Rail

South Australian Rail Access Regulation Report 2015-16

Railways (Operations and Access) Act 1997

September 2016

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Glossary of terms

Term	Description
Above-rail	Refers to operations involving rolling stock
Access Regime	The third-party access regime established under the Railway (Operations and Access) Act 1997 for below-rail railway infrastructure services
Below-rail	Refers to operations involving track management
Commission	Essential Services Commission established under the Essential Services Commission Act 2002
GSR	Great Southern Railway Ltd
GWA	Genesee & Wyoming Australia Pty Ltd
Information Kit	South Australian Rail Access Regime Information Kit
Minister	Minister for Transport and Infrastructure
ROA Act	Railway (Operations and Access) Act 1997

1 Introduction

The Essential Services Commission (**Commission**) is the regulator under section 9 of the Railway (Operations and Access) Act 1997 (**ROA Act**). The ROA Act establishes a negotiate/arbitrate access regime (**Access Regime**) that covers proclaimed railway infrastructure services within South Australia (**below-rail** services).

The Access Regime aims to encourage access negotiation on fair commercial terms between infrastructure owners and those seeking to use that infrastructure. As access under the regime relates to infrastructure, it does not extend to services such as the provision of locomotives, wagons, workshops and maintenance (**above-rail** services).

The ROA Act assigns to the Commission the following specific functions:

- monitoring and enforcing compliance with Part 3 (general rules for conduct of business) of the ROA Act
- monitoring the costs of rail services under the ROA Act
- making an application to the Supreme Court for appointment of an administrator where a rail operator becomes insolvent, ceases to provide railway services or fails to make effective use of the infrastructure of the State
- establishing pricing principles for fixing a floor and ceiling price for railway services, which are to be used by an arbitrator in the event of an access dispute
- establishing requirements for information about access to rail services and determining the price to be charged for such information
- conciliation of access disputes and referral of disputes to arbitration, and
- fulfilling any other functions and powers conferred by regulation under the ROA Act.

Following recommendation from the National Competition Council, the Access Regime was certified by the Parliamentary Secretary to the Federal Treasurer in July 2011 as an 'effective' State regime under the National Access Regime (Part IIIA of the Competition and Consumer Act 2010 (Cth)) for a period of 10 years (until 26 July 2021).[1]

Section 7(A) of the ROA Act requires the Commission to conduct a review of the operators and railway services subject to the Access Regime every five years, to determine whether or not the Access Regime should continue to apply. The decision to continue the application of the Access Regime rests with the Minister for Transport and Infrastructure (**Minister**), upon receiving a recommendation from the Commission.

The ROA Act requires the Commission to report annually to the Minister on work it has carried out relating to its role under the ROA Act.

The rail access regime expired on 31 October 2015, and subordinate legislation to continue the application of the regime had not come into operation as at 30 June 2016. This report therefore only covers the period for which the rail access regime was in force during 2015-16 (1 July 2015 to 30 October 2015).

Further information about the Commission's role as the regulator under the ROA Act, together with the regulatory guidelines, is available from the Commission's website at www.escosa.sa.gov.au.

[1] For further information on the Access Regime certification by the National Competition Council refer to http://ncc.gov.au/making-an-application/certification.

2 Railways and facilities covered by the Access Regime

The Access Regime applies to railway infrastructure services as defined under the ROA Act and includes:

- rail track and yards, but excludes 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 such as the provision of locomotives, wagons, workshops and maintenance are excluded from the Access Regime.

The specific railways and associated facilities within South Australia covered by the Access Regime include:

- the broad gauge rail lines within metropolitan Adelaide used mainly for urban public transport services, controlled by the Rail Commissioner[2]
- the intra-state lines controlled by Genesee & Wyoming Australia Pty Ltd (GWA) 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 Great Southern Railway Ltd (GSR) owned and operated passenger terminal at Keswick.

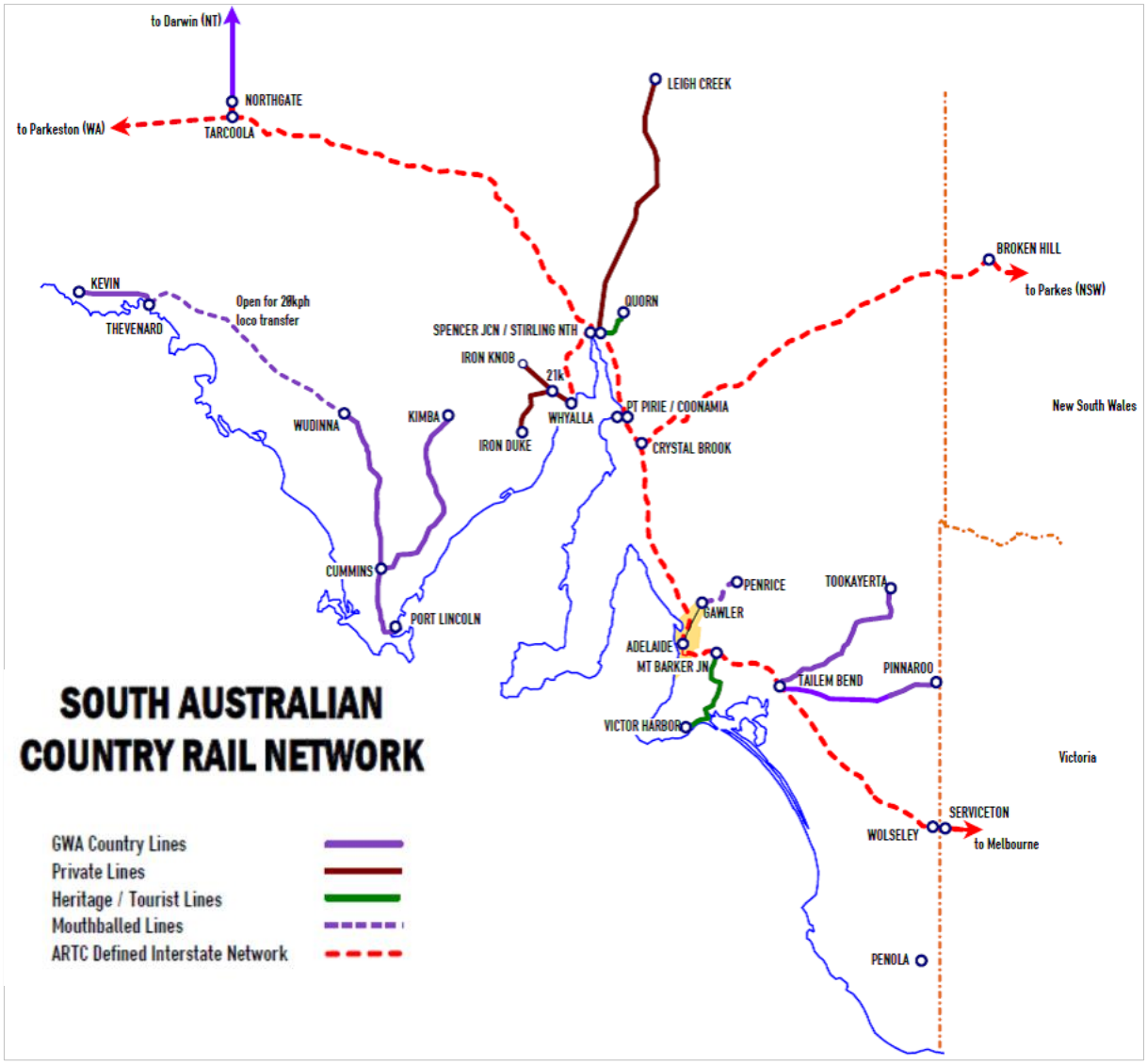
The Access Regime does not apply to the Australian Rail Track Corporation Ltd-owned interstate mainlines, the Glenelg tramline, the lines owned by Arrium (formerly OneSteel), the Leigh Creek line or any tourist or heritage railway lines.

New railway infrastructure services can be included and existing services can be removed from the Access Regime by proclamation.

Figure 1 shows a map of the major railways in South Australia, with the majority of GWA owned railways separately identified.

[2] The Passenger Transport (Transfer of Assets and Vesting of Rights and Liabilities) Proclamation 2010 transferred all real and personal property of TransAdelaide to the Rail Commissioner with effect from 1 September 2010.

Figure 1: South Australian Rail Network



Source: SA Track and Signal

3 Commission's activities

3.1 South Australian Rail Access Regime Review

Railways have significant economies of scale compared to road transportation, potentially providing railway operators with market power. In addition, the South Australian rail industry is vertically integrated, with GWA and the South Australian Government operating both below-rail and above-rail infrastructure. This gives rise to the potential for vertically integrated operators to misuse market power, to the detriment of customers.

In February 2015, the Commission commenced a review into the access regulation of intrastate railways in South Australia, pursuant to section 7(A) of the ROA Act. The purpose of that review was to provide advice and recommendations to the Minister on whether access regulation should continue.

The Commission released an Issues Paper inviting comments on the Access Regime and alternative approaches to achieving the intentions of the Access Regime. It outlined the scope and issues relevant to the review, and provided an opportunity for stakeholders to submit information and evidence to the Commission.

Submissions were made suggesting that GWA could potentially misuse its market power by cross-subsidising its competitive above-rail business from its below-rail revenues. The Commission engaged KPMG to provide it with advice on GWA's regulatory accounting practices; specifically, whether or not costs and revenues had been allocated appropriately between above-rail and below-rail services. KPMG advised that, in its opinion, GWA's accounting practices regarding its intrastate railway operations were appropriate. It further advised that GWA was offering access prices to access seekers comparable to those it charged itself. The Commission had regard to that advice in reaching its view that, while there is the potential for GWA to misuse market power, there is no evidence that it has done so.

The Commission released a Final Report in September 2015. Its recommendation to the Minister was that the Access Regime should continue from 31 October 2015 for a further five-year period. The Commission also identified areas where the Access Regime could be improved. Those related to clarifying the scope of regulated infrastructure services and investigating opportunities for integrating transport access regimes.

In reaching its final recommendation, the Commission had regard to the terms and legislative objectives of the ROA Act and the Essential Services Commission Act, the policy objectives of the Access Regime and principles of best practice access regulation.

Taking those matters into account, the recommendation for continuation of the Access Regime was made on the basis that, while there is potential for the misuse of market power and hence a prima facie case for regulation, the risk that market power will actually be misused is low. Of note, the extent to which a railway operator might seek to misuse market power is constrained by the countervailing bargaining power of access seekers (who can utilise other modes of transport). There is also a strong incentive on the operator to grant access so as maximise the effective utilisation of the railways in order to recover fixed costs.

Regulatory interventions should be proportionate to the level of risk sought to be addressed, which, in this case, is low. The Commission concluded that the Access Regime, which encourages negotiation and information exchange, is a proportionate response.

The Issues Paper, Draft Report, Final Report and all submissions received in response to the review are available on the Commission's website at www.escosa.sa.gov.au.

3.2 Other activities

The Commission's other activities for the period 1 July 2015 to 30 October 2015 arose from its statutory functions under the ROA. This included monitoring of operators' compliance with regulatory requirements. In undertaking its compliance role, the Commission is guided by its legislative objectives; in particular, the need to protect the long-term interests of South Australian consumers with respect to the price, reliability and quality of essential services.

To ensure compliance with the various obligations imposed by the Access Regime, a rail operator must:

- testify that it has a sound and effective compliance program
- report non-compliances of the type required to be reported during the relevant reporting period, and
- 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.

The Commission has developed guidelines on its compliance function in respect of the rail industry, through the South Australian Rail Access Regime Information Kit (Information Kit). Regulated entities are required to report to the Commission annually (by 31 August) with regard to compliance systems and processes in accordance with the requirements of the Information Kit.

For the period 1 July 2015 to 30 October 2015, GSR and GWA each reported one minor instance of non-compliance: both submitted their 2014-15 annual compliance report approximately one month after the due date of 31 August 2015. GSR and GWA have assured the Commission that they have updated their processes to ensure that future reports are submitted on time. The Commission's own monitoring of compliance did not identify any further breaches.

The Commission did not receive any access notifications from GWA during the period 1 July 2015 to 30 October 2015, nor were any access disputes notified by other parties. The Rail Commissioner has confirmed that it has no access agreements in place with any rail operators for the reporting period (1 July 2015 to 30 October 2015) and has provided a statement confirming that it maintained an information kit to provide to any potential operators in the event access was requested.

A new declaration of the access regime to operators and railway services was made by the Governor on 29 September 2016. This re-applies the rail access regime until 30 October 2020.

The Commission will continue to administer the regime (for example, monitoring of compliance and maintaining information on its website to enable interested parties to better understand the Access Regime) and attend to any reported access disputes or related inquiries that may arise.

4 Financial information

Funding for the Commission's rail regulatory activities is provided by the South Australian Government. A summary of revenues and expenses for these activities for the period 1 July 2015 to 30 October 2015 is provided in Table 1, together with comparative figures for the previous year.

Table 1: Rail regulatory revenues and expenses

	1 July 2015 to 30 October 2015	2014-15
	$'000	$'000
Opening surplus	43	53
Revenue		
SA Government Contribution	170	150
Total Revenue	170	150
Expenses		
Salaries and on-costs	126	108
Consultants	-	12
Administration	45	40
Total expenses	171	160
Annual surplus/(deficit)	-1	-10
Closing surplus	42	43

The figures above show a small deficit for the period 1 July 2015 to 30 October 2015. Rail regulatory expenses were higher in the four months to 30 October 2015 than in 2014-15 due to additional activities required to be undertaken in finalising the review into the access regulation of intrastate railways in South Australia pursuant to section 7(A) of the ROA Act. Both revenue and expense amounts will vary in future largely according to the timing of regulatory reviews.

The Commission will continue to ensure that its regulatory activities are being undertaken as efficiently and effectively as possible and that surpluses do not accumulate to unnecessary levels.

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