



Review of the South Australian Rail Access Regime Guidelines

FINAL Decision

October 2019

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Table of contents

- Glossary of terms2
- 1 Executive summary.....3
 - 1.1 Findings and amendments.....3
 - 1.2 Background.....4
- 2 The review5
 - 2.1 Objectives of the South Australian Rail Access Regime5
 - 2.2 Purpose of Information Kit and review5
 - 2.3 Scope of the review6
 - 2.4 Process for the review7
 - 2.5 Context for the review.....8
 - 2.5.1 Pricing principles and how they apply to the regime9
 - 2.5.2 Information about access9
- 3 Information Kit amendments.....10
 - 3.1 Pricing principles and ‘likely price’ guidelines10
 - 3.1.1 Pricing principles.....10
 - 3.1.2 Determining the floor price11
 - 3.1.3 Determining the ceiling price12
 - 3.1.4 Should floor and ceiling prices be published?14
 - 3.1.5 ‘Likely price’ guidelines and reference prices14
 - 3.2 Non-discrimination requirements15
 - 3.3 Information requirements and the non-price terms and conditions15
 - 3.4 Information about the coverage of railway infrastructure16
 - 3.5 Compliance and reporting17
- Appendix A: Access Regime19
 - A1. Scope19
 - A2. Certification.....19
 - A3. Periodic review19
- Appendix B: Legal requirements relevant to this review20
 - B1. ROA Act, Part 4, Division 1, Section 2720
 - B2. ROA Act, Part 4, Division 2, Section 2820
 - B3. ROA Act, Part 4, Division 2, Section 2921
 - B4. ROA Act, Part 4, Division 2, Section 3021
 - B5. ROA Act, Part 5, Section 32.....21

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 established 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
Aurizon	Aurizon Holdings Limited
Below-Rail Service	Refers to operations involving track management, including the track and associated infrastructure required to operate it
CCA	Competition and Consumer Act 2010
Commission	Essential Services Commission established under the ESC Act
ESC Act	Essential Services Commission Act 2002 (South Australia)
Fixed Railway Infrastructure	Intrastate railway infrastructure and associated assets, including signalling and control systems as well as railway track, to which the ROA Act applies
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 Section 28 of the ROA Act
Information Kit	The Commission's primary publication concerning the South Australian Rail Access Regime
Pacific National	Pacific National Pty Limited
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

1 Executive summary

The Essential Services Commission (**Commission**) has reviewed the South Australian Rail Access Regime guidelines, issued under the Railways (Operations and Access) Act 1997 (**ROA Act**). The review has found the need for only minor amendments to the guidelines. Those amendments are not expected to have a material impact the operation of the South Australian Rail Access Regime (**Access Regime**).

Under the Essential Services Commission Act 2002, the Commission must keep the contents and operations of codes and rules under review with a view to ensuring their continued relevance and effectiveness. This review has focussed on areas where the information and requirements in the current guidelines (which are presented in an “Information Kit”) could be amended to better facilitate commercial negotiation of access to specified intrastate railway infrastructure services by:

- ▶ providing clear, relevant and detailed information about the Access Regime for existing and prospective railway users, and
- ▶ ensuring that the Commission’s requirements represent current practice and anticipate, as much as practicable, future changes in the rail industry.

This is consistent with the objectives of the ROA Act, particularly in terms of promoting economically efficient investment in and use of the Railway Network and access to those services on fair commercial terms.

This Final Decision has been informed by the submissions made to the Commission during the course of the review. To the extent that issues raised in submissions relate to the Access Regime in general (rather than the guidelines specifically), these will be considered by the Commission as part of the 2020 Access Regime review, which is expected to commence in November 2019 and finish by August 2020.

1.1 Findings and amendments

The Commission has separated the Information Kit into two guidelines:

- ▶ the Access Information and Pricing Principles Guideline, and
- ▶ the Reporting and Compliance Guideline.

The Commission has:

- ▶ retained existing pricing principles for calculating floor and ceiling access prices and guidelines for determining a ‘likely price’ for access, and clarified the language in the Access Information and Pricing Principles Guideline (in particular Section 4 – Further Access Information) to make it clearer that the Commission’s expectations for Section 4 of the Guideline are non-binding
- ▶ retained existing information requirements for the Access Provider, including for the **Information Brochure**, and added a clause that allows an Access Provider to make its Information Brochure available on its website.
- ▶ updated 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
- ▶ made minor modifications to improve readability and provide clearer language.

Those four findings are reflected in the Access Information and Pricing Principles Guideline, which has been released together with this Final Decision.

While the review did not consider major changes to reporting and compliance obligations, as they will be reviewed as part of the Commission's broader review of compliance and monitoring commencing in 2020, the Commission has updated the formatting of the reporting and compliance guideline and updated the procedure regarding the statement of compliance of regulatory accounts. For example, in the event that the Access Provider does not have an External Director, the statement of compliance may be signed by an External Director of a related body corporate of the Access Provider, and in the event that a company does not have a related body corporate it may be signed by the director and a company secretary. If a company does not have a second director, or a company secretary who is a different person from the director, it may be signed by the sole director. Other minor amendments include the updating of definitions and language in the Reporting and Compliance Guideline, and an explicit requirement that applications for exemption from reporting and compliance requirements are to be made in writing with supporting evidence.

The Reporting and Compliance Guideline and the Access Information and Pricing Principles have been released with the Final Decision.

1.2 Background

The Access Regime provides a framework for third party operators (**Access Seekers**) to negotiate access to specified intrastate Railway Network services and allows for commercial arbitration in the event of an access dispute between an Access Seeker and the provider of those services (**Access Provider**). 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 access matters. Alongside background material, the Information Kit provides information about pricing principles and reporting requirements as well as access and dispute resolution. Its purpose has been 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 for access. The Information Kit was last updated in 2010.

2 The review

2.1 Objectives of 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 (**Railway Network**) services. The objectives of the ROA 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 **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** (railway services proclaimed pursuant to Section 7 of the ROA Act, involving track management and the associated infrastructure required to operate it). It 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 SA 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 Commission's powers under the ROA Act to make requirements about the information contained in and the form of information brochures prepared by Access Providers.⁵ 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.⁶

¹ See Section 3 of ROA Act.

² For a short overview of the scope of, and background on, the SA Rail Access Regime, please see Appendix A.

³ See Parts 3 to 8 of the ROA Act.

⁴ The Information Kit that was reviewed is available on the Commission's website at: <https://www.escosa.sa.gov.au/ArticleDocuments/715/100326-RailInformationKit-Revised.pdf.aspx?Embed=Y>. 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.

⁵ Sections 28(1)(c) and 28(4) of the Railways (Operations and Access) Act 1997.

⁶ 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.⁷

The Information Kit was 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.

2.3 Scope of the review

The review has focussed 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, and
- ▶ 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 to promote economically efficient investment in and use of Railway Network services and promote access to those services on fair commercial terms.

The review has examined parts of the Information Kit only, in particular selected matters for which the Commission may impose requirements (by the issue of guidelines or otherwise) pursuant to Sections 27, 28 and 29 of the ROA Act relating to floor and ceiling pricing principles and information about access. The review did not assess the substantive reporting and compliance requirements of the Information Kit, which will be reviewed as part of the Commission's broader review of compliance and monitoring to be undertaken in 2020.⁸ This will allow for greater alignment of compliance requirements across regulated industries in South Australia.

While several formal and informal submissions have raised issues that relate to the effectiveness of the Access Regime, the Commission notes that this was not a review of the ROA Act, nor of the Access Regime in general. The latter will be reviewed in 2020, as required under Section 7A of the ROA Act and will provide advice and recommendations to the Minister for Planning, Transport,

⁷ 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.

⁸ The same approach for compliance and reporting guidelines was taken in the 2019 Review of rail guidelines for Tarcoola-Darwin Railway. See Commission (2019), '2019 Review of rail guidelines for Tarcoola-Darwin Railway', Final decision, July 2019, p.4.

Infrastructure and Local Government as to whether the Access Regime established under the ROA Act should continue for a further five years.⁹

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.

In December 2016, the Commission sought submissions on the review of the Information Kit. 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.¹⁰

Submissions to the first round of consultation were received from:

- ▶ Aurizon Holdings Limited (**Aurizon**), a national rail freight company operating Above-Rail Services in parts of Australia.¹¹
- ▶ 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.¹²
- ▶ Pacific National Pty Limited (**Pacific National**), a national rail freight company operating Above-Rail Services in parts of Australia.¹³

Following release of the Draft Decision in April 2019, the Commission received submissions relating to the Information Kit from GWA¹⁴ and Pacific National.¹⁵ In Pacific National's submission to the Review of rail guidelines for the Tarcoola-Darwin Railway – Further Draft Decision, which was outside of the

⁹ For example, see the Commission's previous review; Commission (2015), 'South Australian Rail Access Regime Review: Final report', August 2015, p. 4, available at: <https://www.escosa.sa.gov.au/ArticleDocuments/358/20150907-SARailAccessRegimeReview-FinalReport.pdf.aspx?Embed=Y>.

¹⁰ Rail transport companies should be distinguished from the end users of rail services such as those parties purchasing the freight being carried.

¹¹ See Aurizon (2017), '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.

¹² See GWA (2017), 'Submission to Review of Regulatory Guidelines – Submission 24 February 2017', available at https://www.escosa.sa.gov.au/ArticleDocuments/1065/20170307-ReviewOfRailGuidelinesAccessRegime_2017Submission-GeneseeWyoming.pdf.aspx?Embed=Y.

¹³ See Pacific National (2017), 'Submission to 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.

¹⁴ See GWA (2019), 'Review of regulatory guidelines – Submission 17 May 2019', available at: <https://www.escosa.sa.gov.au/ArticleDocuments/1059/20190607-Rail-ReviewOfRailGuidelinesandRegimeDDSubmission-GWA.pdf.aspx?Embed=Y>.

¹⁵ See Pacific National (2019), '2019 Review of rail guidelines for Tarcoola-Darwin Railway and South Australian rail access regime information kit', 16 May 2019, available at: <https://www.escosa.sa.gov.au/ArticleDocuments/1059/20190607-Rail-ReviewOfRailGuidelinesandRegimeDDSubmission-PacificNational.pdf.aspx?Embed=Y>.

formal submission period for the Information Kit, Pacific National provided general comments regarding the Information Kit.¹⁶

The issues raised in all submissions were carefully considered in preparing this Final Decision. Where relevant, certain arguments and submissions have been mentioned in the text of this Final 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 final conclusions.

2.5 Context for the review

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

The Intrastate-Railway Network in South Australia 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).

Below-Rail Services in many parts of the 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.¹⁷ 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 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 Viterra (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 improve their efficiency and competitiveness.¹⁸

Looking ahead, general utilisation of the Intrastate Railway Network will depend on developments in global commodity prices and agricultural productivity growth. For example, higher (lower) mineral and resource prices can increase (decrease) the likelihood for increased production from new and existing operations and higher (lower) oil prices can reduce (improve) 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 in the short to medium term.

¹⁶ Pacific National stated: "While we note this Further Draft Decision only relates to the interstate Tarcoola-Darwin Railway access regime, given the similarities between the two regimes, the Commission should incorporate these recommendations in its final decision on the review of the South Australian rail access regime information kit" (p.2). See Pacific National (2019), 'Further Draft Decision on review of rail guidelines for the Tarcoola-Darwin Railway', p. 2, available at: <https://www.escosa.sa.gov.au/ArticleDocuments/21411/20190910-Rail-ReviewRailGuidelines-Tarcoola-Darwin-FDDSubmission-PacificNational.pdf.aspx?Embed=Y>.

¹⁷ See Commission, South Australian Rail Access Regime Review: Final report, p. 29.

¹⁸ See Viterra (2019), 'Viterra decision provides competitive supply chain to Eyre Peninsula growers', media release, 26 February 2019, available at: <http://viterra.com.au/index.php/2019/02/26/viterra-decision-provides-competitive-supply-chain-to-eyre-peninsula-growers/>. Relatedly, a study was undertaken to assess the associated business case for upgrades to Eyre Peninsula railways including options for keeping the rail line open; see SMEC (2018), 'Eyre Peninsula Freight Study', study prepared for the Department of Planning, Transport and Infrastructure and GWA, September 2018, available at: https://www.dpti.sa.gov.au/_data/assets/pdf_file/0008/540872/Eyre_Peninsula_Freight_Study.pdf.

2.5.1 Pricing principles and how they apply to the regime

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).

The Information Kit provides 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, and
- ▶ the ceiling price is based on 'full economic cost'. This 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 Railway Network the Access Seeker wishes to access (taking into account other Below-Rail users for that segment of the Railway Network).

2.5.2 Information about access

Section 28 of the ROA Act requires an Information Brochure to be provided by the Access Provider if requested by an Access Seeker (see Appendix B.2). The purpose is to facilitate the timely exchange of information prior to a formal access proposal between an Access Seeker and the Access Provider. 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.

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 Railway 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.¹⁹

The Information Kit also 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. Further, the Commission has powers to decide or approve what is a reasonable charge for providing this information.

¹⁹ See Section 29(1) of the ROA Act.

3 Information Kit amendments

The Commission has separated the Information Kit into two guidelines:

- ▶ the Access Information and Pricing Principles Guideline, and
- ▶ the Reporting and Compliance Guideline.

The Commission's assessment of and amendments to the Access Information and Pricing Principles Guideline relates 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 has also made minor modifications to improve readability and provide clearer language in the Access Information and Pricing Principles Guideline.

While the review did not consider reporting and compliance obligations, the Commission has re-formatted the Reporting and Compliance Guideline and made some minor amendments that clarify requirements without changing substantive elements.

3.1 Pricing principles and 'likely price' guidelines

The Commission has retained 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'. None of the submissions to the Draft Decision raised concerns in regard to retaining the principles for floor and ceiling prices.

3.1.1 Pricing principles

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 Below-Rail Services. These pricing principles are not binding except when prices are set through arbitration.

In the event of an access dispute, the arbitrated price must not be less than the floor price or exceed the ceiling price.²⁰ However, a negotiated access price may sit outside that range.²¹

The use of floor and ceiling pricing principles for determining initial (proposed) access prices and arbitrated prices is common among rail access regimes in Australia (Table 1).

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

²⁰ See Section 27(4) of the ROA Act.

²¹ See Section 27(3) of the ROA Act.

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?

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 ²²
Queensland – 2016 Access Undertaking	Reference tariffs within the floor and ceiling limits ^{23,24}
Australian Rail Track Corporation (ARTC)	Access charges are subject to floor and ceiling revenue limits ^{25,26}

3.1.2 Determining the floor price

As noted earlier, 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 an economic loss for providing that particular access, consistent with the requirements of the ROA Act.

²² 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).

²³ See Queensland Rail’s Access Undertaking 1, clause 3.5 as well as clauses 3.22 and 3.23, all of which are available at: <https://www.queenslandrail.com.au/business/access/Access%20Undertaking%20and%20related%20documents/Queensland%20Rail%20Access%20Undertaking%201%202016.pdf>.

²⁴ In arbitration, the Queensland Competition Authority (QCA) 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 clauses 3.22 and 3.23 of Queensland Rail’s Access Undertaking.

²⁵ 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>.

²⁶ 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.

The Commission's pricing principle for 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). No submissions to this review raised concern about the current approach.

On that basis, the Commission has retained the current incremental cost approach to determining the floor price, as specified in Clause 3.2 in Access Information and Pricing Principles Guideline.

3.1.3 Determining the ceiling price

The Commission currently sets out the concept of full economic cost as the pricing principle for calculating ceiling prices. The Commission defines full economic cost in clause 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 the directly incurred incremental cost of access and an appropriate contribution by the Access Seeker towards the fixed costs of the required railway infrastructure. Clause 3.3 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 Fixed Railway Infrastructure is imposed on each access holder. This approach is used in some other jurisdictions,²⁷ 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).²⁸

Nevertheless, the Commission has retained 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.²⁹ The use of standalone cost is not a 'fair' ceiling price when multiple access users are paying the standalone cost, as there will be a risk of over recovery of total costs (as multiple users would pay for the same fixed costs). This situation 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 in 2017 from Aurizon and Pacific National argued that the concept of full economic cost is inconsistent with a fair maximum ceiling price.³⁰ Specifically, Aurizon argued that strong competition facing the rail industry, low utilisation of the Railway Network and the vertically integrated structure of the operator should all factor into the Commission's considerations of the fair maximum.³¹ 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

²⁷ The exact specifications for valuing assets and setting rate of return parameters for ceiling prices can differ across regulatory jurisdictions.

²⁸ See Commission (2019), 'Review of rail guidelines for Tarcoola-Darwin Railway', Final decision, July 2019, p. 6.

²⁹ See Section 27(2) of the ROA Act.

³⁰ See Aurizon, pp. 5-6.

³¹ See Aurizon, pp. 5-6.

the operator the same profit margin whether the freight is transported on its own Above-Rail Services or those of a facility user.

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
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 ³²	Not below economic cost ³³
Western Australia	Total cost ³⁴	Incremental cost
New South Wales	Derived from economic cost for each segment of a pricing zone, shared between access holders ³⁵	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

The concerns raised by Aurizon and Pacific National are intended to address the potential for the vertically-integrated operator to discriminate between a third-party Access Seeker and its own Above-Rail Services. 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 markets³⁶
- ▶ that access prices should not allow a vertically integrated operator to set terms and conditions that would discriminate in favour of its downstream operations (ie its related provider of Above-Rail Services), except to the extent that the cost of providing access to others would be higher,³⁷ and
- ▶ that access prices should provide incentives to reduce costs or otherwise improve productivity.³⁸

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

³² See 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).

³³ Ibid, Section 3(1).

³⁴ Total cost is the cost to access the entire route, not just a segment that the Access Seeker wishes to utilise.

³⁵ See 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.

³⁶ See Section 32(1)(h) of the ROA Act.

³⁷ See Section 32(2)(b) of ROA Act.

³⁸ See Section 32(2)(c) of the ROA Act.

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 has retained 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.^{39,40}

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.

Pacific National's submission in 2017 suggested that the Information Kit should require an operator to submit floor and ceiling prices to the Commission at regular intervals and be published.⁴¹ 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. None of the submissions to the Draft Decision provided arguments to the contrary. Its publication would assist transparency and ease of reference by potential Access Seekers.

On that basis, the Commission has introduced a new provision (Clause 2.6.2) in the Access Information and Pricing Principles Guidelines. The provision states that an Access Provider may meet its requirements under section 28 of the ROA Act by making its Information Brochure available on its website. This would allow the Access Provider to share the Information Brochure with Access Seekers at relatively low cost. However, if an Access Seeker requests the Information Brochure in another format (other than by accessing the website), the Access Provider must provide the Information Brochure in that format.

3.1.5 'Likely price' guidelines and reference prices

The specification of 'likely price' guidelines remains an important feature. Under Section 29(1)(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 Access Information and Pricing Principles Guideline sets out information expectations for the provision of the 'indication of the likely price'. 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 negotiation of access. Those expectations include⁴²:

- ▶ 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.

³⁹ 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.

⁴⁰ 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>.

⁴¹ See Pacific National, Submission to ESCOSA Review of Rail Guidelines, p. 8.

⁴² See Section 4 of the Access Information and Pricing Principles Guidelines.

The language in the Access Information and Pricing Principles Guideline (in particular Section 4 – Further Access Information) has been updated to make it clearer that those expectations are non-binding.

In contrast to South Australia’s Access Regime, some other rail access regimes in Australia require a methodology to calculate reference prices.⁴³ In principle, the Commission has the authority under the ROA Act to introduce a reference-type pricing obligation in the Information Brochure.⁴⁴

The advantage of reference prices is that it can increase transparency. While the use of reference prices relates only to ‘typical services’, it can be a useful starting point for access negotiations.⁴⁵ A key disadvantage is that access tends to be infrequent and specific to parts of the railway, and so the use of reference prices may add costs but, in many instances, add only limited benefit.

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. None of the submissions to the Draft Decision provided evidence to suggest that this may not be the case (though submissions from Pacific National advocated for the setting of reference prices⁴⁶).

In relation to the ‘likely price’ guidance in the Access Information and Pricing Principles Guideline, GWA suggested in its submission to the Draft Decision that a minor change be made to existing Clause 4.2.7 (amended Clause 4.2.8), such that the wording becomes: ‘an access holder is operating within the *same* above-rail market’.⁴⁷ While these elements of the Guideline are non-binding, the addition of the word ‘same’ clarifies that the intent of the clause is to deter price discrimination where the nature of the service and type of load are the same.

3.2 Non-discrimination requirements

Pacific National provided general recommendations for amendments to protect against discrimination where an Access Provider’s Below-Rail business discriminates in favour of its affiliated Above-Rail business to the detriment of other Above-Rail businesses.⁴⁸ However, the Commission notes that the ROA Act already outlines general rules for the conduct of the operator’s business that protect against unfair discriminations. Section 22 requires an operator to keep separate accounts to give a true and fair view of that business as distinct from other businesses carried on by the operator. Section 23 requires that an operator must not unfairly discriminate between parties including on, but not limited to, the terms and conditions offered for access. These sections of the ROA Act provide the Commission with appropriate powers to address allegations of unfair discrimination.

3.3 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.

⁴³ GWA have argued that published prices, and in particular published reference prices, would be of limited value; see GWA, Submission to Review of Regulatory Guidelines – Submission 24 February 2017, pp. 6-8.

⁴⁴ See Section 28(1)(c) of ROA Act.

⁴⁵ Some other jurisdictions also require publication of reference prices by infrastructure operators, although only for particular commodities such as coal. See GWA, Review of regulatory guidelines – Submission 17 May 2019, p. 12.

⁴⁶ See Pacific National, 2019 Review of rail guidelines for Tarcoola-Darwin Railway and South Australian rail access regime information kit, p. 4, and see Pacific National, Further Draft Decision on review of rail guidelines for the Tarcoola-Darwin Railway.

⁴⁷ See GWA, Review of regulatory guidelines – Submission 17 May 2019, p. 25.

⁴⁸ See Pacific National, Further Draft Decision on review of rail guidelines for the Tarcoola-Darwin Railway, p. 2

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 Queensland⁴⁹ and Western Australia.⁵⁰ As pointed out above, an Access Seeker can receive a likely price as part of a request for access to specific Fixed Railway Infrastructure.

In its submission to the Draft Decision, Pacific National argued that a standard access agreement, including non-price terms and conditions, could be approved and defined by the Commission.⁵¹ The information brochure, however, already includes various general non-price terms and conditions. Further, and as noted above, access requests tend to be infrequent and specific to parts of the railway, so more prescriptive information may add costs but yield limited practical benefit.

3.4 Information about the coverage of railway infrastructure

The Commission has updated Guidelines to reflect the Proclamation made under the ROA Act in September 2016.⁵² 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 has updated information in the guidelines on ownership and operation of the railways in South Australia.

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 of date⁵³ and where clarity of rail yards and sidings could be improved.⁵⁴ Some submissions claimed that the uncertainty could reduce business confidence.⁵⁵

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 in the Access Information and Pricing Principles Guideline will address some of these concerns.

Additionally, some submissions argued that there would be value in publishing rail maps and diagrams publicly.⁵⁶ As pointed out by Aurizon,⁵⁷ 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, by jurisdiction

Jurisdiction	Diagrams, maps or plans	Regulated frequency of publication
South Australia - Intrastate	On request for Information Brochure	Must be kept up to date

⁴⁹ 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>.

⁵⁰ The Economic Regulation Authority (ERA) in Western Australia details a number of non-price terms and conditions, such as its Train Path Policy, available at: <https://www.erawa.com.au/cproot/18421/2/Arc%20Infrastructure%20-%20Part%205%20Instruments%20-%20Train%20Path%20Policy%202017.pdf>.

⁵¹ See Pacific National, 2019 Review of rail guidelines for Tarcoola-Darwin Railway and South Australian rail access regime information kit, pp. 7-8.

⁵² 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.

⁵³ See GWA, Submission to Review of Regulatory Guidelines – Submission 24 February 2017, p. 11.

⁵⁴ See Aurizon, pp 3-4, and Pacific National, Submission to ESCOSA Review of Rail Guidelines, p. 8.

⁵⁵ See Aurizon, p. 4.

⁵⁶ See Aurizon, p. 4, and Pacific National, Submission to ESCOSA Review of Rail Guidelines, p. 8.

⁵⁷ See Aurizon, p. 4.

Jurisdiction	Diagrams, maps or plans	Regulated frequency of publication
South Australia – Tarcoola to Darwin	No requirements	N/A
Western Australia	Must be made available ⁵⁸	As often as necessary to be up to date but subject to audit at least every two years ⁵⁹
Queensland - 2016 Access Undertaking	Published on website (preliminary information, line diagrams ⁶⁰ and capacity information)	Must be kept up to date
ARTC	On request and published on website ⁶¹	Must be kept up to date

The Commission agrees that more information about rail line segments could reduce barriers to negotiation,⁶² but acknowledges that the Access Seeker and Access Provider have commercial incentives to share information. GWA has recently published rail information and maps on its website.⁶³ Moreover, rail maps and diagrams are also available to Access Seekers through the Access Provider's Information Brochure.⁶⁴

3.5 Compliance and reporting

While the review did not consider reporting and compliance obligations, submissions to the Draft Decision suggested some amendments.

⁵⁸ See Railway (Access) Code 2000 (WA), Schedule 2, clauses 2 and 4.

⁵⁹ See ERA (2012), '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.

⁶⁰ See Queensland Rail's Access Undertaking 1, clauses 1.2.3 and 2.1.1 and Schedule A.

⁶¹ See ACCC (2008), '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>.

⁶² As part of the Commission's review of the Access regime in 2015, the Commission suggested that the effectiveness could be improved through increased clarity on the boundaries of the regime, and its relationship to regimes in other jurisdictions and industries – which could be achieved via a central information repository; see Commission, South Australian Rail Access Regime Review, p. 5.

⁶³ See GWA's website, available at: https://www.gwrr.com/railroads/australia/genesee_wyoming_australia#m_tab-one-panel

⁶⁴ Under the Access Information and Pricing Principles Guideline, 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).

GWA proposed updating the document to reflect its current practice of reporting on a calendar year basis.⁶⁵ However, given reporting obligations apply to parties other than just GWA (for example, the South Australian Government, which operates broad gauge rail lines within metropolitan Adelaide⁶⁶), the Commission has retained the procedure for reporting on a financial year basis (though acknowledges the current exemption given to GWA that allows reporting on a calendar year basis).

In addition, GWA proposed that the procedure regarding compliance of regulatory accounts be modified, to be in line with the proposal for the Tarcoola-Darwin Railway. This involves adding the following statement: *'In the event that the Access Provider does not have an External Director, the statement of compliance may be signed by an External Director of a Related Body Corporate of the Access Provider. In the event that a company does not have a Related Body Corporate it may be signed by the director and a company secretary. If a company does not have a second director, or a company secretary who is a different person from the director, it may be signed by the sole director.'*⁶⁷ The Commission has accepted the proposed change as it does not materially change the operation of the Guideline. The definition of External Director is defined in the Corporations Act 2001 (Cth) and so has been used in the Guideline.

Other minor amendments in the Guideline include the updating of definitions and language and inclusion of a requirement that exemptions on reporting and compliance are to be made in writing with supporting evidence.

Pacific National suggested that the Access Provider report on operational performance levels as part of a standard access agreement. Example measures included, contracted versus scheduled train services, Railway Network availability (including track closures) and below-rail transit times. However, as noted earlier, the reporting and compliance requirements of the railway will be reviewed as part of the broader compliance framework review to take place in 2020.

⁶⁵ GWA proposed this modification in its written response to the Draft Decision; see GWA, Review of regulatory guidelines – Submission 17 May 2019, p. 24-25.

⁶⁶ See Appendix A.

⁶⁷ GWA proposed this modification in its written response to the Draft Decision; see GWA, Review of regulatory guidelines – Submission 17 May 2019, pp. 24-25.

Appendix A: Access Regime

A1. Scope

Subject to certain specific exclusions in the 2016 Proclamation,⁶⁸ the current 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 Creek⁶⁹
- ▶ 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, and
 - major yards and sidings, including those associated with the interstate mainline track, but excluding freight terminals and private sidings.
- ▶ passenger railway stations, and
- ▶ the services needed for the operation of these, such as train control.

A2. Certification

On 26 July 2011, the Commonwealth Minister certified the Access Regime as effective under Section 44N of the Competition and Consumer Act 2010 (CCA), for a period of ten years.⁷⁰ This means that the alternative pathways for access under Part IIIA of the CCA (declaration or voluntary access undertaking) are not available during the period of certification.

A3. Periodic review

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.^{71,72} In accordance with that recommendation, the then Minister for Transport and Infrastructure extended the Access Regime until 30 October 2020.

⁶⁸ 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.

⁶⁹ Proclamation clause 2(e) states that the Leigh Creek Line becomes accessible once the sublease to NRG Flinders expires, which occurred in 2018.

⁷⁰ See *Ministerial Decision on Effectiveness of Access Regime under Section 44N of the Competition and Consumer Act 2010* (Cth), available at: <http://ncc.gov.au/images/uploads/CERaSAMd-001.pdf>.

⁷¹ See Commission, *South Australian Rail Access Regime Review*, p. 3.

⁷² The prescribed period means the period ended 30 October 2015, and each successive period of five years thereafter; see Division 4 (7A) of the ROA Act.

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 5, 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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