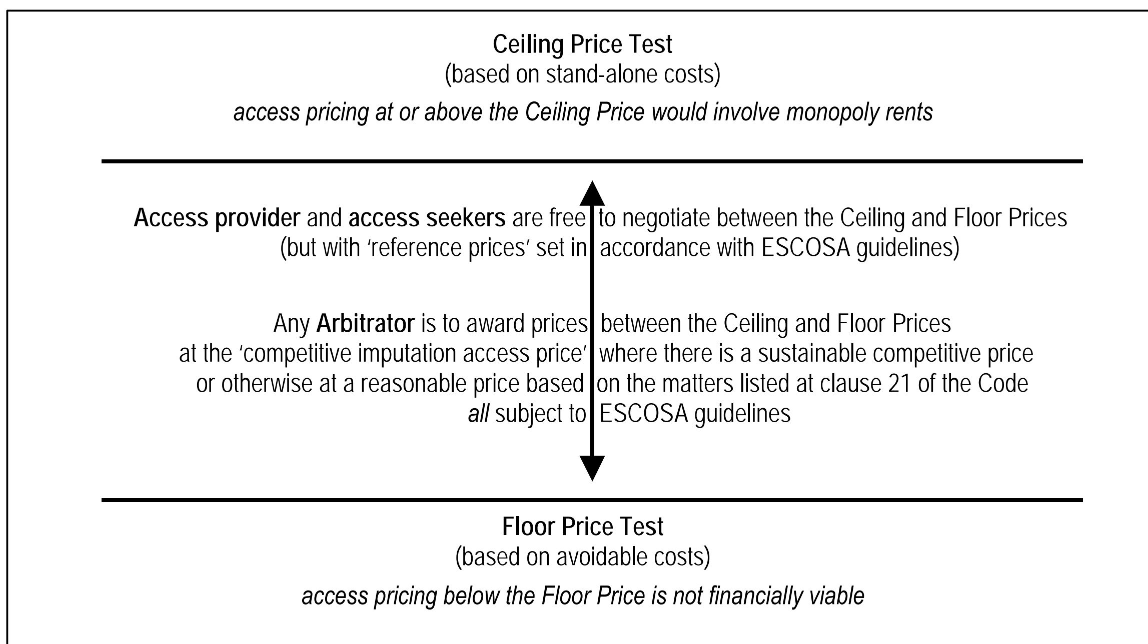
(b) A price ceiling should apply

The competitive imputation pricing rule assumes that there is always a competing mode of transport – or a market capacity for a competing form of transport – that can be used to establish the base-line from which the competitive imputation access price can be developed ***and*** that this price will not be unreasonably high. The latter is the case provided the competitive price is not such as to warrant a user providing the service themselves. The former is the case for existing and new freight, where the current mode of transport is providing the competitive alternative. However, a competitive alternative may not exist for some new freight that could be transported using the new railway.

Whether or not there is a sustainable competitive price, the Schedule therefore provides for a ***ceiling*** on the access price.

Summary of arbitrator pricing rules

The Commission has represented the main themes of the Code's approach to arbitrated pricing in the following diagram.[28]



Novel aspects of the arbitrator pricing rules

The Schedule contains a number of rules that may be judged by some to depart from conventional practice and constrain the arbitrator (and the regulator when developing guidelines to be observed by the arbitrator). The most notable of these are listed below:

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28 This diagram is based on one used by IPART in *Aspects of the NSW Rail Access Regime: Final Report*, April 1999, p.7.

Ceiling prices

- Section 2(8) states that the regulator may, if it thinks it appropriate to do so, allow an adjustment to the DORC valuation of railway infrastructure assets on account of government-contributed assets and other government financial assistance when ceiling prices are being calculated, although any adjustment must (among other things) be pro-rated over all the assets comprising the rail line ("***pro-rata treatment***").
- Where there is a 'sustainable competitive price', sections 1(4) and 2(2)(a) require the ceiling price to be based on the assumption that the access seeker is the sole user of the required railway infrastructure ("***sole user assumption***"), despite the fact that the sole user assumption may be modified on account of the usage of the required railway infrastructure by other access holders where there is no 'sustainable competitive price'.

Actual prices where there is a sustainable competitive price

- The adoption under section 1(6) of a ***competitive imputation test***, involving estimation by the arbitrator of – among other things – the price of providing carriage of a like commodity between two points by rail or some means other than rail (called the competitive rail line-haul price).

Actual prices where there is no sustainable competitive price

- Where the service involved is a freight service subject to no sustainable competitive price or a passenger service, the factors to be taken into account as set out in clause 21(1) of the Code (along with the definition of "business interests" in clause 20(4)) in some respects modify the principles set out in clause 6(4)(i) of the Competition Principles Agreement.

Division 3: worked examples

- In addition to the pricing rules laid down in the Schedule, Division 3 of the Schedule also illustrates the process that an arbitrator should follow (in Attachment A of the Schedule) and provides three worked examples to illustrate application of the pricing principles. One example is for a service covering freight traffics that are already hauled by the railway and the second and third examples are for new freight traffics, with and without a sustainable competitive price respectively.

Definition of railway infrastructure facilities

- Under the Code, the scope of regulation is defined on the basis of a statutory description of the relevant facilities that are subject to the regime that is not necessarily restricted to infrastructure owned by the service provider, with clause 3 of the Code defining "railway infrastructure facilities" to mean:

  > *…facilities necessary for the operation or use of the railway, including –*

(a) *the railway track;*

(b) *the signalling systems, train control systems and communication systems; and*

(c) *such other facilities as may be prescribed; [underlining added]*

but not including rolling stock…".

7.3.2 NCC Final Recommendation

In its Final Recommendation, the NCC stated that this review generally:

> *… should assess the operation of both pricing approaches as well as previewing how likely it is that the ceiling will be breached by the "floor/ceiling" revenues, in combination with the "sustainable competitive" revenues. This review should provide an opportunity to make the changes necessary to ensure the continuing effectiveness of the Regime. It should also provide the Regulator with sufficient information to adjust prices going forward, in anticipation of the 10 year review or provide sufficient information to request a change in that review timetable.*[29]

On the ceiling price pro-rata treatment, the NCC stated that:

> *The Ministerial review after three years of operations, will provide a forum to assess this issue, in conjunction with other aspects of the pricing approaches. For instance, adjustment provisions for the cash and asset subsidies in S.2(8)(b) of the Pricing Schedule, require that any adjustment be "pro rated" over the below-rail infrastructure. This matter will need to be considered in the development of cost units.*[30]

On sustainable competitive pricing, the NCC argued that:

> *…the "sustainable competitive" approach still embodies a less conventional approach to establishing rail prices within that band and the Council welcomes the Ministerial review proposed in S.50, where this issue can be canvassed in light of operational experience.*[31]

On the definition of "business interests", the NCC suggested that this review could consider:

> *whether the definition of "business interests" in clause 20(4), in light of the restrictions on the arbitrator in clauses 20(1) and 20(3), opens up too wide a range of circumstances where the access provider need not be required to extend or expand the facilities.*[32]

On the coverage of infrastructure assets, the NCC posed the question:

> *whether the "railway infrastructure facilities" as defined under the Code include all the relevant assets.*[33]

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[29] NCC Final Recommendation, p.31.

[30] ibid, p.36.

[31] ibid, p.95.

[32] ibid, p.75.

[33] ibid, p.18.

7.3.3 Comments and submissions received

ARTC expressed various views on the Code's arbitrator pricing rules, especially the less conventional aspects of those rules.

On the ceiling price rules, ARTC argued that:

> *… allowing the new track owner to derive a return on publicly contributed cash and assets will have an overall adverse effect on the competitiveness of rail with respect to road, reducing usage of the railway, and overall benefit to the wider community, in the longer term. Although infrastructure capital costs are only relevant to floor/ceiling calculations for pricing and a review of pricing in non-competitive markets, it is conceivable that higher limits on pricing would ultimately give rise to higher pricing.* [34]

On the pro-rata treatment of any adjustment to the DORC valuation of railway infrastructure assets on account of government-contributed assets, ARTC argued:

> *… freight and passengers traveling to Alice Springs only [should not be] required to subsidise the infrastructure north of Alice Springs (with its unique risk profile) given that such freight does not use this part of the network. Freight/passenger movements to Alice Springs are no different to any other rail movement in Australia in this regard. There should be sufficient flexibility in pricing for the new owner to blend prices for freight to Darwin.*
>
> *… neither ARTC nor its customers subsidise less profitable parts of the network with more profitable parts of the network. The ACCC has endorsed this approach on ARTC's current network, enabling users to be confident that they are only paying for those parts of the network that they are utilizing.*[35]

On the use of the competitive imputation pricing rule, ARTC argued that application of this rule:

> *… demands significant market knowledge and information that is not always available to the access provider (intermodal pricing, price/service competitive trade-off etc), and is open to subjective assessment.*
>
> *…It could be envisaged that the significant information requirements and potential for subjective assessment involved in the [competitive imputation] approach to pricing could add significantly to time and costs involved in the process of negotiating access which would have the effect of eroding industry confidence in the process, reducing efficiency and stifling competition.*[36]

APT commented on the Worked Examples:[37]

> *APT has found that the Worked Examples contained in the Schedule to the Code did create some confusion with at least one Access Seeker. The Access Seeker was of the view that the Worked Examples actually prescribed the access rates to be charged.*
>
> *This confusion is understandable and in APT's view, the Worked Examples should be deleted.*

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[34] ARTC submission p.8.

[35] ibid, p.8 and 12.

[36] ibid, p.13 and 9.

[37] APT submission p.1.

7.3.4 The Commission's experience

The Code's ceiling price rules and competitive imputation pricing rule have yet to be tested in arbitration.

The Commission's experience with the arbitrator pricing rules has been limited to developing and publishing the guidelines required by the Schedule.

In developing guidelines to date, the Commission has not felt unreasonably constrained by the Code's pricing rules. For example, while the Schedule is specific about some of the required guidelines, it also empowers the regulator to develop and publish guidelines, if it thinks fit, on matters *in addition to* those specifically referred to in the Schedule.

These additional guidelines could encompass guidance on, among other things:

- valuing capital assets using the Depreciated Optimised Replacement Cost ("DORC") methodology;
- estimating the avoidable costs attributable to the usage of the required railway infrastructure by all other access holders;
- estimating the reasonable contribution that other users might make to the fixed costs of the required railway infrastructure;
- the interpretation to be put on forward-looking and efficient costs;
- defining and estimating incremental above-rail costs in addition to the appropriate allowance for capital costs; and
- defining and estimating the CRLP.

The Commission has acknowledged that such additional guidance could both:

- assist it in providing directions to the access provider under clauses 12B(1) and (4) of the Code and to participate in an arbitration under clauses 17(2) and (3) of the Code; and
- inform the access provider on certain matters in advance of the Commission's revenue reviews under clause 50(4) of the Code, thereby increasing the likelihood of consistency between the pricing guidelines and later revenue reviews.

However, because a less intrusive approach to regulation is warranted in the case of the Railway, with two exceptions (discussed below), the Commission opted against developing detailed additional guidelines, instead restricting itself to developing the various guidelines specifically required in the Schedule.

The Commission has been influenced by uncertainties that can arise over the impact that ambitious guidelines might have on initial access negotiations, and the risk that such guidelines could (unintentionally) hamper negotiations. The

Commission prefers to await experience with access negotiations. It stands ready to consider broadening the scope of its guidelines if evidence emerges that this would serve the objectives of the access regime.

Under clause 45A(1) of the Code, the Commission is empowered, from time to time as it thinks fit, to vary or revoke guidelines developed and published under the Code, or develop and publish new or substitute guidelines. This provision authorises the Commission to progressively develop guidelines as it sees fit, including in light of experience. Whenever considering the adoption of a variation to a guideline, under clause 8(1) the Commission must undertake a public consultation process.

The only guidance that the Commission has been prepared to offer an arbitrator additional to the guidelines specifically required under the Schedule has been with respect to dealing with:

- the treatment of government-contributed assets in the context of clause 21(1)(b); and
- the role of prices for similar services (and so price differentiation) – and the interpretation of section 2(5).

On the former, while the Code does not explicitly mention guidelines to an arbitrator with regard to the treatment of capital costs assets in the context of clause 21(1)(b) when it comes to setting actual (arbitrated) prices, the Commission considered such guidance to be prudent so that the Commission's ceiling price views are not misunderstood or misrepresented when it comes to setting actual (arbitrated) prices. In particular, the Code has not prevented the Commission from including in its guidelines the requirement that, for the purpose of setting actual access prices within the floor and ceiling limits, the DORC value of the railway infrastructure assets should be adjusted to exclude the value of the government-contributed assets.

On the latter, price differentiation is always a contentious matter. While the competitive imputation pricing rule limits price differentiation in markets where there is a sustainable competitive price, the Commission has recognised that some discussion is warranted as to the meaning to be attached to section 2(5) of the Schedule where a sustainable competitive price does not exist, under which an arbitrator is required to:

> *…have regard to economic efficiency taking into account the prices being charged by the access provider to access holders for the same or similar services (including, if the access provider, a related body corporate or an associate has conducted the same or similar services on the railway, the actual prices charged in relation to those services).*

The Commission has included, on page 11 of Guideline No. 2 (Arbitrator Pricing Requirements), that:

In an arbitration, where a reasonable price between the Floor Price and the Ceiling Price is to be based on the prices already charged for the same or similar Services, the Arbitrator may differentiate price on the basis of:

(a) the particular characteristics of the relevant Service, including: axle load, speed, wheel diameter, Train length, origin and destination (including number and length of intermediate stops), departure and arrival times and days of the week;

(b) the commercial impact on the Access Provider's business, including the term of the Access Contract, the consumption of the Access Provider's resources and the credit risk associated with the business;

(c) logistical impacts on the Access Provider's below-rail business, including the impact on other services and risk of failure of the Above-Rail Operator to perform and reduced Capacity and system flexibility;

(d) capital or other contributions by the Above-Rail Operator to the Access Provider's costs; and

(e) the cost of any additional Capacity.

In an arbitration, where a reasonable price between the Floor Price and the Ceiling Price is to be based on the prices already charged for the same or similar Services, the Arbitrator should not differentiate price between circumstances where:

(a) the characteristics of the Services are alike, in terms of location, duration and quality of the train path, train configuration, characteristics of the service, longevity of access, arrival and departure times of the day and week; and

(b) the Above-Rail Operator is operating within the same end market.

7.3.5 Discussion and Recommendation

Degree of prescription

At issue here is the manner in which access pricing principles and regulatory methodologies should be represented in the Code and Schedule or left to the discretion of the regulator (or indeed the arbitrator).

There is no simple set of principles that can be applied to provide meaningful guidance on the appropriate levels of prescription and discretion. The Commission acknowledges that the Schedule is quite prescriptive.

There are a number of reasons for concern with prescriptive regulatory approaches.

First, highly prescriptive rules can result in insufficient flexibility for a regulator/arbitrator to accommodate changing market circumstances.

Secondly, the theory and practice of regulation is evolving in response to experience and analysis of that experience. Over prescription may restrict the ability of a regulator to improve the regulatory approach as regulatory thinking develops.

Thirdly, considerable additional costs are potentially created for market participants by placing significant detail into law. Where laws are highly prescriptive, even minor changes to regulatory practice will require legislative amendment. Significant resources will necessarily be devoted to these processes. As a result, the regulatory costs associated with pursuing improvements in regulatory practice are likely to be significant under a more prescriptive regulatory approach.

However, one of the arguments used to support high levels of prescription is that it provides greater certainty for regulated businesses. The current framework delivers the certainty that is cited as one of the main benefits of a more prescriptive regulatory approach.

Based upon its experience in developing associated pricing guidelines, the Commission has not had its flexibility limited by the current degree of prescription.

Sole user assumption

Rather than define the ceiling price in terms of the bypass option, the ceiling pricing rules simply require the use of the sole user assumption.

The sole user assumption is not an alternative approach to the bypass option. The sole user assumption does not define which costs are to be used in calculating the ceiling price. Instead, this assumption provides that, whichever costs are identified as relevant, the ceiling price should be calculated on the basis of those costs being recovered solely from a single user. This implies a higher 'price' than would be the case were prices based on multiple users.

Only where there is no sustainable competitive price can the sole user assumption be replaced on account of the usage of the required infrastructure by other users.

Hence, nothing in these specific provisions of the Schedule would negate use of the bypass approach to defining the ceiling price (and the relevant costs involved).

Pro-rata treatment

Whatever adjustment is made to the DORC value of the infrastructure assets on account of the government-contributed assets, and even if (as is required) that adjustment does not prevent the access provider from earning a reasonable risk-adjusted return on the capital invested in the railway (that is, disregarding government-contributed assets), that adjustment must be made on a pro-rated basis over the entirety of the capital assets comprising the railway infrastructure facilities.

The Commission understands this required treatment is to ensure that the access prices applying to the use of different sections of the railway (notably the Tarcoola-Alice Springs and Alice-Springs-Darwin sections) are not affected by differential valuation approaches.

The Commission notes that the pro-rata treatment could cause a price shock at the beginning of the regulatory regime, to the extent that access services to the existing railway where there is no sustainable competitive price have been priced to date on the basis of a valuation of the railway infrastructure assets involved lower than the DORC value. While the Code does not permit the Commission to moderate the initial price shock likely on account of the mandating of the DORC valuation, the access to alternative modes of transport mitigates this concern from the access seeker's perspective.

Coverage

While the coverage provisions of the pricing rules potentially encompass more than the infrastructure owned by the below-rail operator, the Commission considers that the potential inflexibilities that could arise are mitigated by clause 3(5) of the Code, which states that:

> *"(a) the Ministers must not prescribe a facility without first consulting with the regulator; and*
>
> *(b) the prescription of a facility must be consistent with the criteria set out in Clause 6(3)(a) of the Competition Principles Agreement referred to in the Trade Practices Act 1974 of the Commonwealth."*

Worked Examples

The only area where the Commission has significant concerns relates to the inclusion of the significantly detailed Worked Examples in the Schedule.

The Commission is aware that the Worked Examples contain some minor errors as well as conflict with the Commission's subsequent rate of return determination.

This series of Worked Examples was put together before the Code commenced, and before the Commission developed and published its pricing guidelines. At best, these examples have served their purpose. At worst, they contain a number of (small) errors and use some assumptions that do not accord with the regulatory guidelines that have since been developed and published by the Commission. Indeed APT's submission notes that the Worked Examples have been singularly unhelpful in facilitating access on at least one occasion.

An alternative to Code prescribed examples would be for the Commission to make available such examples or to require/allow the access provider to provide them (thus allowing them to be kept up to date more readily).

Although not a necessity in terms of the Code's certification, the Ministers should give serious consideration to deleting (or at a minimum correcting) the Worked Examples contained in the Schedule.

Summary

With the exception of the Worked Examples, the Commission believes that the arbitrator pricing rules reflect an appropriate balance between prescription and discretion given the distinguishing characteristics of the Railway. Providing less prescription could leave the Commission with inadequate guidance as to policy makers' intentions, whereas the current level of prescription provides significant investment certainty.

7.4 Reference pricing rules

7.4.1 Code provisions

During negotiations with access seekers, the access provider's offer prices are a matter for the access provider to determine. However, clause 9(1)(e) of the Code provides that the access provider must, on application from an access seeker, provide the access seeker with what can be termed "reference prices".

The Code's reference pricing rules are limited in scope.

Regulatory guidelines

Clause 9(1)(e) of the Code requires that the access provider's reference prices (i.e., the relevant prices and costs associated with railway infrastructure services provided by the access provider … for reference purposes) must be prepared by the access provider:

> *… in accordance with guidelines developed and published by the regulator.*

Consistency

Clause 45A(2) of the Code states that:

> *The regulator should, in developing (or varying) guidelines under this Code, take into account interface issues that may arise under a corresponding access regime (insofar as this may be relevant and insofar as this is consistent with, and not in derogation of the operation of, the other provisions of this Code).*

The Code defines "interface issues" to mean:

> *[those] issues which directly affect two or more railways (including the railway to which this Code applies) and which relate to operating a freight service or a passenger service by means of such railways…*

Such issues arise because a person wishing to operate a rail service on the Railway is likely to need access both to this infrastructure and also to infrastructure owned by:

- ARTC, which owns the interstate line in South Australia (including the track to Kalgoorlie in Western Australia) and has control over the track in Victoria where it has a lease agreement in place; and
- depending on the corridors used, other track owners.

Transparency

Clause 9(1) refers to reference prices being made available "on application" rather than on a "standing" or published basis.

7.4.2 NCC Final Recommendation

The NCC had little to say about the reference pricing rules. However, on the question of consistency, the NCC indicated that the Ministerial review could address:

> *…whether coordination with the role of the ACCC in the ARTC undertaking is capable of being taken into account (Final Report, p.94)*

The ACCC matter is addressed in Chapter 8 (section 8.8).

7.4.3 Comments and submissions received

On the matter of consistency, ARTC stated its view that:[38]

> *… it is important that access regimes (including pricing approach) within each jurisdiction in Australia are consistent to the maximum extent possible, whilst recognizing structural differences between providers in each jurisdiction.*
>
> *… ARTC, and its customers, would prefer consistency with respect to pricing and other facets of access between its own undertaking and neighbouring regimes. Significant volumes could be lost to the interstate rail network (either diverted to another mode or new projects not getting off the ground) as a result of a lack of coordination and consistency between jurisdictions and regimes covering these networks. Similarly, the conduct of one access provider can impact on rail volumes generally, and affect the viability of the network as a whole.*
>
> *…ARTC has sought to set access pricing at a level that will enable rail to be competitive with road in markets served by the interstate network. With the current level of utilization of ARTC's network, however, pricing at the level results in the amount of revenue collected by ARTC not being sufficient for the long-term economic sustainability of its network. It is ARTC's strategy to grow volumes in the long term, such that rail can remain competitive and achieve long-term sustainability of its asset.*

[38] ARTC submission, p.1-2.

> *ARTC considers that this strategy is the only realistic one available to achieve long term sustainability on the interstate rail freight industry in an environment where its main competitor (long haul, heavy road transport) is not paying for the full cost of the infrastructure it uses.*
>
> *…ARTC will not differentiate between like services operating in the same end market.*

On the matter of transparency, ARTC indicated that it:[39]

> *… has adopted the principles of efficiency, equity and open-ness in its approach to facilitating access to the network… In its access undertaking ARTC has voluntarily committed to making its access pricing publicly available and committed that the same pricing will be available to any train operator, regardless of ownership, operates under the substantially the same terms and conditions, and in the same end market as another train operator. ARTC sees these principles as providing confidence and encouragement to potential access seekers that they will be able to use the network on an even playing field with other competitors.*
>
> *…ARTC considers that the Code could be improved by requiring a more open approach to access pricing. ARTC publishes indicative access charges relevant to indicative access services that are superfreighter (intermodal) services. These services form the main part of ARTC business, all have relatively similar operating characteristics and all compete with road freight. The indicative charges are market based and are endorsed by the regulator.*
>
> *… ARTC can see no reason why reference pricing for this type of business could not be developed using the pricing rule upfront, confirmed by the Commission, and published, in a similar way to ARTC's indicative access pricing. This pricing would be available to all operators in this market (included related entities) operating on similar terms and conditions (e.g. a standard access agreement).*
>
> *Further, ARTC publishes a range of 'reference' prices for non-indicative types of service (different axle load/speed combinations). …*
>
> *More open pricing will bring about substantial benefits of greater market confidence and growth, and will also create a more consistent framework for users of the Network and the remaining interstate network. …*

7.4.4 The Commission's experience

Clause 9(1)(e) does not make the required contents of the reference pricing guidelines (or their relationship with other pricing guidelines) clear.[40]

Besides matters of procedure (discussed below), the Commission acknowledges that its reference pricing guidelines could provide guidance on such matters as:

- the purpose to be served by reference prices (and the appropriate balance between the legitimate business interest of the access provider, the interest of the public and the interests of access applicant);
- the nature of a standard service for reference pricing purpose;[41]

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[39] ARTC submission, p.12-13.

[40] While the development and publication of such guidelines are not as explicitly mandatory as the ceiling and floor (where the word "must" is used), the Commission interprets clause 9(1) of the Code to oblige the regulator to develop and publish such reference pricing guidelines.

- the appropriate structure of reference prices – and the extent to which reference prices could comprise a variable component, which is a function of distance and gross mass ($/gtkm); and a flagfall component, which is fixed and specific to each service type and segment ($/km);
- the rail sectors/segments to be used for pricing purposes; and
- the appropriate method for allocating non-segment specific costs to segments.

Given this range of possibilities, the two broad options facing the Commission in this instance have been that it could either:

- restrict the guidelines to dealing only with required processes surrounding the provision of such prices on request, rather than the substance of the reference prices themselves; or
- expand the guidelines to also be prescriptive of the method of calculating such reference prices.

Consistent with its approach with respect to arbitrator pricing guidelines, the Commission has so far preferred the first (more limited) interpretation.

Under clause 45A(1) of the Code, the Commission is empowered, from time to time as it thinks fit, to vary or revoke guidelines developed and published under the Code, or develop and publish new or substitute guidelines. This provision authorises the Commission to progressively develop guidelines as it sees fit, including in light of experience. Whenever considering the adoption of a variation to a guideline, under clause 8(1) the Commission must undertake a public consultation process.

The Commission has been particularly aware that a broader, more prescriptive approach at an early stage could introduce some inflexibility into pricing negotiations that might result in costs that more than outweigh such benefits. This is the case because, given the role played under the access regime by the competition imputation pricing rule, pricing is to be *market-based* as opposed to cost-based under the Code. Under competitive imputation, pricing can be expected to vary more markedly than under a cost-based approach. In such circumstances, published reference prices could inadvertently hamper implementation of the competitive imputation pricing rule. For example:

- setting published reference prices at the high end of the scale, perhaps based on costs and assuming that there is no sustainable competitive price, may only serve to discourage access inquiries and/or distort negotiations; and

[41] ARTC, for example, provides reference prices for a standard service involving an axle load of 21 tonnes, a maximum speed of 110 km/h and average speed of 80km/h and a train length not exceeding 1,800 metres.

- setting published reference prices at the mid-point of the pricing range may only serve to increase the resort to arbitration whenever the access provider pitches its offer prices above the (mid-point) reference price.

The Commission has therefore preferred to make guidelines about the processes to be followed by the access provider in making reference prices available.

However, as clause 9(1)(e) of the Code does not make publication of reference prices by the access provider mandatory, just the provision of reference prices on request, these process guidelines have so far been restricted to the processes to be followed by the access provider in making reference prices available on request.

Once again, the Commission has indicated that it stands ready to vary these guidelines – including by being more prescriptive about the nature of reference prices or their availability – if experience warrants.

7.4.5 Discussion and Recommendation

Extent of prescription

In contrast to the arbitrator pricing rules, the Code's reference pricing rules are not prescriptive. The Commission has explained above that the prescription in the arbitrator pricing rules is reasonable.

The arbitrator pricing rules will influence reference prices, as prices that could result from a subsequent arbitration can be expected to affect the access provider's offer prices. However, clause 9(1)(e) itself does not place any direct limits on the contents of the regulator's reference pricing guidelines.

The only direct limits in the reference pricing rules are those:

- in clause 9(1), that only require reference prices to be made available "on application" rather than on a standing or published basis; and
- in clause 45A(2), that limit interface issues that may arise under a corresponding access regime being taken into account only where "this is consistent with, and not in derogation of the operation of, the other provisions of this Code".

These direct limits aside (which are each subject to separate analysis below), and based upon its experience in developing the reference pricing guidelines, the Commission considers that the reference pricing rules do not constrain its ability to improve the regulatory approach as regulatory thinking develops and as market conditions develop. This is supported also by clause 45A(1) of the Code, under which the Commission is empowered, from time to time as it thinks fit, to vary or revoke guidelines developed and published under the Code, or develop and publish new or substitute guidelines. This provision authorises the

Commission to progressively develop guidelines as it sees fit, including in light of experience.

In addition, it must be acknowledged that the Commission has other means of influencing offer prices besides developing and publishing guidelines. These powers need to be taken into account when assessing the adequacy of the reference pricing rules.

In particular, under the Code, the Commission has the authority:

- to verify that a negotiated outcome complies with the Code and to issue directions to the access provider with regard to matters arising in connection with the negotiation of access in order that the conduct of negotiations can be facilitated (clause 12B);
- to attempt to settle any access dispute by conciliation (clause 15(1)(a)); and
- after appointing an arbitrator to make an arbitrated award, to participate in that arbitration including by providing or calling evidence, making representations on questions arising during the arbitration and assisting the parties or the arbitrator with any matter (as may be appropriate) (clause 17(3)).

In particular, clause 12B allows the Commission to give directions to the parties, during the negotiation phase, regarding the compliance of elements of the negotiated outcome with the Code and the pricing principles.

The NCC stated that clause 12B:

> *"… gives the Regulator the role of initial verifier – the Regulator will keep sufficient information to enable it to verify that negotiated terms or conditions comply with the Regime. The parties can take any issue to the Regulator to check for its compliance with the Regime or to trigger an action by the Regulator to ensure a party acts within the Regime."*[42]

Hence, besides making and publishing pricing guidelines, the Commission's role under the Code with regard to offer prices (and so reference prices) encompasses:

- during access negotiations – responding to requests from an access seeker, the access provider or any other respondent to an access proposal for guidance on aspects of negotiations with the access provider in order that the Commission can either assure an access seeker that the elements it has negotiated comply with the Code or direct the access provider to modify its offer in order to facilitate negotiations; and
- in the case of an access dispute – advising an arbitrator appointed to settle an access dispute.

[42] NCC Final Recommendation, p. 86.

Transparency

As clause 9(1) does not oblige publication of reference prices, only the provision of such prices on request, the Commission has so far limited its reference pricing guidelines to the process requirements involved in the request for and provision of references prices.

The material to be "published" on a clearly identified and publicly accessible page of the access provider's (below-rail) website is limited to the access provider's information requirements of an access seeker requesting reference prices as well as the access provider's standard service characteristics, standard pricing components and its rail segments for reference pricing purposes.

In addition, the Commission as regulator has also allowed the access provider to require that the reference prices provided to a particular access seeker being treated as commercial-in-confidence, and not to be made available to outside parties other than the regulator or an arbitrator.

These features are the direct result of the limits on pricing transparency in the reference pricing rules.

Increased transparency is only possible under the current reference pricing rules at the discretion of the access provider.

No operational experience has emerged to show that this feature of the Code causes it to be ineffective in the context of the clause 6 principles.

However, the Commission considers that there is merit in the Ministers reconsidering this aspect of the reference pricing rules, if only to give the regulator discretion to require publication of a standard set of indicative tariffs akin to those published for the interstate railway network by ARTC.

Consistency

While clause 45A(2) of the Code is prescriptive about whether and when interface issues that may arise under a corresponding access regime may be taken into account, the Commission has not yet had its regulatory flexibility unreasonably limited by this aspect of the reference pricing rules.

For pricing purpose, any relevant "derogation" of the operation of the other provisions of the Code would relate to the arbitrator pricing rules. As discussed earlier, the Commission believes that the arbitrator pricing rules largely reflect an appropriate balance between prescription and discretion given the distinguishing characteristics of the railway. The current level of prescription in those rules – and so the inability of the regulator to "derogate" the operation of those rules when taking into account interface issues – provides the investment certainty necessary for the Railway.

7.5 Recommendation

The Commission does not recommend any changes as being necessary to the Code in this area.

Notwithstanding this, the Commission observes that there would be significant merit in deleting the Worked Examples from the Code.

There would also be merit in allowing the regulator to determine, from time to time, whether publication (e.g. web publication) of reference prices is warranted.

8 DISPUTE RESOLUTION

8.1 The issues

The Terms of Reference requires assessment of:

> *the effectiveness of the Code provisions regarding dispute resolution processes*

8.2 Code Provisions

Clauses 13 to 37 of the Code set out the process for dispute resolution, through a sequence of:

- existence of a dispute;
- referral of a dispute;
- conciliation;
- arbitration, including:
  - appointment of an arbitrator
  - powers of the arbitrator
  - procedural requirements;
  - matters to be taken into account, such as the pricing principles;
  - confidentiality;
  - costs of an arbitration;
  - the making of an award; and
- appeal provisions.

Clause 12B below also provides the Commission with a role of giving advice or directions to parties during the negotiation phase (covering clauses 9 to 12A). This provides some "pre-dispute" resolution options.

> *12B. Referral of issues to regulator*
>
> *(1) An access seeker, the access provider or any other respondent to an access proposal may request the regulator to consider and, if appropriate, to give advice or directions with respect to any matter that has arisen in connection with the operation of this Division in order to facilitate the conduct of negotiations under this Division.*
>
> *(2) A person making a request under subclause (1) must comply with any requirement published by the regulator for the purposes of this clause.*
>
> *(3) The regulator may decline to consider or act on a request under subclause (1) for any reasonable cause.*
>
> *(4) The regulator may, if the regulator thinks fit, give a general direction to the access provider under subclause (1) in respect of a particular matter under this Division.*
>
> *(5) A person must not, without reasonable excuse, contravene or fail to comply with a direction given by the regulator under this clause.*
>
> *Penalty: $10 000.*

(6) This clause does not limit or affect the ability of an access seeker at any time to request that an access dispute be referred to arbitration under Division 2.

8.3 NCC Final Recommendation

The NCC addressed the dispute resolution processes in its Final Recommendation[43] and concluded that it was satisfied that the Code had the necessary requirements in this area. This conclusion largely reflected changes to other aspects of the Code, such as the independence of the regulator, the clause 12B functions and the power to make pricing and service guidelines.

The NCC did not identify any specific issues in this area in the context of this review.

8.4 The nature of the problem

The dispute resolution procedures set out from clauses 13 to 37 are fundamental elements of a negotiate/arbitrate form of regulation, which is the form of regulation embodied in the Code. As the Commission explained in Chapter 1, this review is focussed on the structures, or rules, that support and implement the selected form of regulation.

Therefore, the nature of the problem in this case is that the relevant Code provisions need to provide effective dispute resolution processes.

The structures provided here include three levels of dispute resolution, and allow for escalation as necessary:

- regulator directions (cl. 12B);
- conciliation (cl. 15); and
- arbitration (cl. 15 to 37).

Each level is progressively more directive and, most likely, more costly. This is intended to provide the necessary support to the form of regulation, allow for some flexibility in dispute resolution (e.g. avoid it being too costly) but, at the same time, retain the uncertainty of outcome that this form of regulation requires.

8.5 The clause 6 principles

The dispute resolution processes are relevant to subclauses 6(4)(a), (b), (c), (g), (h), (i), (j), (l) and (o).

6(4) A State or Territory access regime should incorporate the following principles:

(a) Wherever possible third party access to a service provided by means of a facility should be on the basis of terms and conditions agreed between the owner of the facility and the person seeking access.

[43] NCC Final Recommendation, pp. 80-89.

> (b) *Where such agreement cannot be reached, Governments should establish a right for persons to negotiate access to a service provided by means of a facility.*
>
> (c) *Any right to negotiate access should provide for an enforcement process.*
>
> (g) *Where the owner and a person seeking access cannot agree on terms and conditions for access to the service, they should be required to appoint and fund an independent body to resolve the dispute, if they have not already done so*
>
> (h) *The decisions of the dispute resolution body should bind the parties; however, rights of appeal under existing legislative provisions should be preserved.*
>
> (l) *In deciding on the terms and conditions for access, the dispute resolution body should take into account: [see items (i) to (vii) in Appendix A]*
>
> (j) *The owner may be required to extend, or to permit extension of, the facility that is used to provide a service if necessary but this would be subject to: [see items (i) to (iii) in Appendix A]*
>
> (i) *The dispute resolution body should only impede the existing right of a person to use a facility where the dispute resolution body has considered whether there is a case for compensation of that person and, if appropriate, determined such compensation*
>
> (o) *The dispute resolution body, or relevant authority where provided for under specific legislation, should have access to financial statements and other accounting information pertaining to a service*

The relevant subclauses in this case involve many of the steps of the arbitration process and seek to ensure that once entered into, the arbitrator is appropriately armed to resolve the dispute efficiently and in a manner aligned with the regime's objectives.

8.6 Comments and submissions received

ARTC commented that there had been no disputes, and that as such the efficacy of the Code provision had not been tested.[44] Notwithstanding this ARTC also commented that it would support an alternative approach that would guarantee that the ACCC became the final point for arbitration, at least where the dispute had national implications and preferably for all disputes.

8.7 The Commission's experience

As there have been no disputes the Commission has not had direct experience with the arbitration process, the conciliation process or the clause 12B process.

However, the Commission had undertaken some preparatory work in relation to its role in the event of a dispute, as it has for its equivalent roles under the South Australian Rail Access Regime and the South Australian Ports Access Regime. The Commission observes that apart from its clause 12B role, the processes and structures in place for this access regime are consistent with those other regimes. The Commission also understands that they are also generally consistent with the broad processes applying in other jurisdictions.

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[44] ARTC submission p.14.

8.8 Discussion and Recommendation

In the absence of any direct operational experience in respect of these provisions the Commission is unable to conclude that there are any flaws in the Code's dispute resolution processes. Further, the Commission has observed in its preparatory work that the processes provided in the Code are consistent with those in other regimes with which the Commission is familiar – and no obvious flaws have emerged. Therefore, the Commission does not recommend any changes as being necessary to the Code in this area.

One point of difference between the Code and some other access regimes is the separation of the role of regulator and arbitrator (though this separation occurs in each of the transport access regimes in which the Commission is involved). One facet of this separation is that the Commission appoints an arbitrator – pursuant to the provisions in clause 16 in the Code.

In relation to ARTC's proposition about the role of the ACCC, the Commission observes that it is open to it to appoint the ACCC as the arbitrator for a dispute with interface issues, or indeed for any dispute (though the ACCC would need to determine whether it could accept such an appointment). The NCC discussed this prospect in its Final Recommendation.[45]

The Commission also observes that recent developments with the Railway suggest a prospect for future bulk traffics (e.g. ores) travelling to Darwin for export. Such traffics may not raise the same interface issues as intermodal traffic.

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[45] NCC Final Recommendation, pp. 94.

9 RECORD KEEPING

9.1 The issues

The Terms of Reference requires assessment of:

> *the adequacy of the Code provisions regarding record keeping requirements*

9.2 Code provisions

Clause 46 of the Code obliges the access provider to maintain "accounts and records" that:

- distinguish between below-rail and above-rail operations;
- provide sufficient information to enable the pricing principles in the Schedule to the Code to be applied in a reasonable manner (subclause (2)(c)); and
- comply with any guidelines developed and published by the regulator.

Specifically, clause 46 provides for the segregation of the access provider's accounts and records as follows:

> *(1) The access provider must keep accounts and records of its business consisting of the provision of railway infrastructure services in relation to the railway so as to give a true and fair view of that business as distinct from other businesses carried on by the access provider or any related body corporate or associate of the access provider.*
>
> *(2) The accounts and records must comply with any guidelines developed and published by the regulator and be kept in a way that gives –*
>
> *(a) a comprehensive view of the access provider's legal and equitable rights and liabilities in relation to railway infrastructure services;*
>
> *(b) a true and fair view of –*
>
> *(i) income and expenditure derived from, or relating to, railway infrastructure services; and*
>
> *(ii) assets and liabilities of the access provider's business so far as they relate to railway infrastructure services; and*
>
> *(c) sufficient information to enable the pricing principles to be applied in a reasonable manner.*
>
> *(3) The access provider must cause to be kept in a similar way similar accounts and records in relation to the business of any related body corporate or associate of the access provider to whom a railway infrastructure service is provided by the access provider. [underlining added for emphasis]*

Clause 39 of the Code empowers the regulator to obtain information in the form of either (or both):

- regular (e.g. annual) general purpose reports in response to foreshadowed information requirements; or

- once-off, ad hoc reports on request.

As such, clause 39 provides a basis for, amongst other things, monitoring information based upon the accounts maintained under clause 46.

Specifically, clause 39 provides as follows:

> *(1) The regulator may, by written notice to the access provider, require the access provider to provide to the regulator, within a period stated in the notice or at stated intervals, specified information or copies of specified documents related to –*
>
> *(a) the provision of railway infrastructure services to which this Code applies; and*
>
> *(b) any other activity in relation to the railway engaged in by the access provider or a related body corporate or an associate of the access provider.*
>
> *(2) Without limiting subclause (1), the information and documents that may be required extend to financial information and documents relating to the access provider's own use of railway infrastructure facilities. [underlining added for emphasis]*

9.3 NCC Final Recommendation

In its Final Recommendation, the NCC did not nominate record-keeping issues for attention in this review. The NCC's comments in relation to financial accounts and records focussed mainly on the powers of the regulator to access such accounts and records:

> *The regime provides the Regulator with sufficient powers to obtain any relevant financial and accounting information within a reasonable time. The Regulator's ability to direct the access provider to provide information under S.39 is now strengthened by its broader powers and independence.*
>
> *S.46(2)(c) now explicitly requires that the access provider's accounts and records be kept to ensure that sufficient information is available to apply the pricing principles. While it is not clear that the Regulator can direct the access provider to structure its accounts in a fashion that will provide it with the information it requires, it can require that certain information be provided. The access provider will need to set up its accounts so that it can meet these requirements.*[46]

9.4 The nature of the problem

At issue is whether the Code's record-keeping requirements can help ensure that the access provider does not advantage its affiliated above-rail operator relative to other above-rail operators (recognising that record keeping alone does not achieve this).

9.5 The clause 6 principles

The relevant CPA principles are those in clauses 6(4)(n) and (o) of the CPA:

> *6(4) A State or Territory access regime should incorporate the following principles:*
>
> *…*

[46] NCC Final Recommendation, p. 87.

(n) Separate accounting arrangements should be required for the elements of a business which are covered by the access regime.

(o) The dispute resolution body, or relevant authority where provided for under specific legislation, should have access to financial statements and other accounting information pertaining to a service.

9.6 Comments and submissions received

ARTC said that it was:[47]

> *… unaware as to whether the provisions in relation to accounting separation have been tested by the Commission, and cannot comment on the appropriateness or sufficient [sic] of provisions under the Code in this regard.*

9.7 The Commission's experience

The Commission has published Guideline No. 3 (Regulatory Information Requirements) dealing with the information that the access provider must generate, keep and report, including:

- information on the financial performance and position of each prescribed business ("Regulatory Accounts");
- information on the costs of providing railway infrastructure services ("Cost Information"); and
- information on the usage of railway infrastructure services ("Usage Information").

The Regulatory Accounts provisions cover the income and expenditure derived from each of the access provider's prescribed businesses, and the assets and liabilities of those businesses.

The Cost Information provisions distinguish between costs attributable to various types of operations or services (below-rail and above-rail operations, passenger and freight services, and freight services that may involve sustainable competitive prices and those which do not) and in certain circumstances between costs that are avoidable and those that are not.

The Usage Information provisions distinguish between competitive and monopoly freight volumes and passenger kilometres, and between usage by the above-rail business affiliated to the access provider and other above-rail operators in accordance with an existing access agreement or similar arrangement.

The regulatory accounts and cost information elements of Guideline No. 3 reflect the Commission's view on the types of accounts and records that the access provider needs to generate and keep to comply with clause 46 of the Code.

Guideline No. 3 also requires that the information should be:

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[47] ARTC submission p.14.

- provided to the regulator in a form that can be verified;
- prepared, where consistent with this and other Commission guidelines, in accordance with Australian Accounting Standards;
- prepared in a consistent manner so that the Commission can make comparisons between them over time; and
- developed and kept in accordance with the relevant methodology and format set out in the access provider's Information Procedures approved by the Commission.

When developing Guideline No. 3, the Commission noted that clause 46 does not itself require provision of the resultant accounts or records. However, the Commission was not unduly constrained by this due to its broad power to obtain information under clause 39.

9.8 Discussion and Recommendation

The Commission acknowledges the point made by ARTC that the merits of the Code provisions in relation to record keeping have yet to be fully tested. That is to say that while the Commission has published Guideline No. 3 and received the first accounts, the information so collected has not yet been called upon in relation to an access matter.

The Code's record-keeping provisions, and the resultant accounting separation, provide a transparency of accounts that is an essential part of the operation of the Code and can help to ensure that the access provider does not advantage its affiliated above-rail operator relative to other above-rail operators.

The Commission recognises that effective facilitation of access could be at risk if accounting separation is not a requirement of a vertically-integrated access provider. The corporate integration and affiliation of monopoly and contestable businesses gives rise to the possibility that decisions could be made by a monopoly business in ways that discriminate against a competitor of a related business in an upstream or downstream market, or financially or competitively advantage that related business.

Effective ring-fencing aims at providing two related benefits:

- improvement in the effectiveness of above-rail competition, by preventing a below-rail service provider from extending its market power into a contestable sector; and
- improvement in the efficiency of regulation, by preventing contestable costs being recovered through regulated charges.

Some regimes also apply other separations, such as legal or functional separation, as described below:

- legal separation – with the monopoly and contestable functions being separate legal entities as defined by the Corporations Law; or
- functional separation – with the related businesses of an integrated entity (e.g., marketing) being carried out in different locations, using separate or partitioned systems.

The types of market conduct usually deemed undesirable and so prohibited under ring-fencing obligations involve:

- cost shifting to a monopoly business from related contestable (and non-regulated) businesses;
- the provision of confidential information by a monopoly business to a related contestable business in a manner that advantages the related business over competitors of that related business; and
- decisions as to the supply of services by, or the purchase of services from, a related business in an upstream or downstream market being made on the terms and conditions which have the purpose or effect of discriminating unfairly in favour of the related business.

The Code does not require such additional separations, and as a result, the accounting separation becomes all the more significant. The Code's record-keeping requirements address these issues. Operational experience has revealed no flaws or deficiencies in them. Therefore, the Commission does not recommend any changes as being necessary to the Code in this area.

10 OTHER ISSUES

The Commission raised a number of other issues in its Issues Paper that interested parties might have wished to reflect upon and discuss in submissions. ARTC commented on some such matters in its submission and these are addressed here.

10.1 On-selling

The NCC noted that the Code made provision for on-selling of access, largely in response to ARTC concerns, although the provisions are not limited to ARTC.[48] Indeed, such provisions could facilitate access negotiations being initiated by shippers[49] who may then sub-contract the rail task to a preferred supplier – particularly for bulk cargoes. The NCC suggested that these provisions could be “tested” in this review.

ARTC noted in its submission that it has no plan to offer such access, nor is it aware of other parties with such intentions.[50]

The Commission is also not aware of any such on-selling activity, although it has, from time to time, received requests for clarification on pricing principles from parties assessing minerals developments. Whether such prospects might develop is unknown, but it does indicate that access pricing is of interest to shippers as well as above-rail operators.

In the absence of any direct experience with these provisions the Commission does not recommend any changes as being necessary to the Code in this area.

10.2 Safety Accreditation

Safety accreditation refers to the regulatory framework and practices associated with a rail operator gaining approval to operate rail services. Railway operators and railway owners are required to have in place safety management plans that identify significant potential risks, specify the systems, audits, expertise and resources to be employed to address those risks and specify the person responsible for the implementation and management of the plan. Notwithstanding mutual recognition arrangements, jurisdictional differences in rail safety accreditation requirements continue to impose costs and duplication (or more) on operators.

The NCC commented on this issue and again noted that it might be tested in this review.

ARTC noted in its submission that such problems continue to this day. [51]

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[48] NCC Final Recommendation, p.95.

[49] A shipper is a cargo owner or interest.

[50] ARTC submission p.15.

[51] ARTC submission p.15.

The Commission notes that the recent CoAG statement addresses this issue and foreshadows the possibility of a single, national rail safety act and further harmonisation of jurisdictional rail safety legislation, leading to a uniform approach to rail safety by the middle of 2006.[52]

10.3 Further reviews

Clause 50 provides for the Ministers to conduct a review such as this at any time.[53] However, other than this review and the separate revenue reviews, the only review scheduled is to occur around the 29th year of operation of the Code.

ARTC suggested that, given the lack of operational experience available at this stage, there would be merit in scheduling regular reviews.

The Commission is unable to predict at which time relevant experience might emerge on any particular issue under the Code – noting that implicit in the negotiate/arbitrate model is the intention to avoid disputes occurring. As such, any need for future reviews would best await the emergence of specific experience, or other evidence, that indicates a need to review the Code. The Commission would certainly alert the Ministers in such an event.

The Commission also observes that it has, on several occasions, referred to its guidelines in this report and the need or merit of keeping those guidelines up-to-date. In this context, the Commission is minded to re-examine its guidelines through 2006/07. The scope of that examination will be intended to serve as a check on the guidelines – in terms of functionality and completeness. In the absence of operational experience to the contrary, the Commission does not have in mind to recast the guidelines. Note that this intended review of guidelines would not be a Ministerial review.

10.4 Role of the ACCC

The role of the ACCC is addressed in Chapter 8 (section 8.8).

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[52] CoAG, *Competition and Infrastructure Reform Agreement*, 10 February 2006 (see www.coag.gov.au).

[53] Indeed, even if this were not stated it would still be open to the Ministers to review the Code at any time.

APPENDIX A: THE CLAUSE 6 PRINCIPLES

6(2) The regime to be established by Commonwealth legislation is not intended to cover a service provided by means of a facility where the State or Territory Party in whose jurisdiction the facility is situated has in place an access regime which covers the facility and conforms to the principles set out in this clause unless:

(a) the Council determines that the regime is ineffective having regard to the influence of the facility beyond the jurisdictional boundary of the State or Territory; or

(b) substantial difficulties arise from the facility being situated in more than one jurisdiction.

6(3) For a State or Territory access regime to conform to the principles set out in this clause, it should:

(a) apply to services provided by means of significant infrastructure facilities where:

(i) it would not be economically feasible to duplicate the facility;

(ii) access to the service is necessary in order to permit effective competition in a downstream or upstream market; and

(iii) the safe use of the facility by the person seeking access can be ensured at an economically feasible cost and, if there is a safety requirement, appropriate regulatory arrangements exist.

(b) incorporate the principles referred to in sub clause (4).

6(4) A State or Territory access regime should incorporate the following principles:

(a) Wherever possible third party access to a service provided by means of a facility should be on the basis of terms and conditions agreed between the owner of the facility and the person seeking access.

(b) Where such agreement cannot be reached, Governments should establish a right for persons to negotiate access to a service provided by means of a facility.

(c) Any right to negotiate access should provide for an enforcement process.

(d) Any right to negotiate access should include a date after which the right would lapse unless reviewed and subsequently extended; however, existing contractual rights and obligations should not be automatically revoked.

(e) The owner of a facility that is used to provide a service should use all reasonable endeavours to accommodate the requirements of persons seeking access.

(f) Access to a service for persons seeking access need not be on exactly the same terms and conditions.

(g) Where the owner and a person seeking access cannot agree on terms and conditions for access to the service, they should be required to appoint and fund an independent body to resolve the dispute, if they have not already done so.

(h) The decisions of the dispute resolution body should bind the parties; however, rights of appeal under existing legislative provisions should be preserved.

(i) In deciding on the terms and conditions for access, the dispute resolution body should take into account:

(i) the owner's legitimate business interests and investment in the facility;

(ii) the costs to the owner of providing access, including any costs of extending the facility but not costs associated with losses arising from increased competition in upstream or downstream markets;

(iii) the economic value to the owner of any additional investment that the person seeking access or the owner has agreed to undertake;

(iv) the interests of all persons holding contracts for use of the facility;

(v) firm and binding contractual obligations of the owner or other persons (or both) already using the facility;

(vi) the operational and technical requirements necessary for the safe and reliable operation of the facility;

(vii) the economically efficient operation of the facility; and

(viii) the benefit to the public from having competitive markets.

(j) The owner may be required to extend, or to permit extension of, the facility that is used to provide a service if necessary but this would be subject to:

(i) such extension being technically and economically feasible and consistent with the safe and reliable operation of the facility;

(ii) the owner's legitimate business interests in the facility being protected; and

(iii) the terms of access for the third party taking into account the costs borne by the parties for the extension and the economic benefits to the parties resulting from the extension.

(k) If there has been a material change in circumstances, the parties should be able to apply for a revocation or modification of the access arrangement that was made at the conclusion of the dispute resolution process.

(l) The dispute resolution body should only impede the existing right of a person to use a facility where the dispute resolution body has considered whether there is a case for compensation of that person and, if appropriate, determined such compensation.

(m) The owner or user of a service shall not engage in conduct for the purpose of hindering access to that service by another person.

(n) Separate accounting arrangements should be required for the elements of a business which are covered by the access regime.

(o) The dispute resolution body, or relevant authority where provided for under specific legislation, should have access to financial statements and other accounting information pertaining to a service.

(p) Where more than one State or Territory access regime applies to a service, those regimes should be consistent and, by means of vested jurisdiction or other co-operative legislative scheme, provide for a single process for persons to seek access to the service, a single body to resolve disputes about any aspect of access and a single forum for enforcement of access arrangements.

APPENDIX B: CLAUSE 50

50. Review of Code

(1) The Northern Territory Minister and South Australian Minister jointly may, at any time, review the operation of this Code but, in any case, must do so -

(a) firstly, not later than 30 June in the 3rd year of operations of the railway; and

(b) secondly, not later than 12 months before the expiration of the period for which the Commonwealth Minister has specified under section 44N of the Trade Practices Act 1974 of the Commonwealth that the access regime, of which this Code is a part, is to remain in force.

(2) To enable the Ministers to perform their function under subclause (1), the regulator must prepare such reports to the Ministers as the Ministers may require.

(3) The Ministers must, in relation to a review under subclause (1)(a) or (b) -

(a) -

(i) by notice published in a newspaper circulating generally in Australia, invite interested persons to make submissions in relation to the review within a period stated in the notice; and

(ii) give consideration to any submissions made in response to an invitation under subparagraph (i); and

(b) -

(i) in the case of the Northern Territory Minister - cause a report on the outcome of the review to be laid before the Legislative Assembly of the Northern Territory within 12 sitting days after the completion of the review; and

(ii) in the case of the South Australian Minister - cause a report on the outcome of the review to be laid before both Houses of the South Australian Parliament within 12 sitting days after the completion of the review.

…