



RAIL INDUSTRY (TARCOOLA-DARWIN) GUIDELINE NO. 4

COMPLIANCE SYSTEMS AND REPORTING

April 2005



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1. NATURE OF THE GUIDELINE

1.1. Introduction

- 1.1.1. This Guideline outlines the **Commission's** approach to compliance systems and reporting in a **Railway Infrastructure Industry** in South Australia and the Northern Territory.
- 1.1.2. The Guideline applies to an **Access Provider** under the AustralAsia Railway (Third Party Access) Code (the **Access Code**).
- 1.1.3. This Guideline sets out a process for the reporting of compliance by an **Access Provider** in a way that meets the **Commission's** requirements and demonstrates that appropriate compliance systems are in place.
- 1.1.4. This Guideline does not diminish an **Access Provider's** obligation to report, or otherwise respond to, any breach of an obligation under the **Access Code** within the stipulated time and in the manner required where the **Access Code** so requires.

1.2. The Purpose of this Guideline

- 1.2.1. Section 5(1) of the **ESC Act** sets out the functions of the **Commission**, to:
 - (a) regulate prices and perform licensing functions under relevant industry regulation Acts;
 - (b) monitor and enforce compliance with and promote improvement in standards and conditions of service and supply under relevant industry regulation Acts;
 - (c) make, monitor the operation of, and review from time to time, codes and rules relating to the conduct or operations of a regulated industry or regulated entities;
 - (d) provide and require consumer consultation processes in regulated industries and to assist consumers and others with information and other services;
 - (e) advise the Minister on matters relating to the economic regulation of regulated industries, including reliability issues and service standards;
 - (f) advise the Minister on any matter referred by the Minister;
 - (g) administer the **ESC Act**;



- (h) perform functions assigned under the **ESC Act** or any other Act; and
- (i) in appropriate cases, prosecute offences against the **ESC Act** or a relevant industry regulation Act.

1.2.2. Many of the functions of the **Commission** in relation to a **Railway Infrastructure Industry** arise through Section 5(1)(h) of the **ESC Act** – that is, they are functions assigned to the **Commission** by the **Access Code**.

1.2.3. Clause 6 of the **Access Code** assigns to the **Commission** the following functions:

- (a) to monitor and enforce compliance with the **Access Code**;
- (b) such other functions as are contemplated for the **Commission** under the **Access Code** (these being various specific functions that arise throughout the **Access Code**); and adds that the **Commission** has such powers as are necessary to enable it to carry out the functions assigned.

1.2.4. The **ESC Act** requires that in performing its functions, the **Commission** must have as its primary objective the protection of the long term interests of South Australian consumers with respect to the price, quality and reliability of essential services; and at the same time have regard to the need to:

- (a) promote competitive and fair market conduct;
- (b) prevent misuse of monopoly or market power;
- (c) facilitate entry into relevant markets;
- (d) promote economic efficiency;
- (e) ensure consumers benefit from competition and efficiency;
- (f) facilitate maintenance of the financial viability of regulated industries and the incentive for long term investment; and
- (g) promote consistency in regulation with other jurisdictions.

1.2.5. The **Commission** will necessarily require information and reports from **Access Providers** to fulfil these objectives and functions.

1.3. Definitions and Interpretation

1.3.1. In this Guideline:

- (a) words and phrases presented in a bold italic font **such as this**, are defined for the purposes of interpreting this Guideline in the Glossary.

The Glossary seeks to provide clarity and reduce the risk of ambiguity in the interpretation of the Guideline's requirements; and

- (b) the words "*shall*" and "*must*" indicate mandatory requirements, unless the overall meaning of the phrase in which one of these words appears is otherwise.
- 1.3.2. This Guideline seeks to provide definitions consistent with those given in the **Access Code** and the **ESC Act**. Where words and phrases are not defined in the Glossary, they shall have the meaning given to them by these Acts or any other relevant Regulatory Instrument.
- 1.3.3. Explanations in this Guideline as to why certain information is required are for guidance only. They do not limit in any way the **Commission's** objectives, functions or powers.

1.4. Confidentiality

- 1.4.1. **Compliance Reports**, and the information therein, will be collected by the **Commission** pursuant to Clause 39 of the **Access Code**.
- 1.4.2. Therefore, the confidentiality requirements that apply are those arising in Clause 40 of the **Access Code**.

1.5. Exemption

- 1.5.1. Should circumstances so require, the **Commission** may exempt an **Access Provider** from all or part of this Guideline on terms and conditions determined by the Commission. An **Access Provider** shall be informed of the terms, conditions and duration of that exemption, by the **Commission**, in writing.
- 1.5.2. Explanation – exemptions are not intended for general application, rather they are intended for use in situations where the **Commission** decides that the application of part or all of this Guideline would be of no net benefit.

1.6. Processes for Revision

- 1.6.1. The **Commission** may amend and expand this Guideline from time to time where this is necessary to meet the needs of an **Access Provider**, stakeholders or the **Commission**.
- 1.6.2. Before making any revisions to this Guideline, the **Commission** will undertake consultation as required under Clause 45A of the **Access Code**.



1.6.3. For all revisions to this Guideline a Commencement Date will be nominated on the Amendment Record.

1.7. Input from Interested Parties

1.7.1. The **Commission** welcomes comments, discussion, or suggestions for amendments to this Guideline, from any interested party. Any contribution in this regard should be addressed to:

Essential Services Commission of South Australia

GPO Box 2605

Adelaide SA 5001

Facsimile: (08) 8463 4449

E-mail: escosa@escosa.sa.gov.au

1.8. Version History and Commencement Date

1.8.1. An Issue Number and Commencement Date will identify every version of this Guideline.

1.8.2. This Guideline applies from the Commencement Date specified in this Guideline.

2. GENERAL PRINCIPLES AND APPROACH

2.1. Regulatory Objective

- 2.1.1. Each **Access Provider** is required to comply with various obligations imposed by the **Access Code**.
- 2.1.2. The **Commission** is required to ensure compliance with various of these obligations, either as specified throughout the **Access Code** or more generally as set out in Clause 6 of the **Access Code**.
- 2.1.3. The **Commission** has sought to implement a compliance monitoring and reporting system which minimises costs and disruption to **Access Providers**, but ensures compliance systems exist and operate efficiently and effectively.
- 2.1.4. The **Compliance Report** requires that an **Access Provider**:
- (a) testify that it has a sound and effective compliance program;
 - (b) report non-compliances of the type required to be reported during the relevant reporting period; and
 - (c) briefly address the impact of such non-compliance on customers and other entities as well as the implications for the effectiveness of the **Access Provider's** compliance system (see Schedule B of Annexure C).
- 2.1.5. As a matter of policy, the **Commission** will be inclined to exercise the **Commission's** powers in respect of a non-compliance more favourably towards an **Access Provider** where that **Access Provider** has actively co-operated in relation to a regulatory non-compliance.
- 2.1.6. Prompt disclosure of all non-compliances will be viewed favourably by the **Commission**.

2.2. Reporting Approach

- 2.2.1. The **Commission** has decided to adopt a simple reporting approach to compliance auditing and reporting. This requires **Access Providers** to report on their compliance with the obligations which are applicable to them under the **Access Code** or related or subordinate instruments.
- 2.2.2. If new or varied obligations are imposed on an **Access Provider** under the applicable legislation or related regulatory instruments, then the **Access**



Provider should report compliance against those new or varied obligations, even if the **Commission** has not amended this Guideline to reflect the new conditions.

2.2.3. The **Commission** requires:

- (a) immediate reporting of “material” breaches of obligations; and
- (b) annual reporting of compliance in relation to all obligations.

2.2.4. The Annual Report must include any breaches that have been reported immediately.

2.3. Reporting Obligations

2.3.1. Annexure A shows the key obligations under the **Access Code**.

2.3.2. The **Commission** may categorise obligations for which breaches are to be considered material under clause 2.4 differently as between **Access Providers** if the circumstances so require.

2.3.3. This Guideline does not cover reporting of obligations arising under access disputes once they become subject to an arbitration process under the **Access Code**. Compliance obligations arising in such processes will be managed within that process.

2.4. “Material” Breaches

2.4.1. An **Access Provider** should apply the following separate tests to determine whether a breach is “material” or not.

2.4.2. The **Access Provider** will treat a breach as “material”:

- (a) where the **Commission** has identified the obligation in Annexure A as “material” in respect of a breach;
- (b) where the **Commission** has, from time to time, written to the **Access Provider** and informed it of an obligation that the **Commission** considers to be “material”; or
- (c) where the **Access Provider** itself considers that the breach is “material”, having regard to all relevant matters, including having regard specifically to the following:
 - (i) the impact of the breach on customers;

- (ii) whether the breach has a financial impact on customers;
- (iii) the number of customers affected; and
- (iv) the potential (and actual) impact on safety and risk to the public.

3. COMPLIANCE SYSTEM

3.1. Compliance Reporting

3.1.1. The Compliance Report scheme:

- 3.1.1.1. The **Commission** considers it appropriate to require **Access Providers** to adopt the **Compliance Report** scheme, as described below.
- 3.1.1.2. For any **Access Provider**, the **Commission** reserves the right to require, at any time, an external, independent audit of some or all of an **Access Provider's** obligations if the **Commission** considers that such a course is necessary and consistent with the applicable legislation. Such *ad hoc* audits may be ordered by the **Commission** on the basis of any or all of:
- (a) the **Commission's** assessment of the adequacy of the **Access Provider's** compliance system;
 - (b) the level and nature of non-compliances by the **Access Provider**; and
 - (c) any relevant matter disclosed in the **Compliance Reports** provided by the **Access Provider**.
- 3.1.1.3. The **Compliance Report** scheme requires that **Access Providers** have, and rigorously adhere to, a sound compliance system. The **Compliance Report** testifies on a periodic basis to that effect, and reports non-compliances in accordance with the periodic scheme.
- 3.1.1.4. Such a scheme should reduce the need for costly and resource intensive external audits and reviews of **Access Provider** compliance.
- 3.1.1.5. A sound compliance system may be based on the Australian Standard on Compliance Programs, AS 3806-1998 (as amended), or on any other credible compliance standard.
- 3.1.1.6. The **Compliance Report** provides assurance to the **Commission** that the **Access Provider** has a credible compliance system in operation and records the results of that compliance system by way of "exception reporting" – that is, compliance with all obligations is assumed unless breaches are reported to the **Commission**.



- 3.1.1.7. **Access Providers** must report all non-compliances in the relevant **Compliance Report**, even if they have already been reported to the **Commission** in the course of the compliance period by other means.
- 3.1.1.8. Annual **Compliance Reports** should contain a summary of all non-compliances reported to the **Commission** during the relevant reporting year.
- 3.1.1.9. Reporting of all non-compliances, and subsequently an assessment of their nature and extent, will provide the **Commission** with a sound basis upon which to require changes to the **Access Provider's** compliance system, or to review a reporting-based approach to compliance with respect to that obligation or generally.

3.1.2. Reporting Periods:

- 3.1.2.1. The compliance reporting procedure is based on a requirement to provide immediate and annual **Compliance Reports** to the **Commission**.
- 3.1.2.2. The form of the reports is set out in Annexures B and C to this Guideline. The Commission may accept variations to the form of each report, subject to Commission approval of any variations.
- 3.1.2.3. Immediate Reports are to be made as soon as the **Access Provider** becomes aware of the event.
- 3.1.2.4. Annual Reports are in respect of the twelve month period ending on 30 June each year.
- 3.1.2.5. The **Commission** will, if appropriate, allow an **Access Provider** to adopt a flexible approach in respect of that **Access Provider's** first reporting period.
- 3.1.2.6. All Annual **Compliance Reports** are to be provided to the **Commission** within two calendar months of the last day of the relevant reporting period.

3.1.3. Immediate Reports:

3.1.3.1. Each immediate **Compliance Report** must be approved and signed by:

- (a) the Chief Executive Officer of the **Access Provider**, or
- (b) a person holding an equivalent position to the Chief Executive Officer of the **Access Provider**, or
- (c) a person delegated to exercise the powers and functions of the **Access Provider** at a level equivalent to that held by a Chief Executive Officer; or
- (d) the person acting as the Chief Executive Officer or equivalent position during an absence of the substantive office-holder.

3.1.4. Annual Reports:

3.1.4.1. There are a range of options for signing an Annual **Compliance Report** as set out below. The critical element is that the **Commission** is given an independent and expert assurance that the matters referred to in the **Compliance Report** are accurate.

3.1.4.2. Annual **Compliance Reports** must be signed by:

- (a) the Chief Executive Officer and one other Director of the **Access Provider**, who must be an “External Director” (see 3.1.6 and 3.1.8 below); or
- (b) an external and independent auditor approved by the **Commission**; or
- (c) an internal auditor, subject to 3.1.5 below.

3.1.5. Use of Internal Auditor to sign **Compliance Reports**:

3.1.5.1. If the **Access Provider’s** internal audit function is undertaken by an independent and expert auditor, the **Access Provider** may request the **Commission** to accept such an auditor for the purposes of signing annual **Compliance Reports**.

3.1.5.2. If the **Commission** accepts the **Access Provider’s** request to use the internal auditor for this purpose, the annual internal audit reports should be specifically addressed to the **Commission** as well as to the **Access Provider**.



3.1.5.3. If this option is utilised, there is no need to rely precisely on the form of the **Compliance Report** described at Annexure C, so long as the internal audit report, at least:

- (a) certifies that the **Access Provider** has an active and effective compliance scheme in operation;
- (b) lists all applicable obligations with which the **Access Provider** is required to comply by section or clause, and by summary description; and
- (c) lists all non-compliances that have occurred within the reporting period.

3.1.5.4. **Access Providers** intending to use this option are required to obtain the **Commission's** approval annually, prior to the beginning of the reporting year for which this option is intended to be used.

3.1.6. Use of parent company director(s) to sign **Compliance Reports**:

3.1.6.1. Where the **Access Provider** does not have any "External Directors" on its Board, the **Access Provider** may request of the **Commission** that it use "External Director(s)" of an Australian incorporated company that has a **Substantial Shareholding** in the **Access Provider** as a surrogate for the "External Director" of the **Access Provider**.

3.1.6.2. If the **Commission** agrees in writing, such Director(s) will be accepted by the **Commission** as "External Director(s)" of the **Access Provider** solely for the purpose of signing annual **Compliance Reports**.

3.1.6.3. The **Commission** will only give approval for such an arrangement if satisfied that the proposed Director(s) have relevant expertise, and independence from the **Access Provider**.

3.1.7. Other Options for **Compliance Reporting**:

3.1.7.1. The **Commission** will consider other reasonable options for compliance reporting submitted by an **Access Provider**.

3.1.7.2. However, any such option should be based on the **Access Provider** having a sound and effective compliance system and on providing the **Commission** with expert and independent assurance

to that end, and on a systematic reporting of the nature and level of non-compliances to the **Commission**.

3.1.8. External Director:

3.1.8.1. A Director is an “External Director” if the Director:

- (a) is not, and has not been in the previous 2 years, an employee of the **Access Provider** or a related body corporate; and
- (b) is not, and has not been in the previous 2 years, an executive officer of a related body corporate; and
- (c) is not, and has not been in the previous 2 years, substantially involved in business dealings, or in a professional capacity, with the **Access Provider** or a related body corporate; and
- (d) is not a member of a partnership that is, or has been in the previous 2 years, substantially involved in business dealings, or in a professional capacity, with the **Access Provider** or a related body corporate; and
- (e) does not have a material interest in the **Access Provider** or a related body corporate; and
- (f) is not a relative or *de facto* spouse of a person who has a material interest in the **Access Provider** or a related body corporate.

3.1.8.2. The above definition of an External Director is consistent with that in section 601JB of the *Corporations Act 2001 (Cth)* in relation to Compliance Committees.

4. GLOSSARY

In this Guideline, unless the contrary intention appears:

“**Access Code**” means the the AustralAsia Railway (Third Party Access) Code, which is contained in the Schedule to the *AustralAsia Railway (Third Party Access) Act 1999 (SA & NT)*, as in force from time to time and, where the context allows, includes all regulations made under that Act;

“**Access Provider**” has the same meaning as given to it in the **Access Code**;

“**Commission**” means the Essential Services Commission of South Australia established under the **ESC Act**;

“**Compliance Report**” means a report presented in the form described at Annexure B and Annexure C to this Guideline;

“**ESC Act**” means the *Essential Services Commission Act 2002 (SA)*, as in force from time to time and, where the context allows, includes all regulations made under that Act;

“**Railway Infrastructure Industry**” means an industry of providing a railway infrastructure service, or railway infrastructure services, as defined under the **Access Code**.

“**Substantial Shareholding**” means a substantial holding as defined in the *Corporations Act 2001 (Cth)*.

5. ANNEXURE A – INDICATIVE OBLIGATIONS

Relevant Obligations: AustralAsia Railway (Third Party Access) Act 1999 (SA & NT), including the Access Code

Note: The list of obligations below refers to the **Access Code** and related or subordinate instruments. It is a non-exhaustive list of general obligations under that Code. **Access Providers** are encouraged to examine the **Access Code** and related or subordinate instruments to identify other applicable obligations that may apply to them. The description of obligations is intended as a guide only.

Items marked with an X under the “Material” column heading are the obligations so identified by the Commission for the purposes of subclause 2.4.2(a) of this Guideline. Other provisions may also be material, pursuant to subclauses 2.4.2(b) or (c).

OBLIGATIONS

ACCESS CODE	SUMMARY DESCRIPTION	MATERIAL
9	Provision of information to a person	X
9(1)(e)	Provision of reference price information under Rail Industry (Tarcoola-Darwin) Guideline No. 1	X
9(2)	Reasonable charge for information	
9(3)	Service policies in accordance with Rail Industry (Tarcoola-Darwin) Guideline No. 1	X
10	Notification of request and response	X
11	Negotiation in good faith	
12	Limitation on right to contract to provide access	
12A	Protection of confidential information	X
12(6)	Develop and maintain effective confidentiality policy	
12(7)	Confidentiality policy available	
38	No hindrance to access to railway infrastructure services	
39	Provision of information as requested (for example, under Rail Industry (Tarcoola-Darwin) Guideline No. 3)	X
46	Keeping of separate accounts and records, including in accordance with Rail Industry (Tarcoola-Darwin) Guideline No. 3	
46(3)	Keeping of separate accounts and records similarly for a related entity to whom railway infrastructure services are provided	



Schedule A – Relevant Obligations

7. ANNEXURE C – ANNUAL COMPLIANCE REPORT

** Delete if inapplicable.*

To: Essential Services Commission of South Australia
Level 8
50 Pirie Street
ADELAIDE SA 5000

[Name of **Access Provider**] reports as follows:

1. This Report is an Annual Compliance Report for the period [insert] and has been prepared in a manner that meets the requirements of the Compliance Systems and Reporting, Rail Industry (Tarcoola-Darwin) Guideline No. 4 (“**the Guideline**”).
2. [Name of **Access Provider**], having made due enquiry, is not aware of any breach of any of the obligations listed in Schedule A to this Report (“**Applicable Obligations**”), other than as detailed in Schedule B.
3. [Name of **Access Provider**] has maintained a compliance program during the relevant period that ensures that:
 - (a) it has identified all Applicable Obligations;
 - (b) it has identified a “Responsible Officer” who has operational control over the activity or work area where the relevant Applicable Obligations arises;
 - (c) it has ensured that the “Responsible Officer” has programmed the Applicable Obligations into the operational procedures for the relevant activity or work area, and is accountable to the Board of Directors* / Compliance Committee of the Board of Directors* through the Chief Executive for ensuring compliance with the Applicable Obligations;
 - (d) the Chief Executive Officer (or equivalent in accordance with clause 3.1.3 of the Guideline) of [name of **Access Provider**] will be made aware of any breaches of Applicable Obligations without delay;
 - (e) remedial action is taken as soon as possible to rectify breaches of Applicable Obligations, and that the breach of the Applicable Obligation, and the completion of the remedial action, is reported to the Board* / Compliance Committee of the Board of Directors*;
 - (f) the compliance system is reviewed every two years, and also where:

Schedule A – Relevant Obligations

Schedule B

NON-COMPLIANCES	BRIEF COMMENTS
Section/Clause of [Act/Code/Guideline] – brief description	Briefly address the impact of non-compliance on: <ul style="list-style-type: none"> ● Customers and other entities; and ● Implications for the effectiveness of the Access Provider's compliance system.
Section/Clause of [Act/Code/Guideline] – brief description	For example: <ul style="list-style-type: none"> ● Only one customer affected – no delay resulted, explanation given to customer. ● Operational procedures not followed by new employee – remedial action undertaken.