



2009 SA RAIL ACCESS REGIME INQUIRY

FINAL INQUIRY REPORT

October 2009



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GLOSSARY OF TERMS

ABARE	Australian Bureau of Agricultural and Resource Economics
ABB GRAIN	ABB Grain Ltd
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 SEEKER	An Above-Rail Operator seeking access to the Railway
ARTPA ACT	<i>Australasia Railway (Third Party Access) Act 1999</i>
APT	Asia Pacific Transport Pty Ltd
ARTC	The Australian Rail Track Corporation Ltd
AWB	AWB Ltd
CIRA	Competition and Infrastructure Reform Agreement
COAG	Council of Australian Governments
ESC ACT	<i>Essential Services Commission Act 2002</i>
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
INFORMATION KIT	The Commission's primary publication concerning the Access Regime
MSA ACT	<i>Maritime Services Access Act 2000</i>
O&M	Operating and Maintenance
PENRICE	Penrice Soda Products Pty Ltd
NCC	National Competition Council
ROA ACT	<i>Railways (Operations and Access) Act 1997</i>
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	<i>Trade Practices Act 1974</i>

1 EXECUTIVE SUMMARY

The Essential Services Commission of South Australia (the Commission) has finalised its Inquiry into the Access Regime that applies to the major intrastate railways in South Australia. The Inquiry focused on the extent to which the existing Access Regime, which is set out in the *Railways (Operations and Access) Act 1997* (ROA Act), is consistent with certain principles under the Council of Australian Government's Competition and Infrastructure Reform Agreement (CIRA). It also considered whether or not the Access Regime could otherwise be generally improved. This Final Inquiry Report presents the final conclusions of the Commission's Inquiry.

The Commission has concluded that there are three areas where greater consistency between the ROA Act and the relevant CIRA principles could be achieved:

- ▲ objects of the ROA Act - amending section 3(c) of the ROA Act to better reflect the concept of economic efficiency;
- ▲ principles of arbitration - introducing additional principles that are to be taken into account by an arbitrator; and
- ▲ timeframes for decision making by the regulator - introducing a six-month timeframe to the conciliation and arbitration process set out under the ROA Act to resolve access disputes.

The Commission has also identified the following areas where the Access Regime's overall effectiveness could be improved:

- ▲ a review of the Commission's Information Kit be carried out to ensure that the information being provided by a railway operator on terms and conditions of access (including price) is sufficiently detailed and transparent to give adequate guidance to an access seeker;
- ▲ a confidentiality provision be introduced into the ROA Act to protect the commercially sensitive information being exchanged in a negotiation process;
- ▲ various procedural improvements that could be introduced into the negotiate-arbitrate framework;
- ▲ the definition of an "access contract" be narrowed to reduce administrative burdens on rail operators; and
- ▲ removal of section 21 of the ROA Act which currently restricts the business that rail operators can conduct.

The Commission has considered the extent to which coverage of the Access Regime remains appropriate, and its final conclusion is that there is no reason to change the list of services that are currently covered by the regime.

The Commission also believes that the application of the regime to rail sidings is appropriate. However, it believes that the current requirement for access seekers to refer to multiple documents to derive a definition for the term “private siding” is likely to lead to confusion among access seekers as to what constitutes a private siding. The Commission therefore recommends that the South Australian Government consider including a definition of “private siding” in the ROA Act to clarify when a private siding falls (and does not fall) within the terms of the Access Regime.

2 INTRODUCTION

The Commission has conducted an Inquiry into the Access Regime that applies to the major intrastate railways in South Australia. The Inquiry has focused on the following aspects:

- ▲ whether or not the existing Access Regime, which is set out in the *Railways (Operations and Access) Act 1997* (ROA Act), is consistent with certain principles under the Council of Australian Government's Competition and Infrastructure Reform Agreement (CIRA)¹; and
- ▲ areas for general improvement of the Access Regime that may improve its overall effectiveness.

In conducting the Inquiry, the Commission has also performed functions under section 6 of the *Essential Services Commission Act 2002* (ESC Act). Therefore, in addition to address the Terms of References² referred to it by the Acting Treasurer, the Commission must also 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.

As part of the Inquiry, the Commission was directed to provide a recommendation to the South Australian Government on whether or not the Access Regime complies with certain principles set out in clause 2 of the CIRA, and to recommend changes that could improve the its overall effectiveness.

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 Australia Pty Ltd (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, operated 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, operated by Asia Pacific Transport Pty Ltd (APT);
- ▲ the intra-state lines operated by GWA used primarily for freight services, including:

¹ The CIRA is available at: http://www.coag.gov.au/meetings/100206/attachment_b_ncp_review.pdf.

² The Terms of Reference for the Inquiry are contained in Appendix 1 of this Final Inquiry Report.

- 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 above-rail services to customers and compete with the owner/operator by obtaining access to the railways on commercial terms, 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 Principles³ and with Part IIIA of the *Trade Practices Act 1974* (TPA). The Access Regime has not yet been submitted to the National Competition Council (NCC) for certification as an effective State-based access regime under the TPA.⁴ Until certification is achieved, access to services provided by intrastate railways may be subject to declaration under Part IIIA of the TPA.

The scope of services covered by the Access Regime is determined by proclamation.⁵ 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.

³ The Competition Principles Agreement is one of the agreements comprising the National Competition Policy. It can be accessed via: <http://ncp.ncc.gov.au/docs/cpa%20amended%202007.pdf>.

⁴ CIRA requires the South Australian Government to submit the Access Regime for certification by no later than the end of 2010.

⁵ 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.

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 summarised in Appendix 2.

2.4 Process for the Inquiry

The Inquiry into the Access Regime commenced in February 2009 with the release of an Issues Paper for public consultation. The Issues Paper sets out several key issues identified by the Commission that may be of relevance to the Inquiry for stakeholders comment.

The Commission received seven submissions to the Issues Paper from the following parties:

- ▲ ABB Grain Ltd;
- ▲ Asciano;
- ▲ Genesee & Wyoming Australia Pty Ltd⁶;
- ▲ Gypsum Resources Australia;
- ▲ Penrice Soda Products Pty Ltd; and

⁶ GWA has provided the Commission with an initial and supplementary submission to the Inquiry. The supplementary submission provided comments on submissions made by other parties.

- ▲ Western Plains Resources Ltd.

Following the consideration of these submissions, the Commission released its Draft Inquiry Report in July 2009. The Commission received four submissions to the Draft Inquiry Report from the following interested parties⁷:

- ▲ ABB Grain Ltd;
- ▲ Asciano;
- ▲ Genesee & Wyoming Australia Pty Ltd; and
- ▲ Penrice Soda Products Pty Ltd.

The Commission appreciates the contributions made by these stakeholders to the Inquiry process and acknowledges the valuable input that the submissions have provided into the preparation of this Final Inquiry Report.

2.5 Requirements for conducting the Inquiry

This section sets out the legislative requirements and the Terms of Reference for the conduct of the Inquiry.

2.5.1 Application of the ESC Act

The objectives of the Commission are set out in 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;*
 - *Facilitate maintenance of the financial viability of regulated industries⁸ and the incentive for long term investment; and*

⁷ Submissions to the Draft Inquiry Report and Issues Paper are available on the Commission's website at: <http://www.escosa.sa.gov.au/projects/42/2009-south-australian-rail-access-regime-inquiry.aspx>.

⁸ The Commission notes that the South Australian intrastate rail industry is not a regulated industry for the purpose of the ESC Act.

- *Promote consistency in regulation with other jurisdictions.*

2.5.2 Terms of Reference for Inquiry

Pursuant to part 7 of the ESC Act, the Acting Treasurer referred the Inquiry to the Commission in January 2009. The Commission was required to consider the extent to which the Access Regime is consistent with certain principles of the Competition and Infrastructure Reform Agreement (CIRA), entered into by the Council of Australian Governments (COAG) in February 2006. The Inquiry was also required to consider whether or not the Access Regime could otherwise be generally improved.

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's Terms of Reference in Appendix 1.

In summary, these provisions set out COAG's 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 was to 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 was to provide advice to the South Australian Government as to the form that such changes should take.

In 2007, the Commission conducted an Inquiry into the consistency of the ports access regime with these same CIRA clauses.⁹ Amendments to the *Maritime Services (Access) Act 2000* (MSA Act) have recently been enacted to implement many of the recommendations made by the Commission.

In conducting this Inquiry into the SA Rail Access Regime, the Commission was therefore mindful of the changes that have been made to the ports access regime, and to access arrangements for ports and railways generally, in order to ensure that consistency of arrangements is achieved where relevant.

⁹ A copy of the Commission's 2007 Ports Pricing and Access Review is available at: <http://www.escosa.sa.gov.au/projects/24/2007-ports-pricing-and-access-review.aspx#stage-list=4>.

3 CONSISTENCY OF THE ACCESS REGIME WITH CIRA

Pursuant to section 35(1) of the ESC Act, the Acting Treasurer directed the Commission to undertake an Inquiry into whether or not the Access Regime is consistent with certain principles set out in clause 2 of the CIRA. In particular, the Commission was directed to consider clauses 2.1, 2.2, 2.3, 2.4 and 2.6 of the CIRA. These clauses were discussed in section 2.5.2 of this paper, and are contained in the Inquiry Terms of Reference provided in Appendix 1.

Clause 2 of the CIRA commits all signatories to establish a simpler and consistent national approach to economic regulation of “significant infrastructure”. This is defined by COAG as:

infrastructure, including ports and export related infrastructure, that falls within the scope of subclause 6(3)(a) of the Competition Principles Agreement or Part IIIA of the Trade Practices Act 1974.

The South Australian Government has committed to reviewing the intrastate rail access regime for the purposes of clause 2 of the CIRA, and implement necessary changes to promote greater consistency with CIRA.¹⁰ Also included within CIRA is a commitment by jurisdictions to apply for certification of relevant access regimes before the end of 2010.

3.1 Summary of Draft Inquiry Report

The Commission considered whether or not the Access Regime, as it currently stands, is consistent with the relevant requirements of clause 2 of the CIRA. The Commission’s draft findings are discussed below.

3.1.1 Clause 2.1

Clause 2.1 of the CIRA specifies that:

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

The policy objective to introduce greater national consistency in rail access regulation has been given greater prominence since the establishment of Infrastructure Australia in 2008. In a report to COAG, released in December 2008, Infrastructure Australia noted that separate regulatory regimes across different jurisdictions in the area of land transport have contributed to inefficiencies and,

¹⁰ The COAG National Reform Agenda: Competition Reform April 2007 is available at: http://www.coag.gov.au/coag_meeting_outcomes/2007-04-13/docs/coag_nra_competition_reforms.pdf.

more importantly, adversely impacted upon Australia's economic growth.¹¹ As such, Infrastructure Australia considered it critical for the nation to address this issue by adopting the principle of "one set of rules for one economy". It envisaged that such a simpler and national approach to the economic regulation of railways would minimise uncertainty and make it easier for businesses to operate across state and territory borders.

In the Draft Inquiry Report, the Commission acknowledged the economic argument put forward by Infrastructure Australia that different regulatory arrangements across jurisdictions can create uncertainty for access providers and access seekers, drive up costs and ultimately lead to inefficiencies. However, the Commission noted that different railway networks in Australia operate under differing industry structures and competitive environments. As such, the aim of establishing an overarching national regulatory approach needs to be balanced against the specific context in which regulation is being applied. A "one-size fits all" approach to rail access regulation may impose undue limitations in this respect.

The Commission expressed the view that an Access Regime should be sufficiently flexible as to recognise the particular circumstances in which the railway industry operates, reflective of the state of any intermodal competition within a jurisdiction, and should strike an appropriate balance between the interests of all stakeholders. For example, in an environment where there is potential for market power to be exercised, a more heavy-handed form of regulatory regime may be required to curb anti-competitive behavior.

The Commission noted in the Draft Inquiry Report that it interpreted Clause 2.1 of the CIRA as not suggesting that a uniform access regime should be applied to all significant railways in Australia. The ultimate policy objective is to achieve greater national consistency in rail access regulation, not uniformity of regulation. The context to regulation will always remain important, and consistency of regulation where contexts are similar should be the desired outcome. For example, irrespective of whether access is provided for through an Australian Competition and Consumer Commission (ACCC) approved access undertaking or through a state-based access regime, consistency of the regulatory principles that underpin the access regime, where appropriate, is important.

Whilst the South Australian Rail Access Regime was considered by the Commission to be more light-handed compared to other access regimes (e.g. Victoria¹² or ARTC), the Commission noted that this in part reflects different market

¹¹ Infrastructure Australia's report to COAG is available at: http://www.infrastructureaustralia.gov.au/files/A_Report_to_the_Council_of_Australian_Governments.pdf.

¹² It is noted that the Essential Services Commission of Victoria is currently undertaking an inquiry into the effectiveness of the Victorian Rail Access Regime. For further information, please refer to: <http://www.esc.vic.gov.au/public/Rail/Consultations/Victorian+rail+access+regime+review+2009/Victorian+Rail+Access+Regime+%28VRAR%29+review+2009-10.htm>.

conditions and industry structures. For example, the SA railways are largely shorter-haul, bulk transport lines with fewer users relative to the interstate network. Moreover, the Commission was not aware of any principles underpinning the Access Regime that were in conflict with those principles underpinning other access regimes.

The Commission noted in the Draft Inquiry Report that clause 2.1 of the CIRA provides an overarching principle, and should be read in conjunction with the subsequent provisions of clause 2, which provide more specific requirements for access regimes. The Commission proposed that it would focus on clauses 2.2, 2.3, 2.4, 2.6 and 2.7 of the CIRA, on the basis that the intent of the CIRA was for parties to adopt these specific requirements as a means of achieving a simpler, more consistent national approach to economic regulation of significant infrastructure.

The Commission therefore proceeded to examine the more specific requirements under clause 2.

3.1.2 Clause 2.2

Clause 2.2 of the CIRA specifies that:

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.

The Commission noted in the Draft Inquiry Report that the ROA Act favours commercial negotiation for access to a railway service. Section 32 provides that:

- (1) The operator must negotiate in good faith with the proponent with a view to reaching agreement on whether the proponent's requirements as set out in the access proposal (or some agreed modification of the requirements) could reasonably be met, and, if so, the terms and conditions for the provision of access for the proponent; and*
- (2) The other respondents (if any) whose rights (or prospective rights) would be affected by implementation of the access proposal must also negotiate in good faith with the proponent with a view to reaching agreement on the provision of access to the proponent and any consequent variation of their rights (or prospective rights) of access.*

In addition, section 27 of the ROA Act, which provides for the development of pricing principles by the Commission, specifies that:

- (3) *The pricing principles do not prevent an operator from entering into an access contract on terms that do not reflect the principles.*

The “negotiate-arbitrate” model for access as set out in the ROA Act therefore places a strong emphasis on allowing parties to reach commercially agreed outcomes before having to apply access regulation.

The Commission’s draft finding was that the ROA Act is entirely consistent with the principle specified in clause 2.2 of the CIRA.

3.1.3 Clause 2.3

Clause 2.3 of the CIRA specifies that:

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.

The Commission noted in the Draft Inquiry Report that the ROA Act does not currently impose any form of price regulation for intrastate rail services. Rather, it allows the Commission to establish pricing principles that are to be taken into account in the event of arbitration of access disputes. Therefore, the question under clause 2.3 is whether or not the introduction of price regulation is warranted at this stage and, if so, is price monitoring the appropriate response.

In the absence of any support from submissions to this Inquiry and based on its experience under the current intrastate rail access regime where there has not been any access disputes, the Commission’s draft finding was that there were no persuasive arguments for the introduction of price regulation, including price monitoring, and therefore clause 2.3 of the CIRA was not applicable to the Access Regime at this stage.

3.1.4 Clause 2.4

Clause 2.4 of the CIRA specifies that:

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*

of 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.

In relation to clause 2.4(a) of the CIRA, the Commission noted in the Draft Inquiry Report that section 3 of the ROA Act does contain an objects clause, the objects being:

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

(b) to provide for the operation of railways;

(c) to facilitate competitive markets in the provision of railway services;

(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.

The Commission's draft finding was that these objects are broadly consistent with those set out in clause 2.4(a) of the CIRA, although the concept of economic efficiency is given greater prominence in clause 2.4(a) than in section 3 of the ROA Act. However, section 3(c) of the ROA Act does discuss facilitating competitive markets in the provision of railway services, which the CIRA states is the objective of promoting economically efficient use of, operations and investment in significant infrastructure.

The Commission's draft finding was that there was scope for the ROA Act to better reflect the concept of economic efficiency set out under CIRA. To make this link more explicit, the Commission recommended that the South Australian Government consider inserting the following object into section 3 of the ROA Act:

To promote the economically efficient use of, operation of and investment in, railway services.

Clause 2.4(b) of the CIRA concerns the principles by which regulated prices are set. The Commission noted in the Draft Inquiry Report that it does not set prices

for railway access, rather it establishes pricing principles for fixing floor and ceiling prices for railway services. In addition, the ROA Act provides certain principles that an arbitrator must take into account in determining any award relating to an access dispute. Section 38 of the ROA Act provides that:

- (1) the arbitrator must take into account*
 - (a) the objects of this Act;*
 - (b) the non-discrimination principles;*
 - (c) the operator's legitimate business interests and investment in railway infrastructure;*
 - (d) the cost to the operator of providing access as sought by the proponent (excluding costs arising from increased market competition);*
 - (e) if applicable – the economic value to the operator of additional investment the proponent proposes to undertake;*
 - (f) the economically efficient operation of the railway infrastructure;*
 - (g) the pricing principles;*
 - (h) the price of comparable services for other industry participants (including – if applicable – the operator itself);*
 - (i) the interests of industry participants whose interests may be affected by the proposal;*
 - (j) the contractual obligations of the operator and existing industry participants;*
 - (k) the operational requirements for the safe and reliable operation of the railway infrastructure;*
 - (l) the public interest in market competition; and*
 - (m) relevant technical and legal issues.*
- (2) the arbitrator may take into account other matters the arbitrator considers appropriate.*

On the basis that the principles listed in 2.4(b) are intended to be reflected in the principles to be taken into account by an arbitrator under section 38 of the ROA Act, the Commission's draft finding was that there were no principles between the two sets that were in conflict. However, to introduce greater consistency between the two sets, the Commission recommended that the South Australian Government consider the addition of the following provisions to section 38(1) of the ROA Act:

The pricing principles relating to the price of access to a service are as follows:

- (n) that access prices should allow multi-part pricing and price discrimination when it aids efficiency;*
- (o) that access prices should not allow a vertically integrated operator to set terms and conditions that would discriminate in favour of its downstream operations, except to the extent that the cost of providing access to others would be higher; and*
- (p) that access prices should provide incentives to reduce costs or otherwise improve productivity.*

The Commission noted that the proposed non-discrimination principle above is intended to be consistent with the general obligation under section 23 of the ROA Act that requires an operator to not unfairly discriminate between proponents.

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 noted in the Draft Inquiry Report 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's draft finding was that this CIRA principle was not relevant to the Access Regime.

3.1.5 Clause 2.6

Clause 2.6 of the CIRA specifies that:

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 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.*

The Commission noted in the Draft Inquiry Report 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. As such, a provision similar to that set out in clause 2.6 of the CIRA would need to be inserted into the ROA Act to achieve greater consistency between the two sets.

The Commission's draft finding was that there was significant merit in providing time certainty to the process of resolving access disputes and that a time limit provision should be inserted into the ROA Act to reflect clause 2.6 of the CIRA. Notwithstanding this, provisions should be made for the suspension of the six-month time limit on grounds such as requests for further information and consultation periods during which submissions are sought from third parties and the community. Section 30(A) of the *Maritime Services (Access) (Miscellaneous) Amendment Act 2009* provides an example of the type of time limit provision that is required.

3.1.6 Clause 2.7

Clause 2.7 of the CIRA specifies that:

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.

The Commission noted in the Draft Inquiry Report that the South Australian Government was committed under the COAG National Reform Agenda to the implementation of consistent principles between the Access Regime and CIRA in 2009, and to have the regime certified by no later than the end of 2010.

The Commission noted that there was significant merit in having the Access Regime certified as an effective State-based access regime by the NCC. A certified access regime provides the greatest level of regulatory certainty to all industry participants over how access will be regulated. This assists in promoting new capital investments in the upstream and downstream markets. In the absence of a certified access regime, the potential for declaration by an access seeker under Part IIIA of the TPA provides significant uncertainty to an access provider.

The Commission therefore recommended that the South Australian Government submit the Access Regime to the NCC for certification as soon as practicable following necessary amendments to the ROA Act.

3.2 Submissions to Draft Inquiry Report

Submissions to the Draft Inquiry Paper were generally supportive of the proposed amendments to the ROA Act to bring about greater consistency with clause 2 of the CIRA. The Commission did, however, receive two submissions commenting on its draft findings.

GWA's submission to the Draft Inquiry Report expressed concern with the Commission's draft finding for the ROA Act to be amended to better reflect the concept of economic efficiency set out under CIRA. Whilst GWA expressed agreement that the Access Regime should promote economic efficiency, it noted that the issue of return on investment needed to be addressed. It requested that:

“if the concept of economic efficiency is to be included in the Act, the fact that the operator needs to earn a fair rate of return on investment over a commercially acceptable period be included in the pricing principles.”¹³

Penrice's submission to the Draft Inquiry Report commented that it did not agree with the Commission's draft finding that there was currently no case for price regulation.¹⁴

3.3 Commission's Consideration

With regard to the concern expressed by GWA, the Commission notes that rail access prices that are considered economically efficient will include a risk adjusted return on investment. It is commonly accepted that regulated prices should include all economic costs, which include the opportunity costs of investment. The Commission will ensure that the pricing principles for calculating a floor and ceiling price, as set out in the proposed revised Information Kit¹⁵, will explicitly recognise this requirement.

The Commission has also held further discussions with Penrice to seek clarification in relation to its comment made regarding CIRA clause 2.3. On the basis of the discussion held, the Commission understands that Penrice was not suggesting that a price regulation regime should be introduced into the Access Regime, but rather to highlight the need for increased transparency in the form in which price information is being provided by the access provider to access seekers. This matter is addressed by the Commission in section 4.2 of this Report.

In summary, the Commission has found no major conflicts between the relevant parts of clause 2 of the CIRA and the Access Regime. Nevertheless, there are a number of areas in which greater consistency could be achieved through suitable legislative amendment.

The Commission's final recommendation is that the South Australian Government consider amending the ROA Act, for the purposes of introducing greater consistency with clause 2 of the CIRA, as follows:

¹³ GWA's submission to the Draft Inquiry Report, pg 1 of unnumbered document.

¹⁴ Penrice's submission to the Draft Inquiry Report, pg 2 of unnumbered document.

¹⁵ The Information Kit is the Commission's primary publication concerning the Access Regime.

Final Report Conclusion

1.) *The Commission recommends that the South Australian Government consider an amendment to section 3(c) of the ROA Act to provide the following object:*

(b) to facilitate competitive markets in the provision of railway services, by promoting the economically efficient use of, operation of and investment in, railway services.

2.) *The Commission recommends that the South Australian Government consider the addition of the following provisions to section 38(1) of the ROA Act:*

The pricing principles relating to the price of access to a service are as follows:

(n) that access prices should allow multi-part pricing and price discrimination when it aids efficiency;

(o) that access prices should 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

(p) that access prices should provide incentives to reduce costs or otherwise improve productivity.

3.) *The Commission recommends that the South Australian Government consider the insertion of a six-month time limit provision into the conciliation-arbitration framework set out under part 6 of the ROA Act to reflect clause 2.6 of CIRA.*

4.) *The Commission recommends that the South Australian Government commence the certification process for the Access Regime at the earliest opportunity following necessary amendments to the ROA Act.*

4 AREAS FOR GENERAL IMPROVEMENT

The Inquiry's Terms of Reference directed the Commission to provide advice on any other changes to the Access Regime that might improve its overall effectiveness.

The Commission believes that an access regime that is capable of being certified as effective by the NCC provides the greatest level of regulatory certainty to all parties in relation to how access will be regulated. Implementation of the recommendations put forward by the Commission in section 3 of this Final Inquiry Report will therefore assist in the achievement of certification of the Access Regime.

In the Issues Paper for this Inquiry, the Commission highlighted the practical application of the Access Regime in facilitating commercial negotiation of access to railways as a key area of concern in terms of the effectiveness of the Access Regime.

In some areas there has been insufficient application of the provisions of the Access Regime to enable robust conclusions to be drawn about effectiveness. For example, there has been no experience with disputes and arbitration under the Access Regime.

However, in the Draft Inquiry Report, the Commission identified a number of areas where the Access Regime's effectiveness could be improved.

4.1 Coverage of the Access Regime

4.1.1 Summary of Draft Inquiry Report

Mining Developments in South Australia

The Commission's Draft Inquiry Report noted that despite the current economic downturn, in which demand for mineral outputs has declined significantly and funding for capital intensive mining developments is constrained by tighter credit market conditions, there are a number of positive indicators for the South Australian mining industry. South Australia remains highly regarded for its favourable business environment¹⁶ and mining potential.¹⁷ BHP Billiton's expansion plans for Olympic Dam¹⁸ and the Australian Bureau of Agricultural and Resource

¹⁶ South Australia was ranked the least risky jurisdiction in Australia and second internationally for mining exploration activities by London-based ResourceStocks magazine in its annual World Risk Survey. A copy of this survey is available at: http://en.gtk.fi/export/sites/default/ExplorationFinland/ExplorationNews/world_risk_ranking_list_only2008.pdf.

¹⁷ South Australia was ranked in the top ten in terms of mining potential in the Fraser Institute's 2008/09 survey of 71 jurisdictions worldwide by mining and exploration companies. A copy of this survey is available at: <http://www.fraserinstitute.org/researchandpublications/>.

¹⁸ Information in relation to BHP Billiton's proposed expansion of Olympic Dam is available at: <http://www.bhpbilliton.com/bb/odxEis.jsp>.

Economics (ABARE) commodities demand forecast¹⁹ supported the view of an expected increase in mining activities in South Australia.

The Commission therefore expressed the view in the Draft Inquiry Report that it believed that the current economic slowdown represents an opportune time for the Access Regime to be reviewed to ensure it is flexible and robust enough to respond to an eventual upturn in global economic conditions and mining activities.

Whilst comments were sought from stakeholders on whether or not the coverage of the Access Regime should be extended to certain existing railway infrastructure that are not currently covered particularly to accommodate future mining developments, no specific comments were received on this matter, other than on the issue of private sidings.

The Commission's draft finding was therefore that the Access Regime's coverage was appropriate.

Private Sidings

Pursuant to a Proclamation gazetted on 7 May 1998²⁰, the provisions of the Access Regime under the ROA Act do not apply to, amongst other things, "private sidings".

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

Under the *Rail Safety Act 2007* (which repealed the 1996 Act), a private siding is defined as a siding that is managed, owned or controlled by a person, other than a person who manages the rail infrastructure with which the siding connects or to which it has access, but does not include a:

- ▲ marshalling yard;
- ▲ crossing loop;
- ▲ passenger terminal;
- ▲ freight terminal; or
- ▲ siding, or a siding of a class, prescribed by the regulations not to be a private siding.

¹⁹ ABARE has forecasted for the nation's mining exports to continue expanding in volume terms in the long term, despite a flat or lower in value terms during 2009-10. A copy of ABARE's commodities demand forecast is available at: http://www.abareconomics.com/publications.html/ac/ac_09/ac09_March_a.pdf.

²⁰ p. 2115.

Furthermore, pursuant to the *Rail Safety (General) Regulations 2008*, the following are also not private sidings:

- ▲ a siding under the control and management of an accredited rail infrastructure manager; and
- ▲ a balloon loop used for the purpose of loading or unloading trains.

The Commission had discussed the intent of these provisions with the Department of Transport, Energy & Infrastructure. The Department's view was that private sidings are meant to capture privately-owned sidings where the railway infrastructure is for the sole use of the owner (e.g. for manufacturing processes) and is not meant for access purposes.

Based on the discussions held and the Commission's interpretation of the legislation, the Inquiry's draft findings were that:

- ▲ both ABB Grain and GWA are accredited as rail infrastructure managers under Part 4 of the *Rail Safety Act 2007*. As such, any sidings owned by either of these parties are covered by the Access Regime; and
- ▲ pursuant to the *Rail Safety (General) Regulations 2008*, AWB-owned balloon loops are also covered by the Access Regime.

Whilst the Commission's draft finding was that all known grain sidings are covered by the Access Regime, it noted in the Draft Inquiry Report that the issue of grain access needs to be considered within the context of the entire supply chain. For example, not all grain storage and loading facilities are covered by the Access Regime. As such, even if a user gains access to the grain siding, there is still a separate question of whether access could be gained to all grain loading and handling infrastructure where it is uneconomic to build competing infrastructure.

The Commission therefore commented that it would be appropriate to consider rail access issues in the grain industry as part of a broader review of the entire supply chain, noting that it would allow for the specific circumstances of the grain industry to be appropriately considered and scrutinised.

4.1.2 Submissions to Draft Inquiry Report

Mining Developments in South Australia

The Penrice Soda Products Pty Ltd (Penrice) submission to the Draft Inquiry Report supported the proposal for coverage of the Access Regime to remain unchanged.

No other submissions commented directly on this issue.

Private Sidings

Penrice's submission to the Draft Inquiry Report supported the Commission's draft finding that there are no sidings to which coverage of the Access Regime should be extended. GWA's submission, however, noted that a mechanism needs to be put in place to review the effects of any sale of rail facilities to ensure that access rights are protected.²¹

4.1.3 Commission's Consideration

Mining Developments in South Australia

The Commission has not been presented with any information to suggest that the South Australian Government should extend Access Regime's coverage to certain railway infrastructure that is currently not covered at this stage.

It should be noted, however, that this issue should be ultimately considered by the South Australian Government on a case-by-case basis. For example, if there are a number of mining projects located in close proximity to each other, it makes sound commercial sense for these mines to utilise a common railway infrastructure, rather than unproductive facility duplication. This, however, makes the prospect of access disputes and exercise of market power more likely and lends weight to the argument for such rail infrastructure to be covered by the Access Regime.

Nevertheless, in light of the absence of any submissions on this issue, the Commission sees no reason to depart from its draft finding that the Access Regime's coverage is appropriate.

Private Sidings

In the Draft Inquiry Report, the Commission noted that the *Rail Safety Act 2007*, *Rail Safety (General) Regulations 2008*, and a Proclamation gazetted on 7 May 1998 must be read together to determine a definition for the term "private sidings" for the purposes of the Access Regime.

In essence, the Commission understands that the intention of the current definition of private sidings is that only privately-owned sidings which are in existence for the sole use of the siding's owner (e.g. for manufacturing or repair processes), and which are not meant for access purposes, are to be captured.

The Commission believes that the requirement to refer to each of the above documents to derive a definition for the term "private siding" is likely to lead to confusion as to what constitutes a private siding.

²¹ GWA's submission to the Draft Inquiry Report, pg 2 of unnumbered document.

The Commission therefore recommends that a definition of “private siding” be included into the ROA Act to reduce the risk of confusion as to the meaning and interpretation of this term (e.g. by containing the definition within one piece of legislation) and to thereby clarify when a private siding falls (and does not fall) within the scope of the Access Regime.

GWA has raised concerns regarding the coverage of sidings if ownership were to change hands (e.g. a covered siding may be considered “private” following the sale of the siding to a party that is not an accredited rail infrastructure manager or if the siding otherwise is considered private). The Commission notes that coverage of sidings is dependent on a number of factors, but to the extent that a siding may fall outside of the Access Regime and it is considered appropriate to include it within the regime, the South Australian Government has the ability to cover the siding through a further proclamation.

Under the current definition, all grain sidings known to the Commission fall within the terms of the Access Regime; given the monopoly characteristics of these sidings, such coverage seems appropriate. However, access to the sidings is of little value if access in other parts of the grain supply chain (e.g. grain storage and bulk handling) is doubtful. The scope of the current Inquiry does not extend to non-rail access issues and hence the Commission can make no further judgement on this matter. The South Australian Government may wish to consider a broader review of access regulation covering the entire grain supply chain.

The Commission notes that the Productivity Commission has recently been requested by the Australian Government Assistant Treasurer to undertake an inquiry into wheat export marketing arrangements in Australia. In conducting the inquiry, the Productivity Commission is to give consideration to the effectiveness of, and level of competition existing under current arrangements in the whole export supply chain (e.g. transport, storage and distribution of wheat from farm gate to export load port).²²

²² Further information in relation to the Productivity Commission’s inquiry into the operation of the *Wheat Export Marketing Act 2008* and *Wheat Export Accreditation Scheme 2008* is available at: <http://www.pc.gov.au/projects/inquiry/wheatexport>.

Final Report Conclusion

- 1.) The Commission recommends that coverage of the Access Regime remain unchanged.**
- 2.) The Commission recommends that the South Australian Government consider the inclusion of a definition of “private siding” into the ROA Act to clarify when a private siding falls (and does not fall) within the terms of the Access Regime.**
- 3.) The Commission recommends that the South Australian Government consider undertaking a broader review of access regulation covering the entire grain supply chain.**

4.2 Provision of Information

4.2.1 Summary of Draft Inquiry Report

The Draft Inquiry Report sets out the Commission's preliminary views on price transparency and information requirements. A summary of the Commission's draft conclusions are provided below.

Transparency of Price Components

As a matter of principle, the Commission noted in its Draft Inquiry Report that prices provided to access seekers should be provided in a manner that would provide for a clear differentiation in above and below-rail access charges and, more importantly, allow access seekers to determine the reasonableness of the access charges offered. The Commission also noted that a framework that promotes successful commercial negotiation of access must ensure that sufficient information on prices is provided to an access seeker, to enable it to make an informed decision.

Whilst there was a suggestion that this is not the case and that offers were being provided to access seekers in a bundled and non-transparent manner, the Commission's investigation found no positive evidence to substantiate this claim. The Commission observed in the Draft Inquiry Report that whilst specific price information was not provided as part of an access provider initial offer, it was subsequently provided after being requested by the access seeker.

Nevertheless, the Commission concluded in its Draft Inquiry Report that it saw merit in clarifying the nature of the price information to be provided by an access

provider to an access seeker under its Information Kit, particularly given that the current commercial practice appears to exceed the current requirements.

Information Requirements

Section 28(1) of the ROA Act obliges an access provider to provide to an access seeker, on written application, an Information Brochure which must contain, among other things, the terms and conditions on which it is prepared to make its railway infrastructure available and, if not, the reasons why the service cannot be provided.

Whilst some stakeholders had expressed the view that certain cost and price information (e.g. asset valuation) should be specified in the Information Brochure provided by an access provider to an access seeker on written application in the first instance, the Commission expressed the view that it is more appropriate for specific cost and price information to be provided following the receipt of an access application when requirements are known. The Commission considered that this is more likely to produce more relevant information for negotiation.

The Commission further noted in the Draft Inquiry Report that the requirement on an access provider to negotiate in good faith encompasses the need to provide sufficiently detailed information on the terms of access, including price, to ensure that an access seeker can understand the basis on which the offer was prepared. Information that is being provided in a transparent and timely manner is therefore a key input into successful negotiation.

As acknowledged in the Draft Inquiry Report, the Commission examined its Information Kit and identified several components that could be further improved. For example, the Commission considered the current requirement for an access provider to demonstrate how the floor and ceiling prices relate to the pricing principles is somewhat vague and could be clarified, noting that GWA is already providing more detailed information to access seekers. The Commission therefore believed that the Information Kit should reflect this ongoing business practice.

The Commission therefore stated in the Draft Inquiry Report that it planned to address these existing deficiencies by considering the need for an access provider to:

- ▲ unbundle access charges;
- ▲ provide more explicit information on the level of service quality that is to be provided at that particular price; and
- ▲ demonstrate how any proposed capital expenditure is linked to service requirements and how it is being incorporated into the access charges (either through capital contributions or tariffs).

The Commission proposed in its Draft Inquiry Report for a separate review of its Information Kit to be carried out to provide stakeholders with the opportunity for meaningful input. Stakeholders were invited to comment on what sort of information should be provided as part of the Information Brochure and throughout the negotiation process, to give better initial guidance to an access seeker and formulate the starting point for an eventual access proposal anywhere on the covered network.

The Commission also requested comments from stakeholders on the readability of its Information Kit, and whether or not it is sufficiently detailed to give readers an adequate understanding of the Access Regime and the Commission's role.

4.2.2 Submissions to Draft Inquiry Report

Transparency of Price Components

Submissions to the Draft Inquiry Report did not comment directly on this issue. However, in discussions held with the Commission, Penrice expressed concern over the issue of price transparency, noting that price information provided by the access provider to access seekers should allow for clear differentiation between above and below rail charges.

The GWA submission also noted that:

"[it] believes that the changes where they relate to disclosure of pricing information are in line with current GWA practice"²³

Information Requirements

Submissions to the Draft Inquiry Report were generally supportive of the Commission's proposal for a separate review of its Information Kit to be carried out.

The Penrice submission commented that:

"[it] supports initiatives aimed at:

- *unbundling" access charges in a truly transparent and timely manner.*
- *ensuring it is clear how proposed capital expenditure is linked to service requirements and how it is being incorporated into the access charges."²⁴*

The Asciano submission also argued that the Access Regime should require the approval of the standard terms and conditions of access. Asciano commented that:

²³ GWA's submission to the Final Inquiry Report, pg 2 of unnumbered document.

²⁴ Penrice's submission to the Draft Inquiry Report, pg 5 of unnumbered document.

“In other major regulatory regimes regulators like the ACCC and the QCA spend a significant amount of time scrutinising access providers’ terms and conditions to ensure they are fair and reasonable. Asciano believes the South Australian access regime (SA Regime) should be amended to allow the Commission to review and approve GWA’s Information Brochure to ensure the standard terms and conditions on which it is prepared to make its railway infrastructure available are fair and reasonable.”²⁵

No submissions to the Draft Inquiry Report commented directly on the readability of the Commission’s Information Kit, and whether or not it is sufficiently detailed to give readers an adequate understanding of the Access Regime and the Commission’s role.

4.2.3 Commission’s Consideration

Transparency of Price Components

The Commission has not been presented with any additional arguments to suggest that it should depart from its draft conclusions that there was no evidence to suggest that offers are being provided to access seekers in a non-transparent manner.

Nevertheless, the Commission can see merit in clarifying the nature of the price information that is to be provided by an access provider to an access seeker under its Information Kit, particularly given that the current commercial practice appears to exceed the current requirements.

Information Requirements

While submissions to the Draft Inquiry Report did not comment on the type of information that should be provided as part of the Information Brochure and throughout the negotiation process in order to facilitate successful negotiation, no objections were raised in response to the Commission’s proposal for a separate review of the Information Kit to be carried out. The Commission therefore sees no reason to depart from its draft findings. The review of the South Australian Rail Access Regime Information Kit has commenced.

Although no submissions to the Draft Inquiry Report commented directly on the readability of the Information Kit, the Commission will nevertheless examine this aspect as part of the Information Kit review to ensure that it is sufficiently detailed to give readers an adequate understanding of the Access Regime and the Commission’s role.

The Commission will shortly release a Draft Information Kit for public consultation.

²⁵ Asciano’s submission to the Draft Inquiry Report, pg 1.

In response to Asciano's suggestion that the Access Regime should require approval of the standard terms and conditions of access by the Commission, the Commission notes that this proposal may be considered incompatible with the light-handed nature of the current regime. If there was a requirement for the regulator to approve the terms and conditions of access (which includes price), this would significantly change the nature of the regulatory approach that underpins the Access Regime, with the regulator effectively being required to endorse all aspects of the proposed standard access arrangements on an ex-ante basis. While the Commission is currently able to specify the matters that must be addressed in an Information Brochure, extending its powers to the approval of the terms and conditions contained in the brochure is not considered to be justified, nor has it been supported by other stakeholders.

Final Report Conclusion

- 1.) The Commission has found no evidence to suggest that offers are being provided to access seekers in a non-transparent manner.**

- 2.) The Commission is undertaking a separate review of the South Australian Rail Access Regime Information Kit to require an access provider to:**
 - ▲ unbundle access charges;**
 - ▲ provide more explicit information on the level of service quality that is to be provided at that particular price; and**
 - ▲ demonstrate how any proposed capital expenditure is linked to service requirements and how it is being incorporated into the access charges (either through capital contributions or tariffs).**

4.3 Service Quality and Investments

4.3.1 Summary of Draft Inquiry Report

Service Quality in the Railway Network

Whilst the Commission commented in the Draft Inquiry Report on the impact that service quality has on productivity and economic efficiency, it noted that it had not received any evidence of specific circumstances that would show that an access provider is failing to meet the required service levels due to deliberate under-investment. The Commission therefore stated that it was unconvinced that establishing a set of service quality standards is necessary to address the issue of service quality, noting also that it would be inherently difficult to determine an overarching set of service standards that best meet the requirements of different users

with different operational requirements. In any case, the ROA Act does not currently empower the Commission to establish such standards.

The Commission noted in the Draft Inquiry Report that the Information Kit already requires an access provider to provide certain technical information (e.g. maximum speeds which apply on each section for typical trains, average transit times and estimated available capacity) as part of the Information Brochure. The Commission stated that believed that the provision of such technical information was sufficient to give an access seeker an appropriate level of initial guidance as to the minimum level of service quality to be expected. Moreover, the Commission would expect parties in a negotiation to explicitly recognise service quality levels and to incorporate specific requirements into negotiated contracts.

The Commission's draft finding was therefore that the determination of optimal service standards is best left to be dealt with under the Access Regime's negotiate-arbitrate model as a subject of commercial negotiation. The Commission believed that this model is best able to account for individual circumstances and service level requirements, and to develop a price-service package that can provide certainty to both parties and alleviate any perceived risks. For example, commercial negotiations may allow financial compensation to be paid to a user should service delivery not be delivered to the agreed standards.

Investment in the Railway Network

In considering the issue of investment, the Commission noted in the Draft Inquiry Report that it was mindful of the fact that the railway industry is capital-intensive, requiring substantial capital expenditure on assets with long asset 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 provide some assurance that the investment can be recovered.

Whilst there have been instances where funding for capital investments have been obtained from external sources, the Commission observed that these occurrences were predominantly in geographical locations where there are strong economic and social arguments justifying such external funding to be made.²⁶ Therefore, unless there are similar justifications, the Commission would expect parties to discuss service quality, investment or operating and maintenance (O&M) costs needed to provide that level of service, and an appropriate price package that would encompass that investment or O&M costs.

The Commission's draft finding was therefore that investment decisions are best left to be dealt with under the Access Regime's negotiate-arbitrate model. For

²⁶ In 2005, the Australian Government contributed \$15 million towards a \$30 million project for upgrading the Eyre Peninsula rail system. This contribution was conditional on a matching contribution from the South Australian Government, industry and local councils.

example, it allows an access provider to obtain commitment from users regarding the extent of asset utilisation (e.g. term of access arrangement and a minimum annual volume) prior to any investment decision being made. The Commission stated that it believed that this model was best able to provide sufficient certainty to the access provider to alleviate any perceived risks of being left with an obsolete or underutilised asset if the user chooses to cease or reduce its operational activities. Notwithstanding this, the Commission also noted that 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.

4.3.2 Submissions to Draft Inquiry Report

Service Quality in the Railway Network

Submissions to the Draft Inquiry Report did not comment directly on this issue. However, having held direct discussions with relevant stakeholders following release of the Draft Inquiry Report, the Commission perceives that there is a general preference among stakeholders for this issue to be dealt with as a subject of commercial negotiation.

Investment in the Railway Network

The only submission to the Draft Inquiry Report commenting on this issue came from Penrice. Its submission commented that, while it understood the Commission's position for the issue of investment to be left as a subject of commercial negotiation between the parties, it noted that such issues are likely to arise as existing rail infrastructure assets come to the end of their useful lives and enter a period of significant capital reinvestment.²⁷

4.3.3 Commission's Consideration

Service Quality in the Railway Network

Given that no objections were raised in response to its draft conclusion on this matter, the Commission reaffirms its view that service quality issues are best dealt with as a subject of commercial negotiation.

Investment in the Railway Network

Having had regard to submissions made to the Commission's Issues Paper and Draft Inquiry Report, the Commission reiterates its view that commercial reality dictates that an access provider will need assurances over future volumes and term of access contracts before it can commit substantial capital for investment in railway infrastructure. For this reason, the Commission believes that the Access

²⁷ Penrice's submission to the Draft Inquiry Report, pg 5 of unnumbered document.

Regime's negotiate-arbitrate framework provides the most effective framework for identification and facilitation of specific rail infrastructure requirements. The Commission would stress once again that 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.

Final Report Conclusion

The Commission believes that service quality and investment issues are best dealt with as a subject of commercial negotiation between access providers and access seekers. Nevertheless, the Commission is intending to provide better guidelines on the extent of information in relation to service quality or any proposed capital expenditure that should be provided by an access provider during commercial negotiation in its Information Kit review.

4.4 Confidentiality Provision

4.4.1 Summary of Draft Inquiry Report

As the ROA Act currently does not provide for a confidentiality provision as part of the negotiation framework, the Draft Inquiry Report recommended that a confidentiality provision be inserted into the ROA Act to protect commercially sensitive information being exchanged in a negotiation process. It suggested that such a provision would give greater protection to all parties, and in particular prevent an access provider from sharing commercially sensitive information obtained from other access seekers with its downstream businesses. This is particularly relevant given that section 6 of the ESC Act requires the Commission to have regard to ensuring monopoly power is not misused.

While Part 5 of the ROA Act requires an access provider to provide written notice of an access proposal to the Commission and any affected industry participant, this obligation does not require the proposal itself to be disclosed and, therefore, there is no requirement to disclose any confidential information contained in the proposal to a third party.

4.4.2 Submissions to Draft Inquiry Report

Submissions to the Draft Inquiry Report unanimously supported the Commission's proposal to introduce a confidentiality provision into the ROA Act.

4.4.3 Commission's Consideration

As outlined in the Draft Inquiry Report, the *Australasia Railway (Third Party Access) Act 1999* (ARTPA Act) already contains a confidentiality provision.²⁸ However, it only protects the information being supplied by an access seeker to an access provider in a commercial negotiation, and is intended to ensure that the access provider does not pass the information on to an associated above-rail operator. Inclusion of this clause was an important matter in the NCC's consideration, and ultimate certification, of the access regime for the Tarcoola-Darwin Railway.

Having further considered this matter, the Commission is of the view that while there may be merit in ensuring the protection of confidential information provided by the access provider to an access seeker, it is inclined to make no judgment on this matter. It believes that such protection would not improve the effectiveness of the Access Regime, and as such arguably lies outside the Terms of Reference for the present Inquiry. The Access Regime applies to below rail services and its effectiveness is related to the extent to which it facilitates competition in above-rail and related markets. Therefore, the protection of confidential information relating to operators in the competitive market is of paramount importance.

The Commission therefore concludes that it would be appropriate to include a confidentiality provision in the ROA Act that protects the information being supplied by an access seeker to an access provider in a commercial negotiation, in a manner similar to the equivalent provision in the ARTPA Act.

Final Report Conclusion

The Commission recommends that the South Australian Government consider the inclusion of a provision in Part 5 of the ROA Act to protect the confidentiality of information provided by an access seeker to an access provider during commercial negotiations; the equivalent provision in the ARTPA Act may be an appropriate model. .

4.5 Changes to Conciliation/Arbitration Process

4.5.1 Summary of Draft Inquiry Report

Advice and Directions

The Commission noted in the Draft Inquiry Report that whilst it had not yet received any notification of a dispute, it was concerned as to the necessity of the formal

²⁸ A copy of the *AustralAsia Railway (Third Party Access) Act 1999* is available at: <http://www.legislation.sa.gov.au/index.aspx>.

conciliation and/or arbitration dispute resolution processes being utilised in the first instance given the time and cost involved. Furthermore, the Commission expressed the view that given that the outcomes are far from certain in such formal processes, an over-reliance on this avenue would generally be disruptive.

The Commission therefore recommended in the Draft Inquiry Report that an “advice and directions” provision be included in the ROA Act. It suggested that this would encourage the resolution of disputes at an informal level in the first instance and would make low cost dispute resolution more accessible for negotiation matters, noting that the ARTPA Act already contains such an advice and directions provision. Section 12(B) of the ARTPA Act provides that:

- (1) An access seeker, the access provider or any other respondent to an access proposal may request the regulator to consider and, if appropriate, to give advice or directions with respect to any matter that has arisen in connection with the operation of this Division in order to facilitate the conduct of negotiations under this Division;*
- (2) A person making a request under subclause (1) must comply with any requirement published by the regulator for the purpose of this clause;*
- (3) The regulator may decline to consider or act on a request under subclause (1) for any reasonable clause;*
- (4) The regulator may, if the regulator thinks fit, give a general direction to the access provider under subclause (1) in respect of a particular matter under this Division;*
- (5) A person must not, without reasonable excuse, contravene or fail to comply with a direction given by the regulator under this clause*

Penalty: \$10,000.

- (6) This clause does not limit or affect the ability of an access seeker at any time to request that an access dispute be referred to arbitration under Division 2.*

Time Limit for Decisions

In order to ensure that the Access Regime is compliant with the principles set out in clause 2 of the CIRA, in particular clause 2.6, the Commission recommended in the Draft Inquiry Report that provision be made in the ROA Act requiring any regulatory decisions to be made under the Access Regime within six months, with provision made for the suspension of the six-month time limit on reasonable grounds, such as requests for further information and consultation periods during which submissions are sought from third parties and the community. Accordingly, the Commission recommended in the Draft Inquiry Report that a provision similar to that provided in section 30(A) of the *Maritime Services (Access) (Miscellaneous) Amendment Act 2009* be included. It provides for:

- (1) *An award must be made within the period of 6 months from the date on which the dispute is referred to arbitration (the **standard period**);*
- (2) *However, if after the commencement of the standard period the arbitrator exercises a power under this Part in relation to the provision of information or documents, any period between the date of the exercise of the power and the date of compliance is not to be taken into account when determining the end date of the standard period.*

4.5.2 Submissions to Draft Inquiry Report

Advice and Directions

Submissions to the Draft Inquiry Report unanimously supported the proposal to introduce an “advice and directions” provision, similar to that provided for in the ARTPA Act, into the ROA Act.

Time Limit for Decisions

There was similar unanimous support for the proposal to insert a six-month time limit provision into the conciliation-arbitration framework set out under Part 6 of the ROA Act.

4.5.3 Commission’s Consideration

Advice and Directions

Given that stakeholders making submissions to the Draft Inquiry Report were unanimously in favour of introducing an “advice and directions” provision into the ROA Act, the Commission has no reason to deviate from its draft finding in this Final Inquiry Report.

Time Limit for Decisions

Having had regard to submissions made to the Issues Paper and Draft Inquiry Report and, in particular, clause 2.6 of the CIRA, the Commission confirms its draft conclusion that there is significant merit in providing time certainty to the process of resolving access disputes and that a time limit provision should be inserted into the ROA Act to reflect clause 2.6 of the CIRA.

The Commission also reiterates its view that provisions should be made for the suspension of the six-month time limit on grounds such as requests for further information and for stakeholder consultation. The Commission recommends that a provision similar to that provided in Section 30(A) of the *Maritime Services (Access) (Miscellaneous) Amendment Act 2009* be included.

Final Report Conclusion

- 1.) The Commission recommends that an “advice and directions” provision be introduced into the ROA Act.**

- 2.) The Commission recommends that the South Australian Government consider the inclusion of a six-month time limit provision into the conciliation-arbitration framework set out under Part 6 of the ROA Act. Provisions should be made for the suspension of the six-month time limit on grounds such as requests for further information and consultation periods during which submissions are sought from third parties and the community.**

4.6 Access Notifications

4.6.1 Summary of Draft Inquiry Report

Section 31(3)(a) of the ROA Act requires access providers to inform the Commission of any access notifications. The rationale behind such a requirement is to allow the Commission to monitor the extent to which access to railway networks covered by the Access Regime is being sought.

The current definition of “access contract” under the ROA Act is very broad in scope and requires an access provider to provide access notifications to the Commission in all cases, even if the arrangements are ad-hoc and of very small financial value. In the Draft Inquiry Report the Commission therefore stated that it saw merit in narrowing the definition so that such access requests need not be reported. GWA had proposed for the notification process to be limited to access contracts with estimated annual revenue in excess of \$50,000, to reduce administrative effort and costs. The Commission’s draft recommendation was that the South Australian Government consider amending the definition of “access contract” under the ROA Act to specify a:

- ▲ contract giving access to railway services which:
 - has an annual value to an operator of \$50,000 or more; or
 - is for a term longer than 2 months; or

- ▲ contractual variation of an existing contract affecting access to railway services in a significant way or to a significant extent.

The Commission expressed the view that these proposed amendments should ensure that it still obtains copies of access contracts or arrangements of substance

to allow monitoring of access but at the same time reduce the administrative burdens for railway operators.

4.6.2 Submissions to Draft Inquiry Report

Asciano's submission to the Draft Inquiry Report supported the proposal to amend the definition of "access contract" under the ROA Act, commenting that:

*"reducing the unnecessary administrative burden of regulation on the industry is important, therefore [it] supports the proposed amendments to the definition of "access contract" under the ROA Act."*²⁹

In contrast, the Penrice submission did not believe that the existing arrangements need to be modified. However, Penrice presented no arguments in support of this view.

4.6.3 Commission's Consideration

Given that it has not been presented with any additional arguments to suggest that it should deviate from its draft finding, the Commission sees no reason to change its view in this Final Inquiry Report.

Final Report Conclusion

The Commission recommends that the South Australian Government consider amending the definition of "access contract" under the ROA Act to a:

- ▲ *contract giving access to railway services which:***
 - has an annual value to an operator of \$50,000 or more; or***
 - is for a term longer than 2 months; or***
- ▲ *contractual variation of an existing contract affecting access to railway services in a significant way or to a significant extent***

4.7 Segregation of Businesses

4.7.1 Summary of Draft Inquiry Report

Section 21 of the ROA Act currently specifies that an operator must not carry on a business other than an "authorised business" being:

- (a) the provision of railway services;*

²⁹ Asciano's submission to the Draft Inquiry Report, pg 2.

³¹ p.1878

- (b) *the operation of railways;*
- (c) *investing in railway infrastructure (including investment in the share capital of bodies corporate that own railway infrastructure);*
- (d) *designing, constructing or maintaining railways; and*
- (e) *providing consultancy, technical or other services related to investment in railway infrastructure or the design, construction, maintenance or operation of railways.*

The Commission suggested in the Draft Inquiry Report that it was unreasonable to preclude a private rail operator from pursuing other commercial interests. Its key concern was whether or not the appropriate ring-fencing arrangements have been put in place between the below-rail business and the above-rail business, to prevent rail competition from being adversely affected.

The Commission suggested that it would be sufficient for a rail operator to comply with the requirement of section 22 of the ROA Act to keep accounts and records of its railway services business separate to, and distinct from, the accounts and records of any other businesses it operates. The Commission also noted that section 23 of the ROA Act, which prevents unfair discrimination between access seekers, is intended to prevent a vertically integrated operator from behaving in an anti-competitive manner in the above-rail sector.

However, the Commission was minded to seek comments from stakeholders in light of the lack of consultation on this matter, since this matter had been raised by GWA only in a supplementary submission to the Issues Paper. Stakeholders were invited to comment as to whether there is any real benefit in retaining section 21 of the ROA Act and, if so, what types of non-rail businesses should be specifically prohibited before making.

4.7.2 Submissions to Draft Inquiry Report

Submissions to the Draft Inquiry Report did not comment directly on this issue.

4.7.3 Commission's Consideration

Some indication of the rationale for section 21 is provided in Hansard records of the Parliamentary debate on the ROA Bill (21 July 1997). The then Minister for Transport tabled a Departmental statement which put the following view:

"this clause is needed so that rail costs are kept separate for purposes of setting access charges. It would also facilitate the (hopefully rare) situation in which an administrator had to take over the business. It is not a big imposition, as subsidiaries can be set up in the case of businesses with other interests and in any event there is provision in the Bill for exemptions to be granted in appropriate cases."³¹

However, as stated by the Commission in the Draft Inquiry Report, it is arguably the case that sections 22 and 23 of the ROA Act serve a similar intent to that suggested in the Hansard record for section 21.

It is noteworthy also that the legislation establishing the AustralAsia Railway access regime and the South Australian ports access regime do not include such restrictive provisions, and furthermore that it is possible for a rail operator to carry out “non-authorised businesses” by setting up separate corporate entities. Therefore, the Commission queries the benefits to be obtained from retention of section 21.

That said, the Terms of Reference for this Inquiry require the Commission to recommend changes to the Access Regime that would improve its overall effectiveness. It is unclear to the Commission that the overall effectiveness of the Access Regime would be improved by deletion of section 21 of the ROA Act.

Final Report Conclusion

The Commission recommends that the South Australian Government consider whether there is any real benefit in retaining section 21 of the ROA Act and, if so, what types of non-rail businesses should be specifically prohibited.

5 IMPLEMENTATION

The release of this Final Inquiry Report marks the completion by the Commission of the SA Rail Access Regime Inquiry, in accordance with the Terms of Reference, as set by the Acting Treasurer in January 2009, and the objectives set out under section 6 of the ESC Act.

The South Australian Government, if it agrees with the Commission's final findings, will need to make the necessary amendments to the ROA Act to give effect to the recommendations put forward in this paper.

The Commission would stress that the certification of the Access Regime requires an assessment of the effectiveness of the Access Regime by the NCC against the criteria set out in clause 6 of the Competition Principles Agreement. This Inquiry has not sought to determine whether or not the Access Regime would achieve certification as it does not consider all of the principles that NCC must consider as part of the certification process. Furthermore, even where the same principles are being considered, the NCC may reach a different conclusion to that reached by the Commission in this Final Inquiry Report.

As noted in this Report, the Commission is also currently undertaking a separate review of its South Australian Rail Access Regime Information Kit to ensure that information provided as part of the Information Brochure and throughout the process of negotiation between access provider and access seeker is adequate enough to give initial guidance to an access seeker to formulate the starting point for an eventual access proposal anywhere on the covered network. The Commission will shortly be releasing for consultation purposes draft amendments to the Information Kit together with an accompanying discussion paper.

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

APPENDIX 2: OPERATION OF THE ACCESS REGIME

The Access Regime is set out in Parts 3 to 8 of the ROA Act, and is summarised as follows:

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.

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.

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 a written notice 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.

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.