Rail

2020 South Australian Rail Access Regime Review

FINAL Report

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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	A party seeking access to below-rail services
AMEC	Association of Mining and Exploration Companies
ARTC	Australian Rail Track Corporation
Below-rail	Operations involving rail infrastructure management
CC Act	*Competition and Consumer Act 2010*
Commission	Essential Services Commission, established under the *Essential Services Commission Act 2002*
CPA	Competition Principles Agreement
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
JBRE	Journey Beyond Rail Expeditions
GPSA	Grain Producers SA
GRA	Gypsum Resources Australia
Minister	Minister for Infrastructure and Transport
NCC	National Competition Council
Proclamation	*Railways (Operations and Access) (Application of Access Regime) Proclamation 2016*
ROA Act	*Railways (Operations and Access) Act 1997*
Rolling stock	Vehicles (including locomotives, wagons and carriages) that move on a railway
SAFC	South Australian Freight Council
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**) has reviewed whether or not the South Australian intrastate rail access regime, established under the *Railways (Operations and Access) Act 1997* (**ROA Act**),[1] should continue to apply from 31 October 2020. The regime commenced in 1997 and applies to declared rail infrastructure services. The Commission has determined that the regime should continue to apply. It recommends that the regime operate for a further five-year period.

Under section 7A of the ROA Act, the Commission must review and determine whether or not the regime should continue to apply. It must provide a report and advice to the Minister for Infrastructure and Transport (**Minister**), recommending that the regime continue to apply, or not, for a further prescribed period (five years). The decision to continue or cease the application 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 the regulated operator of a declared rail infrastructure service. The framework supports negotiations between an access seeker and access provider. If negotiations fail, it provides a process for conciliation and 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.

In June 2020, the Commission released a draft report for public consultation.[3] Five submissions were received in response. Submissions from, and discussions with, stakeholders relating to the issues paper and draft report have been taken into account in preparing this final report.

1.1 The access regime should continue to apply

The Commission's determination 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). These features can create high barriers to entry, suggesting the potential for market power to be used for improper purposes. Road transport appears to be a competitive substitute for rail for some users, particularly for intrastate lines used for the transport of grain. However, for access associated with haulage of large volumes and/or over long distances (which is often the case for mineral products), as well as access to yards and sidings, road transport may not necessarily provide sufficient competitive constraint on the potential use of market power.

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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.

3 Commission, 'Rail Access Regime Review – Draft report', June 2020, available at: https://www.escosa.sa.gov.au/ArticleDocuments/21495/20200623-Rail-AccessRegimeReview-DraftReport.pdf.aspx?Embed=Y.

- The Commission has not found any evidence in the below-rail and above-rail markets indicating that market power has been used for improper purposes. 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 and, based on views and evidence provided by stakeholders, has a lower 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. This could affect the operation of, and investment in, parts of the South Australian intrastate railway that are currently in use.

Most stakeholders have supported the continuation of the regime. However, some have suggested that certain changes could enhance the effectiveness of the regime. Specifically, there could be changes to the ROA Act to:

- broaden the concept of access seeker from train operator to also include an end-user, which would allow end-users to negotiate directly with an access provider while still being protected under the provisions of the access regime
- allow an arbitrator to make an interim order on access prices or other terms and conditions, in order to address concerns that arbitration could be ineffective in certain circumstances (for example, when long-term contracts cannot account for short-term variations in volumes, or when contract agreements approach expiry) and threaten continuity of rail infrastructure services, and
- introduce a consultative review mechanism by which an access seeker, or other interested party, could seek to have rail infrastructure services included in or excluded from the access regime.

The Commission sees those changes noted above as worthy of further consideration by the South Australian Government. Any such assessment should consider both the costs and benefits of those changes.

The Government should consider applying for re-certification of the regime through the National Competition Council (NCC) prior to July 2021. Certification of a state-based access regime can promote certainty of access pathway for train operators and the monopoly infrastructure owner, by removing the possibility of access pathways under the national regime. It can also reduce scope for duplication of administrative costs across jurisdictions.

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 current regime provides a framework for commercial negotiations between the regulated operator of a declared rail infrastructure service (**access provider**) and a train operator seeking access to that infrastructure (**access seeker**).[4]

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 to apply. Under section 7A of the ROA Act, the Commission must review the regime and provide a report and advice to the Minister for Infrastructure and Transport (**Minister**), determining that the regime continue to apply, 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.[5] In accordance with that recommendation, the South Australian 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.[6] The regime that applies to declared rail infrastructure services in South Australia follows these principles. The regime 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.[7] Competition reforms involved 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

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4 The term 'access seeker' is not used in the ROA Act. Rather, the ROA Act allows an industry participant to make an access request, and defines an industry participant as *'a person who operates, or proposes to operate, railway rolling stock on the railway network'* (see section 4 of the ROA Act).

5 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.

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

7 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.

Australian intrastate freight business, including trains and infrastructure.[8] The regime aims to promote a contestable market for above-rail services, while allowing the infrastructure business to recover efficient costs of providing below-rail services. Such a regime can promote efficient use of, and investment, in rail infrastructure, and can support investment by the end-users of those rail transport services.[9]

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 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. The regime was certified in July 2011 for a period of ten years by the Commonwealth Minister. This national certification precludes access under the national access regime (see section 5.6 and Appendix B).[10]

2.2.1 The negotiate-arbitrate framework

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

An access seeker (who currently must be an operator of, or a person who proposes to operate, trains) can request certain information from the access provider (the regulated 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 to make an award, unless the regulator determines that the dispute is trivial, misconceived or lacking in substance. In making an award, an arbitrator is bound by certain requirements in making an award, including guidance for calculating floor and ceiling prices. An arbitrator's award is subject to appeal on a question of law.

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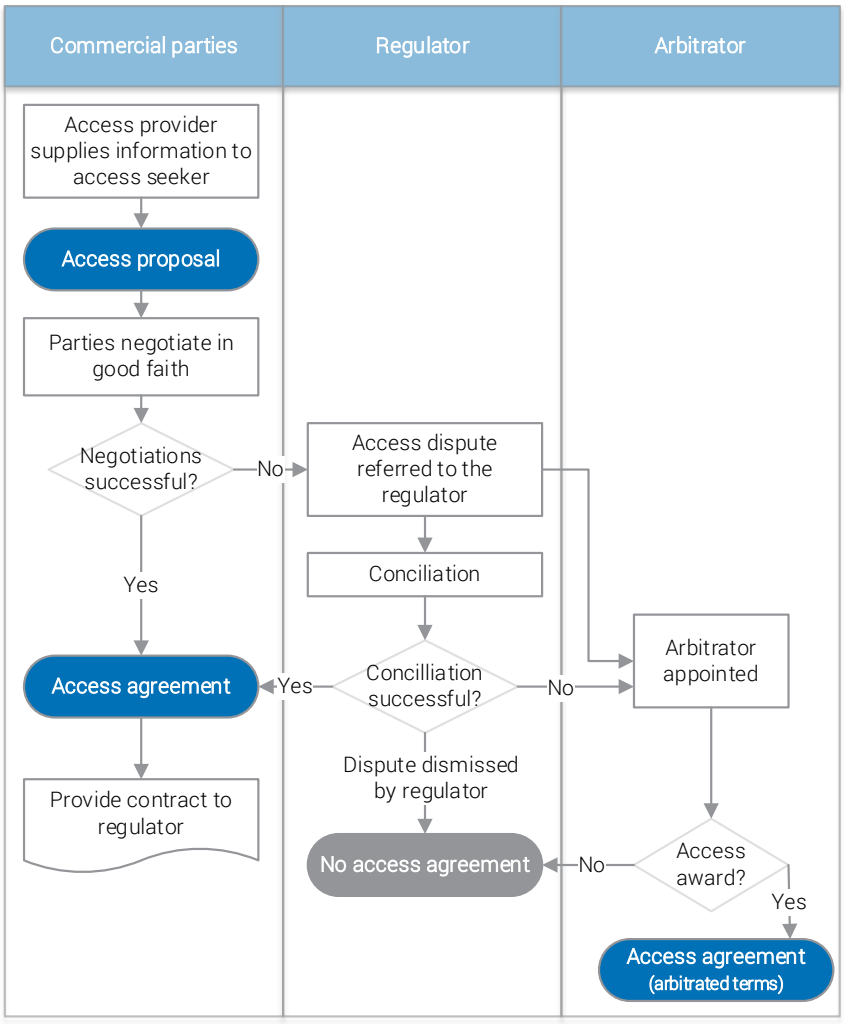
8 This business was purchased for $57.4 million. The South Australian Government granted a 50 year lease over the associated freehold property. See Australian National Audit Office, *Sale of SA Rail, Tasrail and Pax Rail*, 1998, pp. 23-24, available at: https://www.anao.gov.au/work/performance-audit/sale-sa-rail-tasrail-and-pax-rail.

9 For example, both AMEC and OZ Minerals highlighted in submissions to the review the importance of having a regime that can, ultimately, support economic activity in South Australia. See AMEC, submission to draft report, p. 2, and OZ Minerals, submission to issues paper, p. 1.

10 NCC, '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.

Figure 1: Process for reaching an access arrangement



The regime does not seek to guarantee that every negotiation will lead to an agreement. Access negotiations can fail for a number of reasons. For example, access providers and access seekers can have diverging views about 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 a negotiated outcome.

Box 1. Negotiate-arbitrate frameworks

Negotiate-arbitrate frameworks underpin third party access to port and water infrastructure services in South Australia, and to below-rail services on both the Tarcoola-Darwin railway and the South Australian intrastate railway.[11] More generally, the threat of arbitration underpins third party access regulation nationally (under the *Competition and Consumer Act 2010*)[12] and in many other state-based, industry-specific access regimes (though legislative requirements and objectives will differ by jurisdiction).[13]

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.[14]

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.[15]

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.

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[11] For further information about those access regimes, see 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; 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; and 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.

[12] Productivity Commission, 'National Access Regime', 2013, pp. 115-141, available at: https://www.pc.gov.au/inquiries/completed/access-regime/report.

[13] Examples include, New South Wales water infrastructure access, Western Australia railway access and Queensland railway access (through undertakings). See NCC, 'Certification of NSW Water Infrastructure Access Regime', January 2020, p. 14, available at: http://ncc.gov.au/images/uploads/NCC_Final_Recommendation_-_certification_of_NSW_Water_Infrastructure.pdf; and Government of Western Australia Department of Treasury, 'Review of the Western Australian Rail Access Regime', 2019, pp. 1-2, available at: https://www.wa.gov.au/sites/default/files/2020-02/wa-rail-access-final-decision-paper.pdf. A report by PricewaterhouseCoopers states that all rail access regimes in Australia have an arbitration process: PricewaterhouseCoopers, 'Review of rail access regimes', 2018, p. 23, available at: https://www.infrastructure.gov.au/rail/publications/files/Review-of-Rail-Access-Regimes.pdf.

[14] Productivity Commission, 'National Access Regime', p. 119.

[15] 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.

- 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 line).[16]

Section 28 of the ROA Act requires the access provider to supply an information brochure to an access seeker if requested. The information brochure includes 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 requirement to supply an information brochure aims 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 supply 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-rail and below-rail parts of the business. The potential for regulatory review of these separate accounts can incentivise the vertically-integrated operator to comply with the ROA Act. This can discourage costs being 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 operations, as outlined in both the ROA Act[17] and the regulator's guidelines.[18] 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. The regulated operator must provide a copy of the policy to the regulator and to any other person on request.[19]

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16 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.

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

18 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.

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

2.3 Coverage of the access regime

The access regime applies to certain below-rail infrastructure services in South Australia. 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] The location of rail lines is shown in Figure 2. A list of declared below-rail services is provided in Table 1 (below).[22]

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 Australian Rail Track Corporation (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. It operates various yards and sidings on the interstate mainline used for various purposes including refuelling, storage, loading and reconfiguring trains. It also owns several currently unused rail lines on the Eyre Peninsula, and in the Mid-North, the Barossa and the Murray-Mallee regions (Figure 2).

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. Discussions with JBRE suggest there have been no access requests for the Keswick Passenger Terminal.

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. This, in part, reflects that 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 a small amount of activity in 2019, the line has not been in use since 2018. A request for interest on the Barossa line in 2019 did not yield any viable projects for using the line.[24]

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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.

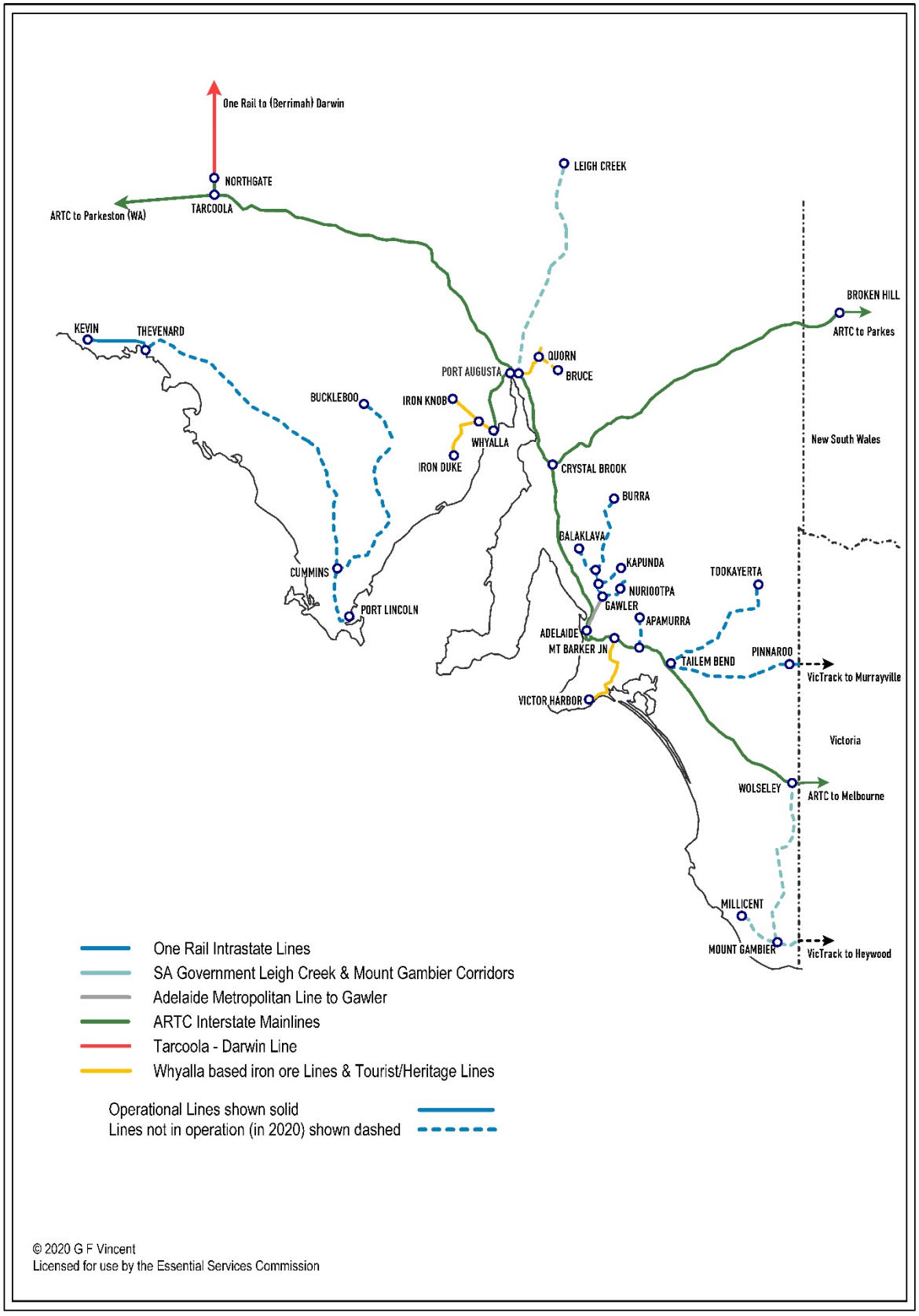
21 *AustralAsia Railway ('Third Party Access') Code*, a Schedule to the *AustralAsia Railway (Third Party Access) Act 1999* (SA) and the *AustralAsia Railway (Third Party Access) Act 1999 (NT)*.

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.

24 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.'* Available at p. 34:

Figure 2: South Australian Rail Lines, 2020



https://www.barossa.sa.gov.au/Media/Default/Council/Council%20Meetings/Council%20Agendas/Agenda%20-%20Council%20Meeting%20-%2028%20January%202020.pdf.

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) Mid-North and Barossa lines Murray-Mallee region lines Kevin to Thevenard line Yards and sidings on the interstate mainline[25]	Narrow Broad Standard Narrow Standard	2019 2014 2015 Operational Operational	— — — One Rail Multiple
JBRE	Passenger terminal at Keswick	Standard	Operational	JBRE
South Australian Government	Adelaide metropolitan train network Stirling North to Leigh Creek line	Broad Standard	Operational 2018	Adelaide metro —

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 to apply.[26] Submissions[27] to the issues paper were received from:

- One Rail, a vertically integrated owner and operator of rail infrastructure in South Australia
- Australian Rail Track Corporation, the owner and operator of the interstate mainline
- Pacific National, an above-rail service provider with operations across Australia
- 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
- Grain Producers SA (**GPSA**), the industry body for South Australian grain growers, and
- The Association of Mining and Exploration Companies (**AMEC**), an industry body representing mining and exploration companies.

[25] 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.

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

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

In June 2020, the Commission released a draft report. One confidential submission was received in response to the draft report, and public submissions were received from:[28]

- One Rail
- AMEC
- The ARTC, and
- The SAFC.

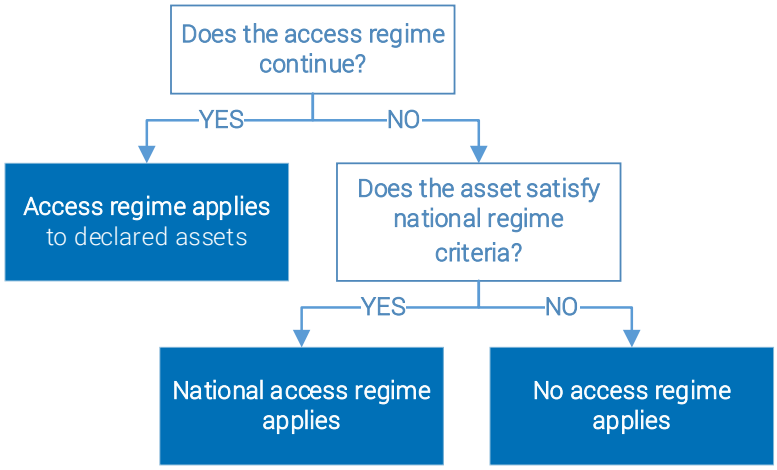
Submissions to the issues paper and the draft report focussed on One Rail's below-rail services and the regime's general features. There were no submissions made to the Commission regarding the passenger terminal at Keswick or the South Australian Government's below-rail services.

The Commission has considered the submissions in preparing this final report. In addition to the written submissions, the Commission met with a number of stakeholders, including below-rail operators, 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 conclusions.

2.5 Approach taken in the review

The access regime should continue to apply if the benefits it delivers outweigh the costs of maintaining it, taking into account the costs and benefits of feasible alternatives.[29] 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 3).

Figure 3: Access arrangements that could apply to the South Australian intrastate railway



[28] Non-confidential submissions to the draft report are available at: https://www.escosa.sa.gov.au/projects-and-publications/projects/rail/south-australian-rail-access-regime-review-2020.

[29] In its Better Regulation Handbook, the South Australian Government states that it *'is committed to taking action to maximise the benefits delivered to the community by its regulatory activities, while avoiding or eliminating unnecessary compliance costs imposed on business and the community.'* South Australian Government, 'Better Regulation Handbook,' 2011, p. 1, available at: https://publicsector.sa.gov.au/wp-content/uploads/SA_Better-Regulation-Handbook_2011.pdf.

Section 3 considers the economic context in which this review takes place. This includes reviewing the trends in, and the outlook for, demand for below-rail services on intrastate rail lines and yards and sidings. Section 4 examines the benefits of the regime. This involves investigating the potential for, and evidence of, the use of market power for anti-competitive purposes (improper purposes). The direct and indirect costs of the regime are also considered. This is followed by 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 changes to the regime that could improve its effectiveness.

Where particular access-related matters were already reviewed in the 2019 Review of the South Australian Access Regime Guidelines,[30] such as the pricing principles for calculating floor and ceiling access prices and exchange of information about the terms and conditions of access, these have not been considered unless new evidence was provided by stakeholders.

Furthermore, as far as particular access-related matters on the Tarcoola-Darwin railway were raised in submissions, those are not within the scope of this review.[31] As mentioned in section 2.3, the Proclamation declares that the regime applies to all below-rail services in South Australia – except those excluded by Proclamation or those covered under the third party access regime that applies to the Tarcoola-Darwin railway.

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

[31] For instance, OZ Minerals has raised concerns regarding the calculation of floor and ceiling prices on the Tarcoola-Darwin railway and the value of rail infrastructure on the Tarcoola-Darwin railway. See OZ Minerals, submission to issues paper, pp. 2-3.

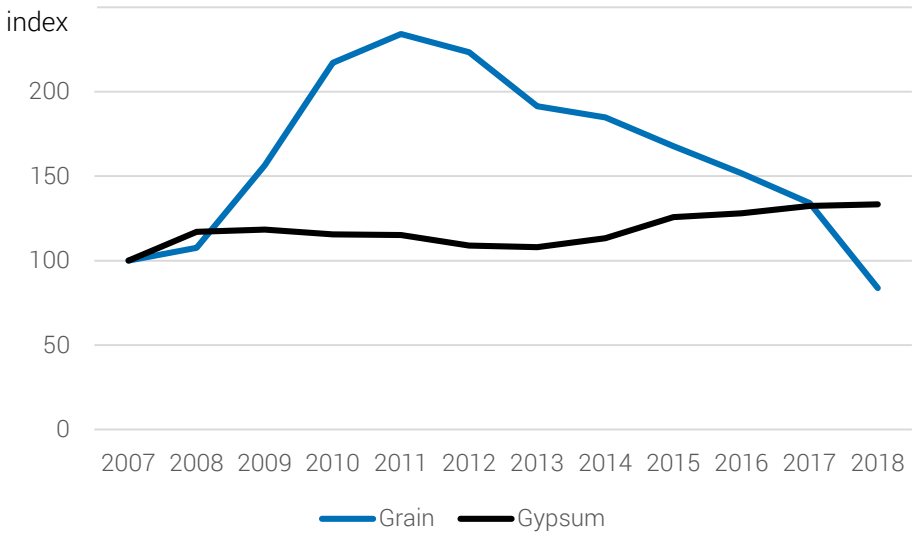
3 Economic context for the review

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.[32] 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. While there was an increase in volumes transported over rail between 2007 and 2011, largely reflecting a recovery in grain production following drought conditions in parts of South Australia, volumes transported have fallen by more than 40 per cent since the peak in 2011. The decrease reflects the closure of the Murray Mallee and Eyre Peninsula lines (in 2015 and 2019 respectively), with grain shifting to road transportation (Figure 4), and the closure of the Barossa line in 2014 (previously transporting mineral products).

Figure 4: Trends in grain and gypsum volumes on rail lines covered by the access regime, index 2007 = 100[33]



Sources: Commission, One Rail

The only rail line under the access regime that is still in use is operated by One Rail for the end-user GRA; the rail line is used to transport 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 transportation on other lines in South Australia (Figure 4). One Rail argued in its submission to the

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

[33] Grain means grain transported over rail 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. The figure does not include volumes transported on the mid north and Barossa lines. These lines have not been used since Penrice Soda Products ceased operations on the lines in mid-2014.

issues paper that the operational nature of the freight task on the Kevin to Thevenard line particularly lends itself to rail transport.[34]

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 (increased flexibility can favour road transport of grain)[35]
- export grain handling facilities have increased, including at some facilities unconnected to rail lines, providing more options for grain exporters to use road transport[36]
- large trucks are carrying an increasing share of road freight, and road transport technology has improved (high productivity vehicles such as road trains use less fuel per tonne of freight than smaller trucks),[37] and
- changes in road transport policy have led to the use of larger vehicles, including road trains, on certain South Australian roads.[38]

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)[39] and the short-haul distances involved (Figure 5).

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34 One Rail, submission to issues paper, p. 4.

35 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-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.

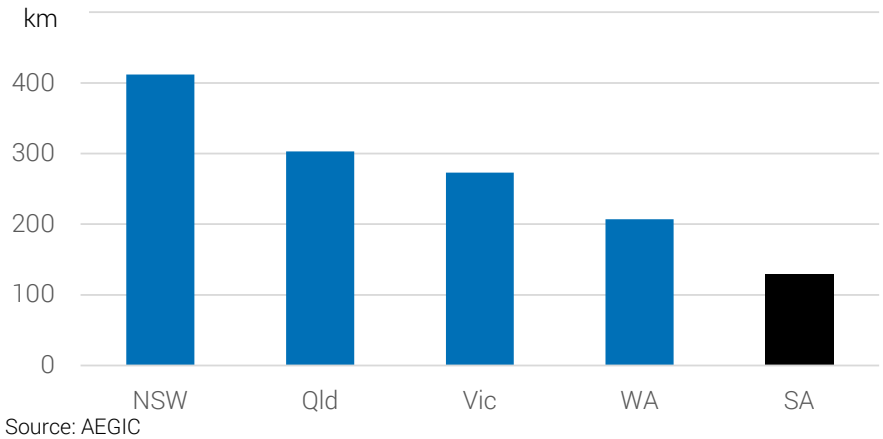
36 Two ports were constructed in South Australia between 2015 and 2017 (LINX and Semaphore), adding approximately 20 percent capacity to total port capacity in the state; ACCC, 'Bulk grain ports monitoring report 2018-19', 2019, pp. 56-64, available at: https://www.accc.gov.au/system/files/Bulk%20grain%20ports%20monitoring%20report%202018-19_0.pdf.

37 Between 2005 and 2019, the share of registered trucks that carry over 60 tonnes in South Australia increased from 38 percent to 62 percent; 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. Larger trucks tend to be more fuel efficient: see Pricewaterhouse Coopers, 'Australian Trucking Association: A future strategy for road supply and charging in Australia', 2013, p. 19.

38 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, available at: 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.

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

Figure 5: Median distance from grain retrieval site to port[40]



Source: AEGIC

In submissions to the issues paper, One Rail, the SAFC, the ARTC, GPSA and GRA reported that the closure of rail lines transporting grain was evidence of competition from road transport. In addition, some stakeholders, namely the ARTC, One Rail and GRA, raised concerns about the subsidisation of road transport, in particular a lack of user pays charges and other charges to cover the social cost of road infrastructure.[41] 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.[42]

In contrast, Pacific National claimed deficiencies in the regime can reduce demand for below-rail services, resulting in higher fixed costs per tonne kilometre.[43] OZ Minerals made a similar claim about the access regime failing to meet its objectives.[44] In its submission to the draft report, AMEC noted that *'pricing, process and restrictions of access to intermodal facilities have all contributed to companies that can afford to do so favouring road'*.[45] The implication of these claims is that the form of the regime may be a contributing factor to low utilisation on intrastate rail lines.

Low utilisation of intrastate rail lines has been observed in locations across Australia, in particular for those that carry grain.[46] Demand for grain transportation is highly variable and the location where rail

[40] 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.

[41] ARTC, submission to issues paper, pp. 2, One Rail, submission to issues paper, p. 2, and GRA, submission to issues paper, p. 2.

[42] The importance of reforming the funding of roads was recently discussed by the ACCC; see Sims, 'ACCC perspectives on transport issues', speech given at the Australasian Transport Research Forum, 30 September 2019, available at: https://www.accc.gov.au/speech/accc-perspectives-on-transport-issues. In its submission to the draft report, the ARTC called on the South Australian Government to investigate and act on this policy issue. See ARTC, submission to draft report, p. 1.

[43] Pacific National, submission to issues paper, pp. 1, 6. Pacific National raised certain suggestions for the regime that are discussed in section 5.4.

[44] OZ Minerals has claimed that, *'The current Regime has resulted in outcomes that are inconsistent with the Objects of the ROA Act. Industry needs access to bulk heavy freight services which are commercially competitive in order to maintain access to market and remain competitive in those markets. These conditions are not facilitated by the current Regime where the few owners of below-track assets are permitted to adopt inflexible pricing positions which result in excessive access charges.'* See OZ Minerals, submission to issues paper, pp. 1-2.

[45] AMEC, submission to the draft report, p. 2.

[46] 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. The decline in rail transport freight in

lines were initially constructed reflects historical passenger and freight transport routes that in some cases are no longer suitable.[47] Also, the location of lines can make it difficult to supplement demand by transporting other primary commodities and containerised goods.[48] 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.'*[49]

There can be factors that work against the competitiveness of road transport. Concerns about road safety and congestion can create resistance from local communities.[50] 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.[51]

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[52]) 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,[53] 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.[54]

One Rail considers the outlook for demand challenging and '*…does not foresee significant growth … in demand for these lines.'*[55] It argued that the factors weighing on the competitiveness of rail are structural in nature, and end-user demand does not show signs of increasing.[56] It is not aware of any prospective new demand for below-rail services on existing intrastate rail lines.[57]

Australia is a key issue on the research agenda for 2020-2022 for the Australasian Railway Association (ARA). See ARA, 'Rail and Port Executive Committee of the Australasian Railway Association', 2020, p. 6, available at: https://ara.net.au/sites/default/files/u710/Strategic plan_06.pdf.

47 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.

48 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 to issues paper, pp. 1-2; SAFC, submission to issues paper, pp. 1-2.

49 BITRE, 'Trainline 7', p. 31

50 OZ Minerals, submission to issues paper, p. 2.

51 The ARA plans to look further into the positive externalities of rail including those relating to pollution, congestion and safety. See ARA, 'Rail and Port Executive Committee of the Australasian Railway Association', p. 6.

52 SAFC, submission to issues paper, pp. 1-2; ARTC, submission to issues paper, pp. 1-2.

53 SAFC, submission to issues paper, pp. 1-2.

54 SAFC, submission to issues paper, p. 2.

55 One Rail, submission to issues paper, p. 2.

56 For example, see One Rail submission to issues paper, p. 2. 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/

57 One Rail, submission to issues paper, 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

3.2 Rail yards and sidings

One Rail's yards and sidings vary in scale, facilities and other characteristics. They are used for various purposes including refuelling, storing, loading and reconfiguring trains. 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 on rail lines.[58] This, in part, reflects the diversity of the end-users and services involved. Train operators carry a variety of freight on the interstate mainline, from mineral products (travelling from mine to port), bulk grain (to port or to interstate locations) and containerised goods.[59]

Also, the need for certain 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.[60]

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 the prospect of new and existing mineral developments.[61] 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*'.[62]

Science, 'March 2020 Resource and Energy Major Project Listing', 2020, available at: https://publications.industry.gov.au/publications/resourcesandenergyquarterlymarch2020/index.html.

58 One Rail, submission to issues paper, p. 3; BITRE, 'Trainline', p. 30.

59 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/Whomoveswhatwhereреport.pdf.

60 One Rail, submission to issues paper, p. 8.

61 AMEC, submission to issues paper, p. 1.

62 One Rail, submission to issues paper, p. 2.

4 Reasons to continue the access regime

- Recommendation: the Minister should extend the access regime for five years from 31 October 2020. The access regime provides a degree of protection for access seekers against the potential use of market power for improper purposes and, based on views and evidence provided by stakeholders, has a lower cost relative to alternative forms of regulatory protection. Most stakeholders supported the continuation of the regime.

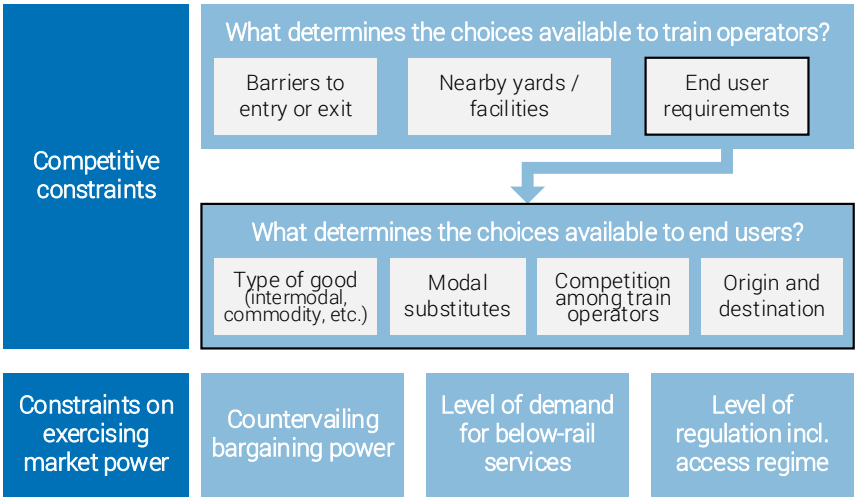
The Commission's assessment of the continuation of the access regime is organised into three parts. First, it considers if a regime is necessary, by assessing market power and the constraints on the regulated operator from exercising that power. Second, it considers the direct and indirect costs of having 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 market power to be used for improper purposes

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 potential use of market power for improper purposes may be required. The Commission has assessed this situation by considering:

- the choices available to train operators (barriers to entry and competing rail assets such as nearby yards or other facilities) 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 6).

Figure 6: Framework for assessing market power in below-rail services[63]



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

As a cross-check to the considerations above, the report includes reference to certain profitability metrics for One Rail.[64] However, the Commission acknowledges both the limits of profitability as a measure of competitiveness[65] and the narrow measure of profits used in this report.[66]

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.[67] If expected demand is insufficient to support competing below-rail services, then given the significant (sunk) investment required, the construction of new infrastructure may prove to be an insurmountable barrier to entry. This situation can create the potential for market power to be used for improper purposes.

The commercial reality over the past decade suggests that there are significant 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 may not be profitable. The tailored nature of yards and sidings could prevent switching to newly built facilities. Moreover, infrequent demand at yards and sidings 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 6). 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 use of market power. The degree to which road transport is a competitive substitute for rail transport, however, is influenced by the choices available to the end-user (as highlighted above in Figure 6). These choices depend on 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).[68]

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 stakeholders of a

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64 Data on operating profit was provided by One Rail for intrastate rail lines (Eyre Peninsula, Murray Mallee, Mid North and Barossa, and Kevin to Thevenard) and for yards and sidings (aggregated). This data (including cost allocations and methodological approach) has not been independently audited. Operating profit was calculated as the revenue derived from the rail asset minus the operating cost of the rail asset. Data on costs includes labour and maintenance costs, statutory depreciation and impairment, incident expenses, and general administration (labour and insurance) costs. Cost allocations across the rail assets were provided by One Rail. In responding to the draft report, One Rail noted, *'The returns assessment used … to evaluate profitability is based on operating profit margins and does not account for finance costs or capital expenditure. For instance, it is not uncommon for single customer line contracts to incorporate specific terms on capital expenditure. This expenditure is often made early in the contract lifecycle. In these years cash flows can be negative.'* See One Rail, submission to draft report, p. 1

65 A firm may earn profits that are considered higher than normal for short periods. This can encourage new entry or expansion.

66 A broad profitability assessment in a market study would include various indicators of profits and returns over a long time period. A market study was not within the scope of this review.

67 Pacific National, submission to issues paper, p. 3, and AMEC, submission to draft report, p. 1. *'Rail is a natural monopoly, costly to build, difficult to replicate and enjoys significant economies of scale'.* See AMEC, submission to issues paper, p. 2.

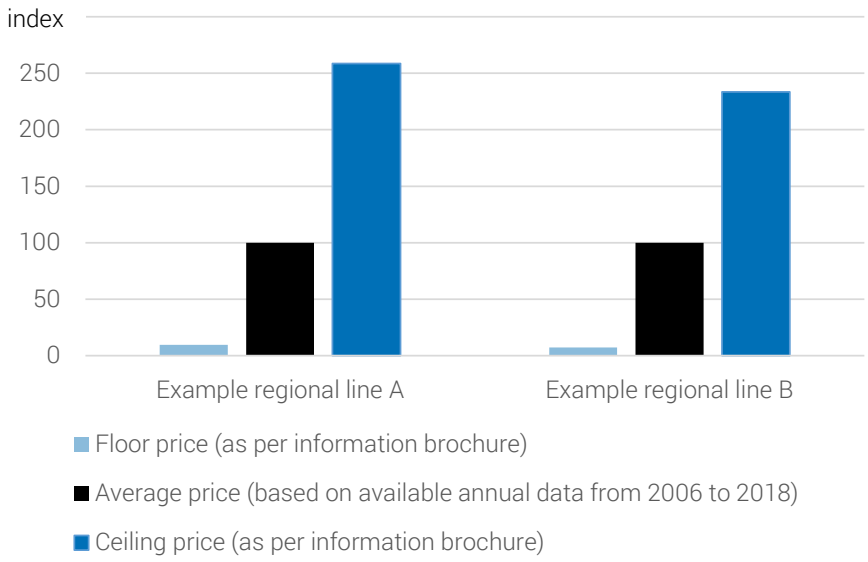
68 BITRE, 'Road and Rail Freight: Competitors or Complements?', 2009, available at: https://www.bitre.gov.au/publications/2009/is_034.

lack of market power in the long run, as noted by the SAFC: *'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.'*[69]

Since reaching a peak in 2011, falling volumes (and therefore higher average below-rail costs) has led to the closure of grain lines, therefore eroding the operating profit margin derived from those lines. This is an indication that competition from road transport is limiting the use of market power.

As a cross-check to the evidence above, in the absence of competitive constraints, one might expect access prices to be at or near the ceiling prices that would be calculated in the case of arbitration. However, actual average prices for grain lines over the past decade have been below the estimated ceiling prices (as published in One Rail's information brochure) (Figure 7).[70] This may suggest that competition from road is exerting downward pressure on prices.

Figure 7: Prices relative to floor and ceiling[71]



Sources: Commission, One Rail

69 SAFC, submission to issues paper, 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 to issues paper, 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/.

70 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.

71 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.

4.1.3 Competition for rail 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.[72] 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.[73] The distance involved is relatively short (74 kilometres), and recent changes in road policy have allowed larger and more efficient trucks on nearby roads.[74] 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.

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.*'[75] 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.[76] This lends support for continuing to protect access negotiations through the access regime. Indeed, both the access provider and access seeker supported the regime's continuation.[77]

As a cross-check to the evidence above, One Rail's below-rail operating margin (as a share of revenue) on the Kevin to Thevenard line has been on average well above the operating margin on other intrastate lines. This suggests that while the end-user may have some countervailing bargaining power, it may be limited if road transport is not, in practice, a close substitute. [78]

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. The potential to use market power is, therefore, influenced by demand for below-rail services on the interstate mainline and the substitutability of road transport for those services.

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72 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 to issues paper, 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 to issues paper, 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. AMEC noted that, *'The ability to affordably access rail can determine a mines (sic) feasibility, particularly in the case of bulk commodities which are generally very remote and heavily reliant on rail freight.'* See AMEC, submission to draft report, pp. 1-2.

73 GRA, submission to issues paper, p. 2.

74 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.

75 One Rail, submission to issues paper, p. 4.

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

77 GRA, submission to issues paper, pp. 1-2, One Rail, submission to issues paper, p. 4, and One Rail, submission to draft report, p. 1.

78 In contrast, the SAFC have noted, based on GRA's submission to the issues paper, that road transport can provide competition on the Kevin to Thevenard line. However, the SAFC's submission does not consider in any detail the counter evidence, such as the prospect of community opposition to road freight and the 'tight integration' of mine-rail-port infrastructure that could favour rail. See SAFC, submission to draft report, p. 2.

End-users undertaking longer-term and 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.[79] For short-term and ad-hoc access to yards and sidings, however, demand-side substitutability may be more limited.[80] If a freight task is 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.*[81]

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 make switching to new facilities difficult. Also, the infrequent demand at these types of facilities may limit the profitability of firms investing in their own yards or sidings. The limitations of competitive alternatives, particularly for short-term or ad hoc access to rail yards and sidings, may support continuing to protect access negotiations through the access regime.

As a cross-check to the evidence above, the Commission considered available information regarding operating profit margins. Below-rail services on yards and sidings have had historically higher operating margins than rail lines, likely reflecting more diversified demand. However, profits have become lower and more volatile over the last few years. The lower operating margins over recent years has been driven by a rise in track maintenance expenses on yards and sidings in the northern Spencer Gulf region (the Port Augusta, Whyalla and Port Pirie yards), coinciding with the timing of investment in rail safety and infrastructure. Aside from the recent changes at major yards and sidings in the northern Spencer Gulf region, operating margins on yards and sidings have remained steady over the longer term.

4.1.5 Competition in the above-rail market

The regime aims to promote contestability in the above-rail market and prevent the regulated operator of below-rail services unfairly discriminating between train operators in the above-rail market. As noted in Figure 6 (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 reviewed 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 relative to those in the below-rail business. This suggests 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).

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79 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).

80 In its submission to the issues paper, Monarto Inland Port pointed to difficulties negotiating access with One Rail for access to yards and sidings; see Monarto Inland Port, submission to issues paper, pp. 1 2. Submissions from the ARTC and Pacific National highlighted the importance of yards and sidings to the functioning of rail freight networks; see ARTC, submission to issues paper, p. 1, and Pacific National, submission to issues paper, p. 2. In its submission to the draft report, the ARTC emphasised the importance of yards and sidings to the use of rail for freight transport in Australia. See ARTC, submission to draft report, p. 1.

81 One Rail, submission to issues paper, p. 5.

Operating profit margins in the above-rail market on the Kevin to 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 axle load locomotives and/or in moving narrow gauge equipment and related services to the region where the line is located.[82] These barriers are not insurmountable when viewed over the longer term, but may increase the risk for a new entrant, therefore lessening competition to some extent.

It is difficult to estimate the counterfactual (for example, the presence of unfair discrimination could take place in the presence of low profit margins). However, there does not appear to be compelling evidence that the above-rail market on intrastate rail lines has not been contestable.

4.2 Cost of the access regime

The costs imposed by the current (certified) 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 (although 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.'*[83,84]

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:

- if regulation is expected to expropriate above-normal returns when demand from access seekers is high, but not compensate for below-normal returns when demand is low. This can leave the operator of below-rail services to bear a disproportionate share of downside risk; and
- if regulatory error in relation to prices and terms and conditions discourages investment.[85]

In its submission to the draft report, the ARTC noted these risks.[86] Nonetheless, nationally, there is limited evidence available to suggest that third party access regimes have had the effect of stifling investment.[87]

4.3 Availability of protections under national access rules

If the current (state-based) regime were to expire, regulatory protections may be available for access seekers under Part IIIA of the *Competition and Consumer Act 2010* (CC Act) (the national access regime).

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82 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.

83 One Rail, submission to issues paper, p. 6.

84 Historical data suggests that some access regimes, such as the Victorian rail access regime, are relatively more expensive to regulate than the South Australian intrastate rail access regime. Productivity Commission, 'National Access Regime', p. 237.

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

86 ARTC, submission to draft report, p. 2.

87 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. The Productivity Commission has suggested that access regimes in general have the potential to stifle investment, but found insufficient evidence to suggest that the national access regime was having that effect in practice; see Productivity Commission, 'National Access Regime', pp. 211, 228.

The four pathways to gaining access under the national access regime are declaration, voluntary access undertaking, competitive tendering for public infrastructure, and a certified state-based access regime (see Box B1 and 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.[88] One Rail has indicated that in the absence of the current regime, it might submit a voluntary access undertaking, but this is not certain. [89] It described an access undertaking as imposing *'significant extra costs'* compared to the current regime. 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, so would 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: according to the ARTC, *'…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.'*[90] One Rail pointed to a number of additional and costly requirements under the national regime including more resource-intensive information obligations and lengthy stakeholder engagements.[91] It 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.'*[92] In its submission to the draft report, One Rail argued that it is *'…critical that the low volume nature of the South Australian market is supported by a low-cost regime.'*[93] The SAFC suggested, in both its submission to the issues paper and the draft report, that avoiding the high costs of the national regime was the only benefit of retaining the current regime.[94]

Declaration of a service under the national access regime can be a lengthy process with the possibility of legal appeals from an initial 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.[95] The longer the declaration process, the higher the legal costs and the commercial costs of delay and uncertainty.

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88 While the Goldsworthy railway is currently declared, no access by third parties has occurred. See Ergas and Fels, pp. 33-34.

89 In its submission to the issues paper, One Rail states, *'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 to issues paper. p. 6.

90 ARTC, submission to issues paper, p. 2.

91 '*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 to issues paper, p. 6.

92 One Rail, submission to issues paper, p. 7.

93 One Rail, submission to draft report, p. 1.

94 SAFC, submission to issues paper, p. 2, and SAFC, submission to draft report, pp. 1-2. As stated by the SAFC, *'… the potential risk of falling under a costlier and harsher Commonwealth regime (given the current regime's low costs and no evidence of wrongdoing) on balance supports continuation of the current regime'*. See SAFC, submission to draft report, p. 2.

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

None of the submissions to the issues paper and the draft report 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 supporting the continuation of the access regime

4.4.1 Stakeholder responses to the draft recommendation for the regime to continue

Most stakeholders that have made submissions to the review, including to the issues paper and the draft report, have supported the continuation of the regime; [96] however, the reasons given differ. Those differing views were evident in submissions to the draft report:

- The ARTC strongly supported the current regime's focus on commercial negotiation, noting that, *'The benefits of regulation focused on commercial arbitration are clear in this Draft Decision, and ARTC considers this aspect of the SARAR is a clear model for any national framework to follow.'*[97]
- One Rail supported the continuation of the regime. It argued that in a low volume market such as South Australia it was critical to maintain a cost-effective regime.[98]
- The SAFC doubted that the effectiveness of the regime could be assessed. But it argued that the risks (and hence costs) associated with the national regime meant it was content to see the current regime continue to apply.[99]
- AMEC supported continuation of the regime, noting that there was a strong view that industry *'cannot operate without the rail access regime'*; however, it noted that pricing, terms and conditions can deter demand for below-rail services. It argued that the negative disruptions from COVID-19 increases the need to reduce the costs of doing business, and in this context stated, *'Making rail access in South Australia, easier, cheaper and more transparent are three ways that this review could support the growth of the State into the future.'*[100]

In addition, in submissions to the issues paper and the draft report, some stakeholders have suggested that certain changes to the ROA Act could enhance the effectiveness of the regime – these suggestions are discussed in section 5.

4.4.2 Summary of evidence

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, promoting investment in, and efficient use of, rail infrastructure, and supporting investment by end-users. Nonetheless, the evidence – as outlined earlier in the report and summarised in the dot points below – on balance supports continuation of the current regime.

[96] Submissions that support the continuation of the regime have come from the following organisations: ARTC, Pacific National, OZ Minerals, One Rail, GPSA, GRA, AMEC and SAFC.
[97] ARTC, submission to draft report, pp. 1-2.
[98] One Rail, submission to draft report, p. 1.
[99] SAFC, submission to draft report, pp. 1-2.
[100] AMEC, submission to draft report, p. 2.

- Rail infrastructure services have natural monopoly characteristics (high fixed costs and low variable costs). These features can create high barriers to entry, suggesting the potential for market power to be used for improper purposes. Road transport appears to be a competitive substitute for rail, particularly for intrastate lines used for the transport of grain. However, for access associated with haulage of large volumes and/or over long distances (which is often the case for mineral products), as well as access to yards and sidings, road transport may not necessarily provide sufficient competitive constraint on the potential 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 improper purposes. 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 and, based on views and evidence provided by stakeholders, has a lower cost relative to alternative forms of regulatory 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. This could have an effect on the operation of, and investment in, parts of the South Australian intrastate railway that are currently in use.

5 Possible improvements to the regime

Recommendation: the Commission sees the following changes as worthy of further consideration by Government and stakeholders:

- the introduction of a consultative review mechanism by which rail infrastructure services can be included or excluded from the access regime
- the broadening of the concept of access seeker in the ROA Act, and
- the allowance for an arbitrator to make an interim order on access prices, terms and conditions.

The Government should consider applying for re-certification of the regime through the National Competition Council (NCC) prior to July 2021.

Stakeholders claim that several changes to the current access regime could improve its effectiveness. Where the Commission sees changes as worthy of consideration by the South Australian Government, it has highlighted this in the sections below. Any such assessment by the Government should consider both the costs and benefits of regulatory changes.[101]

5.1 Transparency and online access to the information brochure

Stakeholders have expressed a preference for a web-based approach to sharing and accessing the information brochure.[102] 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 One Rail's desire to publish the information brochure online, and does not consider that the current requirement to provide an information brochure can only be satisfied by the provision of a physical document.[103] 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 instead of providing an information brochure to each specific access seeker.[104] Therefore, online publication of the brochure would constitute a change in practice rather than a change to the

[101] See the South Australian Government's Better Regulation Handbook, available at: https://www.dpc.sa.gov.au/responsibilities/cabinet-and-executive-council/cabinet/writing-a-cabinet-paper/thinking-about-the-impacts/regulatory-impacts.

[102] 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 to issues paper, 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 to issues paper, p. 2 and AMEC, submission to draft report, p. 2.

[103] One Rail stated, *'As noted by ESCOSA, stakeholders have expressed a preference for a web-based approach for the sharing and accessing of the information brochure. This is different from the current requirements under the Act for One Rail Australia to issue physical brochures to potential customers.'* See One Rail, submission to draft report, p. 2. However, section 28 of the ROA Act allows the Commission to specify the form in which the information brochure is provided, and section 8 of the *Electronic Communications Act 2000* provides that a requirement to give information in writing can be met by means of an electronic communication.

[104] 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.

regime. The Commission recommends that One Rail publish its information brochure online, and continue to supply the brochure to parties (whether electronically or otherwise) if the brochure is specifically requested in writing under section 28 of the ROA Act.

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. In its submission to the draft report, One Rail was *'comfortable with the concept of introducing prescribed time limits on updating the information brochure as long as these limits are reasonable, and they allow for sufficient time for internal decision-making processes and do not result in prioritisation of speed over accuracy.'*[105]

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.[106] 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 have expressed a preference for direct access to the protections in the regime, by applying a broader concept of an 'access seeker' than the one used in the ROA Act. This was also suggested by participants in the 2015 review.[107] A broader definition of access seeker applies in some other jurisdictions. For instance, both the *AustralAsia Railway (Third Party Access) Act 1999* (governing access to the Tarcoola-Darwin railway) and the Western Australian *Railways (Access) Code 2000* allow any party to request access information from the access provider and make an access proposal.[108]

This could 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, allowing more informed investment decisions. 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 and other information. 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.[109] 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.[110] If the legislation were to be changed, some protections may be

[105] One Rail, submission to draft report, p. 2.

[106] The ROA Act uses the term 'industry participant' for someone who may make an access proposal under section 31. Industry participant is defined in section 4 as *'a person who operates, or proposes to operate, railway rolling stock on the railway network'*.

[107] 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.

[108] *AustralAsia Railway (Third Party Access) Act 1999* available at: https://www.legislation.sa.gov.au/LZ/C/A/AUSTRALASIA%20RAILWAY%20(THIRD%20PARTY%20ACCESS)%20ACT%201999/CURRENT/1999.46.AUTH.PDF; *WA Railways (Access) Code 2000* available at: https://www.legislation.wa.gov.au/legislation/prod/filestore.nsf/FileURL/mrdoc_28343.pdf/$FILE/Railways%20(Access)%20Code%202000%20-%20%5B01-f0-03%5D.pdf?OpenElement

[109] For example, any broadening of the concept of access seeker would have to be consistent with the *Rail Safety National Law (South Australia) Act 2012*.

[110] Commission, 'South Australian Rail Access Regime Review – Final Report', p. 28.

warranted to ensure that only commercially viable access requests from technically competent access seekers were able to trigger the provisions of the Act. As stated by One Rail:

> *'…One Rail Australia is open to dealing directly with any party who is a "genuine access seeker" provided an accredited rail operator is involved at some point during the discussions, or, the party is genuinely seeking to become an accredited rail operator. This is important to ensure One Rail Australia receives the correct technical & rail safety information to allow details of the access arrangement to be determined, particularly for greenfield operations… We would be happy to work with ESCOSA and the above rail industry to further define this aspect of the regime.'* [111]

5.3 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.[112] This means that coverage may not respond, or may respond slowly, 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.[113] The SAFC suggested that such a mechanism could be beneficial.[114]

For third party access regimes in South Australia (such as for the intrastate railway, water and ports), the Governor makes a proclamation regarding infrastructure services on the advice of the Executive Council. The Executive Council has access to the criteria set out in the Competition Principles Agreement (CPA) and in agreements between Australian Governments relating to third party access regimes. It can also obtain advice and reporting from the Commission and government agencies. Nonetheless, the regime could be enhanced through the introduction of a consultative mechanism and process for amending coverage including or excluding certain infrastructure services.[115] The mechanism would need a specified periodic review timeframe. Such a timeframe would, as noted during certification in 2011, need to balance providing regulatory certainty with the potential for changes in market conditions.[116]

In submissions to the draft report, several stakeholders, namely One Rail, SAFC and AMEC, supported the introduction of a mechanism and process for amending coverage to include or exclude infrastructure services.[117] One Rail cautioned, however, that the costs and benefits of including or excluding infrastructure services should be carefully considered, particularly in regard to any services that could be excluded from the current regime and later be declared under the national regime, giving rise to potential transition costs and other costs discussed in section 4.3.1.[118] A holistic assessment of

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[111] One Rail, submission to draft report, p. 2. One Rail further suggested that some discretion be allowed (such as by the access provider or the regulator) when determining when the input of such an operator would be required (One Rail, submission to draft report, p. 2).

[112] NCC, 'South Australian Rail Access Regime', 2011, p. 18, available at: http://ncc.gov.au/images/uploads/CERaSAFR-001.pdf.

[113] One Rail, submission to issues paper, p. 8.

[114] SAFC, submission to issues paper, pp. 2-3.

[115] In its submission to the draft report, the SAFC highlighted the importance of a mechanism for including and excluding rail infrastructure services; see SAFC, submission to draft report, p. 2. The Commission notes that this was included in the draft report. The terminology of 'declaration mechanism' refers both to the inclusion and exclusion of rail infrastructure services.

[116] NCC, 'South Australian Rail Access Regime', p. 52.

[117] AMEC, submission to draft report, p. 2, OZ Minerals, submission to draft report, pp. 1-2, SAFC, submission to draft report, pp. 2-3, and One Rail, submission to draft report, p. 3.

[118] One Rail, submission to draft report, p. 3.

costs and benefits, including any transition costs, should be part of any decision to amend the coverage of the access regime.

OZ Minerals' submission to the issues paper[119] called for Tarcoola-Darwin railway infrastructure services to be included within the South Australian intrastate access regime.[120] However, as noted in section 2.4, the Tarcoola-Darwin railway has its own separate access regime; it is explicitly excluded from the intrastate regime by Proclamation. Any decision to review the operation of the Tarcoola-Darwin railway access regime, including its effectiveness, lies jointly with the Northern Territory Minister for Infrastructure, Planning and Logistics and the South Australian Minister for Infrastructure and Transport.[121] As noted earlier, the Commission must review whether or not the current regime (as it relates to declared infrastructure services) continues to apply. It is not within the scope of this review to make recommendations regarding the inclusion and/or exclusion of the Tarcoola-Darwin railway.

5.3.2 Greater provision of information on coverage

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. A 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'*. [122] 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.'*

In its submission to the draft report, One Rail committed to working with stakeholders and uploading a table listing railway tracks and sidings and the corresponding access regime as well as additional information (such as contacts and documentation).[123] The Commission encourages stakeholders to work with, and provide feedback to, One Rail regarding the details and usefulness of the uploaded table.

5.4 Standard access conditions and prices

Some rail access regimes in Australia allow the regulator to approve standard access conditions and prices.[124] Pacific National argued in its submission to the issues paper 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).'*[125] It further argued that the regime may

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[119] OZ Minerals, submission to issues paper, p. 2.

[120] OZ Minerals argues that more protection against the use of market power for improper purposes is needed because of the interconnected dependency of state and national railways. Also, it argues that the review of the intrastate regime should document concerns and issues relevant to interconnected railways such as the Tarcoola-Darwin railway. OZ Minerals, submission to draft report, pp. 1-2.

[121] See clause 50(1) and (2) of the *AustralAsia Railway ('Third Party Access') Code.*

[122] AMEC, submission to issues paper, p. 4.

[123] One Rail stated that, *'it is willing to provide further information to help clarify what rail infrastructure and services are 'in' or 'out' of the regime and would be pleased to work with ESCOSA and access seekers to progress this.'* See One Rail, submission to draft report, p. 4. One Rail noted stakeholder concerns in its submission to the draft report, stating that, *'…at times, and particularly with mainline yards and sidings, it can be unclear which network operator is responsible for which asset.'* It did, however, acknowledge that, *'…One Rail Australia is already providing a significant amount of information that could clarify some confusion and which may not be being used to the fullest extent possible.'* See One Rail, submission to draft report, pp.3- 4.

[124] 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..

[125] Pacific National, submission to issues paper, p. 2.

fail certification under national access legislation unless standard access agreements and standard offer prices were mandated.

In contrast, the ARTC submission to the issues paper 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.'*[126]

The Commission considered the costs and benefits of standard access conditions and prices in the 2019 guidelines review.[127] 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. 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. One Rail and the SAFC argued that there was no need for standard access agreements and prices to apply to rail infrastructure services covered by the access regime.[128]

In its submission to the issues paper, Pacific National also argued for the publication of standard network indicators.[129] 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. In submissions to the draft report, One Rail and the SAFC supported this assessment.[130]

5.5 Improvements to 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.[131] The regime also provides a step before arbitration for the regulator to consider the dispute and either engage in 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

[126] ARTC, submission to issues paper, p. 1.
[127] Commission, 'Review of the South Australian Rail Access Regime Guidelines', pp. 15-16.
[128] SAFC, submission to draft report, p. 2; One Rail, submission to draft report, p. 4.
[129] Pacific National, submission to issues paper, p. 2.
[130] SAFC, submission to draft report, p. 2; One Rail, submission to draft report, p. 4.
[131] 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 to issues paper, 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 to issues paper, p. 2.

rail yards and sidings. This provides general support for retaining the current framework established under the ROA Act. The ARTC, the SAFC and One Rail expressly noted in their submissions to the draft report support for the negotiate-arbitrate framework.[132]

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 in its submission the issues paper 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.'*[133]

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 concerns that the threat of arbitration could be less effective. For example, as it relates to yards and sidings, in some instances competitive substitutes from road transport may be unavailable at short notice if the freight task is already configured for rail, and capacity may not be easily adjusted to meet an increase in demand in the short term.[134] Demands for business continuity could therefore limit the access seeker's ability to effectively pursue arbitration. This could result in higher prices, less accommodative terms and conditions, or lower service quality.

It was in the context of these risks, rather than any evidence of prolonged negotiations, that the Commission suggested in the draft report the potential for an amendment to the ROA Act to specifically empower arbitrators to make an interim order on access prices, terms and conditions. This is particularly important if the arbitration relates to an agreement that is soon to expire. The application of an interim order may help to contribute to continuity of rail infrastructure services while upholding the threat of arbitration.

In response, One Rail claimed that such an amendment could raise several risks. Those risks included uncertainty about the basis of an interim order and that an interim order could become a 'de facto' standard price.[135] More generally, One Rail argued that *'… allowing reasonable time for negotiation prior to the expiry of an agreement is a natural part of negotiating in good faith'* and that there was no regulatory precedent for such orders. Instead, it suggested that an arbitrator be given the power to roll over prices, terms and conditions immediately prior to an access dispute, for a specified time or until the dispute has been resolved.[136]

There are several counter points to One Rail's concerns. First, much of One Rail's concerns relate to the form and basis for an arbitrator's interim order rather than the merits of having the ability to make an interim order. Even in good faith negotiations, an interim order may be needed if unforeseen events inhibit commercial negotiations. The continuity of access to essential infrastructure services is important for investment and economic activity. Second, the risk that an interim order becomes a de

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[132] ARTC, submission to draft report, pp. 1-2; SAFC, submission to draft report, p. 2; and One Rail, submission to draft report, p. 1.

[133] OZ Minerals, submission to issues paper, p. 1.

[134] The SAFC had concerns with this statement as it was expressed in the draft report. The SAFC interpreted the statement as referring to rail lines. For that reason, the Commission has responded and modified the text. See SAFC, submission to draft report, p. 2.

[135] One Rail, submission to draft report, p. 4.

[136] One Rail, submission to draft report, p. 4-5.

facto price is no greater than the current risk of an arbitrator's decision becoming a de facto standard price. Third, there are regulatory precedents available. In South Australia, the *Commercial Arbitration Act 1986* allows for interim orders and applies to the access regime for ports.[137] In Western Australia, a proposal for an interim order was put forward in the recent rail access regime review.[138]

In summary, notwithstanding some limitations, the Commission considers the introduction to the ROA Act of a specific power to empower an arbitrator to make an interim order on access prices or other terms and conditions is worthy of consideration by the South Australian Government.

5.6 National certification of the regime

5.6.1 Recommendation

The Government should consider applying for re-certification of the regime through the NCC prior to July 2021. The regime was considered by the NCC in 2011 and certified as effective by the Parliamentary Secretary to the Treasurer, the Hon. David Bradbury MP on 26 July 2011.[139] This certification was for ten years and will expire in 2021.

5.6.2 General considerations

Regardless of certification, the regime provides protection for access seekers against the use of market power for improper purposes.[140] The effect of certification is to preclude access under the national access regime[141] (the availability of access under the national access regime is discussed in Appendix B). While stakeholders claim that uncertainty relating to the national access regime can raise costs (impacting the operation of, and investment in, parts of the South Australian intrastate railway), a certified state-based access regime would help to avoid those costs. Stakeholder support for the continuation of the access regime is an indicator that declared intrastate rail infrastructure services play an important role in the South Australian economy.[142]

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[137] The *Commercial Arbitration Act 1986* does not apply to an arbitration under Part 6 of the ROA Act or to disputes under the *AustralAsia Railway (Third Party Access) Act 1999*, under sections 59 and 6 of those Acts respectively. However, the *Commercial Arbitration Act 1986* applies to ports access disputes under the *Maritime Services (Access) Act 2000*.

[138] Government of Western Australia Department of Treasury, p. 61. GPSA suggested that the Commission consider the proposed changes put forward in the review of the Western Australian access regime. See GPSA, submission to issues paper, p. 2.

[139] Hon. David Bradbury MP, 'Decision on Effectiveness of Access Regime under Section 44N,' 2011, available at: http://ncc.gov.au/images/uploads/CERaSAMD-001.pdf.

[140] Some, but not all, Australian state-based rail access regimes are certified. Rail access regimes in Victoria, New South Wales and Western Australia are not currently certified, and the declaration of Tasmania's rail network lapsed in 2017. The Queensland rail access regime is due for re-certification in 2021. The Tarcoola-Darwin railway is due for re-certification in 2030. See NCC, available at http://ncc.gov.au/applications-past/past_applications.

[141] NCC, 'South Australian Rail Access Regime', p. 5.

[142] In particular, the intrastate rail line that is currently in operation provides significant support in the trade of gypsum (see Figure 4), and several stakeholders have highlighted the importance of access to yards and sidings on the interstate mainline to the overall functioning of rail freight networks (including for refuelling, storing, loading and reconfiguring trains). See ARTC, submission to issues paper, p. 1; ARTC, submission to draft report, p. 1; One Rail, submission to issues paper, p. 3; Pacific National, submission to issues paper, p. 1. For example, the ARTC states that, *'… the operation of the regional rail networks, as well as access to the yards and sidings which connect into ARTC's network, are of critical importance to maximizing the use of rail for freight transport in Australia.'* See ARTC, submission to draft report, p. 1.

The CPA, as agreed to by the South Australian Government in 1995 and amended in 2007,[143] states that Commonwealth legislation is not intended to cover state-based facilities that are covered under a state-based regime, to the extent the regime is determined by the NCC to be effective.[144] In 2011, the NCC assessed the regime as effective, stating that *'…the SA Rail Access Regime encourages parties to enter into commercial negotiations to reach agreement on the terms and conditions of access, and provides an appropriate balance between commercial negotiation and regulatory intervention to facilitate access negotiations.'*[145]

One submission to the issues paper claimed that the regime would fail re-certification unless the ROA Act were changed to mandate standard access agreements and standard offer prices.[146] However, the ROA Act does not allow for a formal standard access agreement.[147] Furthermore, and importantly, the CPA highlights that there may be a range of approaches to state-based access regime legislation that may reasonably meet the various criteria set out in the agreement.[148]

[143] NCC, 'South Australian Rail Access Regime', pp. 5, 58.
[144] Section 6(2) of the CPA.
[145] NCC, 'South Australian Rail Access Regime', p. 28.
[146] Pacific National argued that the regime would fail certification unless the ROA Act were changed to mandate standard access agreements and standard offer prices. See Pacific National, submission to issues paper, p. 2. This is discussed further in section 5.4.
[147] In its submission to the issues paper, Pacific National noted that the ROA Act would need to be amended to allow for a standard access agreement. See Pacific National, submissions to issues paper, p. 2.
[148] Section of 3(b) of the CPA.

6 Conclusion

The Commission has conducted the review required under the ROA Act and has determined that the regime should continue to apply. It recommends that the regime operates for a further five-year period from 31 October 2020.

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 potential use of market power for improper purposes. Although there is not sufficient data to quantify the benefits generated by the current regime, views and evidence provided by stakeholders suggest the cost of the regime is low relative to alternative forms of protection, namely those available under the national access regime. Submissions from below-rail operators, above-rail operators, end-users, and industry bodies representing end-users, generally support the continuation of the regime. Furthermore, 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. Taken together, this evidence 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 considers some changes as worthy of further consideration by Government and stakeholders. Specifically, there could be changes to the ROA Act to:

- broaden the concept of access seeker from train operator to also include an end-user, which would allow end-users to negotiate directly with an access provider while still being protected under the provisions of the access regime
- allow an arbitrator to make an interim order on access prices or other terms and conditions, in order to address concerns that arbitration could be ineffective in certain circumstances (for example, when long-term contracts cannot account for short-term variations in volumes, or when contract agreements approach expiry) and threaten continuity of rail infrastructure services, and
- introduce a consultative review mechanism by which an access seeker, or other interested party, could seek to have rail infrastructure services included in or excluded from the access regime.

The Government should consider applying for re-certification of the regime through the NCC prior to July 2021. Certification of a state-based access regime can promote certainty of access pathway for train operators and the monopoly infrastructure owner, by removing the possibility of access pathways under the national regime. It can also reduce scope for duplication of administrative costs across jurisdictions.

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.[149]

Access to the ARTC interstate mainline is covered under the national access regime, with a voluntary undertaking that is regulated by the ACCC under the national access regime. Access to the Tarcoola-Darwin railway 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	Standard	Operational	Multiple
One Rail	Tarcoola-Darwin line	Standard	Operational	One Rail
SIMEC	Whyalla based iron ore lines	Narrow	Operational	One Rail
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

[149] 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-based access regime were to expire, access to some rail infrastructure services may be available under Part IIIA of the CC Act (the national access regime). Box B1 sets out the four available pathways to gaining access under the national regime.

Box B1: Pathways to gaining access to infrastructure services under the national access regime[150]

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 CC 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.
2. Access may be sought under the terms and conditions of a voluntary access undertaking approved by the ACCC.
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.
4. Access may be sought under the terms of a State or Territory-based access regime certified by under the CC Act as effective. The access regime under the ROA Act is a certified state-based regime.

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 CC Act would **all** need to be met.[151] 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*
> >
> > *(iii) the importance of the facility to the national economy;*

[150] Productivity Commission, 'National Access Regime', pp. 4-5.
[151] The CC Act is available at: https://www.legislation.gov.au/Details/C2020C00079.

(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.

Whether these criteria would be met or not is a legal question for the 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.'*[152] 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 or have expired, and no applications for access have been made regarding the only currently declared rail line, BHP's Goldsworthy Railway in the Pilbara.[153]

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.[154] 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.'*[155] 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.[156] The NCC found that criterion (a) was not satisfied in respect of the case for the declaration of the Port of Newcastle.[157]

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.[158] The new test was not considered in detail by the NCC in the Port of Newcastle case.[159] 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.'*[160] 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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[152] One Rail, submission to issues paper, p. 6.
[153] Ergas and Fels, p. 33-34.
[154] 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.
[155] NCC, 'Revocation of the declaration of the shipping channel service at the Port of Newcastle', p. 43.
[156] *'…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.
[157] NCC, 'Revocation of the declaration of the shipping channel service at the Port of Newcastle', pp. 138-9.
[158] Productivity Commission, 'National Access Regime', p. 19.
[159] NCC, 'Revocation of the declaration of the shipping channel service at the Port of Newcastle', pp. 140-141.
[160] 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.[161]

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.[162] 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.*[163]

The public interest criterion allows the Minister to consider any other matters that are relevant to the public interest.[164] As the High Court has found, *'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'.'*[165] 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.*'[166]

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.[167]

The third pathway (noted in Box B1) applies only to the tender processes associated with government-owned infrastructure,[168] 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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[161] Productivity Commission, 'National Access Regime', p. 174.
[162] 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.
[163] CC Act, subsection 44CA(3).
[164] NCC, 'Revocation of the declaration of the shipping channel service at the Port of Newcastle', p. 156.
[165] NCC, 'Revocation of the declaration of the shipping channel service at the Port of Newcastle', p. 156.
[166] NCC, 'Revocation of the declaration of the shipping channel service at the Port of Newcastle', p. 158.
[167] One Rail, submission to issues paper, p. 6.
[168] Productivity Commission, 'National Access Regime', pp. 262-264.

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