

# **SOUTH AUSTRALIAN RAIL ACCESS REGIME: INFORMATION KIT REVIEW**

## **FINAL DECISION**

**March 2010**



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## GLOSSARY OF TERMS

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<b>Access Provider</b>	A party providing, or able to provide, railway infrastructure (or 'below rail') services – referred to as "an operator" under the ROA Act
<b>Access Regime</b>	The Access Regime in Parts 3 to 8 of the ROA Act
<b>Access Seeker</b>	An above-rail operator seeking access to railway infrastructure
<b>ARTC</b>	The Australian Rail Track Corporation Ltd
<b>AustralAsia Railway</b>	The railway running from Tarcoola in South Australia to Darwin in the Northern Territory, the access regime for which is also regulated by the Commission
<b>ESC Act</b>	<i>Essential Services Commission Act 2002</i>
<b>GWA</b>	Genesee and Wyoming Australia Pty Ltd
<b>Information Brochure</b>	A document containing information relevant to access that an access provider is obliged to prepare and provide in accordance with section 28 of the ROA Act
<b>Information Kit</b>	The Commission's primary publication concerning the Access Regime
<b>Inquiry</b>	An Inquiry conducted by the Commission into the SA Rail Access Regime in 2009.
<b>ROA Act</b>	<i>Railways (Operations and Access) Act 1997</i>
<b>The Commission</b>	The Essential Services Commission of South Australia

# 1 INTRODUCTION

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The Essential Services Commission of South Australia (the Commission) has finalised its Review of the South Australian Rail Access Regime: Information Kit (the Information Kit). This Review focused on the extent to which the existing Information Kit could be better clarified and/or improved.

In undertaking this Review, the Commission is seeking to ensure that:

- ▲ information provided as part of the Information Brochure and throughout the commercial negotiation process is done so in a transparent manner; and
- ▲ the type of information provided as part of the Information Brochure and throughout the negotiation process is able to facilitate successful negotiation.

This Review arose as a consequence of the Commission's 2009 Inquiry into the Access Regime (the Inquiry) that applies to the major intrastate railways in South Australia as established through the *Railways (Operations and Access) Act 1997* (the ROA Act). During the course of that Inquiry, the Commission had identified several aspects of the existing Information Kit that could be further improved (e.g. clarifying the nature of the price information that is to be provided to an access seeker under the Information Kit).<sup>1</sup>

In conducting this Review, the Commission sought to ensure that all relevant aspects were appropriately considered. However, the Commission stresses that the final revision decisions (Final Decisions) as outlined in this paper in relation to the Information Kit reflect the context of the existing Access Regime only. The Commission's Final Decisions therefore do not anticipate the South Australian Government's response to the recommendations put forward by the Commission in the 2009 SA Rail Access Regime Inquiry: Final Inquiry Report (the Final Inquiry Report), which may result in amendments being made to the ROA Act.

## 1.1 Process for the Review

The Review of the Information Kit commenced in July 2009 with the release of the Commission's 2009 SA Rail Access Regime Inquiry: Draft Inquiry Report (the Draft Inquiry Report). In the Draft Inquiry Report, the Commission identified several deficiencies with the existing Information Kit.

To seek public comment on how these deficiencies could be addressed and whether or not there were any other deficiencies not identified by the Commission, it proposed that a separate review of the Information Kit be carried out. The Commission requested stakeholders to make written submissions and give comment as to how the Information Kit could be further improved as part of the Draft Inquiry Report's public consultation process.

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<sup>1</sup> The Final Inquiry Report is available on the Commission's website at: <http://www.escosa.sa.gov.au/projects/42/2009-south-australian-rail-access-regime-inquiry.aspx>.

Whilst submissions to the Draft Inquiry Report indicated broad support for the Information Kit Review, no submissions commented directly on how particular aspects of the Information Kit could be improved. The Commission has, however, held discussions with stakeholders on this matter as part of the Draft Inquiry Report's public consultation process.

Following consideration of issues raised by stakeholders in those discussions and that identified by the Commission in the Draft Inquiry Report, the Commission released the Draft Revised Information Kit and an accompanying Discussion Paper in December 2009 for public consultation.<sup>2</sup>

The Commission received two submissions from the following parties<sup>3</sup>:

- ▲ Australian Rail Track Corporation (ARTC); and
- ▲ Genesee & Wyoming Australia Pty Ltd (GWA).

The Commission appreciates the contributions made by stakeholders to the Information Kit Review process, and acknowledges the valuable input that the submissions have provided into the development of the Final Revised Information Kit.

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<sup>2</sup> The Draft Revised Information Kit and accompanying Discussion Paper are available on the Commission's website at: <http://www.escosa.sa.gov.au/projects/94/review-of-south-australian-rail-access-regime-information-kit.aspx#stage-list=0>.

<sup>3</sup> Submissions to the Draft Revised Information Kit and accompanying Discussion Paper are available on the Commission's website at: <http://www.escosa.sa.gov.au/projects/94/review-of-south-australian-rail-access-regime-information-kit.aspx#stage-list=1>.

## 2 BACKGROUND

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Third-party access to the major intrastate railway lines in South Australia is subject to the Access Regime as set out in Parts 3 to 8 of the ROA Act. The terms and conditions of rail access are detailed in an Information Brochure prepared and issued by an access operator in accordance with requirements set out in the Information Kit. This document is the Commission's principal regulatory publication in relation to the Access Regime, and contains what the Commission might otherwise publish separately as guidelines.

Under section 28 of the ROA Act, the Information Brochure must refer to the pricing principles, show how the terms and conditions of access relates to these, and contain any other information required by the Commission.

The Information Kit sets out the Commission's positions and requirements under the ROA Act.

In addition to some general descriptive material, the existing Information Kit comprises:

- ▲ Chapter 3 – which sets out the pricing principles developed by the Commission;
- ▲ Chapter 4 – which sets out the information required in an access provider's Information Brochure;
- ▲ Chapter 5 – which sets out the reporting requirements on access providers; and
- ▲ Chapter 6 – which discusses compliance systems and reporting.

As chapters 3 and 4 of the Information Kit reflect the requirements of Part 4 of the ROA Act, any revisions or extensions must therefore take into account these legislative requirements.

### **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:
  - 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 (Alinta Energy<sup>4</sup>); 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 The South Australian Rail Access Regime**

The Access Regime is set out in Parts 3 to 8 of the ROA Act, and was intended to be consistent with the National Competition Principles<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup> 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

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<sup>4</sup> Alinta Energy is formerly known as Babcock & Brown Power.

<sup>5</sup> 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>.

<sup>6</sup> CIRA requires the South Australian Government to submit the Access Regime for certification by no later than the end of 2010.

<sup>7</sup> 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.



such as the Glenelg tramlines, tourist or heritage railway lines, and other privately-owned rail sidings.

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

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

The Commission is therefore 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.

## **2.4 Key Features of the Information Kit**

### **2.4.1 Pricing Principles**

Under the Access Regime, the Commission is not responsible for setting prices for access. Rather, the Commission establishes pricing principles in the Information Kit for the fixing of floor and ceiling price for railway services. While parties are free to enter into an access arrangement on terms that do not reflect those pricing principles, if any access dispute should arise under the Access Regime, the pricing principles establish bounds for an arbitrator to determine an arbitrated price.

A decision by the Commission to establish pricing principles therefore means that they become, in practice, an additional matter for an arbitrator to take into account in an arbitration.<sup>8</sup>

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<sup>8</sup> Section 38 of the ROA Act sets out the principles that an arbitrator must take into account in an arbitration. These principles include the pricing principles (Section 38(1)(g)).

## 2.4.2 Information about Access

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 provided 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, under the requirements of the Information Kit, to be included within the Information Brochure. An access seeker may, however, request reasonable additional information to suit its requirements.

Chapter 4 of the existing Information Kit sets out the information requirements for the Information Brochure. These include:

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

## 2.4.3 Reporting Requirements

Under the Access Regime, an access provider is to prepare, keep and provide to the Commission information in accordance with requirements set out in the Information Kit. These reporting requirements arise pursuant to the Commission compliance function and monitoring powers (contained in Part 1 and 7 of the ROA Act respectively)

Chapter 5 of the existing Information Kit sets out the current reporting requirements for the Information Brochure. These include:

- ▲ the provision of an Annual Statement by an access provider containing the following (among other information):
  - (a) the names and positions of senior office holders;
  - (b) the organisation's legal name, ABN if such exists, and registered office address,

- (c) a description of its business of providing railway services (to which the Access Regime applies); and
  - (d) a summary of each provision of railway services (to which the Access Regime applies) to third-party users.
- ▲ the provision of Accounting Statements and Associated Reports by an access provider that:
- (a) give a true and fair view of its business of providing railway services to which the Access Regime applies; and
  - (b) demonstrate that it has kept accounts and records in relation to its business of providing railway services to which the Access Regime applies, in accordance with s. 22 of the ROA Act.

#### 2.4.4 Compliance Systems and Reporting Obligations

To enable the Commission to perform its monitoring and compliance functions, it will necessarily require information and reports from access providers to fulfil those functions.

Chapter 6 of the existing Information Kit outlines the Commission's approach to compliance systems and reporting in a railway service business in South Australia. It applies to an access provider under the Access Regime, and sets out a process for the reporting of compliance by an access provider in a way that meets the Commission's requirements and demonstrates that appropriate compliance systems are in place. It does not, however diminish an access provider's obligation to report, or otherwise respond to, any breach of an obligation under the ROA Act within the stipulated time and in the manner required where the ROA Act so requires.

## 3 SECTION 27 GUIDELINES

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Section 27 of the ROA Act provides as follows:

### *Pricing principles*

*(1) The regulator may establish principles (the pricing principles) for fixing a floor and ceiling price for the provision of railway services generally or railway services of a particular class.*

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

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

*(4) However, if in an arbitration the arbitrated price for services cannot be less than the floor price and cannot exceed the ceiling price.*

These pricing principles are not intended to bind behaviour to the extent that they might in other access regimes. In effect, the primary role of the pricing principles is to establish bounds for an arbitrator in an arbitration, and exclude certain pricing outcomes. For example, the pricing principles are designed to ensure that an access provider will not incur a loss (floor price) or charge above a fair maximum price (ceiling price) for access.

Accordingly, the Information Brochure provided by the access provider must therefore refer to any relevant pricing principles established by the Commission and demonstrate how the terms and conditions it contains relate to, or compare with, those pricing principles.

### **3.1 Draft Decision**

The Commission's Draft Decision was that the existing floor and ceiling price principles in some minor detailed respects fall short of similar pricing principles applicable to the AustralAsia railway access regime and evident in ARTC's latest Access Undertaking.

By way of example, the Commission noted that both of the regulatory arrangements require that the access price payable must not be less than the avoidable below-rail cost of providing the railway infrastructure service, on the premise that the access provider should not be required to provide a service where it is unable to recover the cost of providing that service.

To provide firmer guidance in the early stages of an access negotiation, the Commission's Draft Decision was for the Information Kit's floor and ceiling pricing principles be extended to incorporate relevant and appropriate features of the AustralAsia railway guidelines and the ARTC Undertaking.

### 3.2 Views in Submissions

While indicating its support for the revised pricing principles set out under Chapter 3 of the Draft Revised Information Kit, the GWA submission raised the following issues:

- ▲ the cost calculation for ceiling price purposes assumed that the operator owns track maintenance equipment and did not recognise the fact that maintenance activities could be contracted to an external third-party, with the operator being charged on a usage basis by segment for the track maintenance equipment<sup>9</sup>;
- ▲ the gross tonne kilometre (gtkm) cost allocation system may be inappropriate in certain circumstances. By way of example, GWA noted that as a good proportion of access requests are for yards access, using the gtkm cost allocation system would therefore skew cost allocation away from yards. GWA argued that an operator should be allowed to allocate costs in proportion to an alternative allocation system where it can be justified, and where the gtkm cost allocation system can be shown to be inappropriate<sup>10</sup>; and
- ▲ while it is comfortable with revaluing the Regulatory Asset Base (RAB) annually based upon movements in the Consumer Price Index (CPI), it argued that an operator should be allowed to review the valuation of its initial RAB where it can be shown to be appropriate (e.g. if tonnages hauled or train kilometres travelled on a segment are significantly different from initial estimates and rail life is over or understated in the valuation.<sup>11</sup>

The ARTC's submission commented that:

*“...the likely gap between ceiling and floor price (due to the relatively low level of cost recovery on these networks) is of some concern in the absence of reference or indicative pricing, and where the network is vertically integrated.*

*“[it] believes that where the network is vertically integrated, controls should be put in place so that charges cannot be structured in such a way as to yield a competitive disadvantage to a third party user, and that the access provider should charge a third party user no more than it charges itself for a given service.*

*“...The presence of reference or indicative charges that are published would also assist in this regard.”<sup>12</sup>*

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<sup>9</sup> GWA's submission to the Draft Revised Information Kit, pg 1 of unnumbered document.

<sup>10</sup> GWA's submission to the Draft Revised Information Kit, pg 2 of unnumbered document.

<sup>11</sup> GWA's submission to the Draft Revised Information Kit, pg 2 of unnumbered document.

<sup>12</sup> ARTC's submission to the Draft Revised Information Kit, pg 4 of unnumbered document.

### **3.3 Final Decision**

In response to GWA's concerns over the inability for an operator to pass through costs associated with the contracting of external third parties for track maintenance, the Commission agrees that such costs should be included in the cost calculations for both ceiling and floor price purposes.

The Commission also agrees with GWA that the gtkm cost allocation system may be inappropriate in certain circumstances (e.g. yards access where the railway infrastructure is shorter in length). The Commission therefore sees merit in GWA's suggestion to allow an operator to use alternative cost allocation bases where it can be justified, and where the gtkm allocation system can be shown to be inappropriate.

As to GWA's comment that an operator should be allowed to review the valuation of its RAB where it can be shown to be inappropriate, the Commission believes that GWA's concerns are related to the potential risk of an operator's railway assets becoming stranded, should utilisation of those assets change materially (e.g. should the actual tonnage of goods transported over a particular railway asset be significantly different from initial estimates). Consequently, an operator faces the risk that it is unable to fully recover the costs associated with providing the railway assets through its regulated charges.

While the Commission agrees with the principle that there should be some protection against asset stranding, it notes that this issue has generally been dealt with by the Commission by ensuring that the regulatory depreciation is calculated each year based on the original economic life of the asset. This, in effect, ensures that the return on and of the assets are not adjusted to reflect changes in asset utilisation.

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

This issue was explored at length by the Commission over the course of its Inquiry into the Access Regime in 2009. The Commission's conclusion was that there were no persuasive arguments for its introduction and that it was inappropriate to impose an ARTC-like reference pricing obligations on an operator under the Access Regime, noting that any introduction of reference pricing would also require a change to the ROA Act. The Commission therefore believes that this matter has been considered as part of the Inquiry and does not fall within the scope of this review of the Information Kit.

Accordingly, the Commission reaffirms its Draft Decision to extend the Information Kit's floor and ceiling pricing principles to incorporate relevant and appropriate features of the AustralAsia railway guidelines and the ARTC Undertaking. Further, GWA's suggestion for

the inclusion of other directly incurred operating costs and allowance for alternative allocation systems to be used have been incorporated by the Commission into the Final Revised Information Kit.

## 4 SECTION 28 GUIDELINES

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Section 28 of the ROA Act in part provides as follows:

*Information brochure*

28. (1) An operator [access provider] must, on the written application of an industry participant, provide an information brochure containing –

- (a) if the operator carries on the business of providing passenger or freight services – a statement of the terms and conditions on which the operator provides the services; and
- (b) the terms and conditions on which the operator is prepared to make the operator's railway infrastructure available for use by others; and
- (c) other information required by the regulator.

...

(3) The information brochure must refer to any relevant pricing principles and show how the terms and conditions relate to, or compare with, relevant pricing principles.

Section 28 of the ROA Act therefore sets out the requirements of an Information Brochure to be prepared by the access provider. The role of the Information Brochure is to provide access seekers with some initial information about access to the access provider's railway services, including the terms and conditions on which the access provider is prepared to make its railway infrastructure available for use by others.

The purpose of these information requirements is therefore 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.

### 4.1 Draft Decision

The Commission noted that it had identified several deficiencies in the existing Information Kit during the course of the Inquiry, namely:

- ▲ inadequate transparency in the manner in which access prices are being provided to a proponent by the access provider;
- ▲ inadequate information as to how the level of service quality is being incorporated into the access prices;
- ▲ inadequate information as to how any proposed capital expenditure is linked to service requirements and how it is being incorporated into the access prices (either through capital contributions or tariffs).

To address these deficiencies, the Commission's draft conclusion was that there was merit to give firmer guidance in the early stages of an access negotiation. Accordingly, the Commission's Draft Decision was to revise the Information Kit's requirements to increase



the level of information disclosure, with respect to the Information Brochure that is to be provided by an access provider to a proponent.

## **4.2 Views in Submissions**

The ARTC submission to the Draft Revised Information Kit was supportive of the Commission's proposed amendments to Chapter 4 of the Information Kit, commenting that:

*"[it] believes that this level of disclosure will increase consistency with the level of disclosure of pricing information required to be published or incorporated in an indicative access proposal under ARTC's Interstate Access Undertaking, so long as the information provided is sufficient for the third- party user to have confidence in the level of pricing to be charged and that the level of pricing will not competitively disadvantage the third party user."<sup>13</sup>*

The GWA submission did not raise any objections to this aspect of the Commission's Draft Decision.

## **4.3 Final Decision**

The Commission reaffirms its Draft Decision to revise the Information Kit to:

- ▲ make explicit the requirement for separation of above- and below-rail components of the indicative prices;
- ▲ require an access provider to provide more detail regarding the factors to be used to determine where access prices are likely to fall within the floor-ceiling price range;
- ▲ require an access provider to provide greater detail regarding the quantitative basis of the indicative floor-ceiling prices provided; and
- ▲ list the types of non-price terms and conditions of access to be provided by the access provider.

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<sup>13</sup> ARTC's submission to the Draft Revised Information Kit, pg 5 of unnumbered document.

## 5 SECTION 29 GUIDELINES

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Section 29 of the ROA Act in part provides as follows:

*Operator's obligation to provide information about access*

*(1) An operator [access provider] must, on the application of a person with a proper interest in making an access proposal to the operator, provide the applicant with information reasonably requested by the applicant about –*

- (a) the extent to which the operator's railway infrastructure is currently being utilised; and*
- (b) the extent to which it would be necessary, and technically and economically feasible, to add to or extend the operator's railway infrastructure so that it could meet requirements stated in the application; and*
- (c) whether the operator would be prepared to provide a service of a specified description and –*
  - (i) if so, the general terms and conditions (including an indication of the likely price) on which the operator would be prepared to provide the service; and*
  - (ii) if not, the reasons why the service cannot be provided.*

Further, section 29(1)(c)(i) of the ROA Act specifically obliges the access provider to make available:

*...the general terms and conditions (including an indication of the likely price) on which the operator [access provider] would be prepared to provide the [access] service.*

The Commission notes that sections 28 and 29 of the ROA Act each concerns a distinct and separate phase of the overall access negotiation process. While the former deals with information provided before any access is sought, or even discussed, the latter deals with information exchanges once an access proposition is being discussed, but before any formal access application has been made. Hence, both sections deal with the formative stages of an access negotiation.

### 5.1 Draft Decision

The Commission noted that the provision of relevant information forms a critical input into the process of commercial negotiations between an access provider and an access seeker and, ultimately, underpins the effectiveness of the Access Regime's negotiate-arbitrate framework.

On that basis, the Commission saw merit to give more guidance on information requirements in relation to section 29 rather than solely in relation to section 28 of the ROA Act. Further, the Commission noted that the limitations of the Information Kit regarding the level of service quality or any proposed capital expenditure were better dealt with under the obligations on an access provider under section 29 of the ROA Act.

To give firmer guidance during access negotiations (and beyond the Information Brochure), the Commission's Draft Decision was for the Information Kit to be extended to include the following:

- ▲ general guidelines as to the nature of likely (or indicative) prices that would be compliant with the access provider's obligations under section 29(1)(c)(i) of the ROA Act (including in relation to complying price differentiation); and
- ▲ guidance as to the minimum nature of the (non-price) terms and conditions that would be compliant with the access provider's obligations under section 29(1)(c)(i) of the ROA Act.

Those extensions will require an access provider to provide greater detail regarding the factors used in determining where access prices are likely to fall within the floor-ceiling range.

## **5.2 Views in Submissions**

In response to the Draft Decision, the GWA submission commented that the Draft Revised Information Kit did not require a proponent with a proper interest in making an access proposal to provide any relevant information (e.g. loading and unloading parameters, and the type of commodity to be transported), to enable the access provider to meet its "likely price" compliance obligation. In the absence of such information, GWA argued that the access provider is unable to offer any reasonably accurate indicative cost.<sup>14</sup>

To enable such information to be gathered from a proponent, the GWA submission flagged its intention to prepare a form similar to ARTC's form "Application for new or varied train path for inclusion in the working timetable", to enable it to provide a reasonably accurate indicative cost.

The ARTC submission expressed its support for the Commission to extend Chapter 4 of the Information Kit, commenting that:

*"a greater level of disclosure may, however, be appropriate to address incentives inherent in the vertically integrated nature of the network."*<sup>15</sup>

## **5.3 Final Decision**

As there is currently no obligation placed on a proponent to provide any specific information to an access provider when requesting a "likely price", the Commission sees merit in GWA's suggestion of requiring a proponent with a proper interest in seeking access to provide certain information to enable the access provider to meet its "likely price" compliance obligation.

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<sup>14</sup> GWA's submission to the Draft Revised Information Kit, pg 2 of unnumbered document.

<sup>15</sup> ARTC's submission to the Draft Revised Information Kit, pg 6 of unnumbered document.

The Commission therefore confirms that it has decided to amend the Information Kit to specify that:

- ▲ the “likely price” that is to be provided by the access provider should be based on indicative information provided by the access seeker about its possible usage of the railway infrastructure; or
- ▲ in the absence of such information, the likely price provided by the access provider should be accompanied by the set of assumptions on which the likely price is based.

## 6 AMENDMENTS

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To give effect to the various aspects of its Final Decisions outlined in this Paper, the Commission confirms that the following amendments have been made to the Draft Revised Information Kit released in December 2009. These amendments are additional to those proposed in the Draft Revised Information Kit.

### 6.1 Amendment of Section 3.1 – Floor Price

- (1) Clause 3.1.2(a) – after “costs” insert:

*“, and other directly incurred operating costs...”*

### 6.2 Amendment of Section 3.2 – Ceiling Price

- (1) Clause 3.2.2 – delete the clause
- (2) Clause 3.2.2A(d)(i) - after “costs” insert:

*“, and other directly incurred operating costs...”*

- (3) Clause 3.2.2C – after clause 3.2.2C(c) insert:

*“For the purposes of clause 3.2.1C(c), where the gtkm allocation system can be shown to be inappropriate, the Operator may use alternative allocation systems where they can be justified.”*

### 6.3 Amendment of Section 4A.1 – “Likely price” compliance guidelines

- (1) Clause 4A.1.4 – delete paragraph and substitute:

*“The likely price should be based on indicative information provided by the applicant to the Operator about its possible usage of the railway infrastructure. In the absence of such information, the likely price provided by the Operator should be accompanied by the set of assumptions on which the likely price is based.”*