

2015 South Australian Rail Access Regime Review

OVERVIEW

The Essential Services Commission of South Australia (**the Commission**) has commenced a review into access to South Australia's intrastate railway services.

The railway services that are the subject of the review are the infrastructure services provided on the Adelaide Metro broad gauge network within metropolitan Adelaide, the Genesee and Wyoming (**GWA**) lines in the Murray-Mallee, Mid-North and Eyre Peninsula, and the Great Southern Railway passenger terminal at Keswick. The review focusses on the rules that govern access to those railways. Access to above-rail services (the provision of rolling stock), is not part of the review.

Railway services are generally vertically integrated in South Australia. This means the owner of the railway is often also a provider of above-rail services on those lines. As a result, the South Australian Parliament introduced the *Railways (Operations and Access) Act 1997* (**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 agreements between owners and operators are governed by the Rail Access Regime (**the Access Regime**) as set out in the ROA Act.

The Commission is the regulator for the Access Regime. Under the terms of the ROA Act, the Commission is required to undertake a review into the Access Regime (**the Review**). This paper briefly outlines the scope and principles that the Commission intends to apply in the Review, and requests information or evidence that any party wishes to provide to the Commission for it to take into account.

The legislative requirements of the review only require the Commission to make, at a minimum, a recommendation on whether the Access Regime in its current form should continue to apply or not. However, the Commission is interested in receiving submissions relating to any aspect of the Access Regime.

LEGISLATION

Essential Services Commission Act 2002

The Commission will conduct the review in accordance with the objectives set out in section 6 of the *Essential Services Commission Act 2002* (**ESC Act**). Section 6 provides that:

In performing the Commission's functions, the Commission must—

- (a) have as its primary objective protection of the long term interests of South Australian consumers with respect to the price, quality and reliability of essential services; and*
- (b) at the same time, have regard to the need to—*
 - (i) promote competitive and fair market conduct; and*
 - (ii) prevent misuse of monopoly or market power; and*
 - (iii) facilitate entry into relevant markets; and*
 - (iv) promote economic efficiency; and*
 - (v) ensure consumers benefit from competition and efficiency; and*
 - (vi) facilitate maintenance of the financial viability of regulated industries and the incentive for long term investment; and*
 - (vii) promote consistency in regulation with other jurisdictions.*

In the case of the Review, for the purpose of section 6a of the ESC Act, consumers are considered to be the immediate customers of the railway services. However, promoting economically efficient railway services benefits those markets that rely on those services and can assist in keeping prices of transported goods as low as sustainably possible.

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 ROA Act appoints the Commission as the regulator.

The ROA Act establishes the Access Regime, which is consistent with the *Competition and Consumer Act 2010* (Cwlth). 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.

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

The ROA Act outlines the process for negotiating access and resolving access disputes. 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, which may include a written access proposal being submitted 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.

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 Commission to refer the dispute to arbitration. The Commission 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.

REVIEW REQUIREMENTS

Under the ROA Act, the Commission must conduct a review of the operators and railway services subject to the Access Regime to determine whether that regime should continue to apply. This review must be conducted in the last year of each prescribed period. The current prescribed period ends 30 October 2015.

On completing the Review, the Commission must forward to the Minister for Transport and Infrastructure a report on the review and the conclusions reached by the Commission as a result of the Review and, in particular, must recommend if the Access Regime should continue or expire at the end of the prescribed period.

Review requirements under the ROA Act

7A—Review and expiry of access regime

(1) The regulator must, within the last year of each prescribed period, conduct a review of the operators and railway services subject to the access regime to determine whether the access regime should continue to apply.

(2) The regulator must give reasonable notice of the review in a newspaper circulating generally throughout the State inviting written submissions on the matters under review within a reasonable time specified in the notice.

(3) The regulator must consider submissions made in response to the notice and other submissions made in the course of other forms of public consultation undertaken by the regulator in connection with the review.

(4) On completing the review, the regulator must forward to the Minister a report on the review and the conclusions reached by the regulator as a result of the review and, in particular, must recommend either—

(a) that the access regime should continue in operation for a further prescribed period; or

(b) that the access regime should expire at the end of the existing prescribed period.

(5) The Minister must have copies of the report laid before both Houses of Parliament and must have the regulator's recommendation published in the Gazette.

(6) The access regime expires at the end of a prescribed period unless—

(a) the regulator has, in the report of a review conducted during the prescribed period, recommended that it should continue in operation for a further prescribed period; and

(b) the period of its operation has been extended by regulation.

(7) In this section—prescribed period means—

(a) the period ending 30 October 2015; and

(b) each successive period of 5 years thereafter.

2009 South Australian Rail Access Regime Inquiry

The Commission conducted an Inquiry into the ROA Act in 2009, in response to terms of reference issued by the Treasurer. The scope of that review was broader than this review and focused on the extent to which the Access regime, as laid out in the ROA Act at that time, was consistent with certain principles under the Council of Australian Government's Competition and Infrastructure Reform Agreement (**CIRA**). It also considered whether or not the access regime could be generally improved. As a result of that Inquiry, the Commission made a number of recommendations¹ for improving the ROA Act at that time; the majority of which were adopted.

¹ See <http://www.escosa.sa.gov.au/projects/42/2009-south-australian-rail-access-regime-inquiry.aspx>.

As a signatory to the CIRA, South Australia has committed to a state-based access regime, which has been certified by the National Competition Council as effective. Notwithstanding this, and the policy commitment to the regime, the Act still requires the Commission to review whether or not the regime should continue. If not, the Commission will need to examine the alternatives.

ISSUES

Intent of the Access Regime

Anti-competitive behaviour can arise where there is substantial market power afforded to a market participant and where there is potential for this power to be exercised and misused. Regulation is often used to protect against such anti-competitive behaviour.

The ROA Act was introduced to accommodate competition between users of railways, recognising that there is the potential for market power to be exercised and misused by rail operators.

The ROA Act enables access by third parties to essential rail infrastructure. It provides a framework for access to be negotiated on fair and commercial terms as well as recourse to arbitration if needed.

The ROA Act is intended to be a light-handed regulatory regime, and is based on the principle of promoting negotiated outcomes rather than regulated outcomes.

The Access Regime in Practice

While the ROA Act sets the legislative framework for the Access Regime, the scope of services covered by the Access Regime is determined by proclamation. As stated earlier, the framework is currently applied to the Adelaide Metro broad gauge network within metropolitan Adelaide, the GWA lines in the Murray-Mallee, Mid-North and Eyre Peninsula, and the Great Southern Railway passenger terminal at Keswick. These services can be varied by further proclamation.

To date, the Commission has never been referred a dispute arising from an unsuccessful negotiation under the ROA Act. This does not mean that the Access Regime has been successful, as it could be that access seekers are unaware of its presence or are unwilling to test it. Gathering evidence from railway users on this matter is an important aspect of the Review.

Specific Matters for Consideration in this Review

In its consideration of the Review, the Commission will adopt a cost-benefit approach. That is, it will consider the costs of maintaining the current regime, and weigh these up against the benefits.

To assist with these matters, the Commission is specifically, but not exclusively, seeking feedback from interested parties on the following:

- **Q1:** *Is there any evidence of misuse of market power by rail operators?*
- **Q2:** *Has the current Access Regime been successful? How should this success be measured?*
- **Q3:** *What are the benefits of retaining the current Access Regime? What would be the risks (if any) if it was to expire?*
- **Q4:** *What are the current costs of the Access Regime (e.g. costs of compliance and administration)?*
- **Q5:** *Are there alternative approaches to achieving the intent of the Access Regime that are appropriate at this time? For example, would adoption of the national access rules (under the Commonwealth Competition and Consumer Act 2010) be suitable?*
- **Q6:** *What are the intentions of rail service providers and their customers in the next 5 years? Are there any key industry developments in the foreseeable future that may impact the demand for these services?*
- **Q7:** *What other issues are relevant to the decision to continue, or discontinue the current Access Regime?*
- **Q8:** *Are there any other matters that the Commission should consider as a part of the Review?*

CALL FOR SUBMISSIONS

The Commission invites comments from all interested parties, particularly those that have been directly involved in the use of the Railway or transportation that may compete with the Railway.

The Commission also invites interested parties to provide any information or evidence that may be of relevance to the Review. A further round of public consultation on that report will occur later in 2015.

Process for making submissions

The Commission invites written submissions from all members of the community on this Issues Paper by **Tuesday 24 March 2015**.

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

Responses to this paper should be directed to:

SA Rail Access Regime Review

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

Alternatively, submissions can be sent to:

Essential Services Commission of South Australia
GPO Box 2605
Adelaide SA 5001

NEXT STEPS AND TIMETABLE FOR THE REVIEW

The proposed key dates for the Review are listed below.

STAGE	TIMING
Consultation on Issues Paper	Feb - Mar 2015
Draft Report Released	May 2015
Public Consultation on Draft Report	May - July 2015
Final Report Released	Sept 2015

FURTHER INFORMATION

Any queries relating to this Issues Paper should be directed to:

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MORE INFORMATION – RAIL INDUSTRY ACTIVITIES

If you would like to keep up to date with the Commission's industry activities and the release of papers for consultation, subscribe at:

<http://www.escosa.sa.gov.au/subscribe.aspx>.



The Essential Services Commission of South Australia is an independent economic regulator of water, electricity, gas, ports and rail industries in South Australia. The Commission's primary objective is the protection of the long-term interests of South Australian consumers with respect to the price, quality and reliability of essential services.

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