SOUTH AUSTRALIAN RAIL ACCESS REGIME REVIEW

Final Report

August 2015

South Australian Rail Access Regime Review

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GLOSSARY OF TERMS

ABOVE-RAIL	Refers to operations involving rolling stock
ACCC	Australian Competition and Consumer Commission
ACCESS PROVIDER	A party providing, or able to provide, railway infrastructure services – sometimes referred to as a below-rail operator
ACCESS REGIME	Set out in Parts 3 to 8 of the ROA Act
ACCESS SEEKER	An Above-Rail Operator seeking access to the Railway
ARTC	The Australian Rail Track Corporation Ltd
BELOW-RAIL	Refers to operations involving track management
CCA Act	*Competition and Consumer Act 2010*
CIRA	Competition and Infrastructure Reform Agreement
COAG	Council of Australian Governments
COMMISSION	The Essential Services Commission of South Australia
CPA	Competition Principles Agreement
DPTI	Department of Planning, Transport and Infrastructure
ESC ACT	*Essential Services Commission Act 2002*
GPSA	Grains Producers SA
GWA	Genesee & Wyoming Australia Pty Ltd
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
INTERMODAL	Involving more than one mode of transport, for example rail and road
Mt	One million tonnes
NCC	National Competition Council
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 purpose 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
REVIEW	The 2015 review of access regulation of intrastate railways in South Australia as required under the *Railways (Operations and Access) Act 1997*
ROA ACT	*Railways (Operations and Access) Act 1997*
ROLLING STOCK	The vehicles and carriages that move on a railway
TONNE KILOMETRE	One tonne of freight moved over one kilometre
VERTICAL INTEGRATION	Where the owner of the below-rail infrastructure is also a provider of above-rail operations

EXECUTIVE SUMMARY

Final Recommendation

The final recommendation of this review is that the current regime that provides for third party access to South Australian railway infrastructure services should continue from 31 October 2015 for a further five-year period.

The Essential Services Commission of South Australia (**Commission**) has undertaken a review of access regulation of intrastate railways in South Australia (**Review**). The Review was conducted under the *Railways (Operations and Access) Act 1997* (**ROA Act**).

The purpose of the Review is to provide advice and recommendations to the Minister for Transport and Infrastructure as to whether or not the South Australian Rail Access Regime (**Access Regime**) established under the ROA Act should continue from 31 October 2015 for a further five years.

The Access Regime provides a framework for the negotiation of access to certain railway infrastructure services ("below-rail" services), with the potential for arbitration should negotiations fail. The railway infrastructure covered by the Access Regime includes:

- the Adelaide Metro broad gauge network within metropolitan Adelaide
- the Genesee & Wyoming Australia Pty Ltd (**GWA**) lines in the Murray-Mallee, Mid-North and Eyre Peninsula
- the Great Southern Railway passenger terminal at Keswick.

The Commission's final recommendation to the Minister is that the Access Regime should continue for at least the next five years. The Commission has noted some possible enhancements to the regime; however, these do not require immediate legislative change.

In reaching its final recommendation, the Commission has had regard to the terms and legislative objectives of the ROA Act and the *Essential Services Commission Act 2002* (**ESC Act**), the policy objectives of the Access Regime and principles of best practice access regulation. Taken together, those matters emphasise the need to prevent the misuse of market power in the provision of railway infrastructure services, in order to promote competition for above-rail services, at the least regulatory cost.

The final recommendation is based on the following findings:

- There is the potential for misuse of market power by rail infrastructure service providers, which justifies access regulation.
- However, there is no evidence of the misuse of market power, which suggests that only light-handed regulation is required.

The potential for the misuse of market power exists

Providers of railway infrastructure services have market power where they do not face significant competitive pressures. While road transport may be competitive for low freight volumes or short freight distances, the railway infrastructure services subject to the Access Regime are primarily used for the haulage of minerals and grains, which generally involve high volumes and long transport distances. Railways have significant economies of scale compared to road transportation, providing railway operators with market power.

In addition, the South Australian rail industry is vertically integrated, with GWA and the South Australian Government owning and operating both below-rail and above-rail infrastructure. The potential for vertically integrated operators to misuse market power to the detriment of competition for above-rail services remains.

There is no evidence of misuse of market power

Submissions and information obtained by the Commission indicate that access seekers are successfully negotiating access to railway infrastructure services. No access disputes have been referred to the Commission since the Access Regime commenced. While the absence of disputes is not itself an indicator that the regime is effective, the Commission has not been presented with, or found, evidence that would lead to the conclusion that market power is being misused and, therefore, that the current Access Regime is ineffective.

There are few users of the South Australian rail infrastructure services. Demand for those services, as measured by Gross Tonne Kilometres of goods transported, has declined slightly since 2009, albeit subject to seasonal fluctuations. Utilisation of the railways continues to be low and, based on the views expressed in submissions, this trend is likely to be similar in the future. In this environment, access seekers have countervailing bargaining power, as there is a strong incentive for railway operators to increase utilisation of the railways in order to recover their fixed costs. This limits the extent to which an operator might seek to misuse market power.

As a result, the current Access Regime appears appropriate and there does not appear to be a case for moving to a more heavy-handed regime.

What if the Access Regime expired?

The available evidence does not suggest that allowing the Access Regime to expire from 31 October 2015 would be in the interests of railway users and potential access seekers. If the regime did expire, the more general access pathways under the National Access Regime (Part IIIA of the *Competition and Consumer Act 2010* (**CCA Act**)) would come into effect. The two alternative pathways under that regime, that facilitate third party access to specified infrastructure services, are for an operator to submit an access undertaking to the Australian Competition and Consumer Commission (**ACCC**) for approval or for a party to request "declaration" of services under the CCA Act, which requires parties to negotiate access and provides for the ACCC to arbitrate in the event of a dispute.

The Commission has compared the costs and benefits of retaining the Access Regime with those of relying solely on the National Access Regime. It has concluded that the certainty of the state-based regime, together with its relatively low regulatory costs, is likely to better prevent the misuse of market power and to minimise regulatory costs. The Commission has also concluded that continuation of a state-based Access Regime is consistent with the Council of Australian Governments (**COAG**) Best Practice Regulation Principles, the COAG Competition and Infrastructure Reform Agreement (**CIRA**) and the COAG Competition Principles Agreement (**CPA**).

The majority of submissions received by the Commission also stated a preference for continuing with a state-based regime; no submissions were made in favour of removing the state-based regime.

Possible improvements to the Access Regime

The Commission has formed the view that there are some areas where the Access Regime could be improved to make it more effective. Those are:

Clarifying the scope of regulated infrastructure services

The scope of the regime may not be clear to some new market entrants or access seekers, who may be unfamiliar with the rail infrastructure network or the regulatory arrangements. In particular, submissions have highlighted potential confusion over which rail access regime applies to certain infrastructure, such as GWA operated yards on the Australian Rail Track Corporation Ltd (**ARTC**) interstate network. The effectiveness of the Access Regime could be improved through increased clarity on the boundaries of the regime, and its relationship to other access regimes, including the ports access regime and other rail access regimes. This could be achieved through a centralised information repository managed by the Commission, or the government department responsible for setting rail regulation policy. The South Australian 'Location SA' map viewer service[1] is one possible existing service that could be used to accommodate this suggestion. Preliminary discussions with the Department of Planning, Transport and Infrastructure and Location SA suggest that this could be achieved relatively easily and at low cost.

Investigating opportunities for greater integration of transport access regimes

The State Government could explore opportunities for enhanced efficiency, and other benefits, from promoting greater integration of transport access regimes (including the South Australian rail access regime, Tarcoola-Darwin rail access regime and the South Australian ports access regime). Alternatively, a review could be conducted to promote greater consistency between a continued set of separate regimes. This may address concerns raised by users about the complexity of operating across multiple access regimes over the transport supply chain. The Commission's final recommendation is

[1] Location SA is an online data repository displaying spatially referenced datasets collected by state government agencies. http://www.location.sa.gov.au/viewer/

consistent with that of previous ports and rail access reviews, where it suggested that a review of the grain supply chain be undertaken to ensure that there is a cohesive approach to the regulation of infrastructure services used for the transport of grain.

Independent review of regulatory accounting practices

During the Review it was suggested to the Commission that GWA may be misusing its market power by cross-subsidising its competitive above-rail business from its below-rail revenues. While no evidence was presented to the Commission to substantiate those claims, in order to provide finality on this matter the Commission undertook an independent review of the regulatory accounting practices of GWA. The review's purpose was to determine whether or not costs and revenues have been allocated appropriately between GWA's below-rail and above-rail businesses.

The review found no inappropriate cost or revenue accounting practices. In addition, the Commission has obtained evidence from GWA that the access price that it charges to its above-rail business is comparable to that offered to third party access seekers. That evidence supports a finding that GWA is not cross-subsidising its above-rail business from its below-rail revenues.

1. INTRODUCTION

1.1 Purpose of this review

The Essential Services Commission of South Australia (**Commission**) is the regulator of third party access to certain South Australian railways under the *Railways (Operations and Access) Act 1997* (**ROA Act**). The ROA Act requires the Commission to undertake a review before 31 October 2015 of access regulation of intrastate railways (**Review**). The specific requirements for the Review are set out in Box 1.1 below.

The purpose of the Review is to provide advice and recommendations to the Minister for Transport and Infrastructure on whether the framework for third party access under the ROA Act (**Access Regime**) should continue from 31 October 2015 for a further five-year period. The decision to continue or to terminate the Access Regime rests with the Minister for Transport and Infrastructure, upon receiving a recommendation from the Commission.

Box 1.1: ROA Act Section 7A—Review and expiry of access regime

(1) The regulator[2] 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.

[2] The ROA Act appoints the Commission as the regulator.

*(7) In this section—**prescribed period** means—*

(a) the period ending 30 October 2015; and

(b) each successive period of 5 years thereafter.

1.2 The review process

The Review commenced in February 2015, with the release of an Issues Paper for public consultation.[3] The Issues Paper set out the key questions regarding the need for continued access regulation, and sought views on any other issues of relevance. The Commission released a Draft Report in June 2015,[4] which set out draft recommendations based on analysis of the industry, the efficacy of the Regime, and consideration of submissions to the Issues Paper.

During the course of the Review the Commission received submissions from the following parties:

- Asciano Ltd. (**Asciano**)
- Aurizon Operations Limited (**Aurizon**)
- Bowmans Intermodal Pty Ltd (**Bowmans Intermodal**)
- Cargill Australia (**Cargill**)
- Grain Producers South Australia (**GPSA**)
- Genesee & Wyoming Australia Pty Ltd (**GWA**)
- Gypsum Resources Australia Pty Ltd (**Gypsum Resources Australia**)
- Mr Matthew La Vista
- South Australia Freight Council (**SAFC**)
- Viterra Operations Ltd (**Viterra**)

The Commission has been assisted by these submissions. The matters raised have been carefully considered and, where relevant, certain arguments and submissions have been mentioned in this Final Report, either by direct quotation or by reference to themes or arguments, to assist stakeholders to understand the positions that have been reached.

However, a failure to reference an argument or submission does not mean that it has not been taken into account. While not all of the positions put in submissions have been

[3] The Commission's *2015 Rail Access Regime Review - Issues Paper* is available at the Commission's website at: http://www.escosa.sa.gov.au/Publications/DownloadPublication.aspx?id=3123

[4] The Commission's *2015 Rail Access Regime Review – Draft Report* is available at the Commission's website at: http://www.escosa.sa.gov.au/projects/projectdetails.aspx?p=69&id=221#stage-list=2

adopted, all submissions have been useful in informing the consideration of each of the relevant issues and the competing viewpoints.

1.3 The Commission's recommendation

The final recommendation of this review is that the current regime that provides for third party access to South Australian railway infrastructure services should continue from 31 October 2015 for a further five-year period. This recommendation is supported by most stakeholders as evidenced through submissions.

1.4 What does the Access Regime cover?

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
- on the GWA lines in the Murray-Mallee, Mid-North and Eyre Peninsula
- at the Great Southern Railway passenger terminal at Keswick.

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

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

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

General categories of railway services not covered by the Access Regime are:

- the provision of locomotives, wagons or other rolling-stock
- workshops, maintenance or construction services.

Figure 1.1 provides a map of the major railways in South Australia, with GWA-owned railways separately identified.

The Access Regime allows for new railway infrastructure services to be included and existing services to be removed, by proclamation. As appears from section 7(1) of the ROA Act (refer Box 1.1), this review must consider the current operators and services subject to the access regime and determine, having regard to relevant legal and contextual considerations, whether or not the regime should continue to apply. In that sense this review does not have a direct focus on whether or not particular operators or railways services should themselves

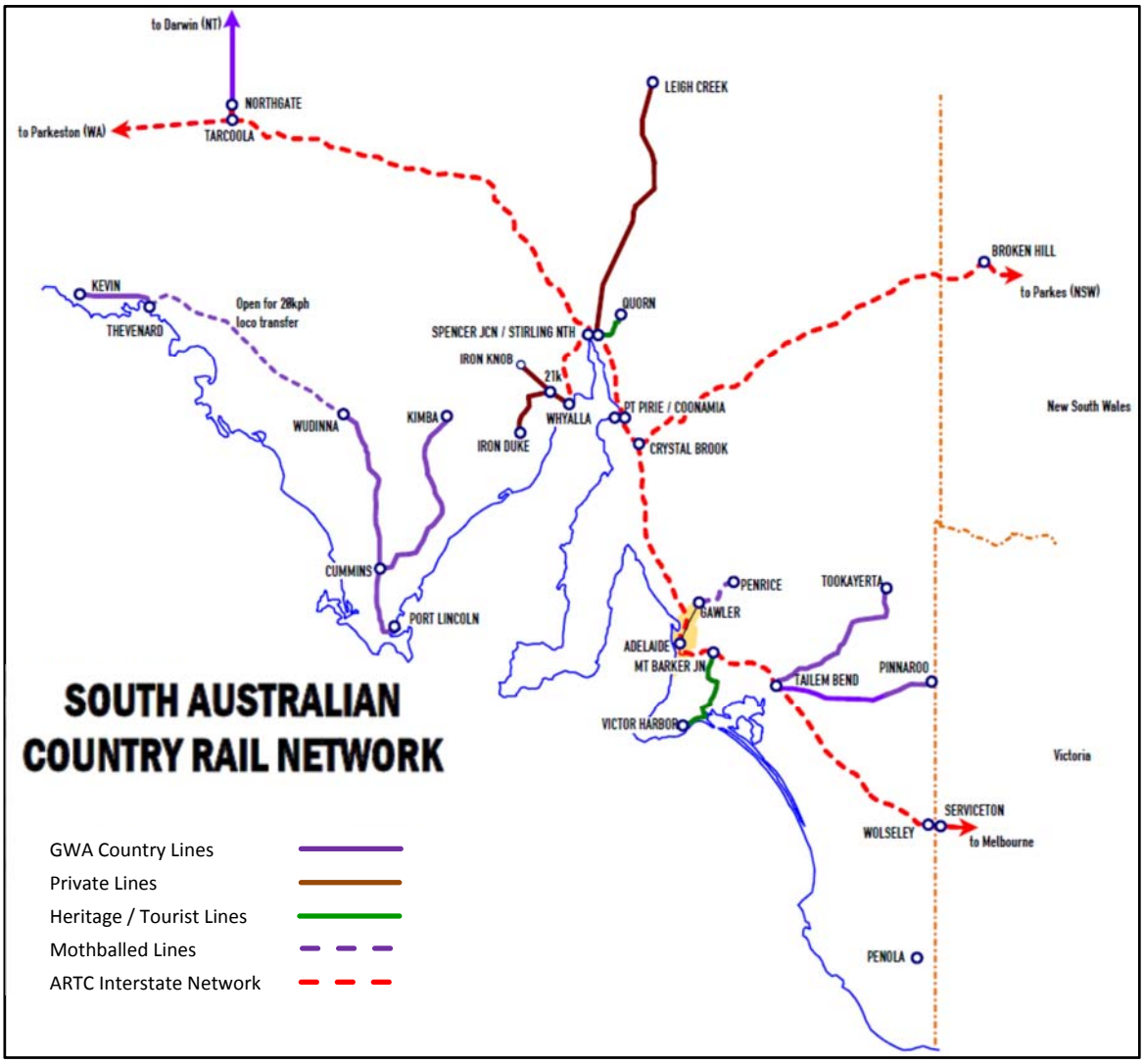
be covered; instead, it looks to whether or not the regime as a whole ought to continue, noting its current coverage.

Nevertheless, the Commission notes that, as a matter of good regulatory practice, the coverage of specific operators or railways services under the regime ought to be reviewed periodically, to test whether or not that coverage continues to be required in order to protect consumers' long term interests. If coverage is not required, then it should be removed (with the potential for re-coverage should circumstances require).

In its submission to the Draft Report, GWA requested that the Commission provide confirmation that the railway yards and sidings GWA owns or controls come under the auspices of the ROA Act. It is the Commission's view that the ROA Act does apply to those rail yards and sidings.[5]

[5] The Commission also notes that third party access under the ARTC Access Undertaking does not extend to railyards and sidings connected to the ARTC line.

Figure 1.1: South Australian Rail Network[6]



1.5 The National Access Regime

The Access Regime fits within the broader National Access Regime, established under Part IIIA of the *Competition and Consumer Act 2010* (**CCA**) and clause 6 of the Competition Principles Agreement (**CPA**). As discussed later in this report, the alternative options for access under the National Access Regime are relevant in considering whether the Access Regime under the ROA Act should be retained or should expire.

The National Access Regime allows for a person to seek access to essential infrastructure services under four possible pathways:

[6] Source: SA Track and Signal, http://www.sa-trackandsignal.net/

1. A party can seek "declaration" of an infrastructure service by the Minister responsible for the CCA, subject to criteria set out in section 44G(2) of the CCA.[7] If the infrastructure services are declared, the infrastructure service provider is required to negotiate access with the access seeker. The Australian Competition and Consumer Commission (**ACCC**) acts as arbitrator should negotiations fail.
2. Access may be sought under the terms and conditions of an access undertaking approved by the ACCC.
3. Access may be sought for Government-provided infrastructure services under terms that have been established through a competitive tendering process approved by the ACCC.
4. Access may be sought under the terms of a State or Territory-based access regime certified by the Minister responsible for the CCA as effective. The Access Regime under the ROA Act is a certified state-based regime.[8]

Options 2 to 4 above create specific frameworks that facilitate third party access to specified infrastructure services. If, for a particular infrastructure service, there are no approved arrangements under options 2 to 4, a party may request that the service be "declared" under option 1. It is only in the case that there are no approved arrangements under any of options 2 to 4 that the declaration pathway can be used. The declaration pathway means that the potential for access regulation of an essential infrastructure service always exists.

In considering whether the current state-based Access Regime should continue for a further five years, it is important to recognise that other access pathways exist and the costs and benefits of retaining the Access Regime should be assessed against those other pathways.

The terms and conditions of access can vary under any of the four access pathways and the basis of access regulation can range from highly flexible to highly prescriptive depending on the approved terms. The choice of pathway does not determine whether the regime is relatively "light-handed" or "heavy-handed."

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[7] Those criteria are:
(a) that access (or increased access) to the service would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for the service;
(b) that it would be uneconomical for anyone to develop another facility to provide the service;
(c) that the facility is of national significance, having regard to:
(i) the size of the facility; or
(ii) the importance of the facility to constitutional trade or commerce; or
(iii) the importance of the facility to the national economy;
(d) [repealed]
(e) that access to the service is not already the subject of [an access regime that has been certified as effective unless there have been substantial modifications to the regime or the relevant principles since the regime was certified];
(f) that access (or increased access) to the service would not be contrary to the public interest.

[8] On 26 July 2011, the Access Regime was certified by the Commonwealth Minister under the Competition and Consumer Act for 10 years, in accordance with a recommendation made by the National Competition Council.

1.6 Railways (Operations and Access) Act 1997

The South Australian Parliament enacted the ROA Act in 1997, to provide a framework for access to be negotiated on fair commercial terms and a recourse to arbitration (if needed).

Before 1997, there was no specific State or industry legislation in South Australia to accommodate access to railway infrastructure services nor to promote competition for above-rail services. The ROA Act was introduced to:

- ensure that rail operations could be undertaken efficiently and effectively
- ensure that rail corridors were afforded competitive neutrality with roads
- provide an access regime that addressed competition issues in the context of possible monopoly power in private hands.[9]

The ROA Act includes arrangements which enable access by third parties to essential rail infrastructure services, protecting above-rail operators from the potential misuse of market power by below-rail operators, and promoting competition for above-rail services (consistent with the CPA and the CCA).

1.6.1. Rail Access Regime

The Access Regime under the ROA Act encourages negotiation of 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
- 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. It is intended to be light-handed and is based on the principle of promoting negotiated outcomes rather than regulated outcomes. The key elements of the Access Regime are set out below and the process for obtaining access under the ROA Act is illustrated in Annexure A.

The scope of services covered by the Access Regime is determined by the State Government through proclamation and can be varied by further proclamation.[10]

1.6.1.1. Information about access (Part 4, Division 2)

The Access Regime establishes requirements for the initial provision of information by an access provider to a prospective access seeker. The purpose of these information requirements is to establish minimum rights and obligations to facilitate the exchange of

[9] Laidlaw D, *Railways (Operations and Access) Bill*, Second Reading to Legislative Council of South Australia, 2 July 1997

[10] The current scope of services was detailed in section 1.4 of this report.

preliminary information about access; the requirements are not intended to dictate how a party must start or conduct its commercial negotiations.

1.6.1.2. Pricing principles (Part 4, Division 1)

Under the Access Regime, the Commission is not responsible for setting access prices. Rather, it establishes pricing principles for fixing a floor and ceiling price for railway services. While parties are free to enter into an access contract on terms that do not reflect the pricing principles, if an access dispute were to arise, the pricing principles establish bounds for an arbitrator to determine an arbitrated price. Any price outcome from an arbitration process is at the discretion of the arbitrator, subject to the arbitrator taking into account the pricing principles set out by the Commission.

1.6.1.3. Negotiation of access (Part 5)

The ROA Act sets out the information that an access seeker may include in a written proposal to the access provider, for obtaining access or materially varying an existing access contract.[11] The access provider must provide copies of any access proposal to the Commission, and to any industry participant that may be affected by the access that is proposed.

The access provider is required to negotiate in good faith with the access seeker, as are any other respondents whose rights would be affected by the proposal.

1.6.1.4. Resolving access disputes (Part 6)

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 after reasonable attempts to do so. A dispute also exists if another industry participant makes a formal objection to a proposed access contract.

In the event of a dispute, an access seeker may request the Commission to refer the dispute to arbitration. The Commission may first attempt to conciliate the dispute and, if unsuccessful, may appoint and refer the dispute to an arbitrator.[12] An arbitrator can make a binding access award.

1.7 Legislative framework for the Review

In assessing the current Access Regime, the Commission has been guided by its legislative objectives, particularly the primary objective of the *Essential Services Commission Act 2002* (**ESC Act**) which is to protect the long term interests of South Australian consumers with respect to the price, quality and reliability of essential services. It has also had regard to other relevant policy objectives and principles of best practice access regulation, including:

[11] Refer to section 31 of the ROA Act.

[12] The ROA Act requires an arbitrator to be a person who is properly qualified to act in the resolution of the dispute and has no direct or indirect interest in the outcome of the dispute.

- Its objectives under the ESC Act
- The objectives of the ROA Act
- The Competition and Infrastructure Reform Agreement (**CIRA**)
- The objectives of the CCA Act
- National Competition Policy (including National Competition Review)
- Council of Australian Governments (**COAG**) Best Practice Regulation Principles
- Other policy frameworks and reviews.

1.7.1. ESC Act objectives

The Commission has conducted the Review in accordance with the objectives set out in section 6 of the ESC Act.

Box 1.2: ESC Act Section 6

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[13] *and the incentive for long term investment; and*

(vii) promote consistency in regulation with other jurisdictions.

[13] The South Australian railway industry is not a regulated industry for the purpose of the ESC Act and hence, section 6(b)(vi) does not apply. However, railway infrastructure services are an essential service for the purpose of that Act.

1.7.2. ROA Act objects

Section 3 of the ROA sets out the objects of the Act, which are presented in Box 1.3.

Box 1.3: Section 3 of the ROA Act

(a) to promote a system of rail transport in South Australia that is efficient and responsive to the needs of industry and the public; and

(b) to provide for the operation of railways; and

(c) to facilitate competitive markets in the provision of railway services through the promotion of the economically efficient use and operation of, and investment in, those services; and

(d) to promote the efficient allocation of resources in the rail transport segment of the transport industry; and

(e) to provide access to railway services on fair commercial terms and on a non-discriminatory basis.

Consistent with the objectives and factors under the ESC Act, the ROA Act objects focus on the efficiency of the railway industry and the facilitation of competition.

1.7.3. Other policy objectives

There are other policy frameworks and reviews which are relevant to the Access Regime.

In 2010 the National Competition Council (**NCC**) accredited the proposed Access Regime on the basis that it was consistent with the CPA.[14]

In 2006, the CIRA was developed to assist to achieve a simpler and consistent national approach to the economic regulation of significant infrastructure, including rail freight infrastructure (refer to Box 1.4)

Box 1.4: Competition and Infrastructure Reform Agreement

The Competition Infrastructure Reform Agreement (**CIRA**):

- provides a broad framework for simpler and nationally consistent regulatory approaches for significant infrastructure
- emphasises specific regulatory arrangements for nationally significant rail and port infrastructure
- reinforces principles of competitive neutrality for government business enterprises engaged in significant business activities.[15]

[14] Specifically Section 6, clause (e)(1)-(16).

[15] Productivity Commission, *National Access Regime,* 2013, p.318-9

With respect to rail freight infrastructure, the CIRA was intended to promote a 'simpler and consistent national system' of access regulation for nationally significant rail infrastructure.[16]

The CIRA is intended to promote simpler and more consistent approaches to the regulation of significant infrastructure, including specific initiatives for rail and port regulation.[17]

An Inquiry was conducted by the Commission in 2009[18] to determine whether or not the Access Regime was generally consistent with the requirements of the CIRA.[19] That Inquiry concluded that the Access Regime was consistent with the CIRA, although it recommended that certain amendments be made to the Access Regime to achieve greater consistency and that some minor modifications could be made to improve its operation. These recommendations were addressed through changes to the Commission's Information Kit[20] in 2010 and amendments to the ROA Act in 2011.

Further consideration is being given to competition policy reform in Australia. The 2015 Competition Policy Review final report makes several recommendations that are relevant to the Access Regime discussed throughout this report.[21]

1.7.4. Conclusion on guiding principles for this Review

In reaching its recommendation, the Commission has had regard to the terms and legislative objectives of the ROA Act and the ESC Act, the policy objectives of the Access Regime and principles of best practice access regulation. Taken together, those matters emphasise the need to prevent the misuse of market power in the provision of railway infrastructure services, in order to promote competition for above-rail services, at the least regulatory cost.

The first component of this principle is consistent with the Commission's objective of protecting the long term interests of consumers and with the promotion of economic efficiency and competition, which is central to the ESC Act, ROA Act and CPA. The main objective of the Access Regime is to ensure that users are protected from any misuse of market power and the effectiveness of the regime should be tested against that objective.

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16 Productivity Commission, *National Access Regime,* 2013, p.319

17 Productivity Commission, *National Access Regime,* 2013, p.317

18 The Terms of Reference for this review were set by the South Australian Treasurer.

19 The review specifically required an assessment to be made as to whether the Access regime was consistent with Clause 2 of the CIRA which provides for *"Simpler and consistent regulation of significant infrastructure."*

20 Under section 28 of the ROA Act, an "Information Brochure" must be provided by a rail operator to an access seeker. This brochure must refer to any relevant pricing principles and other information requirements, and is subject to certain requirements of the Commission. The Commission's Information Kit describes the pricing principles and these additional information requirements http://www.escosa.sa.gov.au/projects/94/review-of-south-australian-rail-access-regime-information-kit.aspx

21 The 2015 Competition Policy Review final report is available at http://competitionpolicyreview.gov.au/final-report/

The second recognises that the best regulatory approach is one that maximises benefits to consumers, net of the associated regulatory costs. The Commission has considered various regulatory approaches which deliver different costs and benefits and has sought to identify the approach that provides an appropriate alignment between the level of protection to customers (in preventing the misuse of market power) and costs of regulation.

Pursuing those objectives involves a trade-off. A regime that provides strong consumer protection in order to prevent misuse of market power may impose significant regulatory costs which are ultimately passed on to consumers, while a regime that imposes few obligations on a regulated operator may not optimally protect consumers' interests. As suggested by Asciano:

> *…a balance needs to be struck between the need for strong and credible regulation and the fact that the rail assets being regulated in this case are relatively low use rail assets (from an Australian rail perspective).*[22]

Less prescriptive, or more "light-handed" regimes, encourage negotiated outcomes between access providers and access seekers, subject to the potential for arbitration if there is a dispute. These generally involve low regulatory costs, although that will depend on the extent and nature of the arbitration process that supports it.

Other regulatory requirements may include price controls and/or revenue caps, standard terms and conditions, service quality standards, market and operational conduct, ring-fencing, etc. The more of these requirements included in a regime, the more it is said to be "heavy-handed." A heavy-handed regime imposes more costs, but is considered to be stronger insofar as it prescribes pricing and service level outcomes that can be expected by consumers.

In trying to find the balance between effectiveness and cost, the regulated environment should be considered. Table 1.1 displays the characteristics of different approaches.

Table 1.1: Light-handed versus heavy-handed regulatory approaches

← *LIGHTER-HANDED APPROACH*	*HEAVIER-HANDED APPROACH* →
• Low threat or evidence of the misuse of market power	• Threat or evidence of the misuse of market power
• Low volume of market, and therefore consequence of misuse of power is small	• High volume of market, and therefore consequence of misuse of power is great
• Low cost regime to administer	• Costly regime to administer
• For the purpose of *infrastructure services*, has been suggested as "negotiate/arbitrate" framework	• For the purpose of *infrastructure services*, may include price setting

Understanding the characteristics of the rail industry, including its structure, the services being provided, and the nature of the relationships between market participants, is required

[22] Asciano submission, p.5

in order to form a view on the most appropriate form of access regulation to be adopted. The following chapter discusses those matters.

2. MARKET CONDITIONS

This chapter discusses the market for railway infrastructure services, both existing and prospective.

2.1. Intermodal competition

Railways are an efficient and cost-effective means to transport large volumes of passengers and freight over long distances. When traffic demand involves smaller passenger numbers or freight volumes that must be distributed over a larger number of points, road transport is usually more efficient and cost effective.[23] In those circumstances, road transport can act as an effective constraint against the misuse of market power by railway operators. As found in the recent Harper review of competition policy, competition from road transport has reduced the need for heavy-handed regulation in much of the rail sector.[24]

The relative benefits and costs of transport by road and rail need to be evaluated when determining the appropriate transport mode. Factors relevant to that evaluation include:

- *Volume of product* – in general, road is better suited than rail for relatively low volumes. As volume increases, rail becomes more viable due to its economies of scale.
- *Length of haul* – over longer distances rail tends to be more economically feasible.
- *Capital expenditure versus operating expenditure* – road transport tends to have a significantly lower capital expenditure than rail, but higher operating costs.
- *Environmental and social impacts* – freight transport by road can have more significant impacts on the environment and local communities (e.g. through noise and congestion) than rail transport. The impacts are, however, specific to each project.[25]

In Australia, rail is often the preferred cost-effective means of transporting ore from mines to ports. However, the competitive position of road is better for grain transportation. Rail's advantage in grain transportation decreases when the growing area is relatively close to ports. The number of grain export ports in South Australia and shorter distances to ports may make road transport more competitive to railways than it is in other States.

In its submission to the Draft Report, the Department of Planning, Transport and Infrastructure (**DPTI**) noted that, while rail can compete effectively over short distances for larger volumes, the South Australian intrastate network does not provide the length of haul to support effective consolidation of smaller volumes onto rail.

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[23] World Bank, *Railway Reform: Toolkit for improving rail sector performance*, 2011, p.6

[24] Commonwealth of Australia, *Competition Policy Review*, 2015, p.211

[25] SA Government, *South Australian Regional Mining and Infrastructure Plan*, 2014, p.37

Therefore, the relative market power of rail compared to road is considered to be low in the context of railways subject to the ROA Act.

2.2. Vertically integrated industry structure

Ownership of South Australia's metropolitan and intrastate lines is vertically integrated, with the Government of South Australia and GWA (respectively) providing both below-rail and above-rail infrastructure services. The presence of vertical integration continues to create the potential for the misuse of market power. Such behaviour may include:

- Unfair discrimination between an operator's above-rail business and its above-rail competitors. For example, a vertically integrated access provider could set terms and conditions, and prices, that discriminate in favour of its own downstream operations.
- Lack of financial "ring-fencing" between below-rail and above-rail businesses, which may lead to cross-subsidisation between the two.

The structure of the rail industry in South Australia has not changed in recent years and submissions to, and information obtained by, the Commission during this review indicate that it is not expected to change in the following five years.

2.3. Demand for railway infrastructure services

In general terms, demand for rail services is primarily driven by the supply of, and demand for, commodities, and the competitive position of road transport for individual sectors.

Australian railways are dominated by bulk freight movements, which account for around 97 per cent of total freight tonnes hauled by rail.[26] Such movements are principally intrastate, with only 0.3 per cent of total volumes being transported interstate. Western Australia accounts for 56 per cent of the nation's rail freight volume (or "freight task"), driven primarily by iron ore volumes in the Pilbara region.[27] Queensland movements account for a further 22 per cent of the national rail freight task. Table 2.1 shows the total rail volumes in each State in 2012/13 and confirms that only a small percentage of Australia's freight task (2 per cent) occurs on the South Australian railways.

[26] Department of Infrastructure and Regional Development, *Trainline 2*, Statistical Report, 2014, p.7

[27] Department of Infrastructure and Regional Development, *Trainline 1*, Statistical Report, 2012, p.27

Table 2.1: Intrastate bulk rail freight 2012/13[28]

	THOUSAND NET TONNES	PERCENTAGE OF NATIONAL TOTAL
Western Australia	584,629	56%
Queensland	224,226	22%
New South Wales	173,022	17%
South Australia	21,123	2%
Victoria	2,550	<1%
Northern Territory	2,356	<1%
Tasmania	1,654	<1%
ACT	0	0%
Total	**1,009,560**	**100%**

Due largely to the resources boom, Australia's rail freight tonnage grew 57 per cent between 2007-08 and 2013-14.[29] That growth has not occurred in South Australia, as shown in Table 2.2.

Table 2.2: Total freight task on South Australian intrastate railways[30]

YEAR	TOTAL (TONNES)	% ANNUAL CHANGE
2010	794,736,344	–
2011	892,984,625	12%
2012	666,592,058	-25%
2013	710,287,941	7%
2014	625,481,584	-12%

Utilisation of the South Australian intrastate railways is generally low. Where demand for railway infrastructure services is low, the incentive for a railway operator to invest in that infrastructure may reduce. This may limit the capacity and performance of railways, in turn increasing the competitive position of road transport, leading to further reductions in demand for rail. In South Australia, a lack of demand has led to the closure of some grain railways.[31] For example, Viterra announced in May 2015 that it would no longer use rail to transport grain in the Murray Mallee region.[32]

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[28] Department of Infrastructure and Regional Development, *Trainline 1*, Statistical Report, 2012, p.3

[29] Department of Infrastructure and Regional Development, *Trainline 2*, Statistical Report, 2014, p.v

[30] GWA, Unpublished data, 2015.

[31] Department of Infrastructure and Regional Development, *Trainline 2*, Statistical Report, 2014, p.30

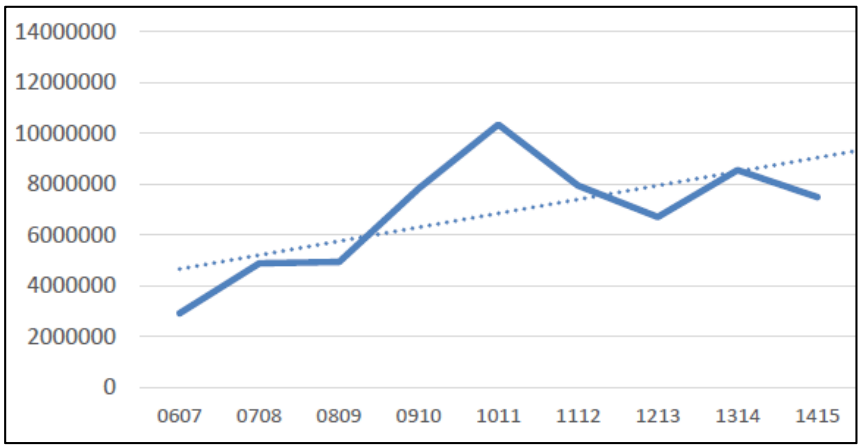
[32] Fogden A, *Mallee rail future in doubt*, Stock Journal, 21 May 2015 http://www.stockjournal.com.au/news/agriculture/cropping/general-news/mallee-rail-future-in-doubt/2732626.aspx

2.4. Future demand and industry developments

2.4.1. Agriculture sector

South Australian grain production volumes have generally increased over the past seven years (see Figure 2.1) and recent trials with soil improvement programs suggest volumes may significantly increase in the near future.[33] Although this would increase the demand for transport services, the extent to which it increases rail haulage will depend upon the competitive position of road transport in the relevant transport corridors.

Figure 2.1: Grain production in South Australia – metric tonnes[34]



2.4.2. Mining sector

Mineral resources contribute significantly to South Australia's economy, accounting for almost 40 per cent of the State's exports by value.[35] Over the last decade there has been an increase in mining exploration in the State.[36]

An expansion of the mining industry would require additional freight and logistics, water and electricity infrastructure.[37] There are several mining regions which, subject to trends in ore prices, may increase production and require rail infrastructure.

In 2014, based on prevailing market prices, the State Government estimated that mines in the Central Eyre Peninsula could increase production from 0.24 Mt per annum to over 31 Mt per annum in the next 5 to 10 years.[38] These mines are located at varying distances from the Central Eyre Peninsula port location and, if expansion were to eventuate, they will likely

[33] Department of Primary Industries and Regions SA, *Premium food and wine from our clean environment*, June 2014
[34] Adapted from Grain Producers SA submission, p.4, based on PIRSA Crop reports
[35] SA Government, *South Australian Regional Mining and Infrastructure Plan*, 2014, p.5
[36] SA Government, *South Australian Regional Mining and Infrastructure Plan*, 2014, p.10
[37] SA Government, *South Australian Regional Mining and Infrastructure Plan*, 2014, p.10
[38] SA Government, *South Australian Regional Mining and Infrastructure Plan*, 2014, p.11

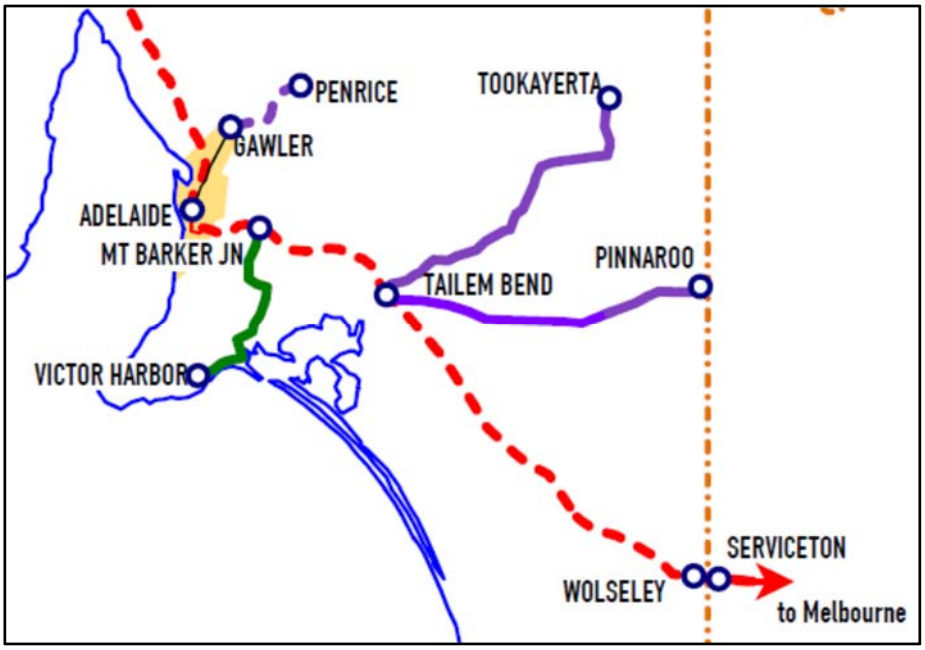
require a combination of road and rail transport solutions.[39] In particular, mines further from the port will be reliant on the development of new rail lines to cost effectively move product from the mine site to port.[40]

Other proposals that may eventuate include the development of new railway infrastructure as part of the OZ Minerals Carrapateena copper-gold project. A rail infrastructure pre-feasibility study has been commissioned for this project.[41]

2.4.3. Future of the Murray Mallee railways

In June 2015, Viterra signed a five-year agreement with GWA to transport grain by rail in the eastern and central regions, and a three-year term for the Eyre Peninsula.[42] Viterra will no longer use rail to transport grain in the Murray Mallee region (see Figure 2.2). A 2014 study by Regional Development Australia found that freight volumes would need to be at least 250,000 tonnes per annum for the Murray Mallee lines to remain viable.[43] There are currently no users of the line.

Figure 2.2: GWA Murray Mallee Lines[44]



[39] SA Government, *South Australian Regional Mining and Infrastructure Plan*, 2014, p.37
[40] SA Government, *South Australian Regional Mining and Infrastructure Plan*, 2014, p.37
[41] See http://www.ozminerals.com/Operations/Carrapateena.html
[42] Viterra, *Viterra makes long term SA rail investment*, 1 July 2015, http://www.viterra.com.au/news
[43] Regional Development Australia, *Freight study and rail operations*, p.7
[44] From SA Track and Signal, http://www.sa-trackandsignal.net/

2.4.4. Intentions of market participants

Some industry participants commented on their intentions in the next five years and on developments that may impact on future demand for rail infrastructure services.

In its submission to the Issues Paper, SAFC suggested that there will be increasing freight volumes, citing the planned expansion in the South Australian mining sector over the next five to ten years. It suggested that the existence of the Access Regime will mean that the expansion is more likely to proceed smoothly.[45]

Bowmans Intermodal stated that it plans to expand its operations through the development of other terminals to capture freight which is currently on road or on rail but using different rail/port nodes. It plans to use a number of terminals and rail corridors which will likely fall under the Access Regime.

Although Aurizon's operations within South Australia are currently limited to interstate freight operations on the ARTC track, in its submission to the Issues Paper it stated that it envisages that it could become an access seeker with the objective of providing intrastate above-rail services within South Australia. It stated that such an expansion would depend upon commercial circumstances and on an access regime which supports a viable and effective rail haulage tender.

In its submission, Viterra indicated that it is difficult to predict its future demand for rail services as demand is driven by seasonal climatic conditions and the size of annual harvests. However, for the majority of its current business, it suggested that "*rail freight provides the most efficient logistics solution to manage peak harvest grain receivals and export demand*."[46] As noted earlier, Viterra subsequently announced that it would no longer use the Murray Mallee lines.

Finally, GWA stated in its submission to the Issue Paper that it continues to invest in rail infrastructure, provide access rates for small developments and looks for, and works with, many larger mineral developments at volumes sufficient to upgrade its current lines.[47] However, it acknowledged that it is facing increased competition from road transport in moving grain and that some capital investment may be required. At current access rates for grain, additional investment may be difficult for it to justify.[48]

Furthermore, GWA stated that as road transport becomes more competitive, it believes that there is a real possibility that all intrastate lines will be without dedicated customers, making them uneconomic.

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[45] South Australian Freight Council submission, p.1
[46] Viterra submission, p.2
[47] GWA submission to Issues Paper, p.5
[48] GWA submission to Issues Paper, p.5

3. CONTINUATION OF THE ACCESS REGIME

Final Recommendation

The Commission has considered the current and near future market conditions and has reached the final conclusion that a light-handed access regime remains appropriate for the next five-year period.

The Commission's final finding is that there are unlikely to be net benefits in adopting either a more heavy-handed regime at this time, or terminating the regime, thereby relying on the more general access pathways under the National Access Regime.

It has also formed the final view that some minor improvements to the Access Regime may result in additional net benefits.

3.1. Is there the potential for use of market power?

Having regard to the market conditions discussed in the previous chapter, the Commission's final finding is that there is the potential for misuse of market power for operators of South Australian rail infrastructure services. In particular:

- There is limited competition from other forms of transport. While road transport does compete with rail transport in some cases, rail infrastructure service providers are likely to have market power, particularly for the transport of bulk freight across long distances.
- The industry continues to have a high degree of vertical integration, creating opportunities for market power to be misused to the detriment of competition in the above-rail market as discussed in section 2.2 of this report.[49]

There are, however, other factors that may offset the potential misuse of market power of the rail infrastructure service providers. Those include:

- The users of the railways are generally large businesses, which can devote significant resources to negotiating access. Unlike other infrastructure industries with mass market customers (e.g. energy and water industries), the consumers of rail infrastructure services have significant countervailing bargaining power.
- There are few users of the South Australian rail infrastructure services. Utilisation of the railways continues to be relatively low and, based on the views expressed in submissions, this trend is likely to be similar in the future. In this environment, there is a strong incentive for railway operators to increase utilisation of the railways in order to recover fixed costs. The potential for access seekers to use

[49] One approach for determining the potential for misuse of market power is through a "sustainable non-transitory increase in price" (SNIP) test, which relies on the ability of a market participant to increase prices in an unconstrained manner. Given the nature of the negotiate-arbitrate regulatory regime, the Commission has not utilised pricing information to form a view on the potential for misuse of market power and has instead relied on other structural and performance indicators.

other forms of transport places a ceiling on the extent to which rail access charges can increase, which limits the extent to which a rail infrastructure service provider can misuse its market power.

Those factors suggest that while there is potential for rail infrastructure service providers to misuse market power, the likelihood of this occurring is low. This is relevant to the Commission's consideration of whether or not the current light-handed Access Regime should continue.

3.1.1. Is there evidence of misuse of market power?

The Commission has not found, or been presented with, any evidence to suggest that market power has been misused, or that it is likely to be misused in the next five years, in respect of operators of South Australian rail infrastructure services. The matters considered by the Commission in reaching that finding are:

- The extent to which competition of above-rail exists
- The absence of access disputes
- Submissions made by stakeholders.

3.1.1.1. Competition for above-rail services

Some submissions raised concerns about the level of above-rail competition, suggesting that the light-handed approach under the Access Regime has not been successful in accommodating competition between users of railways.

For example, Grains Producers SA (**GPSA**) stated that there has been no additional competition since the ROA Act was introduced in 1997. It suggested that this lack of competition is evidenced by "*the declining volume of grain transported by rail each season.*"[50]

The Commission acknowledges that there has not been new entry into the above-rail market and that volumes transported over rail networks has remained flat (as discussed earlier). However, it considers that those outcomes are more likely due to wider economic factors rather than a lessening of rivalry between above-rail operators. As discussed in Chapter 2, demand for rail services is largely driven by supply and demand in commodity markets, not by the intensity of competition within the rail industry. In addition, competition from road transport has also contributed to the declining volume of grain transported by rail.

In its submission to the Issues Paper, Aurizon noted the regime's contemplation that a rail operator is the only party that can request access.[51] It argued that this prevents other parties (e.g. mining companies) from identifying a market opportunity and seeking access, inhibiting effective competition for above-rail services. It suggested that removing this restriction:

[50] GPSA submission, p.3.

[51] The ROA Act identifies access as being obtained by an industry participant which must be an operator, or a person who proposes to operate railway rolling stock on a railway network.

> *…would permit customers to evaluate comparative rail haulage prices (as opposed to a bundled price). The disclosure of above rail prices to the customer and the regulator would also allow ESCOSA to assess whether the incumbent's pricing proposals are consistent with promoting the objectives of the [South Australian Rail Access Regime].*[52]

Aurizon reiterated this point in its submission to the Draft Report[53] and has sought from the Commission, confirmation of its interpretation of section 29 of the ROA Act. That section places an obligation on GWA to provide access information to *"a person with a proper interest in making an access proposal to the operator"*. [54] The Commission's view is that this could include an end-user, provided that there is a realistic prospect of the end-user becoming an above-rail operator. However, the Commission notes this does not require provision of pricing information other than the 'likely price' for access.[55]

In terms of requiring GWA to provide access information to an end-user that is not, and will not, be an above-rail operator, the Commission does not consider that a regulatory response is required at this time. By their nature, access agreements exist between below-rail and above-rail operators, not between the parties seeking above-rail services. There is no practical purpose in providing that information to end-users. It is not the intention of the ROA Act and the Access Regime to regulate the arrangements between GWA and someone who is not its customer. Further to this point, pricing information is sensitive and the obligation to provide it should be only in the instance that there is an ability to execute an access arrangement, and that person is likely to be GWA's customer.

In its submission to the Draft Report, Aurizon also argued that a greater requirement should exist on rail haulage providers to provide an 'unbundled' price:

> *It is preferable where a related operator provides a rail freight service that it is required to quote that service by clearly identifying the above and below rail components of that price*.[56]

The Commission is not persuaded that such a change in the regime is required, for the following reasons:

- Aurizon's suggestion would effectively lead to regulation of above-rail services, which would only be justified if there was potential for the misuse of market power by above-rail operators. Rail haulage (above-rail) services are contestable (this point is not disputed by Aurizon) and there is no evidence which suggests that market power is, or will be, misused.
- The proposal would change the nature of the Access Regime considerably. The current Access Regime has been accredited by the NCC as meeting the CPA and the proposed change to the regime may not be consistent with those principles.

[52] Aurizon submission to Issues Paper, p.4
[53] Aurizon submission to Issues Paper, p.2
[54] Aurizon submission to Issues Paper, p.3
[55] Refer to Section 29(1)(c)(i))
[56] Aurizon submission to Issues Paper, p.4

- The Commission has undertaken a review of GWA's regulated accounts, concluding that GWA is offering prices to access seekers (i.e. above-rail operators) that are comparable with those charged to itself for below-rail services (refer to section 3.3.3 below). This thereby further reduces the likelihood of anti-competitive behaviour in the rail haulage market.
- GWA has previously entered into commercial agreements, and provided pricing information relating to access with non-rail operators, on the basis that they may be rail operators in the future.

Having regard to submissions received and information gathered during the review, the Commission has not found, or been presented with, evidence that would suggest a move towards a more heavy-handed access regime would further promote competition.

3.1.1.2. The absence of disputes

To date, the Commission has not had a dispute arising from an unsuccessful negotiation under the ROA Act referred to it. This suggests that negotiations are occurring successfully or, alternatively, that access seekers are unwilling to test the dispute resolution process.

To determine whether negotiations are occurring successfully, Aurizon, in its submission to the Draft Report,[57] requested that the Commission publish the number of access proposal notices it has received from access providers. Those are shown in Table 3.1.

Table 3.1: Access requests and negotiated access agreements between GWA and third parties

PERIOD	ACCESS REQUESTS[58]	ACCESS AGREEMENTS NEGOTIATED
End-2009 to Mid-2015	14	4

Bowmans Intermodal indicated that the lack of disputes could be a measure of success of the Access Regime.[59] In contrast, Asciano suggested that the absence of disputes is not an indicator of a successful regime, as access seekers may be wary of dispute resolution costs or other avenues the access provider may potentially use to impact their business.[60] Similarly, Aurizon, in its submission to the Draft Report, stated that the absence of disputes is not a reliable indication as to the performance of the Access Regime and whether it is achieving its objectives. In its submission to the Issues Paper, it stated that the absence of access related disputes is not because access seekers are unwilling to test the regime, but that the regime

[57] Aurizon submission to Draft Report, p.2

[58] The number of access requests are larger than the number of negotiated agreements, due to a range of reasons. For example, GWA often receives multiple access applications for the same project/traffic.

[59] Bowmans Intermodal submission, p.1.

[60] Asciano submission, p.7

"*does not provide the supportive framework to allow access seekers to be in a position where they may test it*."[61] It added that even in circumstances where it could be tested, matters relating to price are unlikely to be disputed, given the wide interval between floor and ceiling prices.[62]

This issue was discussed by the Productivity Commission in its 2013 National Access Review[63], when it concluded that while there was little empirical evidence to conclusively prove which of these views is correct, primacy should be given to negotiation.[64] It also noted that some form of impetus or regulatory threat may be required to provide incentives for parties to negotiate reasonable pricing and other conditions.[65]

The Productivity Commission concluded that a negotiate-arbitrate framework should be retained for the National Access Regime. It found that, while there are some concerns about the operation of the negotiate-arbitrate framework, there is no basis for concluding that alternative measures would lead to better outcomes.[66]

While the evidence is equivocal on the question of whether or not the absence of disputes indicates an effective access regime, the Commission agrees with the Productivity Commission's view that the evidence does not support a move to a more heavy-handed regulatory regime.

3.1.2. Conclusion on market power

Despite the potential for misuse of market power, the Commission has not found, or been presented with, persuasive evidence that market power has actually been misused.

Submissions and information obtained by the Commission indicate that access seekers are successfully negotiating access to railway infrastructure services. No access disputes have been referred to the Commission since the Access Regime commenced. While the absence of disputes is not itself an indicator that the regime is effective, the Commission will only consider changes to access regulation if there is probative evidence supporting such a change. At present, no such evidence exists.

3.2. Alternative access regimes

In addition to requirements under the ROA Act, the COAG Best Practice Regulation Principles provide that a range of feasible policy options must be considered when establishing regulatory arrangements.[67] Furthermore, in establishing and maintaining effective

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61 Aurizon submission to Issues Paper, p.5

62 Under the Access Regime, the *floor price* should reflect the lowest price at which the operator could provide the relevant services without incurring a loss. The *ceiling price* should reflect the highest price that could fairly be asked by an operator for provision of the relevant services.

63 Productivity Commission, *National Access Regime*, 2013, p.238

64 Productivity Commission, *National Access Regime*, p.128

65 Productivity Commission, *National Access Regime*, p.115

66 Productivity Commission, *National Access Regime*, p.128

67 COAG, *Best Practice Regulation Principles*, 2007, p.3

arrangements that maximise the efficiency of regulation, consideration should be given to alternatives, having regard to whether the existing regulatory regimes of other jurisdictions might offer a viable alternative.[68]

Decisions should be informed by an assessment of the effectiveness in meeting the identified objective, and the costs and benefits for the community as a whole. The scope of impact analysis should be broadened, where appropriate, to recognise the effect of regulation on individuals and the cumulative burden on business.[69]

The Commission has therefore considered alternatives to the current regime, with the goal of recommending the option that generates the greatest net benefit for the community. The Commission sought stakeholders' views as to whether they thought alternative regulatory arrangements, such as adoption of the National Access Regime, would be more appropriate for the regulation of South Australian rail services.

3.2.1. Benefits and costs under the existing regime

The current regime is intended to be light-handed, based on the principle of promoting negotiated outcomes rather than regulated outcomes. If negotiation is unsuccessful, the Access Regime provides a process to facilitate access on fair commercial terms. The Commission's final finding is that the Access Regime has little cost burden while protecting against the misuse of monopoly power in the current industry environment.

In its submission to the Issues Paper, GWA submitted that the Access Regime is a well-balanced regulatory regime, protecting the interests of access seekers without burdening the access provider with excessive costs.[70] It also stated that, in a relatively low volume rail environment, it is important that the Access Regime encourages participation through negotiation and offers the option of arbitration.

To adequately compare it against the alternatives, the benefits and costs of the current regime will first be discussed.

3.2.1.1. Benefits of the existing regime

Negotiated outcomes

Under the current regime, third party access to monopoly rail infrastructure has occurred.[71] While not all negotiations have led to access agreements, the Commission did not receive any negative comment or submissions about the negotiation process. Further, as explained above, no matters have been referred to the Commission for arbitration over that period.

In its submission to the Issues Paper, GWA stated that the Access Regime has provided a basis for negotiating access to GWA track and yards. It suggested that a regime that

[68] COAG, *Best Practice Regulation Principles*, 2007, p.1
[69] COAG, *Best Practice Regulation Principles*, 2007, p.1
[70] GWA submission to Issues Paper, p.4
[71] GWA reported over 33,000 agreements over the five year prescribed period.

encourages negotiation is important, and believes that the lack of arbitration referrals is strong evidence that the regime is working as intended.[72]

In response to the issue of failed negotiations, the Commission recognises that a right to negotiate the terms and conditions of access does not guarantee that an agreement will be reached between parties. For example, there might be little scope for the parties to reach agreement in the instance that service providers and access seekers have sharply divergent interests. Consequently, the failure of negotiations to reach agreement is not necessarily an indicator of the effectiveness of the overall process.[73]

In its submission to the Issues Paper, GWA commented on the lack of new rail access customers, responding to concerns raised by some project proponents that below-rail costs are preventing some new projects from proceeding.[74] However, GWA argued that those projects are not proceeding because proponents cannot provide the necessary certainty or bear the additional costs required to upgrade the line to the condition required (to accommodate increased axle loads, higher speeds and new connections).[75] It stated that these costs cannot be shared with other users because usually there are "*only one or two existing users of each line with trucking providing a highly competitive alternative*."[76] GWA concluded that the lack of such new developments is not evidence of the regime being unsuccessful but rather of the "*current economic reality*."[77]

In considering the issue of investment, the Commission is mindful of the fact that the railway industry is capital-intensive, requiring substantial capital expenditure on assets with long lives. An access provider will therefore generally require a commitment from users of those assets over future usage (e.g. term of access arrangement and a minimum volume), to underwrite the investment.

While there have been instances where governments have contributed funding for capital investments (for broader economic or social reasons), expenditure needed to support access proposals is generally a matter for access seekers and operators to negotiate, taking into account the benefits that might accrue to each party. Investment needs and funding is a project-specific matter and an access provider is likely to require a commitment from users regarding the extent of asset utilisation (e.g. term of access arrangement and a minimum annual volume) to underwrite the investment decision being made. This would provide sufficient certainty to the access provider to alleviate any perceived risks of being left with an obsolete or underutilised asset should the user cease or reduce its operational activities. Furthermore, the ROA Act does not preclude a user from participating in the financing of new investments (e.g. via joint ventures), with the view of benefitting through greater operational efficiency and lower access charges.

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72 GWA submission to Issues Paper, p.3
73 Productivity Commission, *National Access Regime*, 2013, p.120
74 GWA submission to Issues Paper, p.3
75 GWA submission to Issues Paper, p.3
76 GWA submission to Issues Paper, p.3
77 GWA submission to Issues Paper, p.3

Flexibility to respond to local conditions

Industries and jurisdictions have different characteristics, and regulatory principles are deliberately flexible in order to take these characteristics into account.

As a state-based regime, the Access Regime can be responsive to changes in South Australian economic conditions.[78] For example, it provides a flexible negotiation framework, and infrastructure can be brought into or out of its scope as the need arises.

Known regime provides certainty

Finally, as the Access Regime has been in place since 1997, it is known to, and understood by industry participants. This familiarity with the regime engenders certainty, making for a stable operating environment. As discussed below, the alternative access pathways under the National Access Regime are less certain (in terms of the process for seeking access) than those of the Access Regime.

3.2.1.2. Costs of the existing regime

The Commission has categorised the costs of retaining the current regime into costs of compliance with the regime for rail operators, costs for access seekers to apply in accordance with the regime, and costs incurred by the regulator for overseeing the regime. Ultimately, all of these costs will be borne by the customers of the rail services.

The Commission sought information from stakeholders on the costs of the current Access Regime; however, most were unable to provide quantifiable information.

Costs to operator

Given its light-handed nature, the Access Regime is considered to have low compliance costs. This aligns with the Best Practice Regulation Principles that regulation should "*avoid unnecessary compliance costs and restrictions on competition*."[79]

In its submission to the Issues Paper, GWA stated that the Access Regime's management costs are low, and that the Access Regime has provided a cost efficient basis for negotiating access to GWA track and yards.[80] It has estimated that its cost associated with managing the compliance component of the Access Regime is around $300,000 per year.[81] This figure has been determined by allocating a proportion of costs for administration staff involved in access. Activities carried out by these staff include preparing access accounts, reporting, dealing with the Commission and dealing with proponents negotiating and pricing access requests. As a comparison (although evidence on the exact costs incurred by business is limited) in 2005, KPMG estimated the costs associated with Queensland Rail's compliance with the Queensland rail access regime to be about $1 million per year.[82]

[78] GWA submission to Issues Paper, p.4
[79] COAG, *Best Practice Regulation*, 2007, p.1
[80] GWA submission to Issues Paper, p.4
[81] GWA submission to Issues Paper, p.4
[82] Productivity Commission, *National Access Regime*, 2013, p.239

GWA also stated it is appreciative of the reduction in the regulatory burden that arose as a result of legislative amendments made following the 2009 Review and that, following those amendments, it had no further cost-related issues.[83]

Costs to access seekers

Evidence before the Commission suggests that, compared to other regulatory regimes, the Access Regime is relatively low-cost for access seekers. Submissions described costs for access seekers as immaterial and not a limiting factor. For example, GPSA stated that it did not believe that regulatory costs are "*material in the overall scheme*" or "*a limiting factor for either the ongoing operation of the rail corridors or the potential access of services by any new participants*." It added that "*most of the Access Regime requirements are simply good business practices*."[84]

While Asciano stated that it has not negotiated access to the assets covered by the Access Regime, it considered the costs associated with negotiating access to be "*not particularly substantial when compared to the benefits of third party access.*"[85]

Costs to regulator

The Commission annually publishes its costs of administering the Access Regime. These costs cover activities including the receipt of lodged compliance reports, answering customer queries and conducting reviews such as this one. In the past five years, the average annual cost for the Commission has been approximately $91,000. Figure 3.1 shows the Commission's Access Regime related costs for each of the last five financial years.

By way of comparison, in 2010 the Victorian Government estimated the compliance costs resulting from its rail access regime to be in the order of $200,000 per year.[86] The annual cost associated with the Queensland rail regime incurred by the Queensland Competition Authority is in excess of $5m per year.[87]

[83] GWA submission to Issues Paper, p.6

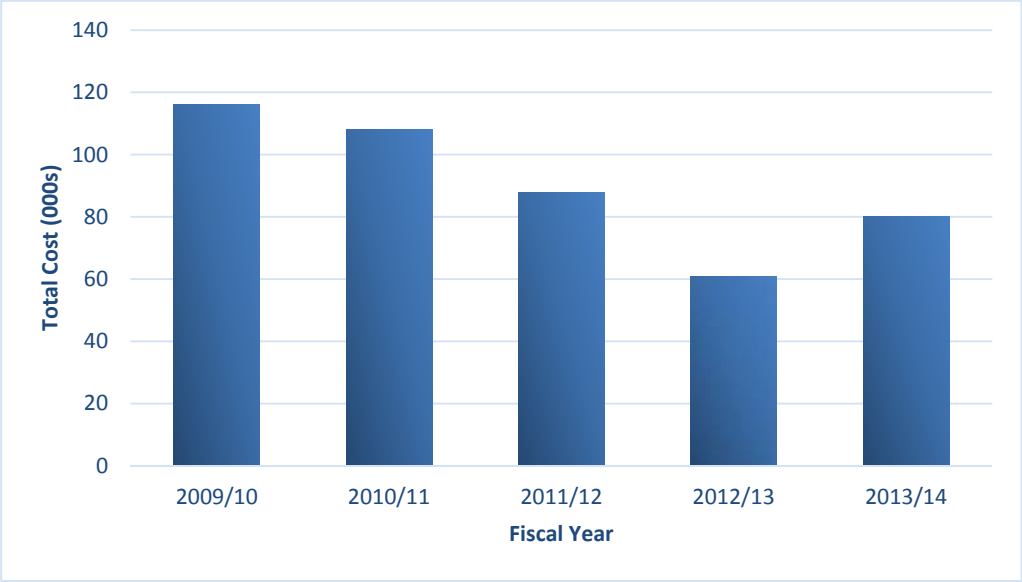
[84] GPSA submission, p.3

[85] Asciano submission, p.9

[86] Productivity Commission, *National Access Regime Inquiry Report*, 2013, p.239.

[87] Aurizon, *Submission to the Competition Policy Review*, June 2014.

Figure 3.1: The Commission's Access Regime administration costs[88]



In a recent review conducted by Frontier Economics, it was found that the regulatory costs of undertaking cost-based water pricing reviews (a more heavy-handed regulatory approach) are between $1m and $2.75m per regulatory decision.[89]

3.2.2. Costs and benefits under the National Access Regime

If the current Access Regime were to expire, the services provided by the rail infrastructure covered under the access arrangements of the ROA Act would fall within the scope of the National Access Regime. Thus declaration under the National Access Regime may become available.

Four submissions raised the regulatory complexities currently associated with the Access Regime, although only one of these advocated for a move to the National Access Regime.

3.2.2.1. Benefits of the National Access Regime

The primary benefit from replacing the Access Regime with the National Access Regime would be a single rail access regime across states, rather than a series of separate regimes. In its review of the National Access Regime, the Productivity Commission concluded that there was evidence to suggest that certification of state-based regimes has led to a broadly consistent approach to access regulation in rail.[90] However, it also noted that a nationally consistent approach to rail access regulation would likely reduce compliance costs for rail

[88] In 2012/13, there was a transfer of accumulated rail regulation surpluses of $290,000 from the Commission to the South Australian Government, which is not displayed on this graph. The Commission's expenditure on intrastate rail regulation in 2012/13, net of that transfer, was around $60,000.

[89] Frontier Economics, *Improving Economic Regulation of Urban Water*, 2014, p.16

[90] Productivity Commission, *National Access Regime*, 2013, p.21

operators that deal with multiple access regimes and multiple economic regulators and also reduce the administrative costs of regulating access.[91]

GPSA referred to "*the cost of the current piece-meal approach to Australian Railways*" as a significant cost and lost opportunity for grain producers, and that "*every break in the 'chain' reduces competition and increases cost or loss of value to grain producers*."[92] However, it did not specifically advocate for a move to the National Access Regime.

Asciano supported a move towards a national access regulator on the basis that the multiplicity of rail access regimes across Australia adds costs and complexity to rail access for little benefit; particularly as many of the access regulation functions are duplicated across states.[93] It noted that the Draft Report of the Commonwealth's Competition Policy Review proposed the establishment of a national pricing and access regulator separate from the ACCC and broadly supported the application of this recommendation to South Australian rail infrastructure access.[94]

In its submission to the Productivity Commission's 2012 review, Asciano indicated that the administrative costs of dealing with different rail access regimes were probably not large and that the benefits of consistency would flow to a small number of national rail providers.[95] It pointed to other issues in dealing with different rail access regimes where it considered a national regulator and national rail regulation would provide benefits. These related to the level of expertise and capacity constraints of State regulators, and differences in operational rules between access frameworks, for example, relating to allowable speeds.[96] In response to those matters, the Productivity Commission concluded that there may be other options available to address these matters that would likely be less costly than developing a national rail access regime and regulator. For example, regulator forums can help facilitate coordination between regulators, encourage an exchange of views on good practice and build professional capability.[97]

Bowmans Intermodal stated that using the ACCC as the sole regulator for the ARTC and other rail and terminals across Australia could be an option.[98] However, in Aurizon's submission to the Issues Paper, it put the view that the National Access Regime is unlikely to realise any substantive benefits relative to retention of the current Access Regime, particularly as the Commission is likely to retain regulatory functions for the Australasia Railway (Third Party Access) Code.[99]

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91 Productivity Commission, *National Access Regime*, 2013, p.270

92 GPSA submission, p.4

93 Asciano submission, p.10

94 Asciano submission, p.10. The Commission also notes that the Final Report of the Competition Policy Review confirmed that recommendation, albeit not to the rail sector specifically.

95 Productivity Commission, *National Access Regime*, 2013, p.271

96 Productivity Commission, *National Access Regime*, 2013, p.272

97 Productivity Commission, *National Access Regime*, 2013, p.271

98 Bowmans Intermodal submission, p.2

99 Aurizon submission to Issues Paper, p.5. The AustralAsia Railway (Third Party Access) Code is a schedule to the *AustralAsia Railway (Third Party Access) Act 1999* and regulates access to the Tarcoola – Darwin railway. The Commission is the regulator under that Code.

GWA did not support a move to a National Access Regime, putting the view that it would be counterproductive to let the current Access Regime expire and move to a more prescriptive regime.[100]

3.2.2.2. Costs of the National Access Regime

The administrative and compliance costs associated with the National Access Regime have been described by market participants as "*substantial*"[101] and the decision making processes have been described as "*long*" and having an adverse effect on investment decisions.[102]

Changing from the current Access Regime may also have transitional costs, including administration costs. Thus a move to the National Access Regime may contradict one of the key objectives in regulation, which is to minimise regulatory cost.[103]

The Commission also identified that access providers may face costs relating to applications for declaration, as well as costs associated with the time taken in relation to submitting and responding to a declaration application. Direct costs of applications for declaration can include direct fees plus costs associated with writing and responding to applicants, management's time, the use of consultants, and in some cases substantial legal costs.[104]

Access seekers and providers can also face costs associated with the time taken to submit and respond to a declaration application. These include losses due to uncertainty and delays. The time taken to resolve applications can extend to 12 months.[105]

GWA submitted that the cost impact from a move to the National Access Regime could be material. It stated that "*any application of a national approach, driven by regulators that may not give the appropriate weighting to South Australian economic conditions, is likely to increase costs upon GWA as the access provider*."[106] It added that this "*increase in costs cannot be shared to the end customers without impacting on the viability of regional rail in South Australia*."[107]

Given these costs, and the potentially small benefit gained from moving to the National Access Regime, the Commission accepts that a move to the National Access Regime would not produce greater net benefits than the existing regime. This is consistent with the view expressed more generally by the Productivity Commission, which stated that it did not believe that a national approach to rail access would generate substantial net benefits to the community.[108]

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[100] GWA submission to Issues Paper, p.2
[101] Productivity Commission, *National Access Regime*, 2013, p.11
[102] Productivity Commission, *National Access Regime*, 2013, p.27
[103] World Bank, *Railway Reform: Toolkit for improving rail sector performance*, 2011, p.150
[104] Productivity Commission, *National Access Regime*, 2013, p.238
[105] Productivity Commission, *National Access Regime*, 2013, p.238
[106] GWA submission to Issues Paper, p.4
[107] GWA submission to Issues Paper, p.4
[108] Productivity Commission, *National Access Regime*, 2013, p.272

3.3. The decision to proceed with a light-handed approach

In determining how prescriptive the Access Regime should be, the Commission has analysed the market conditions of the South Australian rail industry (see Chapter 2). It was found that within the industry there is currently:

- some potential for, but no evidence of, the misuse of market power
- a low volume of freight, and therefore the consequence of misuse of market power is small.

In addition, it is unlikely the market will significantly change in the foreseeable future. The current and future market conditions suggest a light-handed regime remains appropriate.

The costs and benefits of retaining the Access Regime were compared with adopting a fundamentally different state-based regime or the National Access Regime. The Commission's finding is there is not a strong argument to suggest that a more efficient outcome would result from adopting these alternative regulatory arrangements.

Given these factors, the Commission concludes that there are unlikely to be net benefits in moving toward a heavy-handed regime at this time. Continuation of the current light-handed Access Regime best serves the interests of rail users. In general, most stakeholder submissions support this view.

The Commission has, however, considered suggestions made in submissions on areas where the current Access Regime could be improved to make it even more effective. Those suggested changes are discussed in Chapter 5.

4. INDEPENDENT REVIEW OF REGULATORY ACCOUNTING PRACTICES

The Commission received submissions alleging that GWA could misuse its market power by cross-subsidising its competitive above-rail business from its below-rail revenues. For example, Asciano raised concerns that ring-fencing may not be carried out at a level that reduces the potential discriminatory treatment of above-rail operators. It stated that the level of ring-fencing which applies under the Access Regime is less than that which applies to other vertically integrated freight rail operations in Australia and should be strengthened. It argued that a strong ring-fencing regime will promote competition, prevent misuse of monopoly power and promote economic efficiency.

While no evidence was presented to the Commission to substantiate those claims, the Commission undertook an independent review of the regulatory accounting practices of GWA following the release of the Draft Report, in part to ensure that costs and revenues[109] have been allocated appropriately between its below-rail and above-rail businesses.[110]

The review of regulatory accounting practices sought to provide the following:

- evidence that the financial information in relation to the intrastate railway business is maintained by a separate legal entity to the entity that operates the interstate railway, and advice on the reasonableness of any management fees or subsidisation mechanisms that may exist between these two businesses
- confirmation that the allocation of directly attributable costs and revenues and other costs between above-rail and below-rail businesses for the intrastate railway business, was appropriate
- advice as to whether cost allocation methods between above-rail and below-rail are reasonable and if other, more reasonable, cost allocation methods could be used.

The review found no inappropriate cost or revenue accounting practices regarding GWA's intrastate railway operations. It concluded that GWA is offering comparable access prices to access seekers as it charges itself. This result should increase stakeholder confidence in the Access Regime.

[109] In its submission to the Draft Report, Aurizon stated that the review's scope was too narrow and that it should include costs and incomes (p.2). The Commission's scope ensured that both were considered in the review.

[110] The KPMG report can be found on the Commission's website, at http://www.escosa.sa.gov.au/projects/217/tarcoola-to-darwin-railway-ten-year-review-of-revenues.aspx

5. POSSIBLE ENHANCEMENTS TO THE ACCESS REGIME

Final Recommendations

The Commission's final recommendations on areas where the existing Access Regime could be enhanced include:

1. *Developing centralised information on the scope of the Access Regime and its relationship to other access regimes.*
2. *Examining the potential for greater integration of transport infrastructure access regimes in South Australia.*

The Commission has formed the view that there are some areas where the Access Regime could be improved to make it more effective. These are described below.

5.1. Desire for more detailed pricing information

5.1.1. Pricing principles

The Access Regime provides a set of pricing principles for operators:[111]

> *The floor price should reflect the lowest price at which the operator could provide the relevant services without incurring a loss and the ceiling price should reflect the highest price that could fairly be asked by an operator for provision of the relevant services.*[112]

However, the pricing principles do not prevent an operator from entering into a commercially negotiated access contract on terms that do not reflect the principles.[113]

The pricing principles are consistent with those set out in the CIRA (clause 2.4 (b)), which aim to ensure that regulated access prices should be set to:

i. *generate expected revenue for a regulated service or services that is at least sufficient to meet the efficient costs of providing access to the regulated service or services and include a return on investment commensurate with the regulatory and commercial risks involved;*
ii. *allow multi-part pricing and price discrimination when it aids efficiency;*
iii. *not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher; and*
iv. *provide incentives to reduce costs or otherwise improve productivity.*

[111] Refer to http://www.escosa.sa.gov.au/library/100326-RailInformationKit-Revised.pdf
[112] Section 27(2) of the ROA Act.
[113] Section 27(3) of the ROA Act.

In its submission to the Draft Report, Aurizon suggested that the principles of setting a ceiling price may not be prescriptive enough.[114] It stated that the current pricing principles in the Commission's Information Kit, which allow GWA to set an access charge for below-rail access up to the 'full economic cost' (ceiling price), can hinder effective competition above-rail. It argues for a ceiling price that is set at *"freight rate less (GWA's) avoidable above rail costs."*

The proposal is not supported by the Commission for the following reasons:

- The full economic cost is the upper-bound of the economically efficient cost of providing a service. While there may be occasions for negotiating a price below this, it is not appropriate to set the ceiling price (which by its definition is the maximum price that should be able to be charged) below this cost.
- Under the Access Regime, parties are free to enter into a negotiated access arrangement on terms that do not reflect the pricing principles. However, if any access dispute should arise, the pricing principles establish bounds for an arbitrator to determine an arbitrated price.
- This pricing methodology is consistent with the principles outlined in the CIRA, and the pricing principles under the Tarcoola-Darwin Rail Access Regime. Aurizon has stated that its proposed pricing methodology is consistent with the "principles underpinning the competitive imputation price in the Australasian Railways Access Code" (**the Code**) established under that regime. However, the competitive imputation price is not the same as the ceiling price in the Code. In fact, the Code allows for a ceiling price to be set using a similar approach as in the Information Kit pricing principles.

5.1.2. Indicative and reference pricing

In its submission to the Issues Paper, Aurizon stated that:

> *…to facilitate an effective competitive tender on rail haulage it might be necessary to determine an indicative price for access for the appropriate below-rail service which would be applied to the vertically integrated operator and any access seeker which met the condition of that price*.[115]

Aurizon further stated that indicative prices would permit customers to evaluate comparative rail haulage prices and allow the regulator to assess whether or not the pricing proposals are consistent with promoting the objectives of the Access Regime.[116]

Aurizon did not consider the determination and publication of indicative charges as necessary to promote commercial negotiation. However, it put the view that:

[114] Aurizon submission to Draft Report, p.3
[115] Aurizon submission to Issues Paper, p.4
[116] Aurizon submission to Issues Paper, p.4

> *…in order for competition to occur, the access seeker must, subject to differences in cost or risk, be provided the same price for the same below rail service as the owner of the facility is prepared to provide to itself. The role of the indicative price being provided to the access seeker is to ensure that a more efficient rail operator is able to compete fairly in the downstream market.*[117]

As stated earlier in this report, the Commission's review of GWA's regulatory accounting practices concluded that GWA is offering comparable access prices to access seekers as it charges itself.

Other stakeholders expressed concern that below-rail operators do not provide clear rates of charges. Cargill noted that, while GWA provides general information for access seekers, counterparts operating under other access regimes provide specific information.[118] Asciano suggested that cost information is a minimum requirement for even-handed price negotiations, and provisions to publish it should be strengthened. It added that an access regime which requires this information to be available to both negotiating parties is "*more likely to result in an access price which is efficient and cost reflective than a price negotiated in a regime where one party has incomplete information*" and that this "*is more likely to result in a price outcome which approximates the outcome that could be expected in a competitive market*."[119]

Anticipating calls to publish rates, in its submission to the Issues Paper, GWA stated:

> *Published rates… are unlikely to give potential investors in rail transport a reliable guide to future access costs. The risk to GWA is that if it is held to the rates it publishes it may be saddled with more of the risk for a new customer than is able to be justified by the returns or capital investment required. In these examples a case by case negotiated approach is preferable to allow for the asymmetric risks to be resolved.*[120]

In response to comments about publishing clear rates of charges, the Commission notes, and broadly agrees with, GWA's statements. As stated in the Commission's 2009 review of the Access Regime Information Kit:

> *With respect to [suggestions] regarding the introduction of reference prices, the Commission notes that an Access Regime should be sufficiently flexible to account for the particular circumstances in which the industry operates. For example, in an environment where there is potential for market power to be exercised, a more heavy-handed form of price regulation may be required to curb anti-competitive behaviour. The issue of whether or not reference pricing is required for the purposes of the Access Regime therefore needs to be assessed in this context.*

[117] Aurizon submission to Draft Report, p.2
[118] Cargill submission, p.1
[119] Asciano submission, p.8
[120] GWA submission to Issues Paper, p.2

The Commission confirms its findings from its 2009 Review and, in particular (in relation to reference pricing) that:

> *… there were no persuasive arguments for its introduction and that it was inappropriate to impose an ARTC-like reference pricing obligations on an operator under the Access Regime, noting that any introduction of reference pricing would also require a change to the ROA Act.*

In conclusion, in response to the view that more detailed pricing information should be required under the Access Regime, the Commission does not consider that this regulatory response is required at this time.

5.2. Clearer information on regulated infrastructure services

Some stakeholders expressed uncertainty about the infrastructure services that are covered by the ROA Act.[121] Those submissions argued that the uncertainty can result in lost opportunities for access.

For example, Bowmans Intermodal stated that "*it is not clear who the infrastructure owners and relevant regulators are*" and "*the evaluation of who owns/controls/regulates these assets is an expensive investigative exercise and this establishes a very expensive and time-consuming process that adversely impacts a competitive [environment]*."[122] It also suggested that this confusion presents "*a barrier to investigating access*."[123] It provided a recent example where it sought, but did not obtain, information on an asset's lessor, lessee and regulator and therefore did not bid for a tender to access that infrastructure.

Aurizon submitted that the scope of the current regime could be clearer, noting that the full scope of the Access Regime at a granular or line segment level is unclear. It noted that GWA does not publish details of rail infrastructure subject to the Access Regime on its website.[124] It suggested that a geospatial referenced map be made publicly available showing the name of the rail asset owner and its regulator for the various rail and terminal assets in the state.[125] Aurizon noted that it is commonplace within Australia that rail infrastructure service providers publish "line diagrams or network maps" which provide detailed information to potential access seekers of the rail infrastructure to which they require access.[126]

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[121] Bowmans Intermodal submission, p.1. The differences in interpretation of the assets that are included in the regime between Aurizon's submission to Issues Paper (p.5) and Asciano's submission (p.4) (which stated some uncertainty as to whether certain yards were covered by the Access Regime), serve to highlight this confusion.

[122] Bowmans Intermodal submission, p.2

[123] Bowmans Intermodal submission, p.1

[124] Aurizon submission to Issues Paper, p.5

[125] It suggested that much of the data for this is already on the ARTC corridor maps but could be displayed in a similar way that minerals reserves have been displayed by the Department of State Development on its website (http://minerals.statedevelopment.sa.gov.au/online_tools/free_data_delivery_and_publication_downloads/sarig), Bowmans Intermodal submission, p.2

[126] Aurizon submission to Issues Paper, p.5

The Commission agrees that there is some merit in exploring a centralised information repository, such as an online geographic information system that publishes infrastructure diagrams or maps which provide more detailed information to potential access seekers. The Commission's Draft Report included the draft recommendation that this could either be the responsibility of the regulator under the regime, or the government department responsible for setting rail regulation policy.

This draft recommendation was supported by DPTI.[127] It stated that the repository would be best placed with the Commission, but that DPTI would assist in its creation. SAFC also supported the draft recommendation, with the caveat that its implementation and maintenance does not impose extra cost to regulation.[128] The South Australian "Location SA" map viewer service[129] is one possible existing service that could be used to accommodate this suggestion. This option has been discussed with DPTI and Location SA, and appears to be a relatively cost effective solution.

5.3. Alternative state-wide transport regime

In its submission to the Issues Paper, SAFC suggested there may be merit in amalgamating similarly operating transport access regimes, including the SA Rail Access Regime, Tarcoola-Darwin Rail Regime and the SA Ports Access Regime.[130] Such an approach recognises the fact that many access seekers require access to multiple modes of transport to move their product. In submissions to the Draft Report, SAFC and DPTI both stated that they support investigation into an amalgamation.[131]

The State Government has recently established a Resources Infrastructure Taskforce to consider infrastructure solutions to support the State's mining sector. In the establishment of this taskforce, it recognises that there are some limitations with respect to the current ports, road and rail infrastructure that could impact growth in that sector.[132]

5.3.1. Benefits of a state-wide transport regime

The primary benefit an encompassing state-wide transport regime would provide is a reduced need for market participants to navigate several potentially different regulatory regimes. This would include a reduction in complexity, and perhaps in cost. For example, the 2012 Select Committee's Grain Handling Industry report found that the grain industry operates under a range of overlapping regulations and rules imposed under Commonwealth and State legislation which add to the complexities for operators, and the costs, which are passed on to farmers.[133]

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[127] DPTI submission, p.1
[128] SAFC submission to Draft Report, p.2
[129] Location SA is an online data repository displaying spatially referenced datasets collected by state government agencies. http://www.location.sa.gov.au/viewer/
[130] SAFC submission to Issues Paper, p.1
[131] SAFC submission to Draft Report, p.2; DPTI submission to Draft Report, p.1
[132] Refer to http://www.premier.sa.gov.au/images/news_releases/14_06June/rmip.pdf
[133] Select Committee on the Grain Handling Industry, *Final Report*, 2012, p.5

Viterra commented that it "*strongly advocates for anything that would reduce regulatory burden and costs and incentivise investment in rail infrastructure in South Australia*." These burdens and costs include those "*arising from current multi-levels of Federal and State regulation which places South Australia (specifically the grain industry) at a competitive disadvantage*."[134] Viterra added that any reduction in costs of obtaining services from GWA or increased investment in rail infrastructure would ultimately benefit growers and the South Australian grain industry generally, and that it would welcome any change to the Access Regime that would achieve these outcomes.[135]

Similarly, Asciano stated the current rail environment in Australia is complex, at least in part due to multiple regulators.[136]

5.3.2. Costs of a state-wide transport regime

The primary costs in initiating a state-wide transport regime would be the time and financial cost in development and implementation, and the uncertainty and lack of familiarity within the market of a new regime.

Further, although reductions in ongoing costs could be expected from efficiencies gained in reduced complexity, it is difficult to predict whether or not this would actually be the case or what the scale of savings would be.

Furthermore, a state-wide transport access regime may be less flexible to adapt to changes in particular industries than an industry-specific access regime.

With these unknowns, it is difficult to predict whether an encompassing access regime would result in a net benefit. However, the Commission recommends that the merits of a state-wide transport access regime should be explored. Such a regime could, for example, set broad regulatory parameters to guide access negotiations and apply to all significant rail and port infrastructure in the State.[137] Furthermore, as part of such a review, there would be the opportunity to consider the scope of coverage of the access regime whether or not the current operators or railways services should remain covered, and whether or not new operators or railways services ought to become covered.

In its submission to the Issues Paper, the SAFC referred to such a regime as a "Strategic Supply Chain Infrastructure Access Regime", and suggested that it should apply to all significant port and rail infrastructure in South Australia including "*elements that are currently excluded from coverage by existing regimes*."[138] This broadly aligns with a recommendation from the 2012 Select Committee on the Grain Handling Industry to "*undertake a review of the entire grain supply chain with the objective of establishing arrangements that provide the basis for pricing of and access to grain storage and bulk handling facilities (including up-country services)*." Though specifically commenting on grain

[134] Viterra submission, p.3
[135] Viterra submission, p.3
[136] Asciano submission, p.10
[137] This approach was promoted in the SAFC submission to Issues Paper, p.1
[138] SAFC submission to Issues Paper, p.2

freight, the Select Committee also called for a review which would "*clarify the interaction between Commonwealth and State regulations to eliminate possible duplication and simplify the procedures that are imposed on industry participants*."[139]

Alternatively, a review could be conducted with the aim of promoting greater consistency between the separate regimes.

[139] Select Committee on the Grain Handling Industry, *Final Report*, 2012, p.8

6. CONCLUSION

Final Recommendation

The Commission recommends that the current Access Regime should be retained for the next five-year prescribed period.

The primary purpose of this review is for the Commission to recommend to the Minister for Transport and Infrastructure whether the Access Regime should continue for the next five year prescribed period or should expire.

The Commission believes there is an overall benefit to retaining the current Access Regime. In developing this final recommendation, the Commission has taken into account the costs and benefits of the Access Regime in its current form and the cost and benefits of the possible alternatives, including a state-wide transport regime and the National Access Regime. The Commission has also taken into account the views of stakeholders.

The Commission notes there has not been any significant change to the rail industry since its 2009 review of the Access Regime. It also notes over the past five years there have been successful negotiations reached between GWA and access seekers.

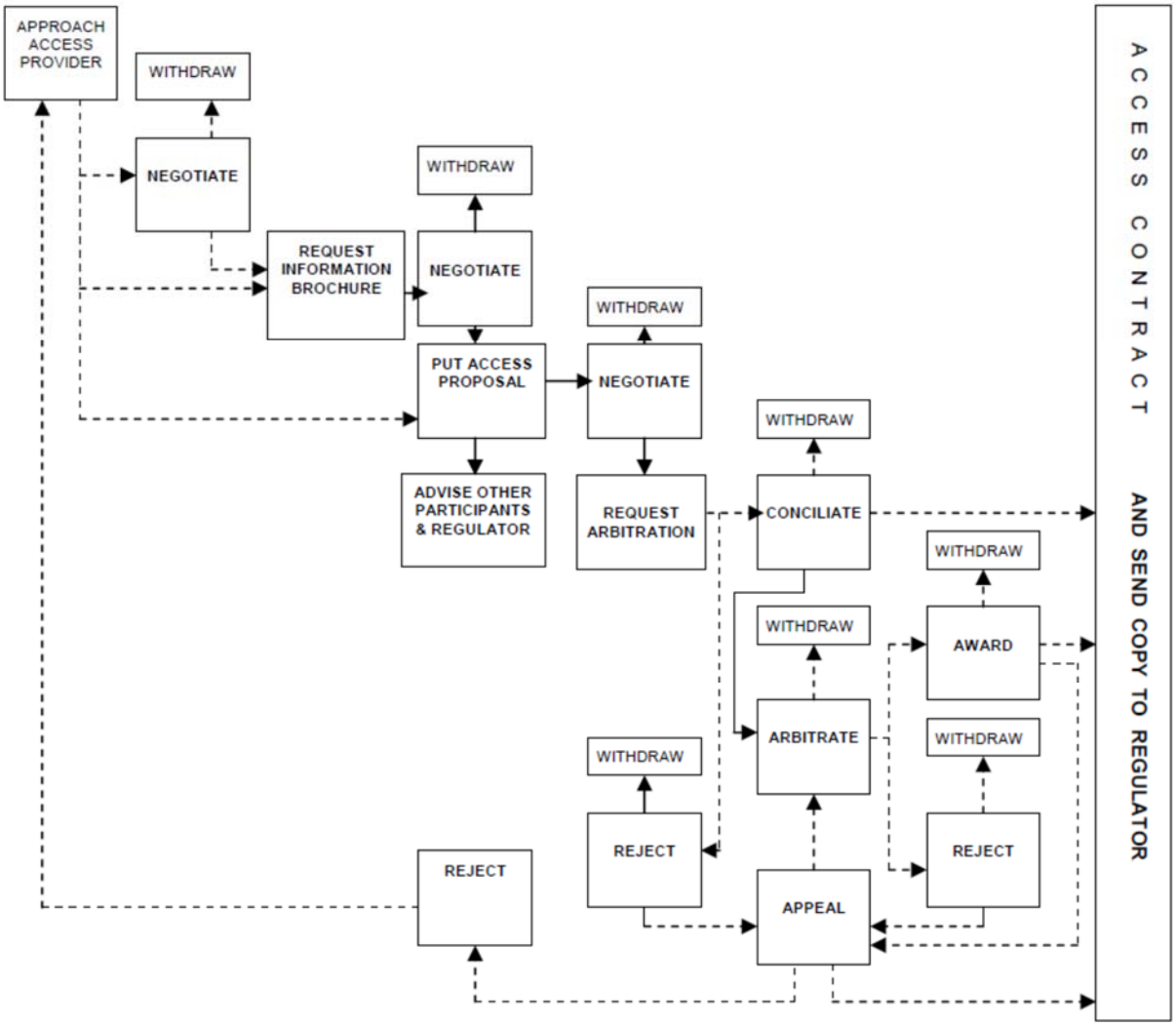
Although the potential for market power to be misused remains, the Commission has not been presented with, or found, evidence which would lead to the conclusion that market power is being misused. Further, an independent review of the regulatory accounting practices of GWA found no inappropriate cost or revenue accounting practices regarding GWA's intrastate railway operations.

The Commission has reviewed cost information for other Australian rail regimes. It has also referred to other publicly available reviews. Assuming those costs and models were applied to the South Australian rail context, the benefits of access regulation under an alternative regime would need to be higher for there to be a more economically efficient alternative. It has concluded that increasing regulation, and associated costs, does not appear to be an efficient response to a stable industry sector with no evidence of misuse of market power. The Commission therefore reached the final decision that there is not a strong case for moving away from the current regime.

The Commission has examined the costs and the benefits of a state-based transport-wide access regime, as well as the National Access Regime, to determine whether an alternative regime might derive a more efficient outcome. The Commission does not recommend transitioning to the National Access Regime, as it has reached the final position that the costs are likely to exceed the benefits. At this stage it is unknown if a state-based transport access regime would derive a net benefit; a comprehensive cost-benefit analysis would be necessary to determine if this would be the case.

Although not directly in scope of the terms of the Commission's review under the ROA Act, the Commission has also made recommendations that may advance the objectives of the Access Regime.

ANNEXURE A – PROCESS FOR OBTAINING ACCESS



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