Rail

Rail Access Regime Review

Draft Report

June 2020

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 **Monday, 20 July 2020.**

It is the Commission's policy to make all submissions publicly available via its website (www.escosa.sa.gov.au), except where a submission either wholly or partly contains confidential or commercially sensitive information provided on a confidential basis and appropriate prior notice has been given.

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: **2020 South Australian Rail Access Regime Review**

It is preferred that submissions are sent electronically to: **escosa@escosa.sa.gov.au**

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Glossary of terms

Above-rail	Operations involving rolling stock / trains
ACCC	Australian Competition and Consumer Commission
Access provider	A party providing, or able to provide, railway infrastructure services – sometimes referred to as a below-rail operator
Access seeker	An above-rail operator seeking access to below-rail services
Below-rail	Operations involving track management
Commission	Essential Services Commission, established under the *Essential Services Commission Act 2002*
Information brochure	A document containing information relevant to access that an operator is obliged to prepare and provide in accordance with s. 28 of the ROA Act
Intermodal	Involving more than one mode of transport, for example rail and road
Minister	Minister for Planning, Transport, Infrastructure and Local Government
NCC	National Competition Council
Review	The 2020 review of South Australian intrastate rail access regulation as required under the ROA Act section 7A
ROA Act	*Railways (Operations and Access) Act 1997*
Rolling stock	Vehicles (including locomotives, wagons and carriages) that move on a railway
Tonne kilometre	One tonne of freight transported one kilometre
Vertical integration	Where the owner of the below-rail infrastructure is also a provider of above-rail services

1 Executive summary

The Essential Services Commission (**Commission**) is reviewing whether or not the South Australian intrastate rail access regime, established under the *Railways (Operations and Access) Act 1997* (**ROA Act**)[1] should continue in operation from 31 October 2020. The regime commenced in 1997 and applies to declared rail infrastructure services. The Commission's draft finding is that the regime should continue. It also recommends that the regime operates for a further five-year period.

Under section 7A of the ROA Act, the Commission must review the regime and provide a report and advice to the Minister for Planning, Transport, Infrastructure and Local Government (**Minister**), recommending that the regime continue in operation, or not, for a further five years. The decision to continue or cease operation of the regime rests with the Minister.

The regime's statutory objective is to promote the economically efficient operation of, and investment in, rail infrastructure through facilitating access to rail services on fair commercial terms and on a non-discriminatory basis. In essence, the regime provides a regulatory backstop to help to protect access seekers against the potential use of market power for improper purposes by owners of rail infrastructure. The framework supports negotiations between an access seeker and access provider and, if negotiations fail, provides a process for commercial arbitration.

In February 2020, the Commission released an issues paper, outlining the regime and its objectives, and the Commission's planned approach to the review.[2] The paper highlighted the recent decline in use of intrastate rail lines and called for evidence, information and views from stakeholders about the regime's effectiveness. Nine submissions were received in response.

1.1 The access regime should continue

The Commission's draft finding that the regime should continue to apply from 31 October 2020 is based on the following evidence:

- Rail infrastructure services have natural monopoly characteristics (high fixed costs and low variable costs) and in some instances (the haulage of some mineral products and the use of some rail yards and sidings) those infrastructure services do not have competitive substitutes. These limits on competition can create high barriers to entry and suggest the potential for improper use of market power.
- The Commission has not found any evidence in the below-rail and above-rail markets indicating that market power has been used for an improper purpose. This suggests that, for rail infrastructure services where competitive substitutes are limited, the current regime is most likely operating as intended.
- The current regime provides a degree of protection against the potential use of market power for improper purposes at, according to stakeholders, only a small cost relative to alternative forms of protection, namely those available under the national access regime. If the current regime were to expire, there may be uncertainty about the degree and operation of available protections, and this could affect the operation of, and investment in, parts of the South Australian intrastate railway that are currently in use.

In both submissions and direct discussions, most stakeholders supported the continuation of the regime, although some suggested that certain changes could enhance the effectiveness of the regime

[1] The ROA Act may be accessed from the Attorney-General's Department website at: https://www.legislation.sa.gov.au/LZ/C/A/RAILWAYS%20(OPERATIONS%20AND%20ACCESS)%20ACT%201997.aspx.

[2] Commission, 'South Australian rail access regime review issues paper', 2020, available at: https://www.escosa.sa.gov.au/ArticleDocuments/21457/20200205-Rail-AccessRegimeReview-IssuesPaper.pdf.aspx?Embed=Y.

in meeting its objectives. Although changes to the regime are outside the scope of this review, the Commission sees the following changes as worthy of further consideration by Government and industry stakeholders:

- online publication of an up to date information brochure, and
- an improved mechanism for which an access seeker, or other interested party, could seek to have rail infrastructure services included or excluded from the access regime.

The Commission is also interested in stakeholder feedback on the potential for broadening the definition of an access seeker (for example, extending protections under the ROA Act to access seekers who are not, or do not propose to be, train operators), and strengthening the arbitration mechanism (for example, by allowing an arbitrator to make an interim order on access prices, terms and conditions if parties are renegotiating an agreement that is soon to expire).

1.2 Next steps

The Commission seeks stakeholder views on this draft report by 20 July 2020. The inside cover of this report explains how to make a submission.

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

The Commission aims to publish its final decision on the review of the South Australian rail access regime in September 2020.

2 The review

The Essential Services Commission (**Commission**) is the regulator of the third party access regime that applies to declared rail infrastructure services in South Australia, established under the *Railways (Operations and Access) Act 1997* (**ROA Act**). The regime provides a framework for commercial negotiations between the regulated operator of a declared rail infrastructure service and a train operator seeking access to that infrastructure.

The purpose of this review is to assess whether or not the regime that applies to declared rail infrastructure services in South Australia should continue in operation. Under section 7A of the ROA Act, the Commission must review the regime and provide a report and advice to the Minister for Planning, Transport, Infrastructure and Local Government (**Minister**), finding that the regime continue in operation, or not. The Commission last reviewed the regime in 2015, recommending that the regime continue for five years from 31 October 2015 to 30 October 2020.[3] In accordance with that recommendation, the Government extended the operation of the regime for a further five years.

2.1 Objectives of the ROA Act

Australia's National Competition Policy includes certain guiding principles that form a framework for states and territories to create regulatory regimes for allowing competitive access to significant infrastructure facilities.[4] The regime that applies to declared rail infrastructure services in South Australia follows these principles and includes, in section 3 of the ROA Act, the following objects:

- 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.

The regime has its origins in the competition policy reforms of the 1990s. Those reforms introduced competition and commercial practices into the rail industry.[5] Competition reforms extended to the privatisation of most of South Australia's rail lines in 1997. A vertically-integrated operator, One Rail Australia (**One Rail**), formerly Genesee & Wyoming Australia (**GWA**), with above-rail (train operations) and below-rail (rail infrastructure) services, purchased the assets of Australian National's South Australian intrastate freight business, including trains and infrastructure.[6]

The regime aims to promote a contestable market framework for above-rail services, while allowing the infrastructure business to recover efficient costs of providing below-rail services. Such a regime can

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3 Commission, 'South Australian Rail Access Regime Review', 2015, available at: https://www.escosa.sa.gov.au/ArticleDocuments/358/20150907-SARailAccessRegimeReview-FinalReport.pdf.aspx?Embed=Y.

4 Council of Australian Governments, 'Competition Principles Agreement', 1995, available at: https://www.coag.gov.au/about-coag/agreements/competition-principles-agreement.

5 Owens H, 'Rail Reform Strategies – the Australian Experience', *Governance, Regulation, and Privatization in the Asia-Pacific Region*, edited by Takatoshi Ito and Anne O. Krueger, University of Chicago Press, pp. 282-283.

6 This business was purchased for $57.4 million, and the South Australian Government granted a 50 year lease over the associated freehold property. See Australian National Audit Office, *Sale of SA Rail, Tasrail and Pax Rail*, 1998, pp. 23-24, available at: https://www.anao.gov.au/work/performance-audit/sale-sa-rail-tasrail-and-pax-rail.

promote efficient use of and investment in rail infrastructure, and can promote investment by the end-users of those rail transport services.

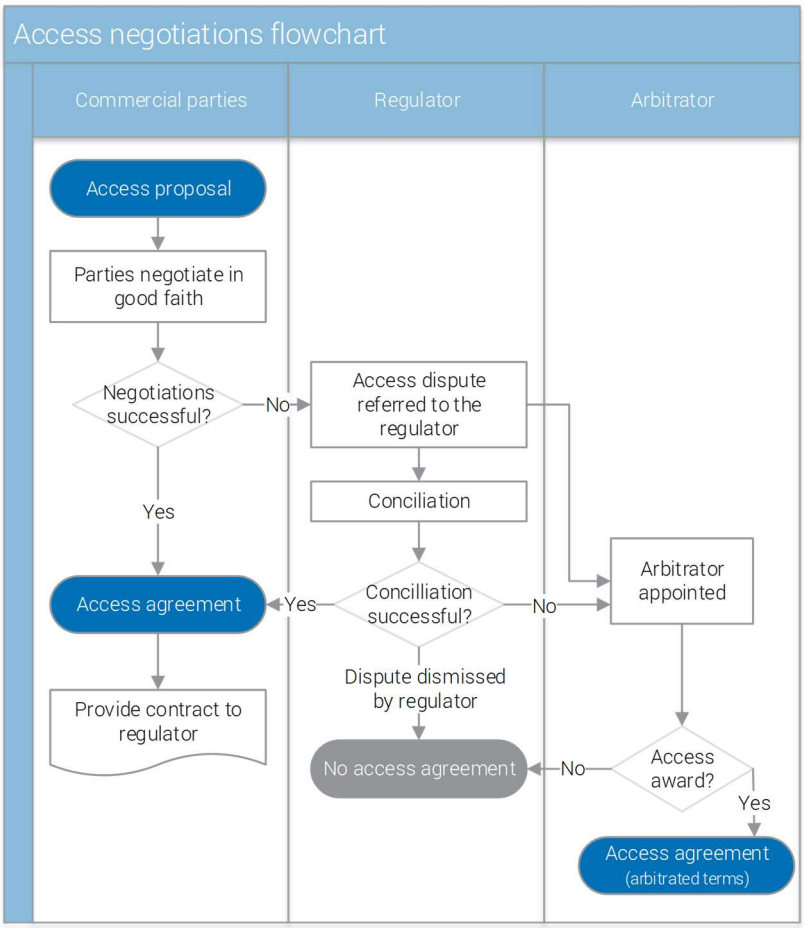
2.2 Operation of the access regime

The ROA Act establishes a negotiate-arbitrate framework to encourage access on fair commercial terms to declared below-rail services, and to settle disputes, should they arise (section 2.2.1). This includes the rights and responsibilities of the regulator and the negotiating parties, such as the technical, contractual and price information that must be provided (section 2.2.2), and the additional responsibilities placed on a vertically-integrated operator of below-rail and above-rail services (section 2.2.3). The pathways to an access agreement under the ROA Act are set out in Figure 1. It should be noted that the regime was certified in July 2011 for a period of ten years by the Commonwealth Minister and this national certification precludes access under the national access regime. [7]

2.2.1 The negotiate-arbitrate framework

The regime supports commercial negotiations through upfront regulatory arrangements, the setting of mandatory information sharing and, ultimately, arbitration if commercial agreement cannot be reached. Figure 1 illustrates the processes set out in the ROA Act whereby parties can reach an agreement for access to declared below-rail services.

Figure 1: Process for reaching an access arrangement



[7] National Competition Council, 'Application for certification of the South Australian rail access regime', 2011, available at: http://ncc.gov.au/application/application_for_certification_of_the_south_australian_rail_access_regime

An access seeker (who must be an operator of, or a person who proposes to operate, trains) can request certain information from the access provider (the operator of below-rail services). Once the access seeker has made an access proposal in writing, the access provider must inform the regulator, unless the proposal falls below certain price or duration thresholds. If commercial negotiations are successful, the access provider notifies the regulator. If a dispute arises, the regulator can either attempt conciliation between the parties or appoint an arbitrator. If conciliation fails, the regulator must appoint an arbitrator, unless it determines that the dispute is trivial, misconceived or lacking in substance. An arbitrator is bound by certain requirements in making an award, including rules for calculating floor and ceiling prices, and an award is subject to appeal on a question of law.

The regime does not seek to guarantee that every negotiation will lead to an agreement. Access providers and access seekers can have diverging views of the outlook for rail transport services, and hence different expectations of future costs and prices of below-rail services.

Box 1 (below) sets out examples of negotiate-arbitrate regulatory frameworks in Australia. It summarises how the threat of arbitration can impact negotiations in the absence of arbitrated outcomes.

Box 1. Negotiate-arbitrate frameworks

Negotiate-arbitrate frameworks underpin third party access to port[8] and water infrastructure services in South Australia,[9] and to below-rail services on both the Tarcoola-Darwin railway[10] and the South Australian intrastate railway. More generally, the threat of arbitration underpins third party access regulation nationally (under the *Competition and Consumer Act 2010*)[11] and in many other state-based and facility-based access regimes in Australia (though legislative requirements and objectives will differ by jurisdiction).[12]

The effectiveness of industry- and facility-specific negotiate-arbitrate frameworks, including the legislation, regulatory guidelines, and, ultimately, the credibility of the threat of arbitration, is a key question considered by economic regulators. The effectiveness of the South Australian intrastate rail access regime is discussed in sections 4 and 5.

Negotiate-arbitrate frameworks are not unique to third party access regulation. The threat of arbitration shapes the environment in which parties negotiate. For example, employees (and their representatives) negotiate pay and conditions with employers and, if talks break down, parties may progress to arbitration.[13]

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8 Commission, '2017 Ports Access and Pricing Review', 2017, p. 22, available at: https://www.escosa.sa.gov.au/ArticleDocuments/1026/20170911-2017PortsAccessAndPricingReview-Final.pdf.aspx?Embed=Y.

9 Commission, '2019 Review of Water Third Party Access', 2019, p. 4, available at: https://www.escosa.sa.gov.au/ArticleDocuments/11291/20190705-Water-ReviewofWaterThirdPartyAccessRegime-FinalReport.pdf.aspx?Embed=Y.

10 Commission, 'Review of Rail Guidelines for the Tarcoola-Darwin Railway', 2019, p. 3, available at: https://www.escosa.sa.gov.au/ArticleDocuments/1061/20191029-Rail-ReviewRailGuidelines-Tarcoola-Darwin-FinalDecision.pdf.aspx?Embed=Y.

11 Productivity Commission, 'National Access Regime', pp. 115-141.

12 Productivity Commission, 'National Access Regime', pp. 115-141.

13 Productivity Commission, 'National Access Regime', p. 119.

2.2.2 Pricing principles and information provision

The access regime's upfront regulatory arrangements and mandatory information sharing has a direct role in access negotiations. In particular, parties are required to negotiate in good faith and the access provider must supply certain information about access in the early stages of negotiations.[14]

Under Section 27 of the ROA Act, the Commission has established principles for a floor and ceiling price, which serve both as a price signal in the early stages of an access negotiation and a price range for arbitration. The ROA Act does not prevent negotiated access arrangements outside of the floor and ceiling price.

- 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 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 rail line the access seeker wishes to access (taking into account other users of the track).[15]

Section 28 of the ROA Act requires the access provider to supply an information brochure to an access seeker if requested, including certain terms and conditions of access (such as safety requirements, physical asset requirements, corporate information and geographical restrictions), and meaningful price information, including floor and ceiling prices. The purpose is to facilitate the timely exchange of information necessary for access negotiations.

Section 29 of the ROA Act concerns a separate phase of the negotiation process. It 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 infrastructure, 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.

2.2.3 Requirements on vertically integrated rail operators

Section 23 of the ROA Act sets out to prevent the regulated operator of below-rail services unfairly discriminating between train operators in the above-rail market. Unfair discrimination can relate to pricing, terms and conditions, and other arrangements (for example, the waiving of contract rights or awards on a non-uniform basis, or making kick-back arrangements).

If a regulated operator of below-rail services is vertically integrated, section 22 of the ROA Act requires that the operator maintain separate accounts for the above and below-rail parts of the business. The Commission has the ability to request information under the *Essential Services Commission Act 2002,* but did not need to use these powers in this review because One Rail agreed to the Commission's request for confidential access to above-rail and below-rail information. The potential for regulatory review of these separate accounts can incentivise the vertically-integrated operator to comply with the ROA Act and the Commission's pricing principles, and discourage cost-shifting (the situation where

[14] For more information, see the Commission's guidelines review: Commission, 'Review of the South Australian Rail Access Regime Guidelines', 2019, p. 9, available at: https://www.escosa.sa.gov.au/ArticleDocuments/1061/20191029-Rail-ReviewSARailAccessRegime-InformationKit-FinalDecision.pdf.aspx?Embed=Y.

[15] The Commission's pricing principles use incremental cost for setting a floor price and full economic cost for setting a ceiling price. These pricing principles would be expected to: (i) generate expected revenues to meet efficient costs and include a return for the investment, (ii) allow for price discrimination (as it related to end-users) when it aids efficiency, and (iii) provides incentives to reduce costs. In addition, as noted in section 2.2.3, section 23 of the ROA prevents a vertically-integrated access provider setting terms and conditions that discriminate in favour of its own train operations. Together, those aspects may be considered to be in line with the criteria set out in the Competition Principles Agreement.

costs are shifted from the above-rail business to the below-rail business to gain competitive advantage in the above-rail market).

A vertically-integrated regulated operator of below-rail services must comply with ring-fencing arrangements relating to its above-rail and below-rail parts of the business, as outlined in both the ROA Act[16] and the regulator's guidelines.[17] The ROA Act requires that the regulated operator must develop and maintain a policy to protect against confidential information obtained by the below-rail business being disclosed.[18] The regulated operator must provide a copy of the policy to the regulator and to any other person who requests a copy.[19]

2.3 Coverage of the access regime

The review of the regime relates to those parts of South Australia's below-rail services that are declared. The Railways (Operations and Access) (Application of Access Regime) Proclamation 2016 (Proclamation) declares that the regime apply to all below-rail services in South Australia except those excluded by Proclamation[20] or covered under the third party access regime that applies to the Tarcoola-Darwin railway.[21] A list of declared below-rail services is provided in Table 1.[22]

The rail assets covered by the regime were publicly owned prior to 1998, when the Commonwealth Government privatised the South Australian regional rail business and the interstate passenger rail business. As stated in the 2015 review, it is the Commission's view that the ROA Act applies to yards and sidings in South Australia owned or controlled by One Rail: that is, third party access arrangements under the ARTC Access Undertaking do not extend to yards and sidings connected to the ARTC's interstate mainline.[23]

There are currently three regulated operators of below-rail services under the ROA Act:

- One Rail
- Journey Beyond Rail Expeditions (JBRE), previously Great Southern Rail, and
- the South Australian Government.

One Rail currently owns and operates the 74 kilometres of rail from Kevin to Thevenard, and owns and operates various yards and sidings on the interstate mainline used for various purposes including refuelling, storage, loading and reconfiguring trains. One Rail also owns several currently unused rail lines on the Eyre Peninsula, and in the Mid-North, the Barossa and the Murray-Mallee regions.

16 ROA Act, sections 33A(7) and 33A(8).

17 Commission, 'Intrastate Rail Access Regime: Access Information and Pricing Principles Guideline', p. 16, October 2019, available at: https://www.escosa.sa.gov.au/ArticleDocuments/1061/20191029-Rail-IntrastateAccessRegime-AccessInformationPricingPrinciples.pdf.aspx?Embed=Y.

18 ROA Act, section 33A(7).

19 ROA Act, section 33A(8).

20 Proclamation published in the 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.

21 *AustralAsia Railway ('Third Party Access') Code*, a Schedule to the *AustralAsia Railway (Third Party Access) Act 1999* (SA) and the *AustralAsia Railway (Third Party Access) Act 1999 (NT)*.

22 Excluded rail infrastructure services are listed in Appendix A.

23 Commission, '2015 South Australian Rail Access Regime Review', 2015, p. 10, available at: https://www.escosa.sa.gov.au/ArticleDocuments/358/20150907-SARailAccessRegimeReview-FinalReport.pdf.aspx?Embed=Y.

JBRE operates the passenger terminal at Keswick under a 50 year lease. The South Australian Government granted the lease in 1997 when JBRE (then Pax Rail) purchased trains and other assets to run passenger services between Adelaide and Melbourne, Perth, Sydney and Alice Springs (now Darwin). JBRE is the only user of the passenger terminal, which has a different rail gauge to the metropolitan rail network, and no access requests have been lodged with the Commission.

Table 1: Rail infrastructure services declared under the ROA Act

Infrastructure owner	Rail infrastructure services covered under the access regime	Rail gauge	Last operational	Current above-rail operator
One Rail	Eyre Peninsula lines (excluding Thevenard)	Narrow	2019	—
	Mid-North and Barossa lines	Broad	2014	—
	Murray-Mallee region lines	Standard	2015	—
	Kevin to Thevenard line	Narrow	Operational	One Rail
	Yards and sidings on the interstate mainline[24]	Standard	Operational	Multiple
JBRE	Passenger terminal at Keswick	Standard	Operational	JBRE
South Australian Government	Adelaide metropolitan train network	Broad	Operational	Adelaide metro
	Port Augusta to Leigh Creek line	Standard	2018	—

The South Australian Government is the owner and operator of the Adelaide metropolitan rail network. There are currently no commercial arrangements to access the network, and connectivity between the metropolitan network and other rail networks is limited due to different rail gauges. All metropolitan passenger rail networks are vertically integrated in Australia. The Leigh Creek line, originally used to transport coal, became part of the regime in 2018 when the sublease to the previous operator expired and the line returned to South Australian Government control. With the exception of some small amount of activity in 2019, the line has not been in use since 2018. A request for interest in 2019 did not yield any viable projects for using the line.[25]

2.4 Submissions to the review

In February 2020, the Commission released an issues paper outlining the regime and the Commission's intended approach for assessing whether or not the regime should continue in operation.[26] Submissions[27] to the issues paper were received from:

- One Rail, a vertically integrated owner and operator of rail lines, yards and sidings in South Australia
- Australian Rail Track Corporation (ARTC), the owner and operator of the interstate mainline track
- Pacific National, an above-rail service provider with operations across Australia

[24] Including One Rail operated yards and sidings in South Australia, such as those at Whyalla, Port Pirie, Port Augusta, Tailem Bend, those in the metropolitan district (including Dry Creek and Port Adelaide), and grain yards and sidings at Snowtown, Gladstone, Crystal Brook, Bowmans and other grain sidings north and south of Adelaide.

[25] Hon Stephen Knoll MP, Minister for Transport, Infrastructure and Local Government, 13 Jan 2020: *'Following detailed consideration of five Expressions of Interest (EOI) for the use of the Barossa rail corridor in August last year, the State Government has concluded none of the proposals, which included passenger and tourist rail services, warrant further development.'* https://www.barossa.sa.gov.au/Media/Default/Council/Council%20Meetings/Council%20Agendas/Agenda%20-%20Council%20Meeting%20-%2028%20January%202020.pdf

[26] Commission, 'South Australian rail access regime review issues paper'.

[27] Submissions to this review are available at: https://www.escosa.sa.gov.au/projects-and-publications/projects/rail/south-australian-rail-access-regime-review-2020.

- Gypsum Resources Australia (GRA), a company exporting gypsum from its quarry in Kevin through the port at Thevenard
- OZ Minerals, a mining company based in South Australia that exports various products
- Monarto Inland Port, a firm with experience seeking access to a rail siding
- The South Australian Freight Council (SAFC), a multi-modal freight and logistics industry body
- GPSA, the industry body for South Australian grain growers, and
- AMEC, an industry body representing mining and exploration companies.

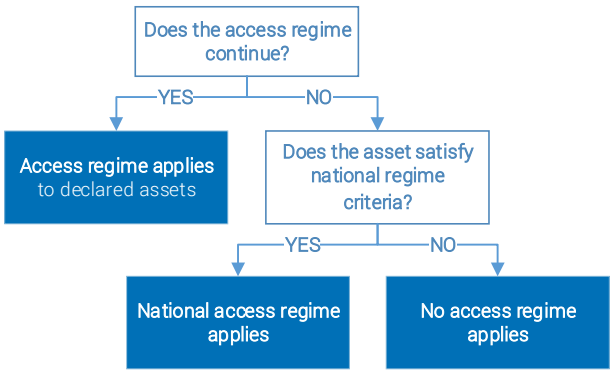
Submissions to the review focussed on One Rail's below-rail services and the regime's general features. There were no submissions made to the Commission regarding the passenger terminal at Keswick or the South Australian Government's below-rail services (the Adelaide metropolitan network and the Leigh Creek rail line).

The Commission has considered the submissions in preparing this draft report. In addition to the written submissions, the Commission met with a number of stakeholders, including above-rail operators, end-users of transport services, and industry associations representing transport companies and the end-users of transport services. Certain arguments and submissions have been mentioned in the text of this report, 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 Approach taken in the review

The access regime should continue in operation if the benefits it delivers outweigh the costs of maintaining it, taking into account the costs and benefits of feasible alternatives. Alternatives to the current regime, if it were to expire, include the potential for the national access regime to apply to some or all relevant infrastructure services, or for no formal access regulation to apply (Figure 2).

Figure 2: Access arrangements that could apply to the South Australian intrastate railway



Section 3 considers the economic context in which this review takes place, including trends in the demand for access to intrastate rail and yards and sidings, and the outlook going forward. Section 4 examines the benefits of the regime through investigating whether or not there is evidence that market power has been, or could be, used for improper purposes, and whether or not the protections provided by the regime are effective. The direct and indirect costs of the regime are also considered, followed by an examination of the potential for the national regime to cover below-rail services and the costs and benefits that could arise in such a scenario. Section 5 considers what changes to the regime could improve its effectiveness, in the case that the regime continues to operate.

Where particular access-related matters were already reviewed in the 2019 Review of the South Australian Access Regime Guidelines,[28] such as the pricing principles for calculating floor and ceiling access price and exchange of information about the terms and conditions of access, these have not been considered unless new evidence was provided by stakeholders.

[28] Commission, 'Review of the South Australian Rail Access Regime Guidelines', pp. 3-4.

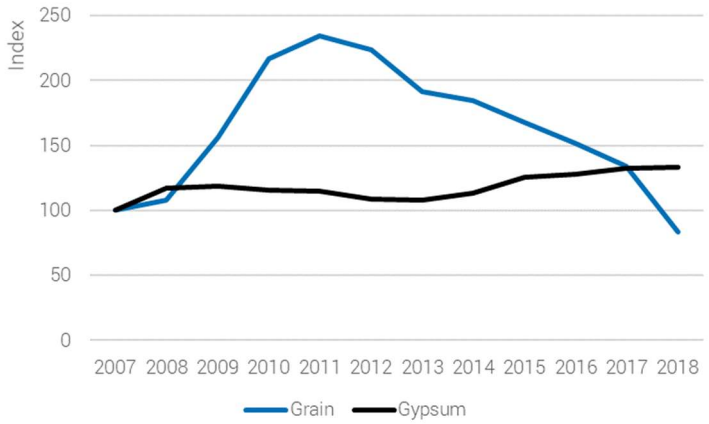
3 Economic context for the review

The demand for below-rail services is derived from the demand for transport services, which, in turn, flows from the demand for and supply of commodities and other goods that require transportation. This section considers the key trends in demand for One Rail's below-rail services on intrastate rail lines and on the rail yards and sidings located along the interstate mainline.[29] Rail lines accounted for half of the below-rail revenues earned by One Rail in 2018, the other half being from access to yards and sidings. Given different demand profiles, rail lines are considered separately from yards and sidings in the discussion below.

3.1 Rail lines

The demand for One Rail's below-rail services on rail lines has declined over the past ten years. Since the peak in 2011, total volumes transported over rail lines have fallen by more than 40 per cent, as grain previously transported on the Murray Mallee lines and, more recently, Eyre Peninsula lines, has shifted to road transportation (Figure 3).

Figure 3: Trends in grain and gypsum volumes on rail lines covered by the access regime, index 2007 = 100[30]



Sources: Commission, One Rail

The only regional intrastate rail line under the access regime that is still in use is operated by One Rail for the end-user GRA, and involves the transport of gypsum 74 kilometres from Kevin to the port at Thevenard. Volumes on this line have grown over the past five years, but not by enough to offset the fall in grain transportation on other lines in South Australia. One Rail argued in its submission that the operational nature of the freight task on the Kevin to Thevenard line particularly lends itself to rail transport.[31]

The decrease in demand for below-rail services on rail lines has been facilitated by a range of structural factors:

- on-farm storage of grain has increased, allowing farmers to change the timing and mode of transport, and this increased flexibility can favour road transport of grain[32]

[29] No competition or demand issues have been brought to the Commission's attention regarding the metropolitan rail network and the passenger terminal at Keswick, which are not discussed in this section.

[30] Grain means grain transported on the Murray Mallee lines and Eyre Peninsula lines. Data is a three-year centred moving average, used as a simple measure to smooth volatility. The index sets the 2007 centred moving average of volumes at 100. Grain transportation on these lines ceased in May 2019, but zero transport is assumed for 2019 for the purpose of constructing the three-year centred moving average.

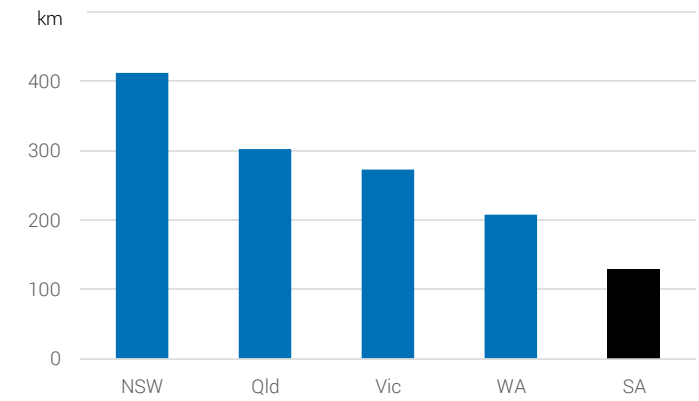
[31] One Rail, submission, p. 4.

[32] Commission, 'Inquiry into the South Australian bulk grain export supply chain costs', 2019, pp. 24-25, available at: https://www.escosa.sa.gov.au/ArticleDocuments/1076/20190129-Inquiry-BulkGrainExportSupplyChainCosts-

- port facilities have increased, including some port facilities unconnected to rail lines, providing more options for grain exporters to use road transport[33]
- large trucks are carrying an increasing share of road freight, and road transport technology has improved (larger trucks such as B-triples use less fuel per tonne of freight than smaller trucks),[34] and
- road transport policy has changed, allowing larger sized trucks such as B-triples and B-quads on certain South Australian roads.[35]

As a result, road transport costs have fallen relative to rail costs. This has strengthened the existing advantages of road transport for grain in South Australia: the variable and fragmented nature of grain production (which encourages frequent, smaller transport volumes)[36] and the short-haul distances involved (Figure 4).

Figure 4: Median distance from grain retrieval site to port[37]



Source: AEGIC

One Rail, the SAFC, the ARTC, GPSA and GRA reported that the closure of rail lines transporting grain was evidence of lower prices and higher service quality offered by road transport. In addition, some stakeholders, namely the ARTC, One Rail and GRA, raised concerns about the subsidisation of road

FinalReport.pdf.aspx?Embed=Y; and SA Department of Planning, Transport and Infrastructure (DPTI), 'Eyre Peninsula Freight Study', 2018, p. 9, available at: https://www.dpti.sa.gov.au/infrastructure/eyre_peninsula_freight_study.

33 Two ports were constructed in South Australia between 2015 and 2017 (LINX and Semaphore), adding approximately 20 percent capacity to total port capacity in the state: ACCC, 'Bulk grain ports monitoring report 2018-19', 2019, pp. 56-64, available at: https://www.accc.gov.au/system/files/Bulk%20grain%20ports%20monitoring%20report%202018-19_0.pdf.

34 PricewaterhouseCoopers, 'Australian Trucking Association: A future strategy for road supply and charging in Australia', 2013, p. 19, available at: https://qta.com.au/resources/Documents/Regulations/Future%20strategy%20for%20road%20supply%20and%20charging%20FINAL%20FOR%20WEB.pdf. Between 2005 and 2019, the share of registered trucks that carry over 60 tonnes in South Australia increased from 38 percent to 62 percent (measured in gross combination mass, a weight metric used in road transport); see Australian Bureau of Statistics, catalogue number 9309.0 - Motor Vehicle Census, table 8, 2019, available at: https://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/9309.031%20Jan%202019?OpenDocument.

35 These changes are in response to the *Heavy Vehicle National Law (South Australia) Act 2013*. DPTI, South Australia's first B-Quad hits the road', 2019, https://dpti.sa.gov.au/news?a=563406; and Primary Producers SA, 'Improving Road Transport for Primary Production Project', 2018, p. 6, available at: https://pir.sa.gov.au/__data/assets/pdf_file/0011/311132/Improving_Road_Transport_for_Primary_Production_Status_Update_-_web.pdf.

36 Commission, 'Inquiry into the South Australian bulk grain export supply chain costs', pp. 27-28.

37 Australian Export Grains Innovation Centre (AEGIC), 'The cost of Australia's bulk grain export supply chains', 2014, p. 17, available at: https://www.aegic.org.au/wp-content/uploads/2016/04/The-cost-of-Australias-bulk-grain-export-supply-chains-Full-Report.pdf. The data used in the chart is from 2014. Research from AEGIC in 2018 indicated that the relative difference in medians across jurisdictions had not changed by much since 2014. AEGIC, 'Australia's grain supply chain – costs, risks and opportunities', 2018, p. 22, available at: https://www.aegic.org.au/wp-content/uploads/2018/11/FULL-REPORT-Australias-grain-supply-chains-DIGITAL.pdf.

transport, in particular a lack of user pays charges and other charges to cover the social cost of road infrastructure.[38] The different funding models for road and rail is a complex and difficult issue to assess. It is outside the scope of this report and is an issue for government policy.

In contrast to other stakeholders, Pacific National claimed deficiencies in the regime can reduce demand for below-rail services, resulting in higher fixed costs per tonne kilometre.[39] The implication of this claim is that the form of the regime may be a contributing factor to low utilisation on intrastate rail lines.

The low utilisation of intrastate rail lines that carry grain is an issue that has been observed in locations across Australia.[40] Demand for grain transportation is highly variable and the location where rail lines were initially constructed reflects historical passenger and freight transport routes that in some cases are no longer suitable.[41] The location of lines also makes it difficult to supplement demand by transporting other commodities.[42] In 2019, in an Australia-wide context, the Bureau of Infrastructure, Transport and Regional Economics (BITRE) reported that, *'While rail transport has a traditional advantage for grain transportation over long distances and is the preferred mode choice, this advantage is not absolute and has been partially eroded by other factors that have improved road transport's competitiveness or restricted rail transport's efficiency.'*[43]

There can be factors that work against the competitiveness of road transport. Concerns about road safety and congestion can create resistance from local communities.[44] This situation, however, depends on the commodity, the size of the trucks and the transport routes involved. A detailed assessment of these factors is not within the scope of this review.

Looking ahead, there are developments that could revive demand for below-rail services on rail lines. Changes in government policy (for example, carbon pricing, heavy vehicle subsidies or charges[45]) or large movements in fuel prices could improve the relative competitiveness of rail transport. Growth in agricultural production could increase demand for rail, as could new or expanded mineral and resource production.

The likelihood of these developments is difficult to quantify. SAFC considers policy changes unlikely,[46] but suggests new mining developments (such as iron ore mines in the Braemar Province in northeast South Australia) are more likely to use new, rather than existing, rail lines.[47]

One Rail considers the outlook for demand challenging and '*…does not foresee significant growth … in demand for these lines.*'[48] It argued that the factors weighing on the competitiveness of rail are structural

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38 ARTC, submission, pp. 2, One Rail, p. 2, and GRA, p. 2.

39 Pacific National, submission, pp. 1, 6. Pacific National raised certain suggestions for the regime that are discussed in section 5.4.

40 Productivity Commission, 'Road and Rail Freight Infrastructure Pricing', 2006, pp. 149, 314, available at: https://www.pc.gov.au/inquiries/completed/freight/report/freight.pdf

41 Freebairn, 'Access Prices for Rail Infrastructure', *The Economic Record*, vol. 74, No. 226, September 1998, pp. 286-296. According to Freebairn, *'Initial construction of most Australian railways for freight and passengers took place in the nineteenth century'*, p. 287.

42 Bureau of Infrastructure, Transport and Regional Economics (BITRE), 'Trainline 7', 2019, p. 31, available at: https://www.bitre.gov.au/publications/2019/trainline-7; Government of Western Australia Department of Treasury, 'Review of the Western Australian Rail Access Regime', 2019, p. 77, available at: https://www.wa.gov.au/sites/default/files/2020-02/wa-rail-access-final-decision-paper.pdf; ARTC, submission, pp. 1-2; SAFC, submission, pp. 1-2.

43 BITRE, 'Trainline 7', p. 31

44 OZ Minerals, submission, p. 2.

45 SAFC, submission, pp. 1-2; ARTC, submission, pp. 1-2.

46 SAFC, submission, pp. 1-2.

47 SAFC, submission, p. 2.

48 One Rail, submission, p. 2.

in nature, and end-user demand does not show signs of increasing.[49] It is not aware of any prospective new demand for below-rail services on existing intrastate rail lines.[50]

3.2 Rail yards and sidings

One Rail's yards and sidings are used for various purposes including refuelling, storage, loading and reconfiguring trains. The characteristics of those yards and sidings can differ in scale and scope.

Demand for below-rail services on One Rail's yards and sidings located alongside the interstate mainline has generally held up over the past ten years, eschewing the downward trend observed for rail lines.[51] The interstate mainline is operated by the ARTC, and train operators carry a variety of freight, from mineral products (travelling from mine to port), bulk grain (to port or to interstate locations) and containerised goods.[52] Also, the need for yards and sidings may sometimes be unanticipated. This can reflect changes in mining or grain production, disruptions to rail traffic, or a change in the needs of the end-buyers of goods. For example, drought on the east coast of Australia increased demand for grain to be transported from South Australia to Queensland and New South Wales. This led to increased demand for access to certain yards and sidings, as grain was moved on the interstate mainline rather than being moved to ports in South Australia.[53]

The outlook for demand for below-rail services on yards and sidings appears stronger than for below-rail services on intrastate rail lines. This reflects the diversified end-user base and the varied below-rail services involved. Demand from the minerals and resources sector could increase given recent expansions of mining operations near the Tarcoola-Darwin line[54] and the prospect of new and existing mineral developments.[55] Indeed, One Rail anticipates *'[i]ncreased use of yards to facilitate mineral volumes moving on the ARTC main line network to ports in South Australia for export … while commodity prices remain high*'.[56]

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49 For example, see One Rail submission. Further evidence can be found in recent investment by major grain exporter Viterra designed to '*…smooth [the] transition to road transport.*' See Viterra, 'Viterra unveils new $6 million major upgrade at its Port Lincoln site', 2019, available at: http://viterra.com.au/index.php/2019/11/12/6million_upgrade_port_lincoln/

50 One Rail, submission, p. 2. Consistent with this, the Department of Industry, Innovation and Science's March 2020 major mineral resource project listing shows three major iron ore projects publicly announced (though yet to start the feasibility stage) and two projects in the feasibility stage. The estimated start dates of most projects were between 2024 and 2025. See Department of Industry, Innovation and Science, 'March 2020 Resource and Energy Major Project Listing', 2020, available at: https://publications.industry.gov.au/publications/resourcesandenergyquarterlymarch2020/index.html.

51 One Rail, submission, p. 3; BITRE, 'Trainline', p. 30.

52 The east-west freight route (from the eastern states to Perth) is the only intercity route for which rail transport exceeds road transport. See National Transport Commission, 'Who Moves What Where: Freight and Passenger Transport in Australia', 2016, p. 87, available at: https://www.ntc.gov.au/sites/default/files/assets/files/Whomoveswhatwhererereport.pdf.

53 One Rail, submission, p. 8.

54 According to the Department of Industry, Innovation and Science, there were capacity expansions at OZ Minerals' Carapateena mine in 2019. Increased production would be transported on the Tarcoola-Darwin line and be transferred on to the interstate mainline. Once on the interstate mainline the use of yards and sidings may be needed.

55 AMEC, submission, p. 1.

56 One Rail, submission, p. 2.

4 Reasons to continue the access regime

- Draft recommendation: the Minister should extend the access regime for five years from 31 October 2020. Most stakeholders support the continuation of the access regime, as it provides a degree of protection for access seekers against the misuse of market power, and at only a small cost relative to alternative regulatory frameworks.

The Commission's assessment of the continuation of the access regime is organised into three parts. First, it considers if a regime is necessary, by assessing market power and the constraints on the regulated operator from exercising that power. Second, it considers the direct and indirect costs of having the current regime in operation. Third, it asks whether protection would be available to access seekers under the national access regime, and considers the associated costs and benefits.

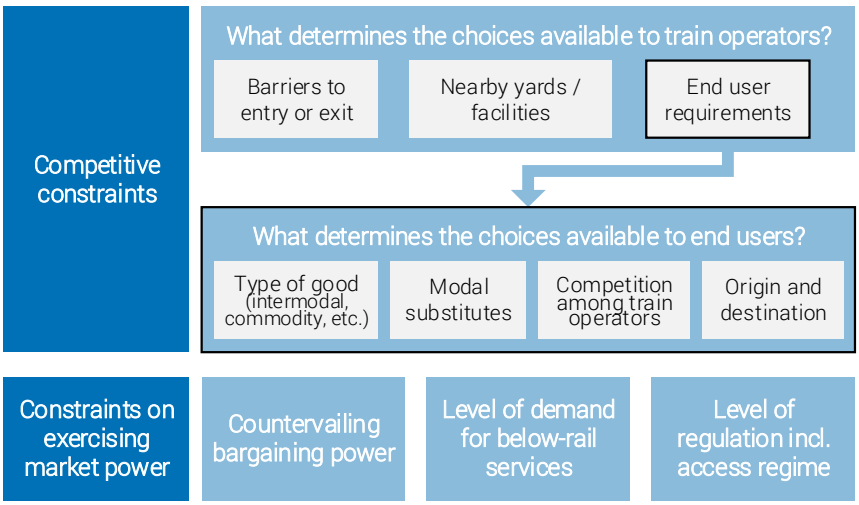
4.1 Potential for misuse of market power

A lack of effective competition can give rise to market power. Market power may allow the regulated operator of below-rail services to set access prices above the efficient cost of providing access, provide service levels that do not meet customers' requirements, and, in the case of a vertically-integrated operator, allow unequal treatment among train operators in the above-rail market. In this situation some degree of protection against the exercise of market power for an improper purpose may be required.

The Commission has assessed One Rail's ability to use market power for an improper purpose, by considering:

- the choices available to train operators (barriers to entry and competing rail assets) and end-users (substitute transport options, the nature and type of service, and competition in the above-rail market), and
- the constraints on One Rail exercising market power that may exist in addition to, or apart from, competitive constraints (Figure 5).

Figure 5: Framework for assessing market power in below-rail services[57]



[57] Adapted from Productivity Commission, 'Economic Regulation of Airports', 2019, p. 90, available at: https://www.pc.gov.au/inquiries/completed/airports-2019#report.

4.1.1 Barriers to entry and supply-side substitutability

One Rail's below-rail services covered under the regime have high fixed costs and low variable costs: characteristics of a natural monopoly. This is generally considered to be the case for rail, as argued by Pacific National and AMEC.[58] If demand is not sufficient to support competing below-rail services, then given the amount of sunk capital required, the threat of new entry will provide limited competitive constraint. This situation can create high barriers to entry and the potential for improper use of market power.

The commercial reality over the past decade suggests that there are barriers to entry for below-rail services on rail lines and, to a lesser extent, yards and sidings. Fragmented grain production and short distances to port are among the reasons duplication of rail lines has not been profitable. The tailored nature of yards and sidings could prevent switching by some customers to newly built facilities, and the infrequent demand at these types of facilities may limit the profitability of duplication.

These considerations suggest that One Rail may have some degree of market power. This can have an effect on the choices available to train operators (as highlighted above in Figure 5). The nature and extent of market power is considered in the following sections.

4.1.2 Competition for grain lines

Substitute transport services may provide a constraint on the exercise of market power. The degree to which road transport is a competitive substitute for rail transport, however, is influenced by the nature of the freight task including the choices available to the end-user (as highlighted above in Figure 5). This includes the specific goods being transported, the distance (with longer distances favouring rail), the volume and weight (with larger and heavier volumes favouring rail), and the origin and destination (with more dispersed pick-up or delivery locations favouring road).[59]

Competition from road transport has been a key reason for the decrease in demand for below-rail services on intrastate rail lines in South Australia. One Rail's limited market share in grain transportation and the closure of intrastate rail lines has been used as evidence by some stakeholders of a lack of market power in the long run: *'The continued decline of regional freight rail in South Australia, including the cessation of operations on several of the regulated lines, suggests that there is little to no market power to be exercised.'*[60]

In the absence of competitive constraints, one might expect access prices to be at or near the ceiling prices that apply in the case of arbitration. However, actual average prices have been below estimated ceiling prices over the past decade (as published in One Rail's information brochure) (Figure 6).[61] This may suggest that competition from road is exerting downward pressure on prices.

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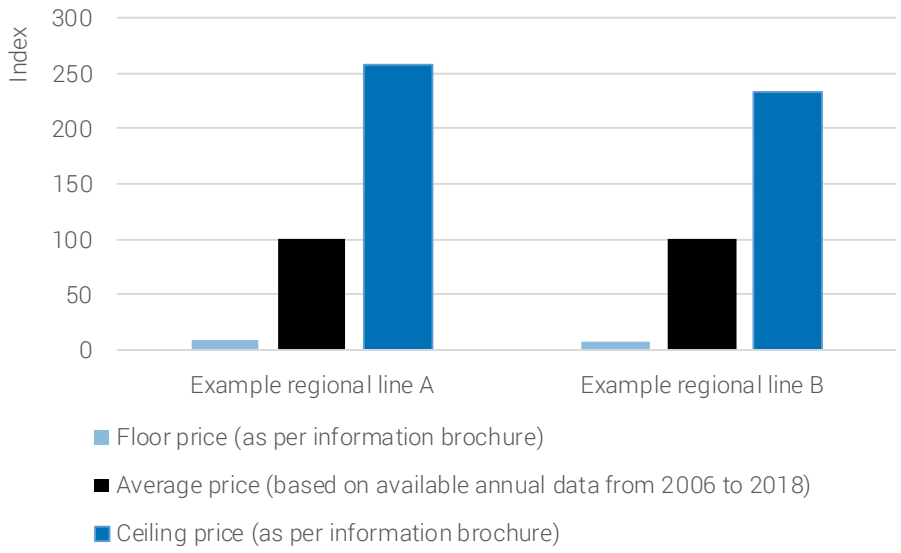
58 AMEC, submission, p. 2; Pacific National, submission, p. 3. As stated by AMEC, *'Rail is a natural monopoly, costly to build, difficult to replicate and enjoys significant economies of scale'.*

59 BITRE, 'Road and Rail Freight: Competitors or Complements?', 2009, available at: https://www.bitre.gov.au/publications/2009/is_034.

60 SAFC, submission, p. 1. Also, several stakeholders have commented on this link between road competition and decline in demand for rail. 'It is therefore apparent to [Grain Producers SA] that the key reason for the abandonment of rail transport on the Eyre Peninsula in favour of road freight is the cost efficiencies and flexibility that road freight provides.' See GPSA, submission, p. 2. Viterra, a grain exporter and the last user of the Eyre Peninsula grain lines, explained the relative disadvantages of rail that led to its decision to move to road transport: 'The condition of the rail infrastructure, the restrictions it placed on operations, and ultimately the cost have all contributed to rail no longer being efficient or cost effective to move grain.' See Viterra, 'Viterra decision provides competitive supply chain to Eyre Peninsula growers', 2019, available at: http://viterra.com.au/index.php/2019/02/26/viterra-decision-provides-competitive-supply-chain-to-eyre-peninsula-growers/.

61 Based on the data available, between 2006 and 2018, average annual access prices in those two regions have been as low as 50 percent of the average and have been as high as between 150 percent (line A) and 175 percent (line B) of the average.

Figure 6: Prices relative to floor and ceiling[62]



Sources: Commission, One Rail

Since reaching a peak in 2011, falling volumes (and therefore higher average below-rail costs), combined with limited ability to raise (or even maintain) average below-rail prices, has led to the closure of grain lines and the erosion of the operating profit margin for those lines.[63] This is an indication that competition from road transport is limiting the exercise of market power.

4.1.3 Competition for lines used for mineral products

The degree to which road transport is a substitute for the rail transport of mineral products is less clear than it is for the transport of grain. Mineral products are heavier, often transported over longer distances and in greater volumes, output is typically less seasonal than grain output, and the transport task generally involves just one origin and one destination.[64] Those factors tend to favour rail transport.

GRA, the end-user of the Kevin to Thevenard rail line, considers road a competitive substitute for the transportation of gypsum by rail.[65] The distance involved is relatively short (74 kilometres), and recent changes in road policy have allowed larger and more efficient trucks on nearby roads.[66] If road transport is a substitute for rail transport, the below-rail operator stands to lose the most from any failure to reach agreement (there being no other users on the line). In that situation, GRA is likely to have some degree of countervailing bargaining power in access negotiations.

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62 Index 100 is equal to the average of actual prices based on the available data since 2006. Floor and ceiling prices are based on the published information brochure. The commercial nature of the data has meant the Commission uses indexes.

63 Revenue and cost information provided by One Rail. Data based on below-rail accounts. The Commission's understanding is that operating expenses include labour and maintenance costs, statutory depreciation and impairment, incident expenses, and general administration (labour and insurance) costs. The operating profit margin is calculated as the difference between operating revenues and operating costs. It is equivalent to an earnings before interest and tax (EBIT) measure. The allocation of costs by yard or railway line has been estimated by One Rail.

64 AMEC expressed the view that, '[f]or many current and potential future users, there is no other viable transport options other than rail.' See AMEC, submission, p. 1. In relation to the transport of mineral products, AMEC said that *'…most mines for bulk commodities are unlikely to be feasible without rail if they are in excess of 100 kilometres from a port.'* See AMEC, submission, p. 2. This is a much shorter distance than has been estimated for other freight tasks: in 2009 BITRE found rail to be lower-cost than road for door-to-door transport in excess of 1000 kilometres, based on commodity prices and other circumstances at that time. See BITRE, *Road and Rail Freight: Competitors or Complements?*, p. 8.

65 GRA, submission, p. 2.

66 South Australian Government, 'Heavy Vehicles – Approved areas or routes', available at: https://www.sa.gov.au/topics/driving-and-transport/heavy-vehicles/operating-a-heavy-vehicle/approved-areas-and-routes-maps.

However, One Rail argued that rail was more suitable than road for this freight task due to the '*consistent and significant volumes as well as tight integration… which allows sufficient funding for capital investment in the track.*'[67] Further, to the extent that the use of large trucks presents perceived safety risks and adds congestion, their use in carrying mineral products may generate resistance from local communities. [68]

One Rail's below-rail operating margin (as a share of revenue) on the Thevenard line has remained consistent, at a level comparable to monopolies such as regulated airports.[69] This suggests that while the end-user may have some countervailing bargaining power, it may be limited if road transport is not a close substitute. This may support continuing to protect access negotiations through the access regime.

4.1.4 Competition for yards and sidings

As noted in section 3.2, the rail yards and sidings along the interstate mainline can face a different demand profile to intrastate rail lines, so may not face the same competitive pressures. Access to these yards and sidings is complementary to access to the interstate mainline, therefore market power is influenced by demand for services on the interstate mainline, and the substitutability of road transport for those services.

End-users undertaking longer-term and more predictable freight tasks will compare the full cost of rail transport, including the cost of below-rail services associated with yards and sidings and the cost of above-rail services, with the cost of alternatives such as road transport. In this situation, market power in respect of yards and sidings may be constrained to some degree by competition from road transport.[70] For short-term and ad-hoc access to yards and sidings, however, demand-side substitutability may be more limited.[71] If a freight task is already configured for rail, it may not be economically feasible to switch to road at short notice. One Rail has highlighted that access to yards and sidings faces limited, if any at all, competitive pressures from road freight:

> *The existence of the access regime is far more important for negotiating competitive agreements for mainline yards, given the alternative of using road is not applicable. In the case of yards, the regime provides protection for both access providers and access seekers via the floor and ceiling pricing regime and arbitration process.*[72]

As noted in section 4.1.1, the infrastructure characteristics of yards and sidings (which can lend themselves to certain types of commodities and activities) could in some cases make switching by some customers to new yards and sidings difficult, and the infrequent demand at these types of facilities may limit the profitability of firms investing in their own yards or sidings.

Below-rail services on yards and sidings have had historically higher levels of operating margin than rail lines, likely reflecting more diversified demand. However, profits have become lower and more volatile over the last few years. The lower operating margin over recent years has been driven by a rise in track maintenance expenses on the Port Augusta, Whyalla and Port Pirie yards, coinciding with the timing of investment in rail safety and infrastructure.

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67 One Rail, submission, p. 4.

68 OZ Minerals, submission, p. 2. DPTI considered the economic cost of road safety in the Eyre Peninsula Freight study in 2018.

69 There are limitations in comparing different industries due to differences in regulatory and commercial environments. ACCC, 'Airport monitoring report 2018-19', 2019, p. 22, available at: https://www.accc.gov.au/system/files/1655_Airport%20monitoring%20report_D09.pdf.

70 The degree of substitutability for road transport may be less for certain freight tasks, such as minerals freight, as discussed above (section 4.1.3).

71 In its submission, Monarto Inland Port pointed to difficulties negotiating access with One Rail for access to yards and sidings. Submissions from the ARTC and Pacific National highlighted the importance of yards and sidings to the functioning of rail freight networks.

72 One Rail, submission, p. 5.

In summary, aside from the recent changes at some major yards and sidings in the northern Spencer Gulf region, operating margins on yards and sidings have remained steady over the longer term. The nature of the demand for below-rail services on yards and sidings (which can involve short-term and ad hoc access) may in principle support continuing to protect access negotiations through the access regime.

4.1.5 Competition in the above-rail market

The regime aims to promote contestability in the above-rail market and it sets out to prevent the regulated operator of below-rail services unfairly discriminating between train operators in the above-rail market. As noted in Figure 5 (shown earlier), the degree of competition in the above-rail market can have an effect on the choices available to end-users of transport services. In light of this, the Commission sought to review information about One Rail's above-rail business, as it relates to the South Australian intrastate railway.

Operating profit margins in the above-rail market for grain transportation have remained low over the past decade, suggesting that the total cost of rail transport services (below-rail and above-rail services) are constrained by competition from road transport. As mentioned earlier, supporting this view is the decline in the rail transport of grain in recent years due to competition from road transport. Furthermore, prices on above-rail services have been relatively stable even as volumes have decreased (therefore increasing average fixed costs).

Operating profit margins in the above-rail market on the Thevenard line have been higher than for grain lines, but relatively stable. This may reflect short run barriers to entry such as the narrow gauge line (other freight train operators use standard gauge rolling stock in South Australia, and there may be costs in obtaining narrow gauge 12 tonne axel load locomotives and/or in moving narrow gauge equipment and related services to the region where the line is located).[73] These short-run barriers are not insurmountable, but may increase the risk for a new entrant, therefore lessening competition to some extent.

In summary, while it is difficult to estimate the counterfactual (for example, the presence of unfair discrimination could still take place in the presence of low profit margins), there does not appear to be compelling evidence that the above-rail market on intrastate rail lines has not been contestable, and that One Rail is using market power in the below-rail and/or above-rail markets for improper purpose.

4.2 Cost of the access regime

The costs imposed by the current regime – on access providers, access seekers and the regulator – appear to be relatively low. One Rail estimated the access regime costs it $313,000 per year (though negotiating access outside the regime would still involve costs). As stated by One Rail: *'Overall, One Rail Australia considers that this direct cost is not a significant burden and is a reasonable price to pay for a fit for purpose access regime taking into account the size of the network and the volume of freight transported, particularly on regional rail lines.'*[74] Historical data suggests that some other regimes are relatively more expensive to regulate.[75]

Also, there can, in theory, be indirect costs resulting from the presence of an access regime. Compulsory third party access can weaken incentives for the operator of below-rail services to invest in rail infrastructure. This could arise, (1) if regulation is expected to expropriate above-normal returns when demand from access seekers is high, but not compensate for below-normal returns when

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[73] GRA raised these issues as a barrier to entry in a submission to the 2009 review. GRA, 2009, p. 5, available at: https://www.escosa.sa.gov.au/ArticleDocuments/708/090401-RailAccessRegimeInquiry_2009-IssueGypsum.pdf.aspx?Embed=Y.

[74] One Rail, submission, p. 6.

[75] Productivity Commission, 'National Access Regime', p. 237.

demand is low. This can leave the operator of below-rail services to bear a disproportionate share of downside risk; and (2) if regulatory error (in relation to prices and terms and conditions) discourages investment.[76] Nonetheless, nationally, there is limited evidence available to suggest that third party access regimes have had the effect of stifling investment. [77] In submissions to the issues paper, stakeholders did not indicate that the regime has had a direct impact on investment incentives of the infrastructure owner.

4.3 Availability of protections under national access rules

If the current (state-based) regime were to expire, some protections against the misuse of market power may be available for access seekers under Part IIIA of the *Competition and Consumer Act 2010* (the national access regime). In the issues paper, the Commission sought feedback on whether the national regime could apply and what the costs and benefits would be, relative to the current regime. Stakeholders have presented differing views, as discussed below. The four pathways to gaining access under the *Competition and Consumer Act* are declaration, voluntary access undertaking, competitive tendering for public infrastructure, and a certified state-based access regime (see Box B1, Appendix B).

If the current regime were to expire, an access seeker could pursue declaration of any rail infrastructure service, but it is uncertain whether the declaration criteria would be satisfied (the criteria are discussed in Appendix B). It is worth noting that the declaration pathway has never resulted in third party access to rail infrastructure services in Australia.[78] One Rail has indicated that in the absence of the current regime, it may submit a voluntary access undertaking, but this is not certain. It described an access undertaking as imposing *'significant extra costs'* compared to the current regime.[79] Of the remaining two pathways, one applies to government-owned infrastructure, so would not be available for gaining access to One-Rail's below-rail services, and the other is through a certified state-based access regime, and would therefore not be available if the current regime were to expire.

4.3.1 Costs and uncertainty under the national access regime

Submissions from One Rail, the ARTC and the SAFC suggested that costs could be significantly higher under the national access regime than under the current regime. These costs include time delays and uncertainty inherent in the transition process: *'…based on the examples of declaration requests made to date, it is possible to forecast that such a process would be lengthy and extremely costly and inconsistent with the value of the services.'*[80] One Rail pointed to a number of additional and costly requirements under the national regime,[81] and estimated that under the national regime, *'…preparation of an access undertaking could cost One Rail Australia between $700,000 and $2,000,000 a year.'*[82] SAFC suggested that avoiding the high costs of the national regime was the only benefit of retaining the current regime.[83]

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76 Ergas and Fels, 'Submission to the Competition Policy Review', November 2014, pp. 8-14; and Productivity Commission, 'National Access Regime', pp. 100-102.

77 Daniels, 'Regulation of Natural Monopoly Infrastructure In Australia – An Empirical Analysis Of The Effectiveness Of Part IIIA of the *Competition and Consumer Act 2010* (Cth)', PhD Theses submitted to Melbourne Law School, 2016, p. 254, available at: http://hdl.handle.net/11343/192644.

78 Ergas and Fels, pp. 33-34.

79 *'At this time, we cannot confirm whether or not One Rail Australia would submit a voluntary access undertaking to the ACCC should the state regime cease to apply.'* See One Rail, submission, p. 6.

80 ARTC, submission, p. 2.

81 '*Under a voluntary access undertaking we would need to develop a range of information that is currently not required (including issues such as setting our initial capital base, developing detailed demand forecasts and determining a reasonable rate of return on investment). Under a declaration we would have to engage in a public consultation process and develop multiple submissions. More complex, costly yet largely pointless ring-fencing and information controls would be required. If the Minister declares the infrastructure then we would need to engage in negotiation and potential arbitration by the ACCC for access seekers.'* One Rail, submission, p. 6.

82 One Rail, submission, p. 7.

83 SAFC, submission p. 2.

Declaration of a service under the *Competition and Consumer Act 2010* can be a lengthy process with the possibility of legal appeals from the NCC's decision (which can take further time). The Fortescue Metals cases, which were about the declaration of four railways in the Pilbara, took over eight years to reach a final determination and, even excluding those cases, the average time from application to conclusion over the last two decades (11 cases) was 20 months.[84] The longer the declaration process, the higher the legal costs and the commercial costs of delay and uncertainty.

None of the submissions to this review expressed a preference for the application of the national access regime, or listed any additional benefits it could deliver over the current regime.

4.4 Evidence supports continuation of the access regime

It is difficult to prove conclusively whether or not the regime is effective in meeting its objectives including: promoting contestability in the above-rail market, providing access on fair commercial terms, encouraging investment in and efficiency in use of rail infrastructure, and promoting investment by end-users. Nonetheless, the evidence on balance supports continuation of the current regime.

- Rail infrastructure services have natural monopoly characteristics (high fixed costs and low variable costs) and in some instances (the haulage of some mineral products and the use of some rail yards and sidings) those infrastructure services do not have competitive substitutes. These limits on competition can create high barriers to entry and suggest the potential for improper use of market power.
- The Commission has not found any evidence in the below-rail and above-rail markets indicating that market power has been used for an improper purpose. This suggests that, for rail infrastructure services where competitive substitutes are limited, the current regime is most likely operating as intended.
- The current regime provides a degree of protection against the potential use of market power for improper purposes at, according to stakeholders, only a small cost relative to alternative forms of protection, namely those available under the national access regime. If the current regime ceased to operate, there may be uncertainty about the degree and operation of available protections, and this could have an effect on the operation of, and investment in, parts of the South Australian intrastate railway that are currently in use.

In both submissions and direct discussions, most stakeholders supported the continuation of the regime,[85] although some suggested that certain changes could enhance the effectiveness of the regime in meeting its objectives (discussed in section 5).

As discussed earlier, pathways for access under the national access regime will not apply where a state access regime is certified. Given stakeholders' concerns regarding the costs of uncertainty of the national access regime (discussed in section 4.3.1), the Commission would recommend that the South Australian Government pursue re-certification of the regime through the NCC prior to 26 July 2021. This certification would promote certainty of access pathway for train operators and the operator of below-rail services and reduce scope for regulatory duplication across jurisdictions.

[84] NCC, 'Past applications', available at: http://ncc.gov.au/applications-past/past_applications.

[85] Submissions that support the continuation of the regime: ARTC, Pacific National, OZ Minerals, One Rail, GPSA, GRA, AMEC, SAFC.

In relation to certification, the submission from AMEC argued that the government *'…should proceed to seek the necessary national recertification.'*[86] Pacific National, in contrast, argued that the regime would fail certification unless the ROA Act were changed to mandate standard access agreements and standard offer prices;[87] however, as explained in section 5.4, the regime was certified in 2011 in its current form. In many respects the information brochure already provides standard access terms and conditions and section 29 of the ROA Act requires that an access provider provide certain information (including a likely price) when reasonably requested by an access seeker. Pacific National has not submitted evidence to demonstrate that the regime would not be certifiable and, as noted in section 5.4, it is unclear what additional benefit a standard contract offer (including a reference price), as proposed by Pacific National, would provide, particularly given the low and infrequent usage of infrastructure services covered by the regime.

86 AMEC, submission p. 1.
87 Pacific National, submission, p. 2.

5 Possible improvements to the regime

- Draft finding: the Commission sees the following changes as worth further consideration by Government and stakeholders: online publication of the information brochure, and the introduction of a consultative mechanism by which rail infrastructure services can be declared. The Commission is also interested in stakeholder feedback on extending protections under the ROA Act to access seekers who are not above-rail operators, and strengthening the arbitration mechanism by allowing an arbitrator to make an interim order on access prices, terms and conditions if parties are renegotiating an agreement that is soon to expire.

Stakeholders claim that several changes to the current access regime could improve its effectiveness. Those suggestions are discussed below.

5.1 Transparency and online access to the information brochure

Stakeholders have expressed a preference for a web-based approach to the sharing and accessing of the information brochure.[88] The information brochure is an important source of information for access seekers in the early stages of negotiations, and includes some terms and conditions of access (as mentioned earlier, this would include safety requirements, physical asset requirements, corporate information and geographical restrictions), and meaningful price information, as set out in the ROA Act and related guidelines (section 2.2.2).

The Commission supports online publishing of the information brochure: in 2019, the Commission's guidelines for access information and pricing were amended to allow an access provider to make its information brochure available on its website.[89] A formal modification to section 28 of the ROA Act could allow stakeholders to access the information brochure online and lower the requirement for the regulated operator of below-rail services to send the information brochure in writing to access seekers and the regulator. Additionally, the Commission recommends that One Rail update the information brochure, including all parameters within it, regularly (annually and after any material change in circumstances). This would bring the information brochure up to date and make it available to train operators and end-users. The Commission could prescribe time limits for updating the information brochure in its Guidelines.

5.2 Protections for end-users

The ROA Act provides a backstop to commercial access negotiations between the below-rail service provider and an accredited above-rail operator. End-users, however, can only access protections under the regime by using an accredited rail operator as an intermediary to negotiate directly with the below-rail service provider. Some end-users of intrastate below-rail services rail have expressed a preference for direct access to the protections in the regime, by applying a broader definition of an 'access seeker' in the ROA Act. This was also suggested by participants in the 2015 review.[90]

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88 One Rail expressed the intention to move toward a more web-based supply of access information and pricing by publishing the information brochure online. See One Rail, submission, p. 8. End-users support greater availability of information too. AMEC stated that, *'Requiring a potential customer to apply for an information brochure rather than freely and anonymously access the information as is the current process leads to a reduction in the transparency of the process'.* See AMEC, submission, p. 2.

89 Commission, 'Review of the South Australian Rail Access Regime Guidelines', p. 16; see also Clause 2.6.2 in the Access Information and Pricing Principles Guidelines, available at: https://www.escosa.sa.gov.au/ArticleDocuments/1061/20191029-Rail-IntrastateAccessRegime-AccessInformationPricingPrinciples.pdf.aspx?Embed=Y.

90 Aurizon, 'Submission to the South Australian rail access regime review 2015 – Issues Paper', 2015, p. 4, available at: https://www.escosa.sa.gov.au/ArticleDocuments/354/20150407-SARailAccessRegimeReviewIssuesPaperSubmission-Aurizon.pdf.aspx?Embed=Y.

This could potentially lower transaction costs by allowing an end-user that is capable of negotiating on its own behalf to do so without involving an above-rail operator until a later stage and without incurring the time and expense of becoming an accredited rail operator. It could also improve price transparency by allowing end-users to separately negotiate below-rail and above-rail arrangements, impacting investment decisions for the end-user. A potential downside is that not all end-users would be capable of supplying the access provider with all the technical details necessary for the access provider to be able to give realistic price estimates. Furthermore, the access provider would need confidence that the party that ended up operating the trains had the technical competence and accreditation to do so. Pricing and other information can also be commercially sensitive, and in 2015, the Commission raised concerns about a below-rail service provider being required to provide information to a party that will not become a direct customer.[91] These issues must be considered carefully before any change to the regime, and the Commission invites further views and evidence from stakeholders.

5.3 Information about the coverage of rail infrastructure services

5.3.1 Mechanism for seeking declaration of rail infrastructure services

There is currently no legislative or regulatory mechanism for an access seeker or other interested party to seek that a rail service not covered by the regime be covered under it, or for an excluded service to be included. This was a limitation noted by the NCC in 2011.[92] This means that coverage may not respond to industry needs and changing economic circumstances. One Rail suggested that coverage could in future be included in the regulator's five-year review of the regime.[93] The SAFC suggested that a public application mechanism could be beneficial.[94]

For third party access regimes in South Australia (such as for water and ports), the Governor makes a proclamation regarding infrastructure services on the advice of the Executive Council, which, in turn, has access to independent advice and reporting from the Commission and others, and the criteria set out in the Competition Principles Agreement and in agreements between Australian Governments. Nonetheless, the regime could be enhanced through the introduction of a consultative mechanism and process for amending coverage including or excluding certain assets.

5.3.2 Stakeholders have called for greater provision of information

Stakeholders have expressed views that the coverage of the ROA Act can, in some cases, be unclear, particularly as it may relate to facilities located near the Tarcoola-Darwin railway. This lack of transparency can increase the cost of access negotiations. As stated by AMEC: *'…there has been a lack of clarity around the scope of AustralAsia Railway (Third Party Access) Code to govern access to sidings and other intermodal facilities'*. [95] As stated by OZ Minerals: *'Clarification of access to the intra-state (and inter-state) rail network from adjoining networks (e.g. balloon loops and sidings) is required within the current Regime. Once clear, access should be included in oversight activities conducted by ESCOSA.'*

Generally speaking, a public register of what rail infrastructure services are 'in' or 'out' of the regime could reduce the cost of commercial negotiations. In particular, the provision of information benefits current and future access seekers by reducing risks (and therefore the costs of negotiation). To the extent that the collection and collation of the detailed rail asset information are considered a 'club good' (public goods with benefits restricted to a specific group may be considered club goods), there could be a role for either public or industry provision of such detailed asset information under a user-pays

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91 Commission, 'South Australian Rail Access Regime Review – Final Report', p. 28.
92 NCC, 'South Australian Rail Access Regime', 2011, p. 18, available at: http://ncc.gov.au/images/uploads/CERaSAFR-001.pdf.
93 One Rail, submission, p. 8.
94 SAFC, submission, pp. 2-3.
95 AMEC, submission, p. 4.

framework. Public policy decisions in this area require an assessment of the relative merits of supply without government intervention, compared to with intervention.

5.4 Standard access conditions and prices

Some rail access regimes in Australia allow the regulator to approve standard access conditions and prices.[96] Pacific National argued that, *'a regulated price determination process and standard access agreement is essential to balance the position of the railway owner with the interests of the access seeker (and its customers).'*[97] It further argued that the regime may fail certification under national access legislation unless standard access agreements and standard offer prices were mandated.[1]

In contrast, the ARTC submission emphasised that access regulation should promote efficiency but not policies that only reallocate rent between contracting parties: *'the purpose of economic regulation is to ensure that access to infrastructure is not unreasonably curtailed to the detriment of Australia's economic efficiency. It is clearly not, however, to resolve commercial disputes and determine the allocation of economic rent between counterparties.'*[98]

The Commission considered the costs and benefits of standard access conditions and prices in the 2019 guidelines review.[99] Notwithstanding the limitations noted above, in many respects the information brochure already provides standard access terms and conditions, and there is a requirement under section 29 of the ROA Act that an access provider provide information reasonably requested by the access seeker including an indication of the likely price on which access may be granted (see section 2.2.2). It is therefore unclear what additional benefit a standard contract would provide, particularly given the low usage of many infrastructure services covered by the regime. The regime was certified in 2011 in its current form.

Further, and as noted in the 2019 guidelines review, access to the intrastate rail network tends to be infrequent and specific to segments of that network or particular freight tasks, while standard (or reference) prices and standard agreements relate only to typical services.

Pacific National also argued for the publication of standard network indicators.[100] Given the low usage of intrastate rail lines, and the varying types of below-rail services involved at yards and sidings, the proposal to publish standard network indicators as suggested by Pacific National would be unlikely to lead to much benefit for the intrastate railway, but at the same time would likely increase costs.

5.5 Improve the negotiate-arbitrate framework

There has not been an arbitrated outcome under the current regime. This could indicate the threat of arbitration is effective in supporting commercial outcomes. Alternatively, the time and uncertainty, and hence expected costs, of arbitration may be discouraging arbitration. There is limited evidence on which of these claims is correct and stakeholders have provided mixed views.[101] The regime also provides a step before arbitration for the regulator to consider the dispute and either engage in

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96 Such as the ARTC interstate mainline: Department of Infrastructure, Regional Development and Cities, 'Review of rail access regimes', 2017, p. 43, available at: https://www.infrastructure.gov.au/rail/publications/files/Review-of-Rail-Access-Regimes.pdf. Recent changes to the WA regime include the requirement for access providers to publish a standing offer price for defined rail tasks; submit a standard access agreement for regulatory approval and publish service quality indicators to assess network performance: Government of Western Australia Department of Treasury, pp.3-4.

97 Pacific National, submission, p. 2.

98 ARTC, submission, p. 1.

99 Commission, 'Review of the South Australian Rail Access Regime Guidelines', pp. 15-16.

100 Pacific National, submission, p. 2.

101 One Rail pointed to the absence of disputes as evidence of the effectiveness of the negotiation-arbitration framework and the ARTC described the arbitration mechanism as supporting the focus on commercial arrangements. See One Rail, submission, p. 1. Pacific National described the reliance on arbitration as, *'[a] fundamental design flaw of the current access regime,'* and *'…not an effective alternative to upfront certainty on agreed terms and conditions of access.'* See Pacific National, submission, p. 2.

conciliation between the parties or appoint an arbitrator. Costs and timeframes under the conciliation mechanism have not been tested.

Negotiate-arbitrate frameworks similar to the one for access to below-rail services under the ROA Act can be observed across many industries. However, it is important that regulators remain open to alternative approaches if there is a strong basis for deviating from this type of framework. The Commission has not found, or been presented with, evidence indicating that market power has been used for improper purposes in respect of the South Australian intrastate railway, either for rail lines or rail yards and sidings. This provides general support for retaining the current framework established under the ROA Act.

That is not to suggest that negotiation and arbitration will be appropriate in all circumstances and that the current regime could not be improved. OZ Minerals argued that:

> *'while the Regime maintains a negotiate-arbitrate framework to facilitate access by accredited rail operators to below-track services on fair commercial terms, business continuity requirements may deter parties from pursuing arbitration. Many end-users would simply be unable to sustain the disruption in supplying product to market and subsequent reduction in associated cashflow which would result during the arbitration process. Currently, end users are forced to simply accept unreasonable pricing in order to maintain supply of product to customers. To date no parties have pursued the arbitration process. This is not necessarily an indication of parties reaching a commercial arrangement without the need for arbitration. It is likely reflective of the above issues and the need to preserve business continuity.'*[102]

To the extent that long-term contracts cannot account for short-term variations in volumes, or when contract agreements approach expiry, stakeholders appear to have concern that the threat of arbitration could be less effective. Competitive substitutes from road transport may be unavailable and capacity at yards and sidings may not be scalable to meet an increase in demand in the short term. Demands for business continuity could therefore limit the access seeker's ability to effectively pursue arbitration and could result in higher prices or lower service quality.

A mechanism allowing an arbitrator to make an interim order on access prices, terms and conditions if parties are renegotiating an agreement that is soon to expire may contribute to business continuity while upholding the threat of arbitration. This may be worth consideration by Government and stakeholders.[103]

[102] OZ Minerals, p. 1.

[103] A similar proposal was put forward in the recent WA access regime review. Government of Western Australia Department of Treasury, p. 61.

6 Conclusion

The Commission has conducted the review required under the Act and finds that the regime should continue to apply. It also recommends that the regime operates for a further five-year period from 31 October 2020. Should the Government wish to continue the regime, the Commission recommends the Government re-apply for certification through the NCC in 2020-21. In principle, certification would promote certainty (of access pathway) for train operators and the monopoly infrastructure owner, and reduce scope for regulatory duplication across jurisdictions. If the regime were continued but not re-certified, some of the costs of uncertainty discussed in section 4.3.1 may be incurred, as access pathways under the national access regime could apply.

Given the natural monopoly characteristics of the South Australian intrastate railway infrastructure, particularly rail yards and sidings, an access regime can provide protection against the use of market power for improper purpose. Although there is not sufficient data to quantify the benefits generated by the current regime, stakeholders consider the costs of the regime to be relatively small. Submissions from below-rail operators, above-rail operators, end-users, and industry bodies representing end-users, generally support the continuation of the regime.

The Commission has not found evidence indicating that market power has been used for improper purposes in regard to below-rail and above-rail services. This provides general support for retaining the regime established under the ROA Act.

That is not to suggest, however, that the regime could not be improved. Submissions from, and discussions with, stakeholders suggest that some adjustments could enhance the effectiveness of the regime in meeting its objectives. Although changes to the regime are outside the scope of this review, the Commission sees the following changes as worth further consideration by Government and stakeholders: online publication of the information brochure, and the introduction of a consultative mechanism for an access seeker or other interested party to seek that a rail service not covered by the regime be covered under it, or for an included service to be excluded. The Commission is also interested in stakeholder feedback on extending protections under the ROA Act to access seekers who are not above-rail operators, and strengthening the arbitration mechanism, for example by allowing an arbitrator to make an interim order on access prices, terms and conditions if parties have an agreement that is expiring and are renegotiating.

Appendix A: excluded rail infrastructure

As discussed in section 2.3, the regime established by the ROA Act only applies to rail infrastructure services that are 'declared' under the Act. Table 1 contains a list of declared rail infrastructure, while Table A1 shows rail lines that are excluded by proclamation.[104]

Access to the ARTC interstate mainline track is covered under the national access regime, with a voluntary undertaking that is regulated by the ACCC. Access to the Tarcoola-Darwin line is regulated under the *AustralAsia Railway (Third Party Access) Act 1999*, which appoints the Commission as the regulator.

Table A1: rail infrastructure services excluded from the ROA Act access regime

Rail owner	Rail lines excluded from the access regime	Rail gauge	Last operational	Above-rail operator
ARTC	Interstate mainline to Melbourne, Sydney, Perth	Standard	Operational	Multiple
One Rail	Tarcoola-Darwin line	Standard	Operational	One Rail
SIMEC	Whyalla based iron ore lines	Narrow	Operational	SIMEC
South Australian Government	Glenelg tramline Mt Barker – Goolwa – Victor Harbor heritage line Port Augusta to Quorn heritage line	Broad Broad Narrow	Operational Operational Operational	Adelaide Metro SteamRanger Pichi Richi
Various	Private sidings and freight terminals	Various	Various	Various

[104] Proclamation published in the 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.

Appendix B: accessing infrastructure services under national access legislation

If the state access regime were to expire, some protections may be available under Part IV of the *Competition and Consumer Act 2010* (the national access regime). Box B1 sets out the available pathways to gaining access under the *Competition and Consumer Act*, and these options are discussed in more detail below.

Box B1: Pathways to gaining access to infrastructure services under national access legislation

In the 2015 review of the access regime, the Commission discussed the four pathways under the national access regime to seek access to infrastructure services:[105]

1. A party can seek declaration of an infrastructure service by the relevant Minister, subject to criteria set out in section 44G(2) of the *Competition and Consumer Act*. If the infrastructure services are declared, the infrastructure service provider is required to negotiate access with the access seeker. The Australian Competition and Consumer Commission (ACCC) acts as arbitrator should negotiations fail (section 4.3.1).
2. Access may be sought under the terms and conditions of a voluntary access undertaking approved by the ACCC (section 4.3.2).
3. Access may be sought for Government-provided infrastructure services under terms that have been established through a competitive tendering process approved by the ACCC (section 4.3.2).
4. Access may be sought under the terms of a State or Territory-based access regime certified by under the *Competition and Consumer Act* as effective. The access regime under the ROA Act is a certified state-based regime (section 4.3.2).

B.1 Declaration under the national access regime

For any infrastructure service (such as a rail line or yard) to be declared under the national access regime, the declaration criteria in section 44CA(1) of the *Competition and Consumer Act* would all need to be met. The declaration criteria are:

> *(a) that access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of the service would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for the service; and*
>
> *(b) that the facility that is used (or will be used) to provide the service could meet the total foreseeable demand in the market:*
>
> > *(i) over the period for which the service would be declared; and*
> >
> > *(ii) at the least cost compared to any 2 or more facilities (which could include the first-mentioned facility); and*
>
> *(c) that the facility is of national significance, having regard to:*
>
> > *(i) the size of the facility; or*
> >
> > *(ii) the importance of the facility to constitutional trade or commerce; or*

[105] Commission, 'South Australian Rail Access Regime Review – Final Report', p. 12.

(iii) the importance of the facility to the national economy;

(d) that access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of the service would promote the public interest. [106]

Whether these criteria would be met or not is a legal question for the National Competition Council (NCC), and not a question for the Commission. One Rail expressed the opinion that if a declaration application was submitted, *'…there is a reasonable likelihood that the NCC would recommend to the designated Minister to declare the network.'*[107] Other parties may have different views. It is worth noting that the declaration pathway has never resulted in third party access to rail services in Australia: most applications to declare rail services have failed, some declaration decisions have been reversed on appeal, and no applications for access have been made regarding the only currently declared rail line, BHP's Goldsworthy Railway in the Pilbara.[108]

B.1.1 Material promotion of competition – criterion (a)

The material promotion of competition criterion was amended in 2017, and the NCC considered the revised requirement in 2019.[109] The NCC pointed out that this competition criterion is not satisfied *'…merely by establishing that regulated access will result in a different share of gains between access seekers and a provider of a service.'*[110] Thus, even if, for example, the result of declaration was lower access prices, criterion (a) would not be satisfied if there was no material increase in competition in the market for the provision of rail transport services or in another market. Some have argued that regulated access to transport infrastructure cannot affect the price of goods if prices are determined in international markets, and therefore would have no impact on competition in those related markets.[111] The NCC found that criterion (a) was not satisfied in respect of the case for the declaration of the Port of Newcastle.[112]

B.1.2 Capacity for facility to meet demand – criterion (b)

This test replaces the previous test of whether the facility is uneconomical to duplicate, thus avoiding complex questions of estimating future prices and rates of return.[113] The new test was not considered in detail by the NCC in the Port of Newcastle case.[114] It is likely that if any facility (such as a particular yard) was not able to meet foreseeable demand, a new facility would be constructed; however, as discussed in section 3, limited new developments are apparent for relevant rail infrastructure in South Australia.

B.1.3 National significance – criterion (c)

The national significance test *'…is a subjective test, with no clear threshold for a facility to be judged as nationally significant.'*[115] This uncertainty is illustrated in Carpentaria Transport's attempt to declare services provided by Queensland Rail in 1997: the NCC found that above and below-rail services

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106 The *Competition and Consumer Act 2010* available at: https://www.legislation.gov.au/Details/C2020C00079.
107 One Rail, submission, p. 6.
108 Ergas and Fels, p. 33-34.
109 NCC, 'Revocation of the declaration of the shipping channel service at the Port of Newcastle', 2019, available at: http://ncc.gov.au/images/uploads/Port_of_Newcastle_-_Recommendation_22.7.2019.pdf.
110 NCC, 'Revocation of the declaration of the shipping channel service at the Port of Newcastle', p. 43.
111 *'…the declaration of vertically integrated facilities used to export commodities whose prices are determined in competitive global markets would not affect the prices of these commodities. Declaration would therefore not lead to competition benefits.'* Ergas and Fels, p. vii.
112 NCC, 'Revocation of the declaration of the shipping channel service at the Port of Newcastle', pp. 138-9.
113 Productivity Commission, 'National Access Regime', p. 19.
114 NCC, 'Revocation of the declaration of the shipping channel service at the Port of Newcastle', pp. 140-141.
115 Productivity Commission, 'National Access Regime', p. 174.

covered by the application were not nationally significant, but the Queensland Premier (as designated Minister) determined that the services were nationally significant.[116]

In the application for declaration of particular services at Sydney and Melbourne international airports in 1997, the NCC considered whether certain freight handling facilities should be declared, and decided that the appropriate test was not whether the freight handling facilities were nationally significant, but whether the airport was nationally significant.[117] This could have implications for how yards and sidings, which are services ancillary to the interstate mainline, are considered.

B.1.4 Material promotion of the public interest – criterion (d)

In considering the public interest criterion, the Minister must have regard to:

> *(a) the effect that declaring the service would have on investment in:*
>
> *(i) infrastructure services; and*
>
> *(ii) markets that depend on access to the service; and*
>
> *(b) the administrative and compliance costs that would be incurred by the provider of the service if the service is declared.*[118]

The public interest criterion allows the Minister to consider any other matters that are relevant to the public interest.[119] In the words of the High Court, *'the power is 'neither arbitrary nor completely unlimited' but is 'unconfined except in so far as the subject matter and the scope and purpose of the statutory enactments may enable the Court to pronounce given reasons to be definitely extraneous to any objects the legislature could have had in view'.'*[120] The NCC found that it was not necessary to express an opinion on the public interest criterion in the Port of Newcastle case: '*As the public interest is a matter better weighed by the holder of political office rather than being a technical matter for expert advice, there would need to be matters that clearly and strongly weigh against the public interest before the Council could arrive at the conclusion that the Minister could not be satisfied that criterion (d) is met.*'[121]

B.2 Other access pathways under the national access regime

One Rail has indicated that in the absence of a state access regime, it may submit a voluntary access undertaking, (option 2 in Box B1), but this is not certain: *'At this time, we cannot confirm whether or not One Rail Australia would submit a voluntary access undertaking to the ACCC should the state regime cease to apply.'* One Rail further described an access undertaking as imposing *'significant extra costs'* compared to the current regime.[122]

The third pathway applies only to government-owned infrastructure, so would not be available for gaining access to One-Rail's below-rail services. The fourth pathway is through a certified state access regime, and would therefore not be available if the current regime were to expire.

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116 Productivity Commission, 'National Access Regime', p. 174.
117 NCC, 'Applications for Declaration of Certain Airport Services at Sydney and Melbourne International Airports', 1997, p. 37, available at: http://ncc.gov.au/images/uploads/DEAiAtRe-001.pdf.
118 The *Competition and Consumer Act 2010*, subsection 44CA(3).
119 NCC, 'Revocation of the declaration of the shipping channel service at the Port of Newcastle', p. 156.
120 NCC, 'Revocation of the declaration of the shipping channel service at the Port of Newcastle', p. 156.
121 NCC, 'Revocation of the declaration of the shipping channel service at the Port of Newcastle', p. 158.
122 One Rail, submission, p. 6.

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