2009 SA RAIL ACCESS REGIME INQUIRY

ISSUES PAPER

February 2009

The Essential Services Commission of South Australia

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REQUEST FOR SUBMISSIONS

The Essential Services Commission of SA (the Commission) invites written submissions from interested parties in relation to the issues raised in this paper. Written comments should be provided by **27 March 2009**. It is highly desirable for an electronic copy of the submission to accompany any written submission.

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

The Commission may also exercise its discretion not to exhibit any submission based on their length or content (for example containing material that is defamatory, offensive or in breach of any law).

Responses to this paper should be directed to:

2009 RAIL ACCESS REGIME INQUIRY: ISSUES PAPER

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Public Information about the Commission's activities

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

TABLE OF CONTENTS

GLOSSARY OF TERMS

ABB GRAIN	ABB Grain Ltd
ACCESS PROVIDER	A party providing, or able to provide, railway infrastructure services – sometimes referred to as a below-rail operator
ACCESS SEEKER	An Above-Rail Operator seeking access to the Railway
APT	Asia Pacific Transport – the Access Provider for the Railway
ARTC	The Australian Rail Track Corporation Ltd
CIRA	Competition and Infrastructure Reform Agreement
COAG	Council of Australian Governments
CPA	Competition Principles Agreement 1995
ESC ACT	Essential Services Commission Act 2002
GWA	Genesee and 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 section 28 of the ROA Act
NCC	National Competition Council
ROA ACT	Railways (Operations and Access) Act 1997
SOUTH AUSTRALIAN RAIL ACCESS REGIME	The Access Regime in Parts 3 to 8 of the ROA Act.
THE COMMISSION	The Essential Services Commission of South Australia
TPA	Trade Practices Act 1974

1 EXECUTIVE SUMMARY

The Essential Services Commission of South Australia (the Commission) has been directed by the Acting Treasurer to conduct an Inquiry into the Access Regime that applies to the major intrastate railways in South Australia. The Inquiry is to focus on the extent to which the existing Access Regime, which is set out in the Railways (Operations and Access) Act 1997, is consistent with certain principles under the Council of Australian Government's Competition and Infrastructure Reform Agreement (CIRA). It will also consider whether or not the Access Regime could otherwise be generally improved.

The release of this Issues Paper marks the first step in the Commission's process of public consultation on the Inquiry. The purpose of this Issues Paper is to engage stakeholders in the identification of key issues that should be considered by the Commission as part of the Inquiry.

The Commission notes that the purpose of this Issues Paper is not intended to limit the scope of the consultation process; stakeholders are free to comment on any matter they see as relevant to the Inquiry.

The Commission believes this Inquiry is of particular relevance to intrastate rail access providers, along with any person that has sought access to an intrastate railway or expects to do so in the future. As such, the Commission is particularly interested to receive comments from these parties based on their actual experiences with the current Access Regime. This, for example, could be in the form of commenting on difficulties faced by access seekers in gaining access to railways, or any changes that stakeholders believe are required to improve the overall effectiveness of the current Access Regime. The Commission notes that comments provided should, if possible, incorporate future expectations and should consider whether or not the Access Regime is likely to accommodate future access requirements. In this respect, the Commission is interested in whether or not the Access Regime will adequately cater for the expected increase in mining developments in South Australia.

The Commission believes that comments received in response to this Issues Paper form an important input into the Commission's consideration as to how greater consistency can be achieved between CIRA principles and the Access Regime and, more importantly, identify how the Access Regime can be improved to promote investment in and the efficient use of the State's railways.

2 INTRODUCTION

The major intrastate railways in South Australia are subject to a regulatory framework that allows for third-party access. The Essential Services Commission of South Australia (the Commission) is the regulator for South Australia's Rail Access Regime (the Access Regime), as set out in the *Railways (Operations and Access) Act 1997* (the ROA Act). Prior to 18 March 2004, the regulatory role was assigned to the Executive Director, Transport SA.

The Commission has a number of functions under the Access Regime, including (but not limited to) developing and setting out:

- pricing principles for floor and ceiling prices (section 27);
- Information Brochure requirements, currently including reference tariffs (section 28); and
- regulatory reporting obligations (section 60 and 62).[1]

On 23 January 2009, pursuant to section 35(1) of the *Essential Services Commission Act, 2002* (the ESC Act), the Acting Treasurer of South Australia directed the Commission to conduct an inquiry into the Access Regime. The Terms of Reference, as set by the Acting Treasurer, direct the Commission to provide recommendations as to whether or not the Access Regime complies with certain requirements under the Competition and Infrastructure Reform Agreement (CIRA), entered into by the Council of Australian Governments (COAG) in February 2006. In addition, the Commission is directed to provide advice on any other changes that would improve the overall effectiveness of the Access Regime. The Inquiry Terms of Reference are set out in Appendix 1 of this Issues Paper.

In conducting the 2009 Access Regime Inquiry (the Inquiry), the Commission is required to comply with the Terms of Reference for the Inquiry and will have regard to the objectives set out in section 6 of the ESC Act. These objectives are discussed in chapter 3 of this paper.

This Issues Paper discusses the key issues that are likely to be relevant to the Inquiry and seeks comments on these and any other relevant issues. The key issues identified by the Commission are discussed in chapter 4 of this paper.

The Commission believes that it is important to engage with stakeholders and other interested parties throughout the Inquiry process in order to ensure that the Inquiry encompasses a wide range of views and experiences.

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[1] The current arrangements covering the three areas are set out in the Commission's publication *South Australian Rail Access Regime: Information Kit* (the Information Kit), which is available at: http://www.escosa.sa.gov.au/webdata/resources/files/061006-D-SARailInfoKit.pdf.

2.1 South Australia's Railways

South Australia's key railways are owned and managed by a combination of government-owned entities, and private companies. The Commonwealth-owned Australian Rail Track Corporation (ARTC), for example, owns and manages South Australia's inter-state gauge lines. On the other hand, private companies such as Genesee and Wyoming (GWA) control various other intra-state lines, with an open access regime in place.

Broadly speaking, South Australia's major railways comprise the following:

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

2.2 The ROA Act

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

To ensure other operators could offer rail services to customers and compete with the owner/operator by obtaining access to the railways on commercial terms and for the market to remain competitive, the South Australian Parliament passed the ROA Act in July 1997.

In general, the ROA Act establishes a framework for the negotiation of access to certain railway services and for the resolution of access disputes that may arise between operators (access providers) and proponents (access seekers).

2.3 South Australian Rail Access Regime

The Access Regime is set out in Parts 3 to 8 of the ROA Act, and was intended to be consistent with the National Competition Principles[2] and with Part IIIA of the *Trade Practices Act 1974*. While it was envisaged that the Access Regime would be submitted to the NCC for certification as an effective access regime, certification has not yet been sought and therefore the regime has not been certified as effective. Until certification is achieved, access to services provided by intrastate railways may be subject to declaration under Part IIIA of the Trade Practices Act.

The scope of services covered by the Access Regime is determined by proclamation.[3] These services can be varied by further proclamation. The Access Regime currently applies to all intra-state railways in South Australia, with the exception of certain railways such as the Glenelg tramlines, tourist or heritage railway lines, and other privately-owned rail sidings.

The Commission is the regulator of the Access Regime and has been assigned the following specific functions set out under Parts 3 to 8 of the ROA Act:

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

As such, the Commission is obliged to monitor and enforce compliance with the whole of the Access Regime, and put in place arrangements to ensure that businesses covered by the Access Regime comply with, and are capable of complying with, their obligations.

Some key aspects of the Access Regime are as set out below.

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[2] The Competition Principles Agreement is one of the agreements comprising the National Competition Policy. It can be accessed via: http://www.ncc.gov.au/publication.asp?publicationID=99&activityID=39.

[3] Services that are proclaimed to fall within the definition of "railway infrastructure" services, and are therefore covered by the Access Regime, were published in the South Australian Government Gazette on 7 May 1998.

2.3.1 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 preliminary information about access, and is not intended to dictate how a party must start or conduct its commercial negotiations.

An access provider must, on written application of an access seeker, provide an Information Brochure, which sets out the terms and conditions of access, pricing principles, and any other information required by the Commission to be included within the Information Brochure. However, an access seeker may request reasonable additional information to suit its requirements.

Chapter 5 of the Commission's Information Kit sets out the current requirements for the Information Brochure. These include:

- a description of the operator's railway infrastructure that the access regime covers;
- proposed terms and conditions of access that would comprise an access contract;
- floor and ceiling prices for access, as well as reference tariffs, showing how the proposed terms and conditions of access relate to the pricing principles; and
- corporate information about the operator.

2.3.2 Pricing Principles (Part 4, Division 1)

Under the Access Regime, the Commission is not responsible for setting prices for access. Rather, the Commission 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. The Commission notes, however, that 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.

2.3.3 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. 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.

2.3.4 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 attempt to conciliate the dispute and, if unsuccessful, may appoint and refer the dispute to an arbitrator. There is no obligation for the Commission to refer a dispute to arbitration where it considers that:

- The subject matter is trivial, misconceived or lacking in substance;
- The parties have not negotiated in good faith; or
- There are other good reasons why it should not.

The ROA Act sets out the powers and functions of the arbitrator and the factors the arbitrator must take into account in the event of arbitration. Some of the key provisions relating to the conduct of arbitration under Part 6 of the ROA Act include:

- The parties to an arbitration are limited to the access seeker, access provider, any other party that has a material interest in the outcome of arbitration and is nominated by the Commission as a party to the arbitration, and any other party that is joined to the arbitration by the arbitrator. The Minister responsible for the ROA Act may also participate in arbitration proceedings;
- There is an obligation on the arbitrator to proceed with the arbitration as quickly as the proper investigation of the dispute will allow;
- An arbitrator has the power to obtain information and documents on matters relevant to the access dispute from any persons and can conduct proceedings in any way (e.g. by telephone or video link);
- Any information collected can be kept confidential in whole or in part. Confidentiality must be requested and will be determined by the arbitrator;
- A number of other procedural powers are conferred upon the arbitrator in order to facilitate an expeditious hearing and determination of the dispute (e.g. ability to give procedural directions, refer a matter to an expert, or sit at any time or place);

- Arbitration proceedings must be in private, unless all parties agree to a public hearing. The arbitrator may give directions as to who can be present at proceedings that are private;
- An arbitration process can be terminated early in cases of triviality, if the proponent has not negotiated in good faith, or at the request of the proponent/parties;
- Before an award is made, the arbitrator must give a copy of a draft award to each party and the Minister, and must take into account any representations before finalising the award. A copy of the award must be given to each party and the Commission. The parties to an award may change it by agreement between all the parties to the award, and if the arbitrator is satisfied that the award is appropriate;
- Arbitration costs are to be borne by the parties to arbitration in proportions decided by the arbitrator, or where the arbitrator does not make such a decision, in equal proportions. However, if the proponent terminates an arbitration or elects not to be bound by an award, the proponent must bear the costs in their entirety; and
- There is a provision for appeal to the Court in respect of an award (or a decision not to make an award) on a question of law.

2.4 Competition and Infrastructure Reform Agreement (CIRA)

On 10 February 2006, having identified the lack of uniformity in regulations across the nation as a major impediment to building efficient and productive infrastructure such as railways, the Council of Australian Governments (COAG) agreed to a program for the implementation of further National Competition Policy reforms by signing the Competition and Infrastructure Reform Agreement (CIRA).[4]

The CIRA commits all signatories to ensure that access seekers can gain access to significant infrastructure in a more timely and nationally consistent way. It was envisaged that by giving effect to the commitments agreed to under CIRA, it would reduce regulatory uncertainty and compliance costs for stakeholders and would lead to more efficient use of the nation's infrastructure. This, for example, includes the adoption of common object clauses and pricing principles.

The relevant CIRA principles to which the Commission is required to have regard in the Inquiry are discussed further in section 3.2 of this Issues Paper.

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4 The CIRA is available at: http://www.coag.gov.au/meetings/100206/attachment_b_ncp_review.pdf

3 REQUIREMENTS FOR CONDUCTING THE INQUIRY

This chapter sets out the legislative requirements, terms of reference and the process for the conduct of the Inquiry.

3.1 Application of the ESC Act

In conducting the Inquiry, the Commission will be performing functions under the ESC Act. Therefore, in addition to addressing the terms of references referred to it by the Acting Treasurer, the Commission must meet its legislative responsibilities and carry out the Inquiry in a manner which meets the objectives set out under section 6 of the ESC Act.

Section 6 of the ESC Act states that:

> *In performing the Commission's functions, the Commission must:*
>
> - *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*
> - *At the same time, have regard to the need to:*
>   - *Promote competitive and fair market conduct;*
>   - *Prevent misuse of monopoly or market power;*
>   - *Facilitate entry into relevant markets;*
>   - *Promote economic efficiency;*
>   - *Ensure consumers benefit from competition and efficiency;*
>   - *Promote consistency in regulation with other jurisdictions.*

3.2 Rail Access Regime Inquiry

The clause 2 CIRA principles which are the focus of the Inquiry seek to establish a simpler and consistent national approach to economic regulation of significant infrastructure. The relevant provisions from clause 2 of the CIRA, to which the Commission must have regard, are set out in the Inquiry Terms of Reference in Appendix 1.

In summary, these provisions set out the COAG agreed principles relating to access regimes for services provided by significant infrastructure facilities. They are as follows:

- a simpler and consistent national approach to economic regulation of significant infrastructure should be established (clause 2.1);
- access regimes should promote commercially agreed outcomes between the access seeker and the infrastructure operator (clause 2.2);
- price monitoring should be considered as a first option where price regulation is required or when scaling back from more intrusive regulation (clause 2.3);

- access regimes should have consistent regulatory principles relating to, among other things, promoting economic efficiency and effective competition in upstream or downstream markets, and the setting of regulated access prices (clause 2.4); and
- there should be a timeframe of up to six months for the making of regulatory decisions under an access regime (clause 2.6).

The CIRA requires that these principles be incorporated into existing access regimes for services provided by means of significant infrastructure facilities as soon as practicable or as they are reviewed, provided that they are included in such regimes no later than the end of 2010.

The Commission will examine the Access Regime to determine whether or not each of the above CIRA principles finds effect in the current legislation. Where changes to the legislation are required in order to achieve compliance with the CIRA principles, the Commission will provide advice to the South Australian Government as to the form that such changes should take.

The Commission believes that in conducting the Inquiry, it is essential for stakeholders to be appropriately consulted and for the Commission to canvass and respond to submissions through reports, of which this Issues Paper is the first. The Commission also welcomes suggestions and/or comments on matters in relation to the Access Regime that are not specifically raised in this Issues Paper but, nevertheless, matters which stakeholders believe the Commission should consider in the Inquiry.

3.3 Process for Inquiry

The Commission's Inquiry into the Access Regime will commence with the release of this paper. As part of the consultative process to be undertaken, the Commission invites submissions from all stakeholders on areas of interest that are relevant to the Inquiry and strongly encourages suggestions of changes that would enhance the effectiveness of the Access Regime, taking into account any past experiences in dealing with the Access Regime, or any expectations about the adequacy of the regime in dealing with future rail access requirements.

The Commission will release a Draft Report in May 2009, including all submissions received from stakeholders to this Issues Paper to further encourage stakeholder engagement with the Inquiry process. The Draft Report will contain the Commission's draft recommendations to the South Australian Government on proposed changes to the Access Regime and will provide opportunities for stakeholders to comment before the Final Report.

The Commission intends to release its Final Report in August 2009. The Final Report will set out the conclusions reached as a result of the Inquiry and, in particular, provide

recommendations to the South Australian Government as to whether or not the Access Regime complies with certain requirements under CIRA, and ways in which the effectiveness of the Access Regime could be further improved.

An indicative timetable of the Commission's Inquiry into the Access Regime is set out below.

Details on how to make submissions are provided on the opening page of this Issues Paper.

INDICATIVE TIMETABLE	
ACTION	DUE DATE
RELEASE OF ISSUES PAPER	24 February 2009
1ST ROUND STAKEHOLDER SUBMISSIONS DUE	27 March 2009
RELEASE OF DRAFT REPORT	May 2009
2ND ROUND STAKEHOLDER SUBMISSIONS DUE	Mid June 2009
RELEASE OF FINAL REPORT	August 2009

4 KEY ISSUES

Some of the issues that may be of relevance to the Inquiry are set out below for comment. The issues discussed here are not intended to limit the scope of the consultation process; stakeholders are free to comment on any matter they see as relevant to the Inquiry.

The Commission notes that it relies on submissions from interested parties to inform its analysis, to identify areas for reforms, and to improve the overall effectiveness of the Access Regime.

4.1 Clause 2 of the CIRA

As discussed previously, the Commission has been directed to conduct an Inquiry under section 35(1) of the ESC Act, into whether or not the Access Regime is consistent with certain principles set out in clause 2 of the CIRA. In particular, the Commission has been directed to consider clauses 2.1, 2.2, 2.3, 2.4 and 2.6 of the CIRA. These provisions were discussed in chapter 3 of this Issues Paper and are reproduced in the Inquiry Terms of Reference set out in Appendix 1.

4.1.1 Clause 2.1

Clause 2.1 of the CIRA provides an overarching principle, which commits all signatories to establish a simpler and consistent national approach to the economic regulation of significant infrastructure.

The Commission believes that an access regime should be sufficiently flexible to accommodate differences between railway operations and reflective of the state of any intermodal competition. As such, an overarching national regulation approach needs to be balanced against the specific context in which regulation is being applied.

The Commission is interested to obtain comments from stakeholders on whether or not the principles that underpin the current Access Regime are consistent with the CIRA clause 2.1 requirement.

4.1.2 Clause 2.2

Clause 2.2 of the CIRA encourages the undertaking of commercial negotiations between access providers and access seekers. It is the Commission's initial view that the ROA Act is consistent with this aspect of the CIRA, in that it attempts to facilitate commercial negotiations, such that the terms and conditions for access may better reflect mutual requirements.

The Commission has not been notified of any intrastate rail access disputes. This may indicate that the Access Regime has been successful in encouraging commercial negotiations and that access seekers and access providers have been

able to agree to terms and conditions of access to suit their individual requirements.

Nevertheless, the Commission is interested to receive comments from stakeholders on whether or not the provisions set out in the ROA Act are consistent with CIRA clause 2.2 requirement.

4.1.3 Clause 2.3

Clause 2.3 of the CIRA specifies that price monitoring should be considered as a first option where price regulation is required. The Commission notes that the ROA Act does not currently impose any form of price regulation for intrastate rail services. It does, however, allow the Commission to establish pricing principles that are to be taken into account in the event of arbitration of an access dispute.

In considering CIRA clause 2.3, it is the Commission's initial view that as price regulation has not yet been required for the Access Regime, this CIRA principle is not relevant to the Access Regime.

The Commission would, however, consider introducing a price monitoring regime, as recommended by CIRA clause 2.3, if any information were to come to light during this Inquiry that would justify such a regime being imposed. Indeed, this would require the ROA Act to be amended to achieve greater alignment with CIRA clause 2.3.

The Commission would welcome comments from stakeholders on whether or not the pricing principles established by the Commission pursuant to section 27(1) of the ROA Act provide sufficient protection to access seekers, such that a more heavy-handed form of regulatory approach (e.g. price monitoring) is not warranted.

4.1.4 Clause 2.4

Clause 2.4(a) of the CIRA specifies that an access regime should have consistent regulatory principles relating to, among other things, promoting economic efficiency and effective competition in upstream or downstream markets, and the setting of regulated access prices.

The Commission considers that the ROA Act, among other things, does contain objects that are intended to promote efficient investment and use of railways, facilitate competition in markets, and provide access to railway services on fair commercial terms and on a non-discriminatory basis.

Clause 2.4(b) of the CIRA concerns the principles by which regulated access prices should be set. The Commission notes, however, that it does not set access prices for railway access; rather, it establishes pricing principles for fixing a floor and ceiling prices for railway services. In the event of an access dispute, these pricing principles also establish bounds for an arbitrator to determine an arbitrated

price. It is the Commission's initial view that there are no principles within the two sets that are in conflict.

Clause 2.4(c) of the CIRA concerns the information to be made available to a merits review, if such a review is provided for. The Commission notes that section 56 of the ROA Act provides for an appeal on a question of law, and does not provide for a merits review. As such, the Commission believes that this CIRA principle is not relevant to the Access Regime.

Notwithstanding its initial views, the Commission would welcome comments from stakeholders on whether or not there are any aspects of the Access Regime that are inconsistent with the CIRA clause 2.4 requirements. Suggestions on how the Access Regime could be amended to produce greater consistency with these CIRA provisions would be welcome.

4.1.5 Clause 2.6

Clause 2.6 of the CIRA specifies that there should be a timeframe of up to six months for the making of regulatory decisions under an access regime. The Commission notes that the ROA Act does not currently provide for any time limits in relation to regulatory decisions made by the Commission under the Access Regime.

The Commission considers that there is scope for greater alignment between the ROA Act and the requirements of clause 2.6 of the CIRA. For example, the Commission could be obliged to refer a dispute to arbitration if conciliation fails to resolve the dispute, or within a six month timeframe, whichever is earlier. Similarly, if an access dispute has been referred to arbitration, the arbitrator could also have a six months timeframe to settle the dispute.

The Commission is interested to obtain comments from stakeholders on any aspects of the Access Regime where there is merit in introducing time certainty (particularly a 6-month time limit) to the conciliation/arbitration process set out under the ROA Act to resolve access disputes.

Are there any aspects of the Access Regime that are inconsistent with the CIRA clause 2 requirements (clauses 2.1, 2.2, 2.3, 2.4 and 2.6)?

In relation to clause 2.3 of the CIRA, is there any reason to impose additional price regulation requirements, beyond the existing pricing principles that have been established pursuant to section 27(1) of the ROA Act?

In relation to clause 2.6 of the CIRA, is there any merit in introducing greater time certainty to the conciliation/arbitration process set out under the ROA Act?

4.2 Other Factors

The Commission has also been directed to provide advice on any other changes to the Access Regime that may improve its overall effectiveness. In considering any possible changes, the Commission believes it is important to receive input from stakeholders who have had experience with the Access Regime, or are expecting to utilise the Access Regime at a future date. The practical application of the Access Regime in facilitating commercial negotiation of access to railways is a key area of concern for the Commission.

The Commission would therefore welcome comments from stakeholders based on past experiences in negotiating access, and whether or not there are any future issues that need to be considered in assessing the effectiveness of the Access Regime (e.g. whether or not the Access Regime's coverage should be extended to cover new railways, such that it will accommodate increased mining developments in South Australia).

Some of the other key issues that the Commission believes may be of relevance to this Inquiry are discussed below.

4.2.1 Coverage of the Access Regime

As was noted in chapter 2 of this Issues Paper, the Access Regime applies to all intra-state railways, with the exception of certain privately-owned rail tracks. The Commission notes that the South Australian Government can, however, choose to vary coverage of the Access Regime by further proclamation.

The Commission notes that submissions made to its 2005 South Australian Rail Access Regime: Review of Regulator Component - Issues Paper[5] raised concerns in relation to the exclusions of privately-owned rail sidings from the Access Regime. ABB Grain, in particular, submitted that the exclusion of certain privately-owned rail infrastructure which links its country storage sites to main interstate lines meant that it is neither physically nor economically viable for a rival rail operator to compete with the incumbent.[6] The submission argued that, these exclusions, in effect, were detrimental to the establishment of an effective and competitive market.

The Commission is mindful that effective competition cannot occur if a rail operator cannot gain access to railways or associated infrastructure, or can only do so if it was subjected to monopoly prices. In this respect, the Commission is of the view that coverage should be extended to rail infrastructure that is necessary for meaningful access to occur, and where it would be uneconomic to develop an alternative facility to provide the same services.

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5 The 2005 South Australian Rail Access Regime: Review of Regulator Component – Issues Paper is available on the Commission's website at: http://www.escosa.sa.gov.au/webdata/resources/files/050503-R-SArailRegReviewIssuesPaper.pdf

6 ABB Grain's submission is available on the Commission's website at: http://www.escosa.sa.gov.au/webdata/resources/files/050608-Sub-SARailAccessRegimeRegComponents-ABB.pdf.

However, the Commission is mindful that regulation imposes compliance costs on the access provider which, ultimately, will be passed on to access seekers in the form of higher prices. As such, the Commission believes that any extension of the Access Regime's coverage is only warranted in instances where the potential benefits of access regulation are expected to outweigh the regulatory costs associated with the Access Regime.

The Commission would welcome comments from stakeholders as to whether or not coverage of the Access Regime should be extended to certain rail infrastructure that are not currently covered by the Access Regime.

Are there any rail infrastructure to which coverage of the Access Regime should be extended? If so, what are arguments for doing so?

4.2.2 Provision of Information

Under Part 4 of the ROA Act, an access provider must, on the written request of an access seeker, provide the access seeker with an Information Brochure, which sets out the terms and conditions of access and any other information required by the Commission.

The Commission believes that the provision of such information is important in facilitating the negotiation process. As such, the Commission seeks feedback from stakeholders as to whether or not the information requirements set out in Part 4 of the ROA Act are sufficient. For example, are the terms and conditions set out in Part 4 sufficiently detailed as to allow an access seeker to make an informed decision?

The Commission would welcome any comments from stakeholders on whether there are any aspects concerning the provision of information under the Access Regime that can be further improved.

Are the information requirements set out in Part 4 of the ROA Act sufficient in facilitating the negotiation of access? Do access seekers need additional information in order to make an informed decision about obtaining access?

4.2.3 Negotiation

Part 5 of the ROA Act provides a framework for the negotiation of access between an access provider and an access seeker. The intention behind establishing such a framework is to allow sufficient flexibility such that an access seeker and access provider may tailor the terms and conditions of an access contract to suit their requirements. Under the framework, an access provider is obliged to use all

reasonable endeavours to accommodate the requirements of an access seeker with a view to reaching agreement on whether the requirements could be reasonably met, and, if so, how the terms and conditions of the access contract should reflect this.

The Commission is of the view that the Access Regime should not constrain the process of commercial negotiation, which is critical to facilitating investment in and promoting the efficient use of railways.

Stakeholders are encouraged to provide comments based on past experiences on any instances where the Part 5 framework has created difficulties in negotiating rail access.

The Commission is also interested in receiving comments from stakeholders on whether the Part 5 process can be improved to further facilitate the negotiation of access. For example, should there be a more detailed negotiating framework so as to ensure equitable negotiation.

Have there been any instances whereby an access seeker and access provider have encountered difficulties in negotiating access to intrastate railways, due to the regulatory framework? If so, what were the impediments?

Is the negotiation process set out in Part 5 of the ROA Act adequate for facilitating commercial negotiation of access? If not, how can the process be improved?

4.2.4 Conciliation/Arbitration

Part 6 of the ROA Act provides a framework for the conciliation or arbitration of access disputes. An access seeker may by written notice require the Commission to refer an access dispute to arbitration. The Commission, in the first instance, would attempt to settle the dispute by conciliation. If, however, the Commission fails to settle the access dispute by conciliation after making reasonable attempts to do so, the Commission must then, if warranted, appoint an arbitrator and refer the dispute to the arbitrator.

The Commission notes that it has not yet been required to refer an access dispute to conciliation or arbitration. As such, the conciliation/arbitration framework set out in Part 6 of the ROA Act has never been utilised.

The Commission believes that a transparent and effective conciliation/arbitration process is important to the overall effectiveness of an Access Regime as it provides a safety net to access seekers and access providers in the event that commercial negotiations fail.

Therefore, the Commission would welcome comments from stakeholders on whether or not the conciliation/arbitration framework set out under the ROA Act is considered adequate for resolving a dispute between an access seeker and an access provider. If not, are there any ways in which the process could be enhanced should an access dispute arise? For example, should the selection and appointment of an arbitrator be a joint process in the first instance. Failing this, the Commission would then assume the responsibility for the appointment of an arbitrator.

Is the conciliation/arbitration process set out in Part 6 of the ROA Act adequate for resolving an access dispute? If not, are there any ways in which the process can be improved?

5 NEXT STEPS

The Commission welcomes any comments on the issues raised in this paper, or on any other matters in relation to the Access Regime that stakeholders believe the Commission should consider in the Inquiry.

The Commission has set out an indicative timetable for the Inquiry in section 3.3 of this paper. Comments in response to this paper are to be provided to the Commission by 27 March 2009.

The Commission will consider all comments received and will prepare a Draft Inquiry Report for public release in May 2009.

The Commission will consult on the Draft Inquiry Report before issuing the Final Inquiry Report in August 2009.

6 APPENDIX 1: TERMS OF REFERENCE FOR INQUIRY INTO SA RAIL ACCESS REGIME

The Hon Kevin Foley MP

MINUTE

Government of South Australia

Deputy Premier
Treasurer
Minister for Industry and Trade
Minister for Federal/State Relations

MINUTES forming ENCLOSURE to

To Chair, The Essential Services Commission of South Australia

NOTICE OF REFERRAL FOR AN INQUIRY INTO THE RAIL ACCESS REGIME

BACKGROUND:

1. Pursuant to section 35(1) of the *Essential Services Commission Act 2002*, the Commission must conduct an inquiry into any matter that the industry Minister, by written notice, refers to the Commission.

2. The Act is committed to the Treasurer by way of *Gazettal* notice dated 12 September 2002 (p 3384).

3. The Competition and Infrastructure Reform Agreement (CIRA) of the Council of Australian Governments (COAG) provides for a simpler and consistent national approach to economic regulation of significant infrastructure, including for ports, railways and other export-related infrastructure. The agreed reforms aim to reduce regulatory uncertainty and compliance costs for owners, users and investors in significant infrastructure and to support the efficient use of national infrastructure.

REFERRAL:

I, PAUL HOLLOWAY, Acting Treasurer, refer to the Commission the matter described in Paragraphs (a) and (b) of the Terms of Reference and subject to the requirements and directions set out in this Notice.

TERMS OF REFERENCE:

The following are the Terms of Reference for the inquiry referred pursuant to section 35 (2) of the Act:

(a) Examine and provide advice on any amendments to the rail access regime legislated in the *Railways (Operations and Access) Act 1997* that would be needed to comply with the following sections from clause 2 of the CIRA.

"2.1 The Parties agree to establish a simpler and consistent national approach to economic regulation of significant infrastructure.

2.2 The Parties agree that, in the first instance, terms and conditions for third party access to services provided by means of significant infrastructure facilities should be on the basis of terms and conditions commercially agreed between the access seeker and the operator of the infrastructure.

2.3 The introduction of price monitoring for services provided by means of significant infrastructure facilities should be considered, where this would improve the level of price transparency, as a first step where price regulation may be required, or when scaling back from more intrusive regulation.

2.4 All third party access regimes for services provided by means of significant infrastructure facilities will include the following consistent regulatory principles.

a. Objects clauses that promote the economically efficient use of, operation and investment in, significant infrastructure thereby promoting effective competition in upstream or downstream markets.

b. Regulated access prices should be set so as 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.

c. Where merits review of regulatory decisions is provided, the review will be limited to the information submitted to the regulator.

2.6 The Parties agree to introduce requirements that regulators will be bound to make regulatory decisions under an access regime within six months, provided that the regulator has been given sufficient information.

a. Regulators will have the discretion to determine when the six month time limit is suspended:

i. grounds for commencing time limits include when the regulator considers that sufficient information has been provided to enable the regulatory process to commence; and

ii. grounds for suspending time limits include requests for further information from significant infrastructure facility service

providers, provided these are on reasonable grounds, and consultation periods during which the regulator seeks submissions from third parties or the community.

b. Where the service provider of a significant infrastructure facility has not provided the requested information, a regulator will be permitted to make a determination on the information before it in order to satisfy six month time limits.

2.7 The principles in clauses 2.4 and 2.6 will be incorporated in existing access regimes for services provided by means of significant infrastructure facilities and Part IIIA of the *Trade Practices Act 1974* as soon as practicable or as they are reviewed, provided that they are included in such regimes no later than the end of 2010."

(b) Provide advice on any other changes to the access regime that may improve its overall effectiveness.

REQUIREMENTS OF THE INQUIRY:

The following requirements are made pursuant to section 35(5) of the Act:

1. A draft report of the review will be made available to the Treasurer and the Minister for Transport two weeks prior to the draft being released to the general public.

2. On completing the review, the Commission must forward to the Treasurer and the Minister for Transport a report on the review and the conclusions reached by the Commission as a result of the review.

3. If the Commission wishes to seek further information or guidance in relation to the conduct of this inquiry, it may contact Ms Christine Bierbaum, Executive Director, Government Relations and Reform Office, Department for Transport, Energy and Infrastructure.

DIRECTIONS:

I direct that in undertaking its inquiry the Commission must preserve the confidentiality of any information, material or documentation provided by Government to enable the Commission to undertake its inquiry and it must be stamped "Strictly Confidential".

Paul Holloway
Acting Treasurer

23 January 2009