Information Kit

SOUTH AUSTRALIAN RAIL ACCESS REGIME

March 2010

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Public Information about the Commission's activities

Information about the role and activities of the Commission, including copies of latest reports and submissions, can be found on the Commission's website at www.escosa.sa.gov.au.

TABLE OF CONTENTS

Glossary of Terms ii

1. Introduction 1

2. The Access Regime 3

3. Pricing Principles 10

4. Information Brochure 15

4A Further Access Information 19

5. Reporting Requirements 23

6. Compliance Systems and Reporting 25

Appendix A: Railway Services A-1

Appendix B: Access Procedures B-1

GLOSSARY OF TERMS

COMPLIANCE REPORT	A report presented in the form described at Annexure B and Annexure C to Section 6 of this Information Kit
THE ACCESS REGIME	The South Australian Rail Access Regime, as established under the ROA Act
THE COMMISSION	The Essential Services Commission of South Australia, established under the ESC Act
ESC ACT	*Essential Services Commission Act 2002*
INFORMATION BROCHURE	A document containing information relevant to access that an Operator is obliged to prepare and provide in accordance with s. 28 of the ROA Act
INFORMATION KIT	The Commission's primary publication concerning the Access Regime
OPERATOR	Defined in s. 4 of the ROA Act to mean a person who provides, or is in a position to provide, railway services in relation to the railway network
RAILWAY NETWORK	Defined in s. 4 of the ROA Act to mean the railways to which the ROA Act applies
RAILWAY SERVICE	For the purposes of the Access Regime a railway service is a service brought into the ambit of the Access Regime by proclamation, pursuant to s. 7 of the ROA Act
ROA ACT	*Railways (Operations and Access) Act 1997*
SUBSTANTIAL SHAREHOLDING	A substantial holding as defined in the *Corporations Act 2001* (Cth)

1. INTRODUCTION

1.1 South Australia's Railways

South Australia's major railways comprise:

- the broad gauge rail lines within metropolitan Adelaide used mainly for urban public transport services, controlled by TransAdelaide;
- the standard gauge inter-state lines which form part of the national railway network, used for passenger and freight train services, controlled by the Australian Rail Track Corporation Ltd (ARTC), or, in the case of the Tarcoola to Darwin line, controlled by Asia Pacific Transport Pty Ltd (APT);
- the intra-state lines controlled by Genesee and Wyoming (GWA)[1] used primarily for freight services, including:
  - the narrow gauge lines on the Eyre Peninsula,
  - the broad gauge lines in the Mid North and;
  - the standard gauge lines in the Murray-Mallee region;
- the standard gauge line between Port Augusta and Leigh Creek used principally for coal freight trains, controlled by NRG Flinders; and
- the narrow gauge lines on the Eyre Peninsula used for ore haulage, controlled by OneSteel Ltd.

1.2 The South Australian Rail Access Regime

Railway ownership on South Australia's metropolitan (TransAdelaide) and intra-state (mainly GWA) lines is vertically integrated. This means the owner of the railway is also a provider of above-rail services on those lines.

As a result, the State introduced the *Railways (Operations and Access) Act 1997* (the ROA Act), to ensure other operators could offer rail services to customers and compete with the owner/operator by obtaining access to the rail network on commercial terms.

The ROA Act establishes the South Australian Rail Access Regime (the Access Regime), which was intended to be consistent with National Competition Principles and with Part IIIA of the *Trade Practices Act 1974*.

It aims to encourage negotiation for access on fair commercial terms. Specifically it provides for:

- a regulator to monitor and oversee access matters, establish pricing principles and information requirements, and refer access disputes to arbitration; and
- the use of arbitration to resolve access disputes, where required.

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[1] Australian Southern Railroad Pty Ltd (ASR) formerly operated some of the intra-state rail lines subject to the SA Rail Access Regime. GWA was formed on 1 June 2006, following the sale of Australian Railroad Group, of which Australian Southern Railroad was a part.

1.3 Information Kit

This Information Kit explains the principal features of the Access Regime and communicates the Pricing Principles, Information Brochure Requirements and Reporting Requirements established by the Essential Services Commission of South Australia (the Commission).

1.4 Contacts

Enquiries regarding the administration of the Access Regime should be directed to:

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1.5 Structure of this Information Kit

Chapter 2 provides detailed information on the Access Regime.

Chapter 3 sets out the pricing principles.

Chapter 4 sets out the information required in an Information Brochure.

Chapter 4A sets out the information required in response to an initial access application.

Chapter 5 sets out the reporting requirements on Operators.

Chapter 6 discusses compliance systems and reporting.

Operators must comply with the obligations set out in Chapters 4, 5 and 6.

Appendix A contains the proclamation of 7 May 1998 which describes what railway services are covered by the Access Regime.

Appendix B contains information relating to access procedures.

2. THE ACCESS REGIME

2.1 Railways in South Australia

Railway ownership in SA is often vertically integrated: that is, the track is owned and managed by the operator of the trains.

There are three different track gauges in SA. These are: broad gauge at 1600mm width, standard gauge at 1435mm width, and narrow gauge at 1067mm width.

The six main owners of railway track and related infrastructure in South Australia are:

- ARTC;
- APT;
- NRG Flinders;
- OneSteel;
- GWA; and
- TransAdelaide.

The ARTC owns and manages the three inter-state standard gauge lines linking South Australia to Victoria, New South Wales and Western Australia, and a spur line from Port Augusta to Whyalla. Within metropolitan Adelaide, the inter-state network includes a north-south standard gauge line adjacent to the urban lines as well as a dual gauge spur line from Dry Creek to Port Adelaide and Outer Harbour. It should be noted that ARTC does not own the Port Adelaide to Glanville section of this spur line, which is part of TransAdelaide's metropolitan network.

APT owns and manages the inter-state standard gauge line from Tarcoola to Darwin. This line connects to the ARTC network at Tarcoola.

NRG Flinders owns the standard gauge line connecting Leigh Creek with Port Augusta. The line is used mainly to haul coal between NRG Flinders' coalfields at Leigh Creek and its power stations at Port Augusta. Pacific National is the contracted service operator here.

OneSteel owns the rail lines around Whyalla. GWA is the contracted service operator here.

GWA owns and manages the principal intra-state lines in South Australia. These are:

- the standard gauge lines in the Riverland and Murray-Mallee region, which connect to the Adelaide to Melbourne inter-state mainline at Tailem Bend;
- the Mid-North broad gauge lines, which connect to TransAdelaide's metropolitan network; and
- the stand-alone narrow gauge network on the Eyre Peninsula.

TransAdelaide is a public corporation which owns and operates the broad gauge rail network within metropolitan Adelaide. This network is used mainly by TransAdelaide's urban passenger train services, but is also traversed by both interstate and intrastate services. TransAdelaide controls all rail traffic using the metropolitan broad gauge system, as well as rail traffic on the inter-state standard gauge lines where these interface with it.

In addition, Great Southern Railway Ltd (GSR) owns and operates the passenger terminal at Keswick.

The South Australian Government, through Transport SA, owns some currently disused lines in South Australia, such as the Wolseley to Mt. Gambier broad gauge line, which could be re-opened if there were sufficient demand.

A number of other businesses operate terminals, yards or sidings around the state, and there are some short historical rail lines in operation as tourist services.

2.2 *The Railways (Operations and Access) Act 1997*

The ROA Act was passed by the South Australian Parliament in July 1997 and proclaimed on 11 September 1997. The Act appoints the Commission to be the regulator.

The most relevant purpose of the ROA Act in respect of the Access Regime is to provide for access to railway services on fair commercial terms.

The Access Regime is set out in Parts 3 to 8 of the ROA Act.

The regime was designed to accord with the requirements of Part IIIA of the Commonwealth *Trade Practices Act 1974* for certification as an effective access regime. However, certification has not been sought and hence the regime has not been certified.

In December 2009, the Commission completed an Inquiry into the SA Rail Access Regime. The Final Inquiry Report identified several areas where the Access Regime's overall effectiveness could be improved.[2] The South Australian Government, if it agrees with the Commission's final findings, will need to make the necessary amendments to the ROA Act to give effect to the Commission's recommendations. The Commission therefore stresses that this Information Kit reflects the context of the existing Access Regime only. It does not anticipate the South Australian Government's response to the recommendations put forward by the Commission in the Final Inquiry Report.

Where access is negotiated commercially the ROA Act creates little imposition. If negotiation is unsuccessful, the ROA Act provides a process for access on fair commercial terms, with the

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[2] The Final Inquiry Report is available on the Commission's website at: http://www.escosa.sa.gov.au/projects/42/2009-south-australian-rail-access-regime-inquiry.aspx.

provisions of the legislation being triggered progressively. Ultimately this could result in enforcement of a binding access award following arbitration.

The extent of coverage of railway services by the Access Regime is determined by proclamation.

2.3 Coverage of the Access Regime

The scope of the Access Regime was determined by proclamations on 7 May 1998 (pages 2115 and 2116 of the South Australian Government Gazette). These proclamations define the railway services that are covered by Parts 3 – 8 of the ROA Act.

The proclamations specify that s. 21 of the ROA Act, which requires the separation of railway businesses from other businesses, does not have effect.

Subject to the specific exclusions in the proclamations, in general terms the railway services covered by the Access Regime are:

- rail track and yards, but excluding freight terminals and private sidings;
- passenger railway stations; and
- the services needed for the operation of these, such as train control.

General categories of railway services not covered are:

- passenger and freight rail services themselves;
- locomotives, wagons or other rolling-stock and;
- workshops, maintenance or construction services.

The Access Regime applies to all railways in South Australia, with the specific exception of the interstate mainlines, the Glenelg tramline, the lines owned by OneSteel, the Leigh Creek line and tourist or heritage railway lines.

Freight terminals and private sidings, as defined in the proclamations, have been specifically excluded from the Access Regime. The definitions are shown in Appendix A.

The definition of a private siding for this Access Regime focuses on whether the siding owner someone other than the owner of the mainline with which the siding connects – so some “private” sidings may be included. Note that some ARTC-owned sidings in South Australia are managed under licence by GWA. ARTC obliges GWA to provide third party access to its licensed sidings on fair and reasonable terms. Access seekers are advised to take those arrangements into account if seeking access to sidings licensed to GWA.

The South Australian Government can vary the coverage of the Access Regime by further proclamation. See Appendix A for more details of the services proclaimed.

2.4 Rights and Obligations of Operators

The ROA Act sets out the rights and obligations of regulated Operators.

An Operator is obliged to:

- keep separate accounts and records of its railway service business to give a true and fair view of that business (s. 22);
- not discriminate unfairly between access proponents (s. 23);
- not engage in conduct preventing or hindering access to railway services (s. 24);
- propose prices for access according to principles set by the regulator (s. 27);
- provide an Information Brochure to any rail industry participant requesting one (s. 28);
- provide other information reasonably required by an intending access seeker, and on a non-discriminatory basis (s. 29, s. 30);
- give notice of access proposals to the regulator and affected industry participants (s. 31);
- negotiate in good faith with a view to reaching agreement (s. 32);
- not enter into an access contract unless other affected industry participants (if any) have been notified and have agreed to the proposal (s. 33); and
- pay the share of costs of an arbitration decided by the arbitrator (s. 57).

The Operator also must provide reports, notices and information to the Minister, an arbitrator and the Commission, as required under various provisions of the ROA Act.

The Operator has the right to:

- enter into any access contract that is freely negotiated (s. 27);
- make reasonable charges to an access applicant for supplying certain information that has been requested (s. 29);
- have its costs, legitimate business interests and investments taken into account in the event of access arbitration (s. 38);
- request confidential information provided to the regulator or an arbitrator be kept confidential (s. 48, s. 63);
- not to have to bear any capital costs of addition or extension of railway infrastructure to meet an applicant's needs (s. 52); and
- appeal an arbitrator's decision (s. 56).

2.5 Rights and Obligations of Proponents

The ROA Act also sets out the rights and obligations of access proponents.

A proponent has the right to:

- not be unfairly discriminated against, or prevented or hindered in obtaining access (ss. 23-24);
- be provided with information about the terms and conditions on which railway services would be made available (s. 28);
- be provided with other reasonable and relevant information (s. 29);
- obtain information on a non-discriminatory basis (s. 30);
- put a written proposal to an operator setting out the requirements (s. 31);
- have an access dispute arbitrated (ss. 35-36);
- request confidential information provided to the arbitrator kept confidential (s. 48);
- elect not to be bound by an award made by the arbitrator (s. 54);
- obtain access under an award, unless the award is specifically suspended by the Court, until the determination of the appeal (s. 56); and
- appeal an arbitrator's decision (s. 56).

A proponent is obliged to:

- provide materials, information and reports to the arbitrator (s. 45, s. 47); and
- pay the share of costs of an arbitration decided by the arbitrator (s. 57).

Appendix B provides more details about access procedures.

2.6 Access pricing

Access pricing is a critical issue. The ROA Act favours commercial negotiation and access on mutually agreed terms. However, in the event of arbitration of an access dispute, it also provides for pricing principles within which access prices must be set.

Under s. 27 the regulator may determine pricing principles. These flow from the requirement that the price for providing railway services, or services of a particular class, is to be set between a floor and a ceiling price, where:

- the floor price is the lowest price at which the operator could provide the service without making a loss; and
- the ceiling price is the highest price that could be fairly asked.

Pricing Principles are in Section 3 of this Paper.

It should also be noted that s. 23 requires that the access price negotiated with a third party be no more advantageous to the Operator than that which it would charge to itself.

2.7 Information about access

The terms and conditions of access are detailed in an Information Brochure prepared and issued by the rail service provider. The rail service provider must provide the Information Brochure within 30 days of a written request from an industry participant.

Only an industry participant, as defined in the ROA Act, is entitled to an Information Brochure. In general terms an industry participant is a person who provides railway services or proposes to operate rolling-stock on the rail network.

Under s. 28 of the ROA Act, the Information Brochure must refer to the pricing principles, show how the terms and conditions of access relate to these, and contain any other information required by the regulator. The information brochure may also contain other information.

Under s. 29, a person seeking access can request reasonable additional information. For example, a prospective proponent may ask for the available capacity on a given route and whether it would be technically feasible to run its proposed services.

The operator must respond by advising on the extent of existing use of the infrastructure, the extent to which it would be necessary and feasible to extend the infrastructure to meet the applicant's requirements, and the terms and conditions for providing access or the reasons why it cannot be provided.

2.8 Commercial negotiation of access

A person considering seeking access must contact the relevant operator directly. If it is not possible to reach agreement on the terms and conditions of access then the process set out in the ROA Act needs to be followed. Throughout the process commercial negotiation is encouraged.

If an agreement cannot be reached the next steps are to:

- write to the operator seeking the Information Brochure and any other reasonable information required; and then, if desired
- put a written access proposal to the operator.

An operator who receives an access proposal is required to advise any other industry participant who may be affected by the proposal, as well as the Commission.

2.9 Resolving access disputes

A dispute exists if there is no response to a written access proposal within thirty days, there is no negotiation in good faith, or there is a failure to achieve agreement with either the operator or another industry participant, after reasonable attempts to do so.

A dispute also exists if another industry participant makes a formal objection to a proposed access contract.

The applicant then may request the regulator to refer the dispute to arbitration. The regulator may attempt to conciliate the dispute and, if unsuccessful, must appoint an arbitrator.

The ROA Act sets out the powers and functions of the arbitrator and the factors the arbitrator must take into account. The arbitrator makes an access award after considering the interests of all affected parties.

3. PRICING PRINCIPLES

Section 27 of the ROA Act provides that the Commission may establish pricing principles for fixing a floor and ceiling price for railway services.

The pricing principles so established by the Commission in relation to third-party access to the services of railway track and related infrastructure ("below-rail services") are as set out below.

3.1 Floor price

The floor price should reflect the lowest price at which the Operator could provide the relevant services without incurring a loss.[3]

3.1.1 For the purposes of determining a floor price, the incremental cost of providing the relevant service prudently must be determined.

3.1.2 Cost calculations for floor price purposes must include any additional:

(a) labour and material costs, and other directly incurred operating costs associated with the operation and maintenance of the railway infrastructure (including major periodic maintenance) arising, if and only if the additional labour and material costs, and other directly incurred operating costs are a direct result of providing the relevant service prudently; and

(b) administrative costs arising, if and only if the additional administrative costs are a direct result of providing the relevant service prudently; and

(c) capital costs arising, if and only if the additional capital costs are a direct result of providing the relevant service prudently, and where included capital costs are limited to costs:

(i) arising because the prudent replacement of the required railway infrastructure is brought forward by the operation of the relevant service (such as wear and tear of the track); and/or

(ii) incurred by providing specific infrastructure enhancements for the traffic in question.

3.1.3 "Incremental cost" means the costs that vary directly with the usage of the railway infrastructure by the third-party user and are directly attributable to (though not necessarily incurred in) the period for which access is sought.

3.1.4 A "relevant service" is a below-rail service.

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3 These are the words from s. 27(2) of the ROA Act.

3.1.5 "Prudent" costs are forward-looking costs incurred by an efficient operator acting efficiently in accordance with good industry practice to achieve the lowest sustainable cost of delivering the service in question, taking into account the circumstances and obligations of the operator.

3.1.6 Any asset values required for the purposes of determining a floor price must be based upon the prudent cost of the purchase, acquisition or construction of the new or replacement assets.

3.1.7 Any return on assets required for the purposes of determining a floor price must be calculated in a manner consistent with calculation of the return on assets required for the purposes of determining the ceiling price in section 3.2.

3.1.8 Floor prices must be expressed in terms ordinarily and reasonably used in the rail industry for the railway service in question.

3.2 Ceiling price

The ceiling price should reflect the highest price that could fairly be asked by an Operator for provision of the relevant services.[4]

3.2.1 For the purposes of determining a ceiling price, the full economic cost of providing the relevant service prudently must be determined.

3.2.1A "Full economic cost" means the costs associated with the operation of the required railway infrastructure needed by a third-party user for the provision of the relevant service involving the transportation of passengers or freight on relevant segments of the railway, less the aggregate of:

(a) the incremental costs attributable to the usage of that required railway infrastructure by all other access holders (including the Operator's own use); and

(b) a reasonable contribution to the fixed costs of that required railway infrastructure ("R") from all other access holders using that required railway infrastructure (including the Operator's own use),

where—

(c) R is to be an amount which is not greater than the amount, if any, by which revenues of the Operator attributable to access holders' (other than the access seeker's) usage of the required railway infrastructure required by those access holders exceeds the incremental costs attributable to those access holders' usage of that required railway infrastructure; and

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4 These are the words from s. 27(2) of the ROA Act.

(d) the costs are to be on-going costs that are causally related to the relevant required railway infrastructure, including:

(i) labour and material costs, and other directly incurred operating costs associated with the operation and maintenance of the required railway infrastructure (including major periodic maintenance); and

(ii) an appropriate allocation of administrative costs; and

(iii) an appropriate allocation of capital costs, including both depreciation and a return on assets.

3.2.1B For the purposes of clause 3.2.1A, economic cost of a segment means:

(a) segment specific labour and material and administrative costs; and

(b) depreciation of segment specific assets; and

(c) a return on segment specific assets, being determined by applying a real rate of return to the regulatory asset value of segment specific assets; and

(d) an allocation of non-segment specific costs; and

(e) an allocation of depreciation of non-segment specific assets; and

(f) an allocation of return of non-segment specific assets, being determined by applying a real rate of return to the value of non-segment specific assets.

3.2.1C For the purposes of clause 3.2.1B, non-segment specific costs and depreciation of, and return on, non-segment specific assets must be allocated to segments in accordance with the following principles:

(a) where possible, costs are to be directly attributed to a segment;

(b) where possible, non-segment specific costs and non-segment specific assets are to be identified with a corridor, corridors or identified as system-wide; and

(c) non-segment specific costs and depreciation of, and return on, non-segment specific assets identified with a corridor or corridors, or identified as system-wide, are to be allocated to those parts of segments in that corridor or corridors, or, where identified as system wide, to segments owned, leased or licensed by the Operator, in proportion to:

(i) gross tonne kilometres (gtkm) with respect to non-segment specific costs and depreciation of, and return on, non-segment specific assets associated with track maintenance; and

(ii) train kilometres with respect to non-segment specific costs and depreciation of, and return on, non-segment specific assets not associated with track maintenance.

(d) For the purposes of clause 3.2.1C(c), where the gtkm allocation system can be shown to be inappropriate, the Operator may use alternative allocation systems where they can be justified.

3.2.2 A “relevant service” is a below-rail service.

3.2.3 “Prudent” costs are forward-looking costs incurred by an efficient operator acting efficiently in accordance with good industry practice to achieve the lowest sustainable cost of delivering the service in question, taking into account the circumstances and obligations of the operator.

3.2.3A For the purpose of these ceiling price principles, all costs must comprise reasonably anticipated costs over a reasonable future timeframe.

3.2.4 Regulatory asset values required for the purposes of determining a ceiling price must be;

(a) valued initially using the depreciated optimised replacement cost method of valuing assets ("Initial Regulatory Asset Base (Initial RAB)") in a manner consistent with the principles and methodologies applied in the independent valuation of ARTC’s Interstate Network assets approved by the ACCC, though notwithstanding that land and formation works shall be valued at no more than historical cost; and

(b) adjusted annually by roll forward according to the following methodology:

$RAB_{t\ start} = RAB_{t-1\ end} =$

$(I + CPI_{t-I}) * RAB_{t-1\ start} + Net\ Capex_{t-1} – Depreciation_{t-1}$

where

$RAB_{t-1\ start}$ is the RAB at the start of the relevant year (t) (which for the initial year would be the Initial RAB);

$RAB_{t-1\ end}$ is the RAB at the end of the preceding year (t-1) as applicable;

$RAB_{t-1\ start}$ is the RAB at the start of the preceding year (t-1) as applicable;

CPI_{t-1} is the inflation rate for the preceding year (t-1), determined by reference to the All Groups Consumer Price Index Statistics published for the March quarter of that year;

Net $Capex_{t-1}$ is the net additions to the RAB in year t-1 (that is out-turn capital expenditure less any disposals during period t-1) on a prudent basis; and

$Depreciation_{t-1}$ is the Depreciation applicable to the RAB in year t-I.

3.2.4A For the purposes of clause 3.2.4, the optimised replacement cost means the cost of replacement by commercially efficient application of best known currently available technology based on existing capacity and performance characteristics of the asset.

3.2.5 The “Rate of Return” is the (post-tax) real weighted average cost of capital (“WACC") after consideration of all regulatory and commercial risks involved, the elements of which must comprise:

(a) a capital asset pricing model ("CAPM") method of determining the cost of equity; and

(b) a debt to equity ratio which would be considered prudent for the Operator’s business in relation to the railway by reputable lenders; and

(c) an appropriate adjustment (beta) factor to the equity risk margin appropriate for investment in railway infrastructure.

3.2.6 Ceiling prices must be expressed in terms ordinarily and reasonably used in the rail industry for the railway service in question.

4. INFORMATION BROCHURE

In accordance with s. 28(1)(c) of the ROA Act, an Operator must include in its Information Brochure the information identified in this Chapter.

4.1 Description of railway services

4.1.1 The Information Brochure must include a full current description of the railway services that the Operator provides, or can reasonably provide, and which are covered by the Access Regime. These services must include below-rail services separate from other railway services. The Information Brochure must clarify the availability and capacity of the services where appropriate and be time and location specific.

Railway track

4.1.2 This includes all rail lines, yards, sidings, crossing loops, passing loops and associated infrastructure such as bridges, tunnels, formations, supporting services permitting use of the track.

4.1.3 The description must include, but need not be limited to:

(a) the lengths and locations of track, which should be provided in plans and maps, together with any height, width, or axle load restrictions;

(b) the maximum speeds which apply on each section for typical trains;

(c) major track and other relevant infrastructure improvement or upgrade plans, together with any track closures or limitations to availability expected;

(d) the train scheduling, signalling and communication systems used for train control, safe working and emergencies, including hours of operation and availability;

(e) the safety record on the line, including number of derailments and collisions over the last two years;

(f) average transit times;

(g) minimum radius curves and ruling grades;

(h) estimated available capacity; and

(i) available train paths.

4.1.4 All such information must be reported by track section or other division as reasonable and appropriate.

Terminals and Stations

4.1.5 Terminals and stations include all facilities and associated services for embarking or disembarking passengers, and the incidental loading and unloading of freight.

4.1.6 The description must include, but need not be limited to:

(a) a functional description of each facility, as it exists and with anticipated changes in the next twelve months, plus a plan or diagram showing its physical configuration and layout;

(b) any other relevant track information as set out in the section on Railway track above;

(c) hard standing areas and available storage space;

(d) an operational description of the facility, including fixed equipment, communications and train control systems, the hours of operation and any physical limitations to access; and

(e) the existing use of the facility describing who uses it, at what frequency, based on the last year of operation, and any expected changes to this use in the next twelve months.

4.2 Proposed terms and conditions of access

4.2.1 Section 28(1)(b) requires that the Information Brochure must include the terms and conditions on which the Operator is prepared to make its railway infrastructure available to others. For the avoidance of doubt, this includes, but is not limited to:

(a) general rights of access, including:

(i) path length availability;

(ii) available capacity;

(iii) axle load limitations;

(iv) maximum allowable speeds;

(v) infrastructure characteristics;

(vi) applicable safeworking requirements; and

(vii) segment run times;

(b) network control;

(c) track occupations;

(d) rolling-stock standards;

(e) incident management;

(f) environmental constraints (for example, noise);

(g) accreditation requirements;

(h) inspection requirements;

(i) indemnity and insurance;

(j) performance undertakings to be made by both parties;

(k) breaches and termination; and

(l) dispute resolution.

4.3 Access prices and their relationship to the pricing principles

4.3.1 An Operator must provide indicative floor and ceiling prices for all significant railway services – being services it provides that are, or are highly likely to be, subject to access interest (e.g. major network tasks) – that it offers and which are subject to the Access Regime.

4.3.2 The Commission may identify railway services to be significant railway services.

4.3.3 The indicative floor and ceiling prices provided must be accompanied by statements explaining how the floor and ceiling prices relate to each aspect of the pricing principles in Chapter 3, including by disclosing:

(a) the value of the real rate of return used; and

(b) the latest regulatory asset values used, by railway segment.

4.3.4 Any prices or price information provided by the Operator are to be expressed in terms ordinarily and reasonably used in the rail industry for the railway service in question.

4.3.4A Any indicative floor and ceiling prices or price information provided by the Operator must clearly and separately state the prices applying to third-party use of the railway track and related infrastructure.

4.3.5 The Information Brochure also must detail, as appropriate:

(a) the prices for any other items for which a charge would be made, for example, for particular services or items of plant;

(b) any price penalties that may apply, for example delays or disruption caused to other services;

(c) the basis for charging any direct costs arising from the access applicant's operations, for example, due to damage caused; and

(d) any other prices that would be charged, if not covered by the above.

4.4 Corporate information requirements

4.4.1 The Information Brochure must provide a description of the organisation in sufficient detail to inform an access applicant of all the relevant aspects of the organisation it is dealing with and its capabilities.

4.4.2 The description must include, but need not be limited to:

(a) the corporate and legal nature of the organisation, its registered and head office addresses, and the names of major office bearers, its ABN and its major shareholders or equivalent;

(b) details of insurance policies held;

(c) details of rail safety and quality accreditation held; and

(d) the name(s), titles, contact addresses, phone and fax numbers of persons:

(i) to whom access enquiries and applications should be addressed; and

(ii) who would be responsible for ongoing management of an access contract.

4.5 The form of the Information Brochure

4.5.1 An Operator may elect to meet some of the content requirements by cross-referencing in its Information Brochure to suitably accessible, and maintained, ancillary information on its website.

4A FURTHER ACCESS INFORMATION

In accordance with s.29 of the ROA Act, an Operator must, on the application of a person with a proper interest in making an access application to the Operator, provide the applicant with certain types of information. This information goes beyond the information required in the Operator's Information Brochure.

This Chapter sets out the Commission's views as to nature and detail of information which an Operator ought to provide under s. 29 in order to meet the intention of that section. While the Commission's views on this issue are not binding per se on an Operator, they represent a best practice approach in access regulation by promoting an exchange of information between an Operator and a person applying for access that is intended to facilitate successful negotiation of access.

This Chapter also sets out the Commission's s. 29(2) statement on the basis for determining a reasonable charge for information provided under s. 29.

4A.1 "Likely price" compliance guidelines

An operator must, on the application of a person with a proper interest in making an access proposal to the operator, provide the applicant with … an indication of the likely price on which the operator would be prepared to provide the service.[5]

4A.1.1 The Operator must, on application of a person with a proper interest in making an access proposal to the Operator, provide that person with information reasonably requested by the person about, in relation to the railway infrastructure that is subject to the application, relevant prices and costs associated with railway services provided by the Operator. These prices and costs should relate to below-rail services separately from any other railway services.

4A.1.2 The likely price should provide meaningful pricing information to the applicant, and so should go beyond the indicative floor and ceiling prices (and the accompanying statement listing the main factors to be used by the Operator to determine where the access price might most appropriately fall between the floor and ceiling price) provided as part of the Information Brochure.

4A.1.3 The likely price should be based on indicative information provided by the applicant to the Operator about its possible usage of the railway infrastructure. In the absence of such information, the likely price provided by the Operator should be accompanied by the set of assumptions on which the likely price is based.

[5] These are the words from s. 29(1)(c)(i) of the ROA Act.

4A.1.4 The assumptions underlying the Operator's indication of the likely price should include:

(e) the level of service quality that is to be provided at the likely price;

(f) in the event the proposed access to the railway infrastructure requires the applicant to have recourse to additional capacity, an outline of the works and an indicative estimate of the cost of such works required to provide the additional capacity or an outline of the requirements for an investigation into the provision of additional capacity for the proposed access; and

(g) a demonstration of how any proposed capital expenditure during the access period is linked to service requirements and how it is to be incorporated into the access charges (either through capital contributions or tariffs).

4A.1.5 Where the likely price is to be based on prices already charged for the same or similar services, the Operator may differentiate price on the basis of:

(a) the particular characteristics of the relevant service, including: axle load, speed, wheel diameter, train length, origin and destination (including number and length of intermediate stops), departure and arrival times and days of the week;

(b) the commercial impact on the Operator's business, including the term of the access period, the consumption of the Operator's resources and the credit risk associated with the business;

(c) logistical impacts on the Operator's below-rail business, including the impact on other services and risk of failure of the third-party user to perform and reduced capacity and system flexibility;

(d) capital or other contributions by the third-party user to the Operator's costs; and

(e) the cost of any additional capacity.

4A.1.6 Where the likely price is to be based on prices already charged for the same or similar services, the Operator should not differentiate price between circumstances where:

(a) the characteristics of the railway services are alike, in terms of location, duration and quality of the train path, train configuration, characteristics of the service, longevity of access, arrival and departure times of the day and week; and

(b) the third-party user is operating within the above-rail market.

4A.1.7 Any indication of likely prices or price information provided by the Operator must clearly and separately state the prices applying to third-party use of the railway track and related infrastructure.

4A.2 Scope of (non-price) terms and conditions

An operator must, on the application of a person with a proper interest in making an access proposal to the operator, provide the applicant with information …about …the general terms and conditions … on which the operator would be prepared to provide the service. [6]

4A.2.1 In addition to an indication of the likely price, the Operator should, on application of a person with a proper interest in making an access proposal, provide that person with information about, in relation to the railway infrastructure that is subject to the application:

(a) the extent to which that particular railway infrastructure is currently being used;

(b) technical details and requirements of the Operator with regards to use of that railway infrastructure, such as axle load data, clearance and running speeds;

(c) the Operator's time-path allocation and reallocation policies for the railway; and

(d) the Operator's service quality and train management standards.

4A.2.2 More generally, the general terms and conditions could include (but not limited to):

(e) the minimum performance standards to be met by the Operator;

(f) any minimum or indicative annual purchase quantity obligations;

(g) the length/term of the proposed period of access, and the terms laid down for renegotiation of terms and conditions at the end of the access contract;

(h) details of any actions or activities by one or other party that would be prohibited under the terms of the proposed access contract;

(i) details of any actions or activities that would be required to be undertaken by one or other party under the proposed access contract;

(j) the risks to be assigned to each party under the proposed access contract;

(k) advice in respect of the existence of other applicants who have submitted an access proposal (where negotiations are continuing) in respect of access which, if it were to be provided, may limit the ability of the Operator to provide access in accordance with the general terms and conditions provided;

(l) details of the additional information required from the applicant for the Operator to progress the proposal and further develop the access pricing charges and terms and conditions for acceptance;

(m) the indicative train path availability;

(n) all other material non-price terms and conditions; and

(o) any other information relating to capacity or train operations reasonably required by the applicant, provided the Operator is given an opportunity to

[6] These are the words from s. 29(1)(c)(i) of the ROA Act.

provide to the applicant an estimate of the reasonable cost of preparing the aspects of such other information which are not ordinarily and freely available to the Operator, and the applicant agrees to pay such costs.

4A.2.3 The Operator's obligation under clause 4A.2.2 is subject to:

(a) the Operator not disclosing any information which would breach a confidentiality obligation binding on it; and

(b) the applicant agreeing to pay the reasonable costs incurred by the Operator in obtaining information that is not ordinarily and freely available to the Operator.

4A.3 Section 29 charges

The operator may make a reasonable charge (to be determined on a basis decided or approved by the regulator) for providing information under this section [s.29]. [7]

4A.3.1 The reasonableness of a charge for information provided under s. 29 is to be assessed against the following principles:

(a) The charge should not exceed the efficient cost of gathering and providing the necessary information.

(b) The charge should be consistent with a competitive market for the provision of railway services.

(c) The charge should not serve as a hindrance to access.

(d) The charge should reflect the s. 30 non-discriminatory provision of information.

[7] These are the words from s. 29(2) of the ROA Act.

5. REPORTING REQUIREMENTS

The following reporting obligations arise pursuant to the Commission's monitoring powers (contained in Part 7 of the ROA Act) – and its s. 9 compliance function.

5.1 Organisational information

5.1.1 In accordance with s. 62 of the ROA Act, an Operator must provide the Commission with an Annual Statement containing the following information:

(a) the names and positions of senior office holders;

(b) the locations and addresses of major sites of business;

(c) the organisation's legal name, ABN if such exists, and registered office address;

(d) the names, addresses and ABNs of any subsidiaries;

(e) details of quality / safety accreditation and any changes since the last report;

(f) a description of its business of providing railway services (to which the Access Regime applies);

(g) a summary of each provision of railway services (to which the Access Regime applies) to third party users; and

(h) name, title, address, email, phone and fax numbers for the contact person in respect to the matters covered in the report.

5.1.2 An Operator must advise the Commission in writing of any significant change to the information provided in its previous Annual Statement as soon as practicable after the change has occurred.

5.2 Accounts and Records

5.2.1 An Operator must provide the Commission with Accounting Statements and Associated Reports that:

(a) give a true and fair view of its business of providing railway services to which the Access Regime applies; and

(b) demonstrate that it has kept accounts and records in relation to its business of providing railway services to which the Access Regime applies, in accordance with s. 22 of the ROA Act.

5.3 Reporting Periods

5.3.1 An Operator must provide the Commission with its Annual Statement, Accounting Statements and Associated Reports as soon as possible after production and no later than four months after the end of the financial year to which they relate.

5.4 Assurance

5.4.1 An Operator must provide an accompanying Statement of Compliance, containing assurance that its Accounting Statements and Associated Reports have been prepared in accordance with the requirements herein. The statement must be signed by at least two Directors of the Operator, one of whom must be a Non-Executive Director.

5.5 Exemption

5.5.1 The Commission may exempt an Operator from all or part of these Chapter 5 requirements should circumstances so require. An Operator will be informed of its exemption, and the duration of that exemption, by the Commission, in writing.

6. COMPLIANCE SYSTEMS AND REPORTING

In accordance with s. 9(2) and s. 62 of the ROA Act, this Chapter sets out the compliance systems and reporting obligations which must be met by an Operator.

6.1 Introduction

6.1.1 This Chapter outlines the Commission's approach to compliance systems and reporting in a Railway Service Business in South Australia.

6.1.2 The Chapter applies to an Operator subject to the Access Regime under the ROA Act.

6.1.3 This Chapter sets out a process for the reporting of compliance by an Operator in a way that meets the Commission's requirements and demonstrates that appropriate compliance systems are in place.

6.1.4 This Chapter does not diminish an Operator's obligation to report, or otherwise respond to, any breach of an obligation under the ROA Act within the stipulated time and in the manner required where the ROA Act so requires.

6.2 The Purpose of this Chapter

6.2.1 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.

6.2.2 Many of the functions of the Commission in relation to a Railway Service Business arise through Section 5(1)(h) of the ESC Act – that is, they are functions assigned to the Commission by the ROA Act.

6.2.3 Section 9(2) of the ROA Act assigns to the Commission the function of monitoring and enforcing compliance with the ROA Act (other than Part 2).

6.2.4 Section 62 of the ROA Act provides the Commission with the power to require an Operator to give it information or copies of specified documents related to the provision of railway services by the Operator.

6.2.5 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.

6.2.6 The Commission will necessarily require information and reports from Operators to fulfil these objectives and functions.

6.3 Definitions and Interpretation

6.3.1 In this Chapter, the words "*shall*" and "*must*" indicate mandatory requirements, unless the overall meaning of the phrase in which one of these words appears is otherwise.

6.3.2 This Chapter seeks to provide definitions consistent with those given in the ROA Act 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.

6.3.3 Explanations in this Chapter 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.

6.4 Confidentiality

6.4.1 Compliance Reports, and the information therein, will be collected by the Commission pursuant to s. 62 of the ROA Act.

6.4.2 Therefore, the confidentiality requirements that apply are those arising in s. 63 of the ROA Act.

6.5 Exemption

6.5.1 Should circumstances so require, the Commission may exempt an Operator from all or part of this Chapter on terms and conditions determined by the Commission. An Operator shall be informed of the terms, conditions and duration of that exemption, by the Commission, in writing.

6.5.2 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 Chapter would be of no net benefit.

6.6 Processes for Revision

6.6.1 The Commission may amend and expand this Chapter from time to time where this is necessary to meet the needs of an Operator, stakeholders or the Commission.

6.6.2 The Commission will undertake consultation with relevant Operators and other stakeholders as appropriate before making any significant amendment to this Chapter.

6.7 Regulatory Objective

6.7.1 Each Operator is required to comply with various obligations imposed by the Access Regime.

6.7.2 The Commission is required to ensure compliance with various of these obligations, either as specified throughout the Access Regime or more generally as set out in s. 9(2) of the ROA Act.

6.7.3 The Commission has sought to implement a compliance monitoring and reporting system which minimises costs and disruption to Operators, but ensures compliance systems exist and operate efficiently and effectively.

6.7.4 The Compliance Report requires that an Operator:

(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 Operator's compliance system (see Schedule B of Annexure C).

6.7.5 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 Operator where that Operator has actively co-operated in relation to a regulatory non-compliance.

6.7.6 Prompt disclosure of all non-compliances will be viewed favourably by the Commission.

6.8 Reporting Approach

6.8.1 The Commission has decided to adopt a simple reporting approach to compliance auditing and reporting. This requires Operators to report on their compliance with the obligations which are applicable to them under the Access Regime or related or subordinate instruments.

6.8.2 If new or varied obligations are imposed on an Operator under the applicable legislation or related regulatory instruments, then the Operator should report compliance against those new or varied obligations, even if the Commission has not amended this Chapter to reflect the new conditions.

6.8.3 The Commission requires:

(d) immediate reporting of "material" breaches of obligations; and

(e) annual reporting of compliance in relation to all obligations.

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

6.9 Reporting Obligations

6.9.1 Annexure A shows the key obligations under the ROA Act.

6.9.2 The Commission may categorise obligations for which breaches are to be considered material under clause 6.10 differently as between Operators if the circumstances so require.

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

6.10 "Material" Breaches

6.10.1 An Operator should apply the following separate tests to determine whether a breach is "material" or not.

6.10.2 The Operator 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 Operator and informed it of an obligation that the Commission considers to be "material"; or

(c) where the Operator 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.

6.11 Compliance Reporting

<u>The Compliance Report scheme:</u>

6.11.1 The Commission considers it appropriate to require Operators to adopt the Compliance Report scheme, as described below.

6.11.2 For any Operator, the Commission reserves the right to require, at any time, an external, independent audit of some or all of an Operator'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 Operator's compliance system;

(b) the level and nature of non-compliances by the Operator; or

(c) any relevant matter disclosed in the Compliance Reports provided by the Operator.

6.11.3 The Compliance Report scheme requires that Operators 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.

6.11.4 Such a scheme should reduce the need for costly and resource intensive external audits and reviews of Operator compliance.

6.11.5 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.

6.11.6 The Compliance Report provides assurance to the Commission that the Operator 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.

6.11.7 Operators 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.

6.11.8 Annual Compliance Reports should contain a summary of all non-compliances reported to the Commission during the relevant reporting year.

6.11.9 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 Operator's compliance system, or to review a reporting-based approach to compliance with respect to that obligation or generally.

<u>Reporting Periods:</u>

6.11.10 The compliance reporting procedure is based on a requirement to provide immediate and annual Compliance Reports to the Commission.

6.11.11 The form of the reports is set out in Annexures B and C to this Chapter. The Commission may accept variations to the form of each report, subject to Commission approval of any variations.

6.11.12 Immediate Reports are to be made as soon as the Operator becomes aware of the event.

6.11.13 Annual Reports are in respect of the twelve month period ending on 30 June each year.

6.11.14 All Annual Compliance Reports are to be provided to the Commission within two calendar months of the last day of the relevant reporting period.

<u>Immediate Reports:</u>

6.11.15 Each immediate Compliance Report must be approved and signed by:

(a) the Chief Executive Officer of the Operator; or

(b) a person holding an equivalent position to the Chief Executive Officer of the Operator; or

(c) a person delegated to exercise the powers and functions of the Operator 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.

Annual Reports:

6.11.16 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.

6.11.17 Annual Compliance Reports must be signed by:

(a) the Chief Executive Officer and one other Director of the Operator, who must be an "External Director" (see 6.11.22 to 6.11.24, and 6.11.27 and 6.11.28 below); or

(b) an external and independent auditor approved by the Commission; or

(c) an internal auditor, subject to 6.11.18 to 6.11.21 below.

Use of Internal Auditor to sign Compliance Reports:

6.11.18 If the Operator's internal audit function is undertaken by an independent and expert auditor, the Operator may request the Commission to accept such an auditor for the purposes of signing annual Compliance Reports.

6.11.19 If the Commission accepts the Operator'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 Operator.

6.11.20 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 Operator has an active and effective compliance scheme in operation;

(b) lists all applicable obligations with which the Operator 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.

6.11.21 Operators 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.

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

6.11.22 Where the Operator does not have any "External Directors" on its Board, the Operator may request of the Commission that it use "External Director(s)" of an Australian

incorporated company that has a Substantial Shareholding in the Operator as a surrogate for the "External Director" of the Operator.

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

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

Other Options for Compliance Reporting:

6.11.25 The Commission will consider other reasonable options for compliance reporting submitted by an Operator.

6.11.26 However, any such option should be based on the Operator 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.

External Director:

6.11.27 A Director is an "External Director" if the Director:

is not, and has not been in the previous 2 years, an employee of the Operator or a related body corporate; and

(a) is not, and has not been in the previous 2 years, an executive officer of a related body corporate; and

(b) is not, and has not been in the previous 2 years, substantially involved in business dealings, or in a professional capacity, with the Operator or a related body corporate; and

(c) 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 Operator or a related body corporate; and

(d) does not have a material interest in the Operator or a related body corporate; and

(e) is not a relative or de facto spouse of a person who has a material interest in the Operator or a related body corporate.

6.11.28 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.

ANNEXURE A – Indicative Obligations

Relevant Obligations: Railways (Operations and Access) Act 1997

Note: The list of obligations below refers to the ROA Act and related or subordinate instruments. It is a non-exhaustive list of general obligations under that Act. Operators are encouraged to examine the ROA Act 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 6.10.2(a) of this Chapter. Other provisions may also be material, pursuant to subclauses 6.10.2(b) or (c).

OBLIGATIONS

ROA Act	Summary Description	Material
22	Segregation of accounts and records	X
23	Unfair discrimination	X
24	Preventing or hindering access to railway services	X
28	Information brochure	X
29	Operator's obligation to provide information about access	X
30	Information to be provided on non-discriminatory basis	X
31	Access proposal	
32	Duty to negotiate in good faith	X
33	Limitation on operator's right to contract to provide access	
60	Regulator's power to monitor costs	X
61	Copies of access contracts to be supplied to regulator	X
62	Operator's duty to supply information and documents	X

ANNEXURE B – Immediate Report

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

[Name of ***Operator***] reports as follows:

1. This Report is an Immediate Report and has been prepared in a manner that meets the requirements of the Compliance Systems and Reporting Chapter ("the Chapter") of the *Information Kit*.
2. This Report has been approved by the Chief Executive Officer (or equivalent in accordance with clause 6.11.15 of the Chapter).
3. [Name of Operator] reports a breach of the obligations listed in Schedule A of this report.

Dated the day of 201

SIGNED in accordance with clause 6.11 of the Chapter, by:

Print Name: ....

Designation: ....
(Sign-off must be pursuant to clause 6.11.15 of the Chapter. Please indicate: Chief Executive Officer (CEO), person holding position equivalent to CEO, delegate exercising powers and functions of CEO, person acting as CEO).

Signed: ....

Schedule A – Relevant Obligations

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 Operator] 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 Chapter ("*the* Chapter") of the *Information Kit*.

2. [Name of Operator], 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 Operator] 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 6.11.15 of the Chapter) of [name of Operator] 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:

   - continued breaches indicate systemic failure, to ensure that the compliance system is effective and relevant;

- and there is a significant change to the regulatory regime, in order to update the system to accommodate the change.

4. [Name of Operator] has established a process for signing this Compliance Report that is in accordance with clause 6.11 of the Chapter.

5. Both the Chief Executive Officer/ External Director/ parent company External Director who have signed the Report below state that:

   "We certify that we have made all necessary inquiries of appropriate officers in this organisation to confirm that management has developed a compliance system that meets the regulatory arrangements relating to the economic regulation of the rail industry in South Australia under the Railways (Operations and Access) Act 1997, and that the system has been implemented and is being appropriately used by the organisation."

Dated the day of 201

PREPARED AND SIGNED in accordance with clause 6.11 of the Chapter, by:

....	....
Signature	**Signature**
....	....
Name (Please Print)	**Name (Please Print)**
....	....
Designation (Please Print)	**Designation (Please Print)**

(Sign-off must be pursuant to clauses 6.11.16 and 6.11.17 of the Chapter. Please indicate: Chief Executive Officer, External Director, parent company External Director etc*).

Schedule A – Relevant Obligations

Schedule B

NON-COMPLIANCES	BRIEF COMMENTS
Section/Clause of [Act//Chapter] – brief description	Briefly address the impact of non-compliance on: ● Customers and other entities; and ● Implications for the effectiveness of the Operator's compliance system.
Section/Clause of [Act//Chapter] – brief description	For example: ● Only one customer affected – no delay resulted, explanation given to customer. ● Operational procedures not followed by new employee – remedial action undertaken.

APPENDIX A: RAILWAY SERVICES

The Access Regime applies to Operators and railway services to the extent that it is declared by proclamation to apply.[8]

In a proclamation gazetted on 7 May 1998,[9] it was declared that:

1. All of the provisions of the access regime, other than section 21[10], apply to any railway services associated with the provision (or the provision and operation) of any railway infrastructure by any operator.
2. The above clause 1 does not apply to or in relation to:
   a. services associated with the Interstate Mainline Track as defined by the Railways Agreement set out in the schedule to the *Non-Metropolitan Railways (Transfer) Act 1997* (as that agreement is amended from time to time) including associated crossing and passing loops, but not including infrastructure that is declared to be accessible under clause 3); or
   b. services associated with the tram track from Victoria Square (Adelaide) to Glenelg; or
   c. services associated with any track on Eyre Peninsula owned by BHP (or a subsidiary of Broken Hill Proprietary Company Ltd; or
   d. services associated with the Leigh Creek Line; or
   e. freight terminals; or
   f. private sidings; or
   g. services established on a non-profit basis -
      i. for heritage value or amusement; or
      ii. to provide services for tourists.
3. The following infrastructure is accessible (despite clause 2(a)):
   a. buildings, installations and equipment for –
      i. the embarkation and disembarkation of passengers; or

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8 Section 7 of the ROA Act.

9 p. 2115.

10 which relates to the segregation of businesses.

ii. the loading and unloading of goods, other than buildings, installations and equipment situated at a freight terminal; and

b. railway yards and sidings (including associated track structures, supports, lines, posts and signs); and

c. railway infrastructure owned and maintained by TransAdelaide (or a subsidiary of TransAdelaide) for the purposes of providing services associated with the Interstate Mainline Track.

In the proclamation –

"BHP" means Broken Hill Proprietary Company Limited;

"freight terminal" means an area set aside for transferring goods to a train from another transport service (including another service provided by train), or from a train to another transport service (including another service provided by train), whether or not the goods are held, kept or stored at the terminal for a period of time pending transfer to the train or to the other transport service;

"Leigh Creek Line" means the rail corridors specified in schedule 5 of the Railways Agreement set out in the schedule to the *Non-Metropolitan Railways (Transfer) Act 1997* (or in any other relevant instrument modifying or varying any such corridor);

"private siding" means a private siding within the meaning of the *Rail Safety Act 1996* that is used or maintained to provide access to an area that is used (or predominantly used) by the person who owns and maintains the siding (or any other person) for a purpose other than transport purposes.

Section 3 of the *Rail Safety Act 1996* defines a private siding to mean "a siding owned and maintained by a person who does not own, control or manage the running line with which the siding connects or to which it has access, but does not include a marshalling yard or a passenger or freight terminal, or a siding of a kind excluded by the regulations from the ambit of this definition".

APPENDIX B: ACCESS PROCEDURES

This Appendix sets out the Commission's statutory obligations and its proposed approach to the exercise of its functions and powers under the Access Regime. This should help to provide some regulatory certainty with respect to the regime.

B.1. Information brochure

B.1.1. Legislative requirements

An Operator must, on the written application of an industry participant, provide an information brochure containing:

- if the Operator carries on the business of providing passenger or freight services, a statement of the terms and conditions on which the Operator provides the services; and
- the terms and conditions on which the Operator is prepared to make the Operator's railway infrastructure available for use by others; and
- other information required by the regulator.[11]

The information brochure must be provided within 30 days (or a longer period allowed by the regulator) after the Operator receives the application.[12]

The information brochure must refer to any relevant pricing principles and show how the terms and conditions relate to, or compare with, relevant pricing principles.[13]

The form of the information brochure must comply with requirements imposed by the regulator.[14]

The Operator must, within 14 days after providing an industry participant with the information brochure, give a copy to the regulator.[15]

If the Operator fails to comply with this section in any respect, the Operator is guilty of an offence and liable to a penalty of up to $20,000.[16]

B.1.2. Commentary

The Commission has issued this *Information Kit*, setting out the content that the Information Brochure must contain and the form it must take. A charge may not be made for an Information Brochure.

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[11] Section 28(1) ROA Act
[12] Section 28(2) ROA Act
[13] Section 28(3) ROA Act
[14] Section 28(4) ROA Act
[15] Section 28(5) ROA Act
[16] Section 28(6) ROA Act

B.2. *Operator's obligation to provide information about access*

B.2.1. Legislative requirements

An Operator must, on the application of a person with a proper interest in making an access proposal to the Operator, provide the applicant with information reasonably requested by the applicant about:

- the extent to which the Operator's railway infrastructure is currently being utilised; and
- the extent to which it would be necessary, and technically and economically feasible, to add to or extend the Operator's railway infrastructure so that it could meet requirements stated in the application; and
- whether the Operator would be prepared to provide a service of a specified description and:
  - if they would be so prepared the general terms and conditions (including an indication of the likely price) on which the Operator would be prepared to provide the service; and
  - if they would not be so prepared, the reasons why the service cannot be provided.[17]

The Operator may make a reasonable charge (to be determined on a basis decided or approved by the regulator) for providing the required information.[18]

If the Operator makes a charge for providing information under this section, the Operator must give the regulator written notice of the amount of the charge and the nature of the information provided.[19]

B.2.2. Commentary

In considering whether a charge is reasonable, the Commission will look at the principles it has established for this purpose as set out in section 4.6 of this *Information Kit*.

The Commission will usually consider a person to have a "proper interest" in making an access proposal, if that person is an industry participant and the information that they are seeking from the Operator is reasonable within the context of an access proposal.

B.3. *Information to be provided on a non-discriminatory basis*

B.3.1. Legislative Requirements

An Operator must provide information to persons interested in making access proposals to the Operator on a non-discriminatory basis.[20]

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[17] Section 29(1) ROA Act

[18] Section 29(2) ROA Act

[19] Section 29(3) ROA Act

B.3.2. Commentary

Providing information on a non-discriminatory basis requires that the Operator does not treat access seekers differently because of perceived differences between them. For example, an Operator must not provide fuller or more favourable information to an access seeker with whom it has a close relationship than it would to an access seeker with which it had a lesser relationship.

B.4. Access proposal

B.4.1. Legislative requirements

An industry participant (the proponent) who wants access to a railway service, or who wants to vary an access contract in a significant way or to a significant extent, may put a written proposal (the access proposal) to the Operator of the relevant railway infrastructure setting out;

- the nature and extent of the required access or variation; and
- terms and conditions for the provision of access, or for making a variation, terms and conditions that the proponent considers reasonable and commercially realistic and to which the proponent is prepared to agree.[21]

If the implementation of an access proposal would require an addition or extension to the railway infrastructure, the access proposal may include a proposal for that addition or extension to railway infrastructure.[22]

When the Operator receives an access proposal, the Operator must give written notice of the proposal to the regulator and any industry participant whose interests could be affected by implementation of the proposal.[23]

The respondents to the proposal are the Operator and the other industry participants whose interests could be affected by the implementation of the proposal.[24]

B.4.2. Commentary

An industry participant will usually be considered to have interests that could be affected by implementation of the access proposal, if implementation would affect their proprietary rights and/or interests.

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[20] Section 30 ROA Act

[21] Section 31(1) ROA Act

[22] Section 31(2) ROA Act

[23] Section 31(3) ROA Act

[24] Section 31(4) ROA Act

B.5. Duty to negotiate in good faith

B.5.1. Legislative requirements

An Operator must negotiate in good faith with the proponent with a view to reaching agreement on whether the proponent's requirements as set out in the access proposal (or some agreed modification of the requirements) could reasonably be met, and, if so, the terms and conditions for the provision of access for the proponent.[25]

The other respondents (if any) whose rights (or prospective rights) would be affected by the implementation of the access proposal must also negotiate in good faith with the proponent with a view to reaching agreement on the provision of access to the proponent and any consequent variation of their rights (or prospective rights) of access.[26]

B.5.2. Commentary

The Access Regime encourages negotiated outcomes to access proposals. The Operator, Proponent and any other interested industry participants should be aware of their rights and obligations under the ROA Act and should endeavour to negotiate in good faith. Possible indicators of negotiations in good faith are presented in B.7.2 below.

B.6. Limitation on Operator's right to contract to provide access

B.6.1. Legislative requirement

An Operator must not enter into an access contract unless:

- there is no other respondent to the proposal; or
- all other respondents to the access proposal agree; or
- the Operator gives the other respondents written notice of the proposed access contract and;
  - no formal objection to the proposed contract is made within 21 days of the notice; or
  - a formal objection, or formal objections, are made within the 21 day period, but all objections are later withdrawn.[27]

A respondent to an access proposal makes a formal objection to a proposed access contract by giving written notice setting out the grounds of the objection to the proponent, the respondent and the other respondents to the access proposal.[28]

A contract entered into in contravention of this section is void.[29]

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[25] Section 32(1) ROA Act
[26] Section 32(2) ROA Act
[27] Section 33(1) ROA Act
[28] Section 33(2) ROA Act
[29] Section 33(3) ROA Act

B.6.2. Commentary

If a contract is deemed to be "void" then this means that it is legally non-existent - it is considered to have been invalid from the beginning – any rights or liabilities created under a void contract are not legally recognised.

B.7. Access dispute

B.7.1. Legislative requirements

An access dispute exists if:

- the Operator or another respondent to an access proposal fails to respond to the proposal within 30 days after the proposal is given to the Operator or other respondent;
- the Operator or another respondent to an access proposal refuses or fails to negotiate in good faith with the proponent on the access proposal;
- the proponent, after making reasonable attempts to reach agreement with the Operator and other respondents, fails to obtain an agreement on the proposal or an agreed modification of the proposal; or
- a respondent to an access proposal makes a formal objection to a proposed access contract of which notice has been given under Part 3 of the ROA Act.[30]

B.7.2. Commentary

Whether or not the parties are considered to have negotiated in good faith may depend on whether one, both or all of the parties have:

- unreasonably delayed initiating communications in the first place;
- failed to make proposals in the first place;
- failed, without explanation to communicate with other parties within a reasonable time;
- failed to contact one or more of the other parties;
- failed to follow up a lack of response from the other parties;
- failed to take reasonable steps to facilitate and engage in discussions between the parties;
- failed to respond to reasonable requests for relevant information within a reasonable time;
- stalled negotiations by unexplained delays in responding to correspondence or telephone calls;
- unnecessarily postponed meetings;
- sent negotiators to meetings without authority to do more than argue or listen;

[30] Section 34 ROA Act

- refused to agree on trivial matters;
- shifted position just as agreement seems in sight;
- adopted a rigid non-negotiable position;
- failed to make counter proposals;
- engaged in unilateral conduct which harmed the negotiating process; or
- failed to do what a reasonable person would do in the circumstances.[31]

B.8. *Request for reference of dispute to arbitration*

B.8.1. Legislative requirements

A proponent may, by written notice given to the regulator, ask the regulator to refer an access dispute to arbitration.[32]

A copy of a notice under this section must be given to all respondents to the access proposal.[33] (This will include interested industry participants).

B.8.2. Commentary

The Commission requests that a party referring a dispute to the Commission provide the Commission with the information set out in Annexure A of this Appendix. The applicant may wish to seek professional help in preparing this application.

In order that the Commission understands the issues that it may be required to conciliate under section 36(1)(a) of the ROA Act, it is important that the matters in dispute are well defined in the application, and that all relevant information is provided. The applicant should be aware that, once filed with the Commission, the Commission may refer to and use the notice of dispute as a convenient summary of the nature of the dispute and that a copy may be given to the respondent party and any interested third party.

The Commission would expect that it would place a notice on its website as to the existence of a dispute under the ROA Act.

B.9. *Conciliation and reference to arbitration*

B.9.1. Legislative requirements

Conciliation

On receipt of a request to refer an access dispute to arbitration, the regulator must attempt to settle the dispute by conciliation or appoint an arbitrator and refer the dispute to the arbitrator.[34]

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31 *Mullan Garry Ernest, Njamal People, State of Western Australia, Taylor Johnson v Native Title Party* [1996] NNTTA 34 (7 August 96).

32 Section 35(1) ROA Act

33 Section 35(2) ROA Act

Arbitration

If the regulator fails to settle an access dispute by conciliation after making a reasonable attempt to do so, the regulator must then appoint an arbitrator and refer the dispute to the arbitrator.[35]

The regulator is not obliged to refer the dispute to arbitration if, in the regulator's opinion:

- the subject matter of the dispute is trivial, misconceived or lacking in substance;
- the person seeking arbitration of the dispute has not negotiated in good faith; or
- the regulator is satisfied on the application of a party to the dispute that there are good reasons why the dispute should not be referred to arbitration.[36]

A dispute cannot be referred to arbitration if:

- the dispute involves only one proponent and, before the appointment of the arbitrator, the proponent notifies the regulator that the proponent does not want to proceed with arbitration; or
- the dispute involves two or more proponents and, before the appointment of the arbitrator, all proponents notify the regulator that they do not want to proceed with the arbitration.[37]

B.9.2. Commentary

Conciliation

Conciliation is a process in which the parties to the dispute, with the assistance of a neutral third party (in this case, the Commission), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement.

The conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, but not a determinative role.

The conciliator may advise on or determine the process of conciliation whereby resolution is attempted, and may make suggestions for terms of settlement, give expert advice on likely settlement terms, and may actively encourage the participants to reach an agreement.[38]

In attempting to conciliate a dispute, the Commission is likely to take into account principles similar to the arbitration principles set out in section 38 of the ROA Act. Those principles are set out in full later.

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[34] Section 36(1) ROA Act

[35] Section 36(2) ROA Act

[36] Section 36(3) ROA Act

[37] Section 36(4) ROA Act

[38] Description of conciliation taken from the Institute of Arbitrators and Mediators Australia website http://www.iama.org.au/arbitration.htm

The Commission will issue directions to all parties in relation to the conduct of the conciliation process, which may address:

- the procedures to be followed in the conciliation process;
- the timetable for the submission of written material;
- the timetable for the conciliation process;
- requests from third persons for leave to join as a party to the conciliation process; and
- any other matters raised by the parties.

If a party wishes to seek procedural direction from the Commission in relation to the conciliation process, they should notify the Commission within 5 business days of receipt of notice of the access dispute.

Information requirements for conciliation

In order to attempt to conciliate the dispute, the Commission may require from the relevant parties the following information:

- a copy of the proponent's request for access, specifying the relevant regulated service(s);
- any offers received from the Operator, or any letters refusing access;
- all other relevant correspondence between the parties (including emails – this should demonstrate that the parties are not able to reach agreement about the terms and conditions of access);
- a copy of any current agreements between the proponent and Operator or between the Operator and an interested third party, that are relevant to access to the regulated service;
- details of the offer which is being sought by the proponent, including, where relevant, the terms and conditions of access being sought;
- the costs to the Operator of providing the service requested by the proponent (including the costs of any necessary modification to, or extension of, railway infrastructure); and
- the operational and technical requirements necessary for the safe and reliable provision of the service requested by the proponent.

The Commission will specify a reasonable time in which the information must be provided.

The Commission obtains its power to obtain information for these purposes under Part 5 of the ESC Act, which states that the Commission may, by written notice, require a person to give the Commission, within a time and in a manner stated in the notice (which must be reasonable), information in the person's possession that

the Commission reasonably requires for the performance of the Commissions functions.[39]

Performing functions assigned to the Commission under an Act is one of the Commission's functions for the purposes of the ESC Act.[40]

Conciliation of a dispute is a function assigned to the Commission by section 36(1)(a) of the ROA Act.

Confidentiality

Where the Commission obtains information pursuant to Part 5 of the ESC Act it must comply with the confidentiality provisions set out in Part 5 and the appeal and review processes set out in Part 6.

Appointment of nominee

The Commission may choose to appoint a nominee to conduct the conciliation with the parties. The Commission may seek advice on the appointment of a suitable conciliator from a body such as the Institute of Arbitrators and Mediators of Australia.

The costs of the conciliator would be borne by the Commission; the parties would bear their own costs.

The Commission or its nominee will usually conduct the conciliation in private. Private proceedings mean that no person other than those who are parties to the conference, or those who have been given leave to participate, will be present.

The privacy of the proceedings requires that:

- all communications between the parties, and between the parties and the Commission, in connection with the conciliation, are private and should not be published or otherwise disclosed; and
- the parties should not comment publicly on the conduct or content of the conciliation.

Arbitration

Arbitration is a formal dispute resolution process in which two or more parties refer their dispute to an independent third person (the arbitrator) for determination.

The Commission may refer a dispute straight to arbitration where it believes that:

- the dispute would benefit from a more formal and structured approach;

[39] *Essential Services Commission Act* section 29(1)

[40] *Essential Services Commission Act* section 5(1)(h)

- the dispute would benefit from resolution being attempted by a person with specific dispute resolution experience and skills and/or with the professional or technical background of the matters in dispute;

Trivial, misconceived or lacking in substance

When considering whether the subject matter of the dispute is trivial, misconceived or lacking in substance, and thus whether or not to refer the dispute to arbitration, the Commission will give these words their ordinary, literal meaning.

Good Faith

When deciding not to refer a dispute to arbitration due to a lack of good faith on one or more of the parties, the Commission may look at whether one, both or all of the parties have:

- unreasonably delayed initiating communications in the first place;
- failed to make proposals in the first place;
- failed, without explanation to communicate with other parties within a reasonable time;
- failed to contact one or more of the other parties;
- failed to follow up a lack of response from the other parties;
- failed to take reasonable steps to facilitate and engage in discussions between the parties;
- failed to respond to reasonable requests for relevant information within a reasonable time;
- stalled negotiations by unexplained delays in responding to correspondence or telephone calls;
- unnecessarily postponed meetings;
- sent negotiators to meetings without authority to do more than argue or listen;
- refused to agree on trivial matters;
- shifted position just as agreement seems in sight;
- adopted a rigid non-negotiable position;
- failed to make counter proposals;
- engaged in unilateral conduct which harmed the negotiating process;
- failed to do what a reasonable person would do in the circumstances.[41]

The Commission is not aware of any special judicial interpretation of the words “trivial, misconceived or lacking in substance”.

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[41] *Mullan Garry Ernest, Njamal People, State of Western Australia, Taylor Johnson v Native Title Party* [1996] NNTTA 34 (7 August 96).

B.10. Appointment of an arbitrator

B.10.1. Legislative requirements

An arbitrator must be a person who is properly qualified to act in the resolution of the dispute and who has no direct or indirect interest in the outcome of the dispute.[42]

Before appointing an arbitrator, the regulator must consult with each of the parties to the dispute and must attempt (but is not bound) to make an appointment that is acceptable to all parties.[43]

B.10.2. Commentary

As soon as practical after it is decided that the dispute should be arbitrated, the Commission will appoint a person to act as arbitrator. The Commission will seek advice regarding suitable candidates for conducting the arbitration. The Commission will hold meetings with all the parties, either jointly or separately, in an attempt to achieve agreement as to who should be appointed as arbitrator.

The Commission will make the final decision as to the appointment of the arbitrator. It will promptly inform the parties of its decision.

The *Commercial Arbitration Act 1986 (SA)* **does not** apply to an arbitration under Part 6 of the ROA Act.[44]

B.11. Principles to be taken into account in an arbitration

B.11.1. Legislative requirements

In conducting an arbitration, the arbitrator must take into account:

- the objects of the ROA Act which are:
  - to promote a system of rail 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;
  - 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.[45]
- the non-discrimination principles which are:

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[42] Section 37(1) ROA Act
[43] Section 37(2) ROA Act
[44] Section 59 ROA Act
[45] Section 3 ROA Act

- an Operator must not unfairly discriminate between proponents in preferring once access proposal to another;
- an Operator must not unfairly discriminate between industry participants in the terms and conditions on which the Operator provides access to railway services;
- an Operator must not unfairly discriminate between industry participants by:
  - waiving rights under access contracts or awards on a non-uniform basis; or
  - making a kick-back arrangement(s) (i.e. arrangements directly or indirectly returning a proportion of the consideration to which the Operator is entitled under the contract or award to industry participants or their associates) on a non-uniform basis;
- a person must not be a party to discrimination by an Operator that is contrary to the non-discrimination principles;
- a person is party to discrimination if the person:
  - aids, abets, counsels or procures the discrimination; or
  - induces the discrimination through threats or promises or in some other way; or
  - is knowingly concerned in the discrimination; or
  - conspires with the Operator to discriminate.[46]

▲ the Operator's legitimate business interests and investment in railway infrastructure;

▲ the cost to the Operator of providing access as sought by the proponent (excluding costs arising from increased market competition);

▲ if applicable, the economic value to the Operator of additional investment the proponent proposes to undertake;

▲ the economically efficient operation of the railway infrastructure;

▲ the pricing principles, as set out in this *Information Kit*;

▲ the price of comparable services for other industry participants (including, if applicable, the Operator itself);

▲ the interests of industry participants whose interests may be affected by the proposal;

▲ the contractual obligations of the Operator and existing industry participants;

▲ the operational requirements for the safe and reliable operation of the railway infrastructure; and

▲ the operational requirements for the safe and reliable operation of the railway infrastructure;

▲ the public interest in market competition; and

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[46] Section 23 ROA Act

- relevant technical and legal issues.[47]

The arbitrator may also take into account other matters the arbitrator considers appropriate.[48]

B.12. Parties to the arbitration

B.12.1. Legislative Requirements

The parties to an arbitration are;

- the proponent and respondents to the access proposal;
- any other person who has, in the regulator's opinion a material interest in the outcome of the arbitration and is nominated by the regulator as a party to the arbitration; and
- any other person who is joined by the arbitrator as a party to the arbitration.[49]

A party whose interests are unlikely to be materially affected by the outcome of the arbitration may, by leave of the arbitrator, withdraw from the arbitration.[50]

B.12.2. Commentary

A person's interests are usually considered to be materially affected if they are affected in an important, essential or relevant way.

B.13. Representation of parties

B.13.1 Legislative Requirements

A party may be represented in the arbitration proceedings by a lawyer or, by leave of the arbitrator, another representative.[51]

B.14. Minister's right to participate

B.14.1 Legislative Requirements

The Minister may participate in arbitration proceedings under this Act. If the Minister participates, the Minister may call evidence and make representations on the questions subject to the arbitration.[52]

The relevant minister is the Minister for Transport.[53]

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[47] Section 38(1) ROA Act
[48] Section 38(2) ROA Act
[49] Section 39(1) ROA Act
[50] Section 39(2) ROA Act
[51] Section 40 ROA Act
[52] Section 41 ROA Act

B.15. Arbitrator's duty to act expeditiously

B.15.1. Legislative Requirements

An arbitrator must proceed with the arbitration as quickly as the proper investigation of the dispute, and the proper consideration of all matters relevant to the fair determination of the dispute, allow.[54]

B.16. Hearing to be in private

B.16.1. Legislative Requirements

Arbitration proceedings must be conducted in private unless all parties agree to have the proceedings (or part of the proceedings) conducted in public.[55]

An arbitrator may give directions about who may be present at arbitration proceedings conducted in private.[56]

In giving directions as to who may be present at arbitration proceedings conducted in private, the arbitrator must have regard to the wishes of the parties and the need for commercial confidentiality.[57]

A person must comply with a direction made by the arbitrator as to who may be present at arbitration proceedings conducted in private, or face a maximum penalty of $15,000.[58]

B.17 Procedure on arbitration

B.17.1. Legislative Requirements

An arbitrator is not bound by technicalities, legal forms or rules of evidence and may obtain information on matters relevant to the dispute in any way the arbitrator thinks appropriate.[59]

For example, the arbitrator may conduct proceedings by telephone, closed circuit television or by other means of communicating at a distance.

An arbitrator may require the presentation of evidence or argument in writing and may decide matters on which the arbitrator will hear oral evidence or argument.[60]

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[53] See South Australian Government Gazette No 30, 5 March 2002, p 1142

[54] Section 42 ROA Act

[55] Section 43(1) ROA Act

[56] Section 43(2) ROA Act

[57] Section 43(3) ROA Act

[58] Section 43(4) ROA Act

[59] Section 44(1) ROA Act

[60] Section 44(2) ROA Act

B.18. Procedural powers of the arbitrator

B.18.1. Legislative Requirements

An arbitrator may:

- give procedural directions;
- make orders requiring the delivery of documents clarifying the issues between the parties and the discovery and inspection of documents;
- sit at any time and place;
- adjourn the arbitration proceedings from time to time and from place to place;
- refer a matter to an expert for report, and accept the expert's report in evidence;
- do anything necessary for the expeditious hearing and determination of the dispute.[61]

An arbitrator may proceed with arbitration proceedings in the absence of a party if the party has been given notice of the proceedings.[62]

An arbitrator may engage a lawyer to provide advice on the conduct of the arbitration and to assist the arbitrator in drafting the award.[63]

B.19. Provision of relevant documents to the arbitrator

B.19.1. Legislative Requirements

A party to the arbitration may give the arbitrator a copy of all documents (including confidential documents) the party considers to be relevant to the dispute.[64]

B.20. Arbitrator's power to obtain information and documents

B.20.1. Legislative Requirements

If an arbitrator has reason to believe that a person is in a position to give information, or to produce documents, that may be relevant to the dispute, the arbitrator may, by written notice:

- require the person within a period stated in the notice to give the arbitrator a written statement of specified information or to produce to the arbitrator specified documents or copies of specified documents; or
- require the person to appear before the arbitrator at a specified time and place to give evidence.[65]

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[61] Section 45(1) ROA Act

[62] Section 45(2) ROA Act

[63] Section 45(3) ROA Act

[64] Section 46 ROA Act

A written statement must, if the arbitrator so requires, be verified by statutory declaration of the person providing the information or, if the person is a body corporate, an appropriate officer of the body corporate.[66]

If documents (whether originals or copies) are produced to an arbitrator the arbitrator may:

- take possession of, make copies of, and take extracts from, the documents; and
- keep the documents for as long as is necessary for the purposes of the arbitration.[67]

A person must comply with a requirement of the arbitrator (as are specified above) and if the person is required to appear as a witness before the arbitrator they must comply with further requirements to make an oath or affirmation, or to answer questions. Failure to do so may result in a penalty being imposed of up to $15,000.[68]

However, a person need not give information or produce a documents if:

- the information or the contents of the document is the subject of legal professional privilege, or would tend to incriminate the person of an offence; and
- the person objects to giving the information or producing the document by giving written notice of the ground of the objection to the arbitrator or, if the person is appearing as a witness before the arbitrator, by an oral statement of the ground of objection.[69]

B.21. Confidentiality of information

B.21.1. Legislative Requirements

A person who gives the arbitrator information, or produces documents, may ask the arbitrator to keep the information or the contents of the documents confidential.[70]

The arbitrator may, after considering representations from the parties (or the other parties), impose conditions limiting access to, or disclosure of, the information or documentary material.[71]

A person must not contravene conditions imposed by the arbitrator limiting access to, or disclosure of, the information or documentary material. Contravention may result in the imposition of a penalty of up to $60,000.[72]

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[65] Section 47(1) ROA Act
[66] Section 47(2) ROA Act
[67] Section 47(3) ROA Act
[68] Section 47(4) ROA Act
[69] Section 47(5) ROA Act
[70] Section 48(1) ROA Act
[71] Section 48(2) ROA Act
[72] Section 48(3) ROA Act

B.22. Termination of arbitration in cases of triviality, etc

B.22.1. Legislative Requirements

The arbitrator may terminate an arbitration if the arbitrator thinks the subject matter of the dispute is trivial, misconceived or lacking in substance, or thinks that the person on whose application the dispute was referred to arbitration has not engaged in negotiations in good faith[73]

The arbitrator may also terminate an arbitration by consent of the parties.[74]

B.22.2. Commentary

See earlier for discussion of the meaning of the phrases “trivial, misconceived or lacking in substance” and “good faith”.

B.23. Proponent’s right to terminate arbitration

B.23.1. Legislative Requirements

If an arbitration involves only one proponent, the proponent may terminate the arbitration, and if it involves two or more proponents, the proponents may together terminate the arbitration.[75]

The arbitration is terminated under this section by giving notice of termination to the arbitrator and the regulator and to the other parties to the arbitration.[76]

B.24. Awards

B.24.1. Legislative Requirements

Before the arbitrator makes an award, the arbitrator must give each of the parties and the Minister a copy of the draft award and may take into account representations that any of them may make on the proposed award.[77]

An award must be in writing and must set out the reasons on which it is based.[78]

If an award confers a right of access, it must:

- state the period for which the proponent is entitled to access;
- state the terms and conditions on which the proponent is to have access; and

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[73] Section 49(1) ROA Act
[74] Section 49(2) ROA Act
[75] Section 50(1) ROA Act
[76] Section 50(2) ROA Act
[77] Section 51(1) ROA Act
[78] Section 51(2) ROA Act

- resolve, or provide for the resolution of, all related and incidental matters.[79]

The arbitrator must, within seven days after an award is made (including an award made by consent), give a copy of the award to the regulator and the parties to the arbitration.[80]

B.25. Restrictions on awards

B.25.1. Legislative Requirements

An arbitrator cannot make an award that would have the effect of requiring the Operator to bear any of the capital cost of an addition or extension to railway infrastructure unless the Operator agrees.[81]

An arbitrator cannot make an award that would prejudice the rights of an existing industry participant under an earlier contract or award unless the industry participant agrees or the arbitrator is satisfied that:

- the industry participant's entitlement to access exceeds the entitlement that the participant actually needs and there is no reasonable likelihood that the participant will need to use the excess entitlement; and
- the proponent's requirements cannot be satisfactorily met except by transferring the excess entitlement (or some of it) to the proponent.[82]

B.26. Consent awards

B.26.1. Legislative Requirements

If the parties to an arbitration consent to a proposed award and the arbitrator is satisfied that the award is appropriate in the circumstances, the arbitrator may make an award in the terms proposed.[83]

B.27. Withdrawal from award

B.27.1. Legislative Requirements

A proponent may, within seven days after the making of an award or such further time as the regulator may allow, elect not to be bound by the award by giving written notice of the election to the regulator.[84]

The regulator must, within seven days after receiving a notice of election not to be bound by an award, notify the Operator and the other parties to the arbitration.[85]

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[79] Section 51(3) ROA Act
[80] Section 51(4) ROA Act
[81] Section 52(1) ROA Act
[82] Section 52(2) ROA Act
[83] Section 53 ROA Act
[84] Section 54(1) ROA Act

If the proponent elects not to be bound by an award the award is rescinded and the proponent is precluded from making another access proposal for 12 months from the date the notice of election was given unless the regulator authorises a further access proposal within that period.[86]

An authorisation allowing a further access proposal may be given on conditions the regulator considers appropriate.[87]

B.27.2. Commentary

In granting an authorisation to make a further proposal, the Commission may set conditions such as:

- not allowing the proponent to withdraw after the making of the award; and/or
- requiring the proponent to meet the costs incurred by the Operator due to the new arbitration.

B.28. Variation of revocation of an award

B.28.1. Legislative Requirements

The regulator may vary or revoke an award if all parties to the award agree.[88]

If the parties are unable to agree on a proposed variation of an award, the regulator may, on the application of one or more of the parties, refer the dispute to arbitration.[89]

However, the regulator will not refer the dispute to arbitration if the regulator is of the opinion that there is no sufficient reason for varying the award.[90]

In deciding whether to refer a dispute to arbitration under this section, the regulator must have regard to:

- whether there has been a material change in circumstances since the award was made or last varied;
- the nature of the matters in dispute;
- the time that has elapsed since the award was made or last varied; and
- other matters that the regulator considers relevant.[91]

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[85] Section 54(2) ROA Act
[86] Section 54(3) ROA Act
[87] Section 54(4) ROA Act
[88] Section 55(1) ROA Act
[89] Section 55(2) ROA Act
[90] Section 55(3) ROA Act
[91] Section 55(4) ROA Act

The legislative provisions set out in the ROA Act relating to the arbitration of a dispute arising from an access proposal apply with necessary modifications to a dispute about the proposed variation of an award.[92]

B.29. Appeal from an award on a question of law

B.29.1. Legislative Requirements

An appeal lies to the Supreme Court from an award, or a decision not to make an award, on a question of law.[93]

On an appeal, the Supreme Court may exercise one or more of the following powers:

- vary the award or decision;
- revoke the award or decision;
- make an award or decision that should have been made in the first instance;
- remit the matter to the arbitrator for further consideration or re-consideration; and
- make incidental or ancillary orders (including orders for costs).[94]

An award or decision of an arbitrator cannot be challenged or called in question except by appeal under this section.[95]

Unless the Court specifically decides to suspend the operation of an award until the determination of the appeal, an appeal does not suspend the operation of an award.[96]

B.29.2. Commentary

A question of law is a question to be resolved by applying legal principles, rather than by determining a factual situation; it is an issue which involves the application or interpretation of a law and is reserved for a judge. It is not a merits review.

B.30. Costs

B.30.1. Legislative Requirements

The costs of an arbitration are to be borne by the parties in proportions decided by the arbitrator, and in the absence of a decision by the arbitrator, in equal proportions.[97]

However, if the proponent terminates an arbitration or elects not to be bound by an award, the proponent must bear the costs in their entirety.[98]

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[92] Section 55(5) ROA Act

[93] Section 56(1) ROA Act

[94] Section 56(2) ROA Act

[95] Section 56(3) ROA Act

[96] Section 56(4) ROA Act

[97] Section 57(1) ROA Act

The regulator may recover the costs of an arbitration as a debt.[99]

B.30.2. Commentary

The Commission will recover from the parties the costs it has incurred as a consequence of appointing the arbitrator in the proportions determined by the arbitrator.

B.31. Removal and replacement of arbitrator

B.31.1. Legislative Requirements

The regulator may remove an arbitrator from office if the arbitrator:

- becomes mentally or physically incapable of carrying out the arbitrator's duties satisfactorily;
- is convicted or an indictable offence; or
- becomes bankrupt or applies to take the benefit of a law for the benefit of bankrupt or insolvent debtors.[100]

If an arbitrator resigns, is removed from office, or dies, the regulator may appoint another person to take the arbitrator's place.[101]

B.32. Injunctive remedies

B.32.1. Legislative Requirements

The Supreme Court may grant an injunction restraining a person from contravening a provision of an award or requiring a person to comply with a provision of an award.[102]

The power of the Supreme Court to grant an injunction restraining a contravention of a provision of an award may be exercised whether or not the defendant has previously contravened the same provision and whether or not there is imminent danger of substantial damage to any person.[103]

The power of the Supreme Court to grant an injunction requiring compliance with a provision of an award may be exercised whether or not the defendant has previously failed to comply with the provision and whether or not there is imminent danger of substantial damage to any person.[104]

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[98] Section 57(2) ROA Act

[99] Section 57(3) ROA Act

[100] Section 58(1) ROA Act

[101] Section 58(2) ROA Act

[102] Section 65(1) ROA Act

[103] Section 65(2) ROA Act

[104] Section 65(3) ROA Act

The Supreme Court may also grant an interim injunction.[105]

An application for an injunction may be made by the regulator or a person with a proper interest in whether the relevant provision is complied with.[106]

The Supreme Court may grant an injunction by consent without inquiring into the merits of the application.[107]

If the regulator makes an application for an injunction, the Supreme Court cannot require the regulator or any other person to give an undertaking as to damages as a condition of granting the injunction.[108]

The Supreme Court may, on application by the regulator or an interested party, discharge or vary an injunction.[109]

B.32.2. Commentary

The Commission may apply for an injunction restraining a person from contravening an award or requiring a person to comply with an award if the Commission believes that it will help to promote the objectives of the ROA Act and/or the ESC Act. In general, the Commission would expect the parties themselves to pursue such actions.

B.34. Compensation

B.34.1. Legislative Requirements

If a person contravenes a provision of an award, the Supreme Court may, on application by the regulator or an interested person, order compensation of persons who have suffered loss or damage as a result of the contravention.[110]

An order may be made against the person who contravened the provision and others involved in the contravention.[111]

A person is involved in the contravention if the person:

- aided, abetted, counseled or procured the contravention; or
- induced the contravention through threats or promises or in some other way; or
- was knowingly concerned in, or a party to, the contravention; or
- conspired with others to contravene the provision.[112]

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105 Section 65(4) ROA Act

106 Section 65(5) ROA Act

107 Section 65(6) ROA Act

108 Section 65(7) ROA Act

109 Section 65(8) ROA Act

110 Section 66(1) ROA Act

111 Section 66(2) ROA Act

112 Section 66(3) ROA Act

B.35. Enforcement of arbitrator's requirements

B.35.1. Legislative Requirements

If a person fails to comply with an order, direction or requirement of an arbitrator under this Act, the arbitrator may certify the failure to the Supreme Court.[113]

The Supreme Court may inquire into the case and make such orders as may be appropriate in the circumstances.[114]

[113] Section 67(1) ROA Act

[114] Section 67(2) ROA Act

ANNEXURE A – Referral of a Dispute

The Commission requests that the following information be included in a referral of an access dispute to the Commission under section 35(1) of the ROA Act:

- name, company, ABN, address, phone, fax and email for the Applicant and the Respondent;
- details of the service(s) required by the intending proponent;
- the facility by which the service(s) is provided and where relevant the part of the facility for which access is sought;
- details of the service(s) that the intending proponent currently has access to (if applicable);
- where relevant, the time/s at which access is sought;
- where relevant, the period over which access is sought;
- the nature of the dispute;
- the date on which the intending proponent made an access proposal to the Operator;
- any response from the Operator;
- the access terms and conditions that the Applicant seeks from the Operator;
- a complete copy of the proponent's formal proposal;
- any information provided by the Operator to the intending proponent;
- any information provided by the intending proponent to the Operator;
- copies of all relevant correspondence (including emails) between the proponent and the Operator.