



Review of the South Australian Rail Access Regime Information Kit

DRAFT Decision

April 2019

Request for submissions

The Essential Services Commission (**Commission**) invites written submissions from members of the community on this paper. Written comments should be provided by **Friday, 17 May 2019**.

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The Commission may also exercise its discretion not to publish any submission based on length or content (for example containing material that is defamatory, offensive or in breach of any law).

Responses to this paper should be directed to: **2019 Review of South Australian Rail Access Regime Information Kit**

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Glossary of terms

Term	Description
Above-Rail Service	Rolling stock such as locomotives, carriages and wagons.
Access Contract	A contractual agreement between an Access Seeker and the Access Provider regarding access to Below-Rail Services .
Access Provider	A party providing, or able to provide, Fixed Railway Infrastructure – sometimes referred to as a Below-Rail Service .
Access Regime	The framework for access to the Railway Network under Parts 3 to 8 of the ROA Act .
Access Seeker	An operator of an Above-Rail Service seeking access to the Fixed Railway Infrastructure provided by the Access Provider
ARTC	The Australian Rail Track Corporation Ltd.
Below-Rail Service	Refers to operations involving track management, including the track and associated infrastructure required to operate it.
Commission	Essential Services Commission established under the ESC Act .
ESC Act	Essential Services Commission Act 2002 (SA).
Fixed Railway Infrastructure	Facilities necessary for the operation or use of the Railway Network , including signalling and control systems as well as railway track, but not rolling stock.
GWA	Genesee & Wyoming Australia Inc., the provider of Fixed Railway Infrastructure , as well as a provider of Above-Rail services.
Information Brochure	A document containing information relevant to access that an Access Provider is obliged to prepare and provide in accordance with s.28 of the ROA Act .
Information Kit	The Commission's primary publication concerning the South Australian Rail Access Regime .
Intrastate Railway Network	Intrastate railway lines and associated assets to which the ROA Act applies.
Proclamation	The South Australian Governor's Proclamation regarding the ROA Act , published in the South Australian Government Gazette, 29 September 2016.
Railway Network	The Railways subject to the ROA Act .
ROA Act	Railways (Operations and Access) Act 1997.
Third Party Operators	Operators of an Above-Rail Service who are not related to or affiliated with the Access Provider .

1 Executive Summary

The Essential Services Commission is reviewing and publicly consulting on proposed amendments to the South Australian Rail Access Regime Information Kit under the Railways (Operations and Access) Act 1997.

The intent of the review is that the Information Kit, and the guidelines issued by the Commission in accordance with the Information Kit, assist commercial negotiation of railway access, are sufficiently clear, detailed and relevant for existing and prospective railway users and provide flexibility to meet any future changes in the rail industry. This is consistent with the objectives of the ROA Act, particularly in terms of helping to promote economically efficient investment in and use of Railway Network services and promoting access to those services on fair commercial terms.

At this stage, the Commission has not identified the need for major revisions to either the Information Kit or the guidelines. Its draft proposals are therefore of limited scope, including retaining current pricing principles, updating information about the coverage of railway infrastructure, improving readability and updating the format of the Information Kit. While these are considered appropriate changes, the Commission acknowledges that they are unlikely to materially impact on the current operation of the South Australian Rail Access Regime (**Access Regime**).

Of note, this is not a review of the ROA Act overall, nor of the Access Regime in general: those matters will be formally reviewed by the Commission in 2020, as required under Section 7A of the ROA Act. Issues raised in submissions to this review that relate to those overall matters will be considered by the Commission as part of the 2020 Access Regime review, which will run from November 2019 to August 2020.

1.1 Background

The Access Regime allows access by Third Party Operators to the services provided by the intrastate Railway Network through a negotiate-arbitrate framework. The Commission is the designated regulator of the Access Regime, with responsibility for monitoring and enforcing compliance, conciliation and arranging for arbitration of access disputes, and setting requirements for information provision.

The Information Kit sets out the Commission's positions and requirements in relation to those matters. Alongside background material, the Information Kit provides information about pricing principles and reporting requirements as well as access and dispute procedures, and is a combination of what the Commission might otherwise publish as an information paper and guidelines. The purpose of the Information Kit is to reduce information asymmetries (where one party has more, or better, information than the other, creating incentives for opportunism) that can exist between an Access Seeker and Access Provider, therefore assisting commercial negotiations.

The Information Kit was last updated in 2010. The Information Kit was originally developed through 1998 and 1999 when the Access Regime was introduced. Since then, the Information Kit has been re-published multiple times, including in 2004, 2005 and 2010, each iteration adding further information, including background and procedural information.

1.2 Proposals for the Information Kit

The Commission proposes to:

- ▶ retain the existing pricing principles for calculating floor and ceiling access prices and guidelines for determining a "likely price" for access
- ▶ retain existing information requirements for the Access Provider, including for the Information Brochure

- ▶ update the coverage and transparency of information relating to railway infrastructure, including to account for the Proclamation made under the ROA Act in September 2016 which clarified that scope, and
- ▶ make minor modifications to improve readability and provide clearer language.

Those proposals are set out in a draft Intrastate Rail Access Regime: Access Information and Pricing Principles Guideline, which has been released for consultation together with this Draft Decision.

The Commission is proposing to separate the Information Kit into two separate guidelines – the first addressing access information and pricing principles and the second addressing reporting and compliance requirements. A draft guideline containing the existing reporting and compliance obligations under the Information Kit has also been released with this Draft Decision. The review is not considering changes to the reporting and compliance obligations at this time, as they will be reviewed as part of the Commission's broader review of compliance and monitoring later in 2019. This will allow for greater alignment of compliance requirements across regulated industries in SA.

In addition, the Commission proposes to move the background information about the Access Regime from the introductory sections of the Information Kit into fact sheets.

The separation of the Information Kit into separate guidelines and fact sheets is consistent with the approach used by the Commission for other regulated sectors, as well as the Tarcoola-Darwin railway access regime.

1.3 Next steps

The Commission invites written submissions on this draft decision by 17 May 2019. To facilitate the provision of submissions or address any queries, the Commission would be pleased to meet with stakeholders for a briefing upon request.

The Commission intends to release a Final Decision with final guidelines in July 2019.

2 The review

2.1 The South Australian Rail Access Regime

The Railways (Operations and Access) Act 1997 (**ROA Act**) sets out the framework for the operation of and access to certain intrastate railway infrastructure (**Intrastate Railway Network**) services. The objectives of the Act are:¹

- ▶ to promote a system of transport in South Australia that is efficient and responsive to the needs of industry and the public,
- ▶ to provide for the operation of railways,
- ▶ to facilitate competitive markets in the provision of railway services through the promotion of the economically efficient use and operation of, and investment in, those services,
- ▶ to promote the efficient allocation of resources in the rail transport segment of the transport industry, and
- ▶ to provide access to railway services on fair commercial terms and on a non-discriminatory basis.

2.2 Purpose of Information Kit and review

Under Section 9 of the ROA Act, the Essential Services Commission (**Commission**) is designated as the regulator of the regime allowing third parties to access the Intrastate Railway Network in South Australia (SA) (**Access Regime**).² The ROA Act establishes a negotiate-arbitrate framework to encourage access on fair commercial terms to Below-Rail services, and also establishes the Commission's responsibility for monitoring and compliance, setting requirements for information provision, and conciliation and arranging for arbitration of access disputes.³

The Access Regime Information Kit (**Information Kit**) sets out the Commission's requirements in relation to the Access Regime.⁴ In particular, the Information Kit informs both Access Seekers and Access Providers about the access process as well as requirements regarding information provision (including price and non-price terms and conditions) and compliance. It is effectively a combination of what the Commission might otherwise publish as an information paper and guidelines. The "guideline" aspects of the Information Kit have legal effect as they are made pursuant to the ROA Act. Access Seekers and Access Providers must abide by the obligations in those parts of the Information Kit. The ROA Act empowers the Commission to keep the information and guidelines under review.⁵

The Information Kit is currently structured as a single document with chapters describing the:

- ▶ Access Regime
- ▶ pricing principles
- ▶ information that Access Providers must provide to Access Seekers
- ▶ information that Access Providers must report to the Commission, and
- ▶ compliance requirements.

¹ See ROA Act Division 2, section 3.

² For an overview of the SA Rail Access Regime, please see Appendix A.

³ See Parts 3 to 8 of the ROA Act.

⁴ The current Information Kit is available on the Commission's website at: <https://www.escosa.sa.gov.au/industry/rail/codes-guidelines>.

⁵ See Part 4, Division 2, Sections 27, 28 and 29 of the ROA Act.

The Information Kit aims to reduce the potential for the Access Provider to use market power for an improper purpose and therefore assist commercial negotiations for access.⁶

2.3 Scope of the review

The review focuses on areas where the information and guidelines in the Information Kit could be amended to better facilitate commercial negotiation of access to Railway Network services, consistent with the objectives of the ROA Act, by:

- ▶ providing clear, relevant and detailed information about the Access Regime and the Commission's requirements to allow Access Seekers and Access Providers to understand the framework for gaining access to Railway Network services
- ▶ ensuring that Access Providers provide Access Seekers with sufficient information to reach commercially agreed outcomes
- ▶ ensuring that the Commission's requirements represent contemporary practice and anticipate, as much as practicable, future changes in the rail industry.

Those aims are consistent with the objectives of the ROA Act, as they would help promote economically efficient investment in and use of Railway Network services and promote access to those services on fair commercial terms.

The original use of a single document for the Information Kit reflects the fact that the intended readership is specialised, relatively limited and likely to value easy access to the full suite of information. However, this review examines parts of the Information Kit only, in particular those matters for which the Commission may issue guidelines pursuant to Sections 27, 28 and 29 of the ROA Act relating to floor and ceiling pricing principles and information about access. The review is not assessing the reporting and compliance sections of the Information Kit, which will be reviewed as part of the Commission's broader review of compliance and monitoring to be published in 2019.⁷ This will allow for greater alignment of compliance requirements across regulated industries in SA.

This is not a review of the ROA Act, nor of the Access Regime in general, which will be reviewed in 2020 as required under Section 7A of the ROA Act; that review will provide advice and recommendations to the Minister for Transport and Infrastructure as to whether the Access Regime established under the ROA Act should continue for a further five years.⁸ Issues raised in submissions to this review that relate to the effectiveness of the Access Regime generally will be considered by the Commission as part of the review of the Access Regime in November 2019 – August 2020.

2.4 Process for the review

In reviewing the Information Kit, the Commission has been informed by:

- ▶ submissions from stakeholders
- ▶ current and future rail industry conditions, and
- ▶ regulatory practice in other parts of Australia

⁶ The concept of the use of market power for an improper purpose was the subject of the case of *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 205 CLR 1. The full case is available at http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/high_ct/2001/13.html.

⁷ The reporting section of the Information Kit was, however, updated to reflect GWA's current practice of reporting to the Commission on a calendar year basis.

⁸ See Commission, *South Australian Rail Access Regime Review: Final Report*, August 2015, p. 4.

Current and prospective intrastate railway users are well placed to comment on the detail, relevance and clarity of the pricing principles and access information outlined in the Information Kit. The current Access Providers as well as rail transport companies (which must be accredited by the National Rail Safety Regulator) are the main users of the Information Kit.⁹

The Commission conducted targeted consultation and received three submissions from the following parties:

- ▶ Aurizon, a national rail freight company operating Above-Rail Services in parts of Australia.¹⁰
- ▶ Genesee & Wyoming Australia (GWA), a joint-venture of Genesee and Wyoming Inc. and Macquarie Infrastructure and Real Assets, and a rail freight company operating **Above-Rail Services** and **Below-Rail Services**, which also holds the concession to operate much of the Intrastate Railway Network. Its related entity, GWA (North) Pty Ltd is the current concession-holder for the Below-Rail assets of the Tarcoola-Darwin railway, while GWA runs most of the trains that run on that line.¹¹
- ▶ Pacific National, a national rail freight company operating Above-Rail Services in parts of Australia.¹²

The issues raised in submissions were carefully considered in preparing this Draft Decision. Where relevant, certain arguments and submissions have been mentioned in the text of this Draft Decision, either by direct quotation or by reference to themes or arguments, to assist stakeholders to understand the proposed positions that have been reached. A failure to reference an argument or submission does not mean that it has not been considered by the Commission in arriving at its draft conclusions.

2.5 Context for the review

In considering possible amendments to the Information Kit, the Commission has considered current and future rail industry market conditions.

The Intrastate Railway Network in SA has the capacity to carry, among other things, bulk grain and mineral and resource products. However, the industry faces strong competition from road transport largely due to short haul distances and variable and fragmented grain production (which can encourage frequent, small transport volumes).

Fixed Railway Infrastructure services in many parts of the Intrastate Railway Network are significantly underutilised and have been so for some time; for example, between 2010 and mid-2015 there were just four access agreements negotiated. Low utilisation can affect incentives to negotiate; for instance, an Access Seeker will be aware that an Access Provider should be willing to provide access so as to spread fixed costs over greater freight volumes.

Many parts of the Intrastate Railway Network are also in need of refurbishment. For example, the Eyre Peninsula railways require upgrades and Viterro (a company operating grain storage and handling facilities in the region) recently made a decision to move to use road rather than rail transport to

⁹ Rail transport companies should be distinguished from the end users of rail services (such as those parties purchasing the freight being carried).

¹⁰ See Aurizon, 'Submission to 2017 Review of the Rail Guidelines for Access Regimes', 23 February 2017, available at https://www.escosa.sa.gov.au/ArticleDocuments/1065/20170307-ReviewOfRailGuidelinesAccessRegime_2017Submission-Aurizon.pdf.aspx?Embed=Y.

¹¹ See GWA, 'Submission to Review of Regulatory Guidelines', 24 February 2017, available at https://www.escosa.sa.gov.au/ArticleDocuments/1065/20170307-ReviewOfRailGuidelinesAccessRegime_2017Submission-GenesseeWyoming.pdf.aspx?Embed=Y.

¹² See Pacific National, 'Submission to the ESCOSA Review of Rail Guidelines', February 2017, available at https://www.escosa.sa.gov.au/ArticleDocuments/1065/20170307-ReviewOfRailGuidelinesAccessRegime_2017Submission-PacificNational.pdf.aspx?Embed=Y.

improve their efficiency and competitiveness.¹³ Relatedly, a study is currently being undertaken to assess the associated business case for upgrades to Eyre Peninsula railways including options for keeping the rail line open.

Looking ahead, general utilisation of the Intrastate Railway Network will depend on developments in global commodity prices and agricultural productivity growth. For example, higher mineral and resource prices can increase the likelihood for increased production from new and existing operations and higher oil prices can reduce the competitiveness of road transport. Growth in agricultural productivity can be an important determinant of longer-term growth in farm production and requirements for rail access.

Those factors, together with continued competition from road transport, indicate a challenging outlook for the rail industry and limited scope for increased rail access in the short to medium term.

2.5.1 Pricing principles and how they apply to the regime

The following review re-visits the current floor and ceiling pricing principles laid out in the Information Kit and examines if the definitions remain appropriate.

The Commission is not responsible for setting regulated prices for Below-Rail services. Rather, under Section 27 of the ROA Act, the Commission has established principles for a floor and ceiling price to be used by an arbitrator in the event of an access dispute (though these do not prevent negotiated access arrangements outside of the principles). The Commission's pricing principles serve both as a price signal in the early stages of an access negotiation and a price range for arbitration (see Appendix B.1).¹⁴

Chapter 3 of the Information Kit contains the methodology for determining cost-based floor and ceiling prices. The price boundaries are broadly defined as follows:

- ▶ the floor price is based on incremental cost. This is the additional cost incurred by the Access Provider in providing access, which would have otherwise been avoidable. The reason that incremental cost sets the floor price is because any price below incremental cost would lead to the Access Provider sustaining an economic loss, absent subsidies from other sources (see Appendix B.1), and
- ▶ the ceiling price is based on "full economic cost", which is the total cost of providing access to Below-Rail services including all incremental costs associated with the Access Seeker's use and a portion of the fixed costs associated with the segment of the network the Access Seeker wishes to access (taking into account other Below-Rail users for that segment of the network).

2.5.2 Information about access

The review is considering whether or not the current guidance for the Information Brochure, as outlined in the Information Kit, appropriately meets the needs of an Access Seeker while at the same time being mindful of potential regulatory costs imposed on the Access Provider. The Information Brochure must provide sufficient detail in a timely manner to formulate the starting point for an access proposal.

Section 28 of the ROA Act requires an Information Brochure to be prepared by the Access Provider if requested by an Access Seeker (see Appendix B.2). The purpose is to facilitate the exchange of information prior to a formal access proposal between an Access Seeker and the Access Provider. Chapter 4 of the Information Kit sets out the terms and conditions of access, including meaningful price information and the option to publish information on the Access Provider's website, that the Commission has previously assessed should be included in the brochure.

¹³ See <http://viterracom.au/index.php/2019/02/26/viterracom-decision-provides-competitive-supply-chain-to-eyre-peninsula-growers/>.

¹⁴ See Part 4, Division 1, Section 27 of the ROA Act.

Section 29 of the ROA Act concerns a separate phase of the negotiation process (see Appendix B.3). While the Information Brochure deals with information provided before any access is sought, or even discussed, section 29 deals with information exchange once a proposition is discussed, but before a formal application has been made. It includes a requirement that an Access Provider provide information reasonably requested by the Access Seeker about:

- ▶ current utilisation of its Railway Network
- ▶ any requirements to add or extend the network to accommodate access
- ▶ whether or not the requested service can be provided, and
- ▶ the general terms and conditions (including an indication of the likely price) on which access may be granted.¹⁵

Chapter 4A of the Information Kit sets out the nature and detail of information previously assessed by the Commission to meet the intention of the ROA Act. This includes guidance as to the nature of the “likely (indicative) price” of access, scope of non-price terms and conditions, and criteria to make a reasonable charge for providing this information.

¹⁵ See Section 29(1) of the ROA Act.

3 Proposed Information Kit amendments

The Commission’s assessment and proposed minor amendments to the Information Kit relate to:

- ▶ pricing principles for calculating floor and ceiling prices and ‘likely price’ guidelines
- ▶ information requirements, including those set out in the Information Brochure, and
- ▶ information about the coverage of intrastate railway infrastructure

The Commission also proposes minor modifications to the Information Kit to improve readability and provide clearer language. Alongside this, the Information Kit will be separated into two fact sheets and two information and reporting guidelines.

3.1 Pricing principles and ‘likely price’ guidelines

The Commission proposes to retain both the existing pricing principles for floor and ceiling prices and the guidance for operators to provide a ‘likely price on which the operator would be prepared to provide the service’, but will clarify some language to ensure the intent of the Information Kit is clear.

3.1.1 Pricing principles

As discussed in section 2.5.1, section 27(1) of the ROA Act empowers the Commission to establish pricing principles for fixing a floor and ceiling price for the provision of railway services. These pricing principles are not binding except when prices are set through arbitration.

In the event of arbitration of an access dispute, the arbitrated price must not be less than the floor price or exceed the ceiling price (ROA Act, section 27(4)). However, a negotiated access price may sit outside that range (ROA Act, section 27(3)).

The use of floor and ceiling pricing principles for determining initial (proposed) access prices and arbitrated prices is common in Australian rail Access Regimes, as shown in Table 1

Table 1: Basis for access price supplied on initial request and arbitration

Jurisdiction	Pricing principle approach
South Australia - Intrastate	Within floor and ceiling price limits
South Australia – Tarcoola to Darwin	Pricing for reference purposes (neither maxima or minima) (Floor and ceiling only for purposes of arbitration)
Western Australia	Within floor and ceiling price limits ¹⁶

¹⁶ See Railways (Access) Code 2000 (WA), Schedule 4, Division 2, clauses 7 and 8, available at [https://www.legislation.wa.gov.au/legislation/prod/filestore.nsf/FileURL/mrdoc_28343.pdf/\\$FILE/Railways%20\(Access\)%20Code%202000%20-%20%5B01-f0-01%5D.pdf?OpenElement](https://www.legislation.wa.gov.au/legislation/prod/filestore.nsf/FileURL/mrdoc_28343.pdf/$FILE/Railways%20(Access)%20Code%202000%20-%20%5B01-f0-01%5D.pdf?OpenElement).

Jurisdiction	Pricing principle approach
Queensland - 2016 Access Undertaking	Reference tariffs within the floor and ceiling limits ^{17,18}
ARTC	Access charges are subject to floor and ceiling revenue limits ^{19,20}

The principles for a floor and ceiling price must comply with the requirements of section 27(2) of the ROA Act, which states that:

The floor price should reflect the lowest price at which the operator could provide the relevant services without incurring a loss and the ceiling price should reflect the highest price that could fairly be asked by an operator for provision of the relevant services

In reviewing the Commission’s guidance on the pricing principles under the Information Kit, it has focused on two questions:

1. Is the current incremental cost approach the most appropriate method for determining the floor price, to ensure that the operator (Access Provider) does not “incur a loss” in the provision of railway services?
2. Is the current “full economic cost” approach the most appropriate method for determining the ceiling price, such that it is the highest price that could be fairly asked for the provision of railway services?

3.1.2 Determining the floor price

As noted in section 2.2.1, the pricing principle for floor prices is calculated as incremental cost; that is, the total additional operating costs (including labour, materials and administrative costs) and capital costs (capital additions or the advancement of asset replacement) incurred by the operator as a direct result of granting the specific access sought.

The use of incremental cost as a floor price ensures that the operator charges the lowest price without incurring a loss for providing that particular access, consistent with the requirements of the ROA Act. This is because a price that is lower than the incremental cost would lead the operator to recover revenue from the services provided that is below the direct costs incurred by the operator in providing access (assuming there is no subsidy), resulting in an economic loss from that service.

The Commission’s approach to calculating the floor price for the purposes of information requests, and in some cases arbitration, is consistent with the approach used in many jurisdictions in Australia (Table 1). In addition, submissions to this review did not raise any concerns about the current approach.

¹⁷ See Queensland Rail’s Access Undertaking 1, clause 3.5 clauses 3.22 and 3.23, available at <https://www.queenslandrail.com.au/business/access/Access%20Undertaking%20and%20related%20documents/Queensland%20Rail%20Access%20Undertaking%201%202016.pdf>.

¹⁸ In arbitration, the Queensland Competition Authority Act 1997(section 120(1)) requires that the QCA must take into account the pricing principles outlined in the QCA Act section 168A. This is within the floor and ceiling range outlined in the DAU clauses 3.22 and 3.23.

¹⁹ See ACCC, Final Decision – Australian Rail Track Corporation Access Undertaking – Interstate Rail Network, July 2008, p. 11, available at <https://www.accc.gov.au/system/files/ACCC%20final%20decision%20on%20the%20ARTC%20Interstate%20Rail%20Access%20undertaking.pdf>.

²⁰ In arbitration, the Competition and Consumer Act 2010, Division 6, section 44ZZCA states that regulated access prices to a service should be sufficient to meet the efficient costs of providing access to the regulated service(s) which, in effect, will fall between floor and ceiling prices.

On that basis, the Commission proposes to retain the current incremental cost approach to determining the floor price, as specified in section 3.1 of the Information Kit.

3.1.3 Determining the ceiling price

As noted above, the Commission currently uses the concept of full economic cost as the pricing principle for calculating ceiling prices. The Commission defines full economic cost in clause 3.3.3 of the Access Information and Pricing Principles Guideline as:

...the costs associated with the required railway infrastructure needed by the access seeker or access applicant for the provision of the relevant below-rail service on relevant segments of the railway, less the aggregate of:

- (a) the incremental costs attributable to the usage of that required railway infrastructure by all other Access Holders (including the Operator's own use), and*
- (b) a reasonable contribution to the fixed costs of that required railway infrastructure ("R") from all other Access Holders using that required railway infrastructure (including the Operator's own use).*

The intent of the full economic cost definition is to ensure that the ceiling price recovers not only the directly incurred incremental cost of access, but also an appropriate contribution by the Access Seeker towards the fixed costs of the required railway infrastructure. Clause 3.3.5 of the Access Information and Pricing Principles Guideline specifies how those fixed costs are to be allocated, with reference to specific drivers of fixed costs (including gross tonne kilometres or other appropriate drivers).

The use of standalone cost as the pricing principle for calculating ceiling prices is a potential alternative to using the concept of full economic cost. Standalone cost is where the total cost attributable to the Railway Infrastructure is imposed on each access holder. This approach is used in some other jurisdictions,²¹ such as in the event of arbitration in the Tarcoola-Darwin railway in the case where a sustainable competitive price exists (see Table 2 below).²²

Nevertheless, the Commission has adopted the full economic cost pricing principle, noting that it is only binding in the event of arbitration. The ROA Act specifies that a ceiling price reflects the highest price that could fairly be asked.²³ And the use of standalone cost may not be a "fair" ceiling price when multiple access users are involved, as it could lead to over recovery of total costs (as multiple users would pay for the same fixed costs). This would allow excessive profits to accrue to the Access Provider and therefore would not promote the economically efficient use of the infrastructure, nor competition in related markets.

Submissions from Aurizon and Pacific National argued that the concept of full economic cost is inconsistent with a fair maximum ceiling price.²⁴ Specifically, Aurizon argued that strong competition facing the rail industry, low utilisation of the rail network and the vertically integrated structure of the operator should all factor into the Commission's considerations of the fair maximum.²⁵ In light of these concerns, Aurizon suggested that the ceiling price should be calculated as the operator's freight rate minus its avoidable costs of Above Rail Services. Aurizon has stated that this approach guarantees the operator the same profit margin whether the freight is transported on its own Above Rail Services or those of a facility user.

²¹ The exact specifications for valuing assets and setting rate of return parameters for ceiling prices can differ across regulatory jurisdictions.

²² See Commission, 'Review of rail guidelines for Tarcoola-Darwin railway', draft decision, March 2009, p. 6.

²³ See section 27(2) of ROA Act Part 4.

²⁴ See, for example, Aurizon, pp. 5-6.

²⁵ See Aurizon, pp. 5-6.

The concerns raised by Aurizon and Pacific National are intended to address the potential for the operator to discriminate between a third-party Access Seeker and its own above-rail business. While that potential may well exist, the ROA Act addresses it by requiring the arbitrator to determine an arbitrated price taking into account:

- ▶ the benefit to the public from having competitive markets (ROA Act, section 32(1)(h)) (Appendix 5.5)
- ▶ that access prices should not allow a vertically integrated operator to set terms and condition that would discriminate in favour of its downstream operations, except to the extent that the cost of providing access to others would be higher (ROA Act, section 32(2)(b)) (Appendix 5.5), and
- ▶ that access prices should provide incentives to reduce costs or otherwise improve productivity (ROA Act, section 32(2)(c)) (Appendix 5.5).

The definition of the ceiling price provides an upper limit of the access price that may be determined by an arbitrator. It is a cost-based approach, unlike the suggestion provided by Aurizon which references the ceiling price to the price that an operator would charge itself for access. The Commission considers it appropriate to retain a ceiling price definition that is based on the maximum costs that would arise from the provision of access to the Third Party Operator, as there may be situations where those costs are different to the costs that may be incurred by the vertically integrated operator. To the extent that there is no such difference, the requirements described above would clearly require the arbitrator to take any price discrimination and broader anti-competitive behaviour into account.

On that basis, the Commission proposes to retain the full economic cost approach for determining the ceiling price, as it provides flexibility for negotiation, provides an arbitrator with the upper limit of the price that could be fairly asked by an operator and is consistent with general regulatory practice.^{26,27}

Floor and ceiling price methodologies for rail access regimes across Australia are outlined in Table 2.

Table 2: Floor and ceiling price methodologies for rail access regimes in Australia

Jurisdiction	Ceiling price	Floor price
South Australia - Intrastate	Full economic cost	Incremental cost ²⁸
South Australia – Tarcoola to Darwin	Total cost when a sustainable competitive price exists, but full economic cost when a sustainable competitive price does not exist ²⁹	Not below economic cost ³⁰
Western Australia	Total cost ³¹	Incremental cost

²⁶ For example, the Western Australian Railways (Access) Code, Schedule 4, Division 2, clause 8 stipulates in its ceiling price test that total revenues must not exceed the sum of total costs attributable to the route.

²⁷ Also see ERA, The Pilbara Infrastructure Pty Ltd – Costing Principles, p. 8, available at <https://www.erawa.com.au/cproot/11348/2/20130522%20D106462%20-%20TPI%20Costing%20Principles.pdf>.

²⁸ Incremental cost is the change in avoidable cost that would be incurred by the additional utilisation.

²⁹ AustralAsia Railway (Third Party Access) Code – Schedule, Division 1, section 1(4), available at [https://www.legislation.sa.gov.au/LZ/C/A/AUSTRALASIA%20RAILWAY%20\(THIRD%20PARTY%20ACCESS\)%20ACT%201999/CURRENT/1999.46.AUTH.PDF](https://www.legislation.sa.gov.au/LZ/C/A/AUSTRALASIA%20RAILWAY%20(THIRD%20PARTY%20ACCESS)%20ACT%201999/CURRENT/1999.46.AUTH.PDF).

³⁰ Ibid, Section 3 (1).

³¹ Total cost is the cost to access the entire route, not just a segment that the Access Seeker wishes to utilise.

Jurisdiction	Ceiling price	Floor price
New South Wales	Derived from economic cost for each segment of a pricing zone, shared between access holders ³²	Direct cost imposed by the access holder
ARTC	Derived from economic cost for each segment of a pricing zone, shared between access holders	Derived from the incremental cost of each segment or group of segments

3.1.4 Should floor and ceiling prices be published?

The Information Kit requires floor and ceiling prices to be made available in the operator's Information Brochure (described earlier in section 2.5.2), which must be provided to an Access Seeker on request. At present, there is no requirement for GWA to regularly publish floor and ceiling prices, which would then be publicly available.

Pacific National's submission to this review suggested that the Information Kit should require an operator to submit floor and ceiling prices to the Commission at regular intervals and be published.³³ Given that the Information Kit already requires an operator to provide an up-to-date Information Brochure, containing indicative floor and ceiling prices, to industry participants on request, the additional cost of requiring the Information Brochure to be published by an operator is unlikely to be material. Its publication would assist transparency and ease of reference by potential Access Seekers.

On that basis, the Commission proposes to amend the Information Kit to require an operator to publish any updates to its Information Brochure.

3.1.5 'Likely price' guidelines and reference prices

The specification of 'likely price' guidelines remains an important feature of the Information Kit. Under Section 29(1)(9)(c)(i) of the ROA Act, an operator must, if reasonably requested, provide a 'likely price' for Below-Rail services to an Access Seeker.

The Information Kit sets out information expectations for the provision of the 'likely price'. The Information Kit explains that those expectations are non-binding on an Access Provider and represent a best practice approach in access regulation by promoting an exchange of information that would facilitate the successful negotiation of access. Those expectations include³⁴:

- ▶ that the pricing information should be meaningful and therefore go beyond indicative floor and ceiling prices
- ▶ that the likely price should be based on the applicants' proposed usage of the railway and, if that information is not available, be based on a clear set of assumptions, and
- ▶ factors where the likely price may be differentiated from the price charged for the same or similar services and circumstances where price differentiation should not occur.

In contrast, some access regimes require a methodology to calculate reference prices.³⁵ The use of reference prices can increase transparency and protect against the risk of potential misuse of market

³² See ACCC, ARTC Hunter Valley Coal Network Access Undertaking 23 June 2011 (as varied to June 2017), clause 4.3, available at https://www.accc.gov.au/system/files/public-registers/other/1203007-1-32831441%281%29_ARTC%20-%20Extension%20application%203%20-%20Annex%202%20-%20HVAU%20clean%20-%204.5%20....pdf.

³³ See Pacific National, p. 8.

³⁴ See section 4 of the Access Information and Pricing Principles Guidelines.

³⁵ GWA have argued that published prices, and in particular published reference prices, would be of limited value; see GWA, pp. 6-8.

power. The use of reference prices relates only to ‘typical services’, but can still be a useful starting point for access negotiations.³⁶

The Commission has the authority under the ROA to introduce a reference-type pricing obligation in the Information Brochure.³⁷

However, given current and future market conditions, discussed in section 2.5, the low utilisation of South Australian railways, few access requests and tailored nature of Access Contracts suggests that it would be difficult for an operator to develop a general reference price. In addition, the introduction of a reference-type ‘likely price’ may limit flexibility and create misleading expectations about a negotiated price when the services that are subject to negotiation are likely to be different to those assumed in the likely price.

The existing requirements for the provision of a likely price on request balances the desire for transparency early in the negotiation process against the current market conditions of few and specific access requests.

3.2 Information requirements and the non-price terms and conditions

The information required in the Information Brochure includes general terms and conditions in addition to those associated with the ‘likely price’. These include physical asset requirements, the extent of existing asset utilisation, corporate information, geographical restrictions and other information that may be considered necessary for an Access Seeker.

Access regimes for interstate Railway Networks contain broadly similar non-price terms and conditions, with a greater level of prescription for more heavily used Railway Networks such as those in Queensland³⁸ and Western Australia.³⁹ As pointed out above, an Access Seeker can receive a likely price as part of a request for access to specific Fixed Railway Infrastructure. No submissions raised major issues with the current non-price terms and conditions in the Information Kit.

3.3 Information about the coverage of railway infrastructure

The Commission will update the Information Kit to reflect the Proclamation made under the ROA Act in September 2016.⁴⁰ The Proclamation expanded the Access Regime to include rail sidings and yards associated with the interstate mainline rail track (operated by the Australian Rail Track Corporation; ARTC). In addition, the Commission proposes to update the Information Kit regarding current ownership and operation of railways in SA.

3.3.1 Reason for amendment

Submissions raised concerns around the lack of clarity of the information about coverage of the Intrastate Railway Network in the Information Kit. They pointed to instances where information was out

³⁶ Some other jurisdictions also require publication of reference prices by infrastructure operators, although only for particular commodities such as coal.

³⁷ See Division 2(1)(c) of ROA Act.

³⁸ For example, see Queensland Rail’s Access Undertaking at <https://www.queenslandrail.com.au/business/access/Access%20Undertaking%20and%20related%20documents/Queensland%20Rail%20Access%20Undertaking%201%202016.pdf>.

³⁹ The Economic Regulation Authority (ERA) in WA details a number of non-price terms and conditions, such as its Train Path Policy, Part Five Instruments, available at <https://www.erawa.com.au/cproot/18421/2/Arc%20Infrastructure%20-%20Part%205%20Instruments%20-%20Train%20Path%20Policy%202017.pdf>.

⁴⁰ Proclamation published in South Australian Government Gazette, 29-09-2016 p. 3912, available at http://governmentgazette.sa.gov.au/sites/default/files/public/documents/gazette/2016/September/2016_057.pdf.

of date⁴¹ and where clarity of rail yards and sidings could be improved.⁴² Some submissions claimed that the uncertainty could reduce business confidence.⁴³

The Commission acknowledges that, over time, some information in the Information Kit had become out of date. It also agrees that increased clarity of coverage could support business confidence. Updating for the Proclamation will address some of these concerns.

Additionally, some submissions argued that there would be value in publishing rail maps and diagrams publicly.⁴⁴ As pointed out by Aurizon,⁴⁵ many other jurisdictions require rail maps and diagrams to be published by the operator (or the regulator) (Table 3).

Table 3: Requirements for publishing diagrams, maps or plans

Jurisdiction	Diagrams, maps or plans	Regulated frequency of publication
South Australia - Intrastate	On request for Information Brochure	Must be kept up to date
South Australia – Tarcoola to Darwin	No requirements	N/A
Western Australia	Must be made available ⁴⁶	As often as necessary to be up to date but subject to audit at least every 2 years ⁴⁷
Queensland - 2016 Access Undertaking	Published on website (preliminary information, line diagrams ⁴⁸ and capacity information)	Must be kept up to date
ARTC	On request and published on website ⁴⁹	Must be kept up to date

The Commission agrees that, in principle, more information about rail line segments could reduce barriers to negotiation (by allowing information to be available to a wider group of potential Access Seekers). As part the 2015 SA Access Regime review, the Commission suggested that the effectiveness could be improved through increased clarity on the boundaries of the regime, and its

⁴¹ See GWA, p. 11.

⁴² See Aurizon, pp 3-4 and see Pacific National, p. 8.

⁴³ See Aurizon, p. 4.

⁴⁴ See Aurizon, p. 4 and Pacific National, p. 8.

⁴⁵ See Aurizon, p. 4.

⁴⁶ See Railway (Access) Code 2000 (WA), Schedule 2, clauses 2 and 4.

⁴⁷ See ERA, Final Determination on Brookfield Rail's Proposed Revised Train Management Guidelines, p. 13, available at <https://www.erawa.com.au/cproot/10996/2/20121130%20-%20D99106%20-%20Rail%20-%20Brookfield%20Rail%20-%20Final%20Determination%20-%20Brookfield%20Rail%20Proposed%20Revised%20Train%20Management%20Guidelines.pdf>. This indicates that the Train Management Guidelines (which include maps and diagrams) can be audited every two years.

⁴⁸ See QR Access Undertaking 1, clauses 1.2.3, 2.1.1 and Schedule A.

⁴⁹ See ACCC, Final Decision, Australian Rail Track Corporation Access Undertaking – Interstate Rail Network, July 2008, p. 43, available at <https://www.accc.gov.au/system/files/ACCC%20final%20decision%20on%20the%20ARTC%20Interstate%20Rail%20Access%20undertaking.pdf>.

relationship to regimes in other jurisdictions and industries – which could be achieved via a central information repository.⁵⁰

Nonetheless, much of the benefit from published rail maps and diagrams is captured by private parties, and both the Access Seeker and Access Provider have some commercial incentive to share this type of information. Rail maps and diagrams are already available to Access Seekers through the Access Provider's Information Brochure (and section 28 (3) of the ROA Act requires that the brochure be current and up to date if requested).⁵¹ There is also nothing restricting the Access Provider from publishing maps and diagrams to assist commercial negotiations and referring to this information as part of the brochure. GWA has indicated plans to start publishing rail maps and diagrams on its website in 2019.⁵² The Commission will liaise with GWA to ensure that this occurs.

⁵⁰ See Commission, South Australian Rail Access Regime Review, p. 5.

⁵¹ Of the information required, the operator must provide descriptions on the infrastructure to be accessed, including track condition and any restrictions that could physically impact access (including transit times, safety record, track limitations). As part of these requirements, plans and maps need to be provided on the length and location of tracks.

⁵² Some information may also be available on the location of SA rail infrastructure has been made available on the Location SA map viewer, for example at http://location.sa.gov.au/lms/Reports/ReportMetadata.aspx?p_no=2104&pu=y.

4 Next steps

The Commission seeks stakeholder views on this draft decision by Friday 17 May. The inside cover of this report explains how to make a submission.

The Commission would also be pleased to meet informally with stakeholders, either individually or with representative organisations, to discuss the draft decision. If you or your organisation wish to meet with Commission staff, please use the contact details on the inside cover of this Draft Decision.

The Commission aims to publish its final decision on the review of the South Australian Rail Access Information Kit in July 2019.

Appendix A: Scope of the Access Regime

Subject to certain specific exclusions in the 2016 Proclamation,⁵³ the Railway Network which is within the scope of the Access Regime under the ROA Act comprises:

- ▶ the broad gauge rail lines within metropolitan Adelaide, used mainly for urban public transport Services, controlled by TransAdelaide,
- ▶ the standard gauge rail line from Port Augusta to Leigh Creek,⁵⁴
- ▶ the intrastate lines controlled by GWA used primarily for freight services, including
 - the narrow gauge lines on the Eyre Peninsula
 - the broad gauge lines in the Mid North and Barossa region
 - the standard gauge lines in the Murray-Mallee region
 - major yards and sidings, including those associated with the interstate mainline track, but excluding freight terminals and private sidings, and
- ▶ passenger railway stations, and
- ▶ the services needed for the operation of these, such as train control.

In 2015, the Commission undertook a review pursuant to section 7A of the ROA Act to determine whether or not the Access Regime should continue from 31 October 2015 for a further five years. The outcome of that review was a recommendation to the Minister responsible for the ROA Act to continue the Access Regime for the next five-year prescribed period.⁵⁵ In accordance with that recommendation, the Minister extended the Access Regime until 30 October 2020.

⁵³ Proclamation published in South Australian Government Gazette, 29 September 2016 p. 3912, available at http://governmentgazette.sa.gov.au/sites/default/files/public/documents/gazette/2016/September/2016_057.pdf.

⁵⁴ Proclamation clause 2(e) states that the Leigh Creek Line becomes accessible once the sublease to NRG Flinders expires, which occurred in 2018.

⁵⁵ See ROA Act 1997, Division 4 (7). The prescribed period means the period ended 30 October 2015, and each successive period of five years thereafter.

Appendix B: legal requirements relevant to this review

B1. ROA Act, Part 4, Division 1, Section 27

27 – Pricing Principles

- (1) The regulator may establish principles (the pricing principles) for fixing a floor and ceiling price for the provision of railway services generally or railway services of a particular class.
- (2) The floor price should reflect the lowest price at which the operator could provide the relevant services without incurring a loss and the ceiling price should reflect the highest price that could fairly be asked by an operator for provision of the relevant services.
- (3) The pricing principles do not prevent an operator from entering into an Access Contract on terms that do not reflect the principles.
- (4) However, if in an arbitration the arbitrated price for services cannot be less than the floor price and cannot exceed the ceiling price.

B2. ROA Act, Part 4, Division 2, Section 28

28—Information Brochure

- (1) An operator must, on the written application of an industry participant, provide an Information Brochure containing—
 - (a) if the operator carries on the business of providing passenger or freight services— a statement of the terms and conditions on which the operator provides the services; and
 - (b) the terms and conditions on which the operator is prepared to make the operator's railway infrastructure available for use by others; and
 - (c) other information required by the regulator.
- (2) The Information Brochure must be provided within 30 days (or a longer period allowed by the regulator) after the operator receives the application.
- (3) The Information Brochure must refer to any relevant pricing principles and show how the terms and conditions relate to, or compare with, relevant pricing principles.
- (4) The form of the Information Brochure must comply with requirements imposed by the regulator.
- (5) The operator must, within 14 days after providing an industry participant with the Information Brochure, give a copy to the regulator.
- (6) If the operator fails to comply with this section in any respect, the operator is guilty of an offence.

Maximum penalty: \$20 000.

B3. ROA Act, Part 4, Division 2, Section 29

29—Operator's obligation to provide information about Access

- (1) An operator must, on the application of a person with a proper interest in making an access proposal to the operator, provide the applicant with information reasonably requested by the applicant about—
 - (a) the extent to which the operator's railway infrastructure is currently being utilised; and
 - (b) the extent to which it would be necessary, and technically and economically feasible, to add to or extend the operator's railway infrastructure so that it could meet requirements stated in the application; and
 - (c) whether the operator would be prepared to provide a service of a specified description and—
 - (i) if so, the general terms and conditions (including an indication of the likely price) on which the operator would be prepared to provide the service; and
 - (ii) if not, the reasons why the service cannot be provided.
- (2) The operator may make a reasonable charge (to be determined on a basis decided or approved by the regulator) for providing information under this section. Railways (Operations and Access) Act 1997—20.1.2013 Part 4—Pricing principles and information relevant to access Division 2—Information about access 16 Published under the Legislation Revision and Publication Act 2002
- (3) If the operator makes a charge for providing information under this section, the operator must give the regulator written notice of the amount of the charge and the nature of the information provided.

B4. ROA Act, Part 4, Division 2, Section 30

30—Information to be provided on non-discriminatory basis

An operator must provide information to persons interested in making access proposals to the operator on a non-discriminatory basis.

B5. ROA Act, Part 4, Division 2, Section 32

32—Duty to negotiate in good faith

- (1) The operator must negotiate in good faith with the proponent with a view to reaching agreement on whether the proponent's requirements as set out in the access proposal (or some agreed modification of the requirements) could reasonably be met, and, if so, the terms and conditions for the provision of Access for the proponent
- (2) The other respondents (if any) whose rights (or prospective rights) would be affected by implementation of the access proposal must also negotiate in good faith with the proponent with a view to reaching agreement on the provision of access to the proponent and any consequent variation of their rights (or prospective rights) of access.



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