MINISTERIAL REVIEW OF THE AUSTRALASIA RAILWAY (THIRD PARTY ACCESS) CODE

ISSUES PAPER

February 2006

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REQUEST FOR SUBMISSIONS

The Essential Services Commission of South Australia (the Commission) invites written submissions from interested parties in relation to the issues raised in this paper. Written comments should be provided by **17 March 2006**. It is highly desirable for an electronic copy of the submission to accompany any written submission.

It is Commission policy to make all submissions publicly available via its website (www.escosa.sa.gov.au), except where a submission either wholly or partly contains confidential or commercially sensitive information provided on a confidential basis and appropriate prior notice has been given. Note however that all submissions made to this review will be forwarded to the relevant Minister in both the Northern Territory and South Australia.

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

Responses to this paper should be directed to:

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Public Information about the Commission's activities

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

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GLOSSARY OF TERMS

ABOVE-RAIL OPERATORS	operators of above-rail rolling stock (also termed "access seekers")
ABOVE-RAIL ROLLING STOCK	locomotives, wagons and carriages
ACCC	the Australian Competition and Consumer Commission
ACCESS PROVIDER	the owner or operator of the rail track and signals/controls of the railway covered by the Code
ACCESS SEEKER	an above-rail operator seeking access to the railway covered by the Code
APT	Asia Pacific Transport Pty Ltd
ARC	AustralAsia Railway Corporation, a statutory body of the South Australian and Northern Territory Governments, also known as the Corporation
ARTC	Australian Rail Track Corporation Ltd, the Commonwealth body responsible for below-rail operations on the interstate rail network
BELOW-RAIL INFRASTRUCTURE	rail track and signals/controls
BELOW-RAIL SERVICE PROVIDER	rail infrastructure service provider, sometimes also referred to as the "access provider" and the "infrastructure owner"
THE CODE	the *AustralAsia Railway (Third Party Access) Code*, which is a Schedule to the *AustralAsia Railway (Third Party Access) Act 1999* (SA,NT)
THE COMMISSION	The Essential Services Commission of South Australia, established under the ESC Act
ESC ACT	*Essential Services Commission Act 2002*
FINAL REPORT	The NCC's final report recommending certification of the Australasia Railway (Third Party Access) Code under the Trade Practice Act 1974 dated February 2000, which can be accessed at: http://www.ncc.gov.au/document.asp?documentID=2960
INTERSTATE NETWORK	the interstate standard gauge rail network operated by ARTC
NCC	National Competition Council, the body charged with making recommendations to the Commonwealth Treasurer regarding the effectiveness of State access regimes under the *Trade Practices Act 1974* (Cth)
THIRD-PARTY ABOVE-RAIL OPERATORS	above-rail operators who are not related to or affiliated with the below-rail service provider

1 INTRODUCTION

Third-party access to the AustralAsia railway (which runs from Tarcoola to Darwin) is subject to the rail access regime set out in the AustralAsia Railway (Third Party Access) Code ("the Code"), which is a Schedule to the *AustralAsia Railway (Third Party Access) Act 1999* (SA & NT).[1]

The Code is now under review. This Issues Paper sets out the key areas of the review. The Commission invites submissions from all stakeholders on areas of interest to them. This could include suggestions or comments in relation to matters not specifically raised in this paper, but which stakeholders believe should be considered.

1.1 The rail access regime

The railway line subject to the Code comprises both the recently-constructed line from Alice Springs to Darwin and the pre-existing line south of Alice Springs to Tarcoola. Operations on the 1,420km section of the railway north of Alice Springs commenced on 15 January 2004. The pre-existing 830km line (between Tarcoola and Alice Springs) has been leased to the track operator Asia Pacific Transport Pty Ltd (APT) by the Commonwealth since April 2001 at a nominal rental.

The Code unbundles railway services (both freight and passengers) into:

- below-rail services (relating to the provision of track and associated infrastructure); and
- above-rail services (running rolling stock, or trains, on the below-rail infrastructure).

The Code regulates the provision of below-rail services only. It establishes a right for above-rail operators to negotiate access to services of the AustralAsia railway.

As the track operator, APT is a below-rail service provider and hence is the access provider for the AustralAsia railway.

The Code sets out the rights and responsibilities of above-rail operators, as access seekers, and the access provider, and covers matters such as the negotiation process, dispute resolution, and the terms and conditions of access.

FreightLink is the main above-rail operator on the railway and is a related party to APT.[2] The most notable other user of the railway is Great Southern Railway Ltd, operator of The Ghan passenger services between Adelaide and Darwin. A small number of other operators have also enquired about and purchased access to the railway for particular purposes. To date, there have been no access disputes under the provisions of the Code.

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1 The Code can be viewed on the Commission's website, refer http://www.escosa.sa.gov.au/webdata/resources/files/RailAccessActAndCode.pdf.

2 APT and FreightLink are both part of the railway joint venture, co-reside, and are, to a large degree, co-managed.

1.2 The Commission's role

Clause 5 of the Code appoints the Essential Services Commission as the regulator under the Code.[3] Key features of the Commission's role to date as the regulator under the Code are summarised in the following box.

Box 1: Role of the Commission as Regulator under the Code

The Commission is currently in its fifth year as regulator.

Under the Code, the Commission is not responsible for setting prices for the use of the railway track. Prices are to be set by negotiation between potential users and the track operator. In the event of a dispute, prices will be set by an arbitrator appointed by the Commission.

Under the Code, the Commission's role focuses on:

- prior to any access negotiations taking place – the development and maintenance of various guidelines, including:
  - arbitrator pricing requirements;
  - access provider reference prices and service policies; and
  - access provider information reporting requirements;
- once access negotiations commence – facilitating access negotiations and (with consent of the parties) settling access disputes; and
- more generally – monitoring and enforcing compliance with the Code as well as periodically reviewing aspects of operation of the Code.

Prior to the commencement of operations, the Commission developed certain draft guidelines required under the Code, but was not able to finalise them until after commencement of operations and the respective Ministers had published their joint notice declaring the Code as applying to the railway.

Following completion of these formal requirements in January 2004, the Commission finalised the following two guidelines in February 2004:

- Railway Industry (Tarcoola-Darwin) Guideline No. 1: Access Provider Reference Pricing and Service Policies; and
- Railway Industry (Tarcoola-Darwin) Guideline No. 2: Arbitrator Pricing Requirements (incorporating the Commission's regulated rate of return determination).

The Commission later drafted and released the following two guidelines:

- Railway Industry (Tarcoola-Darwin) Guideline No. 3: Regulatory Information Requirements; and
- Railway Industry (Tarcoola-Darwin) Guideline No. 4: Compliance Systems and Reporting.

Further information about the Commission's role as the regulator under the Code, together with the various regulatory guidelines referred to above and annual reports prepared by the Commission on its role as the regulator under the Code are available from the Commission's website at **http://www.escosa.sa.gov.au**.

[3] Note that Clause 5 actually nominates the South Australian Independent Industry Regulator (SAIIR), which is the Commission's predecessor. Schedule 2 of the *Essential Services Commission Act 2002* provides the appropriate succession arrangements.

1.3 Nature of review

The Code has been certified as an 'effective' State-based access regime in accordance with the principles set out in clauses 6(2)-6(4) of the Competition Principles Agreement on the recommendation of the National Competition Council (the NCC).[4]

The NCC's final recommendation was dependent upon there being a review of the Code after three years. In particular, the NCC stated:

> *The certification recommendation is for a relatively long period – an operational period of 27 years. This gives further certainty to the access provider. However, the rail line is yet to be built, there is no history to indicate how the access provider will manage its above and below rail businesses and a few of the Regime's approaches are unique. Such a long certification could see inappropriate elements in the Regime entrenched for the entire period. This increases uncertainty for rail operators.*
>
> *To rebalance these respective risks, the Regime now incorporates a comprehensive review three years after operations commence. This review will be public and conducted by the Northern Territory and South Australian Ministers, supported by the Regulator's assessment of the effectiveness of the Regime. This gives the Northern Territory and South Australian Governments an early opportunity to make the changes necessary to address any problems revealed through the first years of operations. (Final Report, p.1)*

The specific provision to which the NCC refers is clause 50 of the Code, which sets out the following in respect of the review:

> *50. Review of Code*
>
> *(1) The Northern Territory Minister and South Australian Minister jointly may, at any time, review the operation of this Code but, in any case, must do so -*
>
> *(a) firstly, not later than 30 June in the 3rd year of operations of the railway; and*
>
> *(b) secondly, not later than 12 months before the expiration of the period for which the Commonwealth Minister has specified under section 44N of the Trade Practices Act 1974 of the Commonwealth that the access regime, of which this Code is a part, is to remain in force.*
>
> *(2) To enable the Ministers to perform their function under subclause (1), the regulator must prepare such reports to the Ministers as the Ministers may require.*
>
> *(3) The Ministers must, in relation to a review under subclause (1)(a) or (b) -*
>
> *(a) -*
>
> *(i) by notice published in a newspaper circulating generally in Australia, invite interested persons to make submissions in relation to the review within a period stated in the notice; and*
>
> *(ii) give consideration to any submissions made in response to an invitation under subparagraph (i); and*
>
> *(b) -*

[4] Much background to the Code is contained in the reports, and submissions to, the National Competition Council published during the NCC's consideration of the draft access regime in 1999 and 2000. These, the NCC's final report of February 2000, and the Competition Principles Agreement can be accessed via: www.ncc.gov.au.

(i) *in the case of the Northern Territory Minister - cause a report on the outcome of the review to be laid before the Legislative Assembly of the Northern Territory within 12 sitting days after the completion of the review; and*

(ii) *in the case of the South Australian Minister - cause a report on the outcome of the review to be laid before both Houses of the South Australian Parliament within 12 sitting days after the completion of the review.*

The relevant Ministers[5] have commenced this review pursuant to clause 50(1)(a). In doing so the Ministers have requested, pursuant to clause 50(2), that the Commission prepare certain reports as the basis for the Ministerial review. In particular, the Ministers have asked the Commission to conduct the consultative process and to prepare Draft and Final Reports for the Ministers' consideration within the required timeframe.

The Ministers' letter to the Commission is provided at Appendix A. The Ministers also provided Terms of Reference for the review, which are also in Appendix A.

The review is distinguished from most other reviews conducted by the Commission in a number of respects:

- the review is being conducted in accordance with the provisions of the Code, it is not an inquiry under the *Essential Services Commission Act 2002* (the ESC Act) (although in assisting with the review the Commission is fulfilling a function that calls upon the objectives of s. 6 of the ESC Act);
- the Commission is not undertaking a review of matters that are its specific responsibility as the regulator under the Code, with the content of the guidelines that have been issued being outside the review (although the framework provided by the Code for the making of such guidelines is within the scope of the review);
- as this is the Ministers' review, the Final Report of the review, and any final recommendations it contains, are those of the Ministers – noting that the Ministers are not bound to accept or adopt any recommendations that the Commission might propose to them; and
- submissions made to this Issues Paper are submissions to the Ministers, as well as to the Commission (hence all submissions will be forwarded to both Ministers).

The Commission also notes that the Terms of Reference specify that this is a review of the operation of the Code, meaning that observations of actual experience with the Code will form a critical part of the assessment. As a result, the Commission is seeking, through this Issues Paper, comments from interested parties on their experience with the Code, rather than focussing on "in-principle" views on its design. The Commission will supplement such information with its own experiences as regulator under the Code.

[5] The relevant Ministers are: in South Australia, the Minister for Transport and, in the Northern Territory, the Minister for the AustralAsia Railway.

2 THE CODE

2.1 Objects of the Code

Being an effective access regime under the Trade Practices Act, the objectives of the Code are the same as the relevant clauses of the Competition Principles Agreement (clauses 6(2)–6(4), usually referred to as "the clause 6 principles"). In essence, the clause 6 principles:

- identify the type of infrastructure services that should be subject to access regulation; and
- establish principles that the regulatory framework should embody.

The NCC has stated the overall goals of access regulation in the following terms: [6]

> *The application of an efficiency objective in access regulation has the following three broad components:*
>
> - *first, ensuring the efficient use of natural monopoly infrastructure, especially by denying infrastructure owners the opportunity to misuse market power (in either the market for these services or in related markets) by refusing access to and monopoly pricing infrastructure services;*
> - *second, facilitating efficient investment in natural monopoly infrastructure, especially by ensuring:*
>   - *infrastructure services are maintained and developed appropriately;*
>   - *infrastructure owners (and potential owners) earn sufficient returns to provide incentives for efficient investment; and*
>   - *incentives for inefficient development of competitive infrastructure and for inefficient investment in upstream and downstream activities (that is, overinvestment and underinvestment) are minimised; and*
> - *third, promoting competition in activities that rely on the use of the infrastructure service where competitive infrastructure services are not economically feasible.*

2.2 Key features of the Code

2.2.1 Negotiation framework

The Code establishes a right to negotiate access to the railway infrastructure between Tarcoola and Darwin. The Code follows a negotiate/arbitrate model, where parties first attempt to agree on an arrangement, with dispute resolution processes available if necessary.

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[6] National Competition Council, The National Access Regime: A Guide to Part IIIA of the Trade Practices Act, Part C Certification of Access Regimes, February 2003 p.11 – available from www.ncc.gov.au.

2.2.2 Dispute resolution

Under an effective access regime, access negotiations need to be backed by enforceable dispute resolution processes. The arrangements in the Code recognise that some issues may be small or time sensitive so that above-rail operators may not take them to arbitration, given the time and costs it involves. Without a less costly means of dispute resolution, many small or time sensitive disputes could go unresolved. This would discourage access and competition in rail services.

The Code provides several levels of dispute resolution including:

- advice provided by the regulator on whether a negotiated outcome is consistent with the Code;
- voluntary conciliation by the regulator; and
- full arbitration.

2.2.3 Access prices

Access prices set under the Code are to be compatible with those generated by other complementary rail access regimes.

All prices for access are to be struck within a floor/ceiling band, set in accordance with efficient forward looking costs. Where competition from non-rail freight is sufficient to discipline rail operators to minimise their costs and prices, the Code's "sustainable competitive" approach uses the price of the competitive non-rail freight as the starting point for calculating the rail access price between the floor/ceiling band. This ensures that access prices are based on competitive principles.

Further, the Code includes safeguards to ensure that monopoly rents are not built into access charges by periodically testing (by way of review) and, if necessary, adjusting those access prices vulnerable to monopoly pricing (priced under the floor/ceiling approach) to verify that the below-rail service provider is not earning an excessive return.

To ensure that all prices and the pricing review are based on appropriate estimates of costs:

- the Code provides that efficient forward looking costs must be used;
- cost definitions are to be consistent with those in other rail access regimes;
- the regulator is to develop guidelines on various aspects of calculating costs, including capital costs; and
- when developing capital costs guidelines, the regulator has the flexibility to consider the most appropriate way of taking into account the government-contributed assets and cash subsidies to the extent that this adjustment does

not prevent the below-rail service provider from earning an appropriate return on its investment.

2.2.4 Time-path management

The quality of rail services can be just as important to the commercial potential of an above-rail operator's business as the price paid. Therefore, the Code also recognises the importance of service quality, time-path allocation and reallocation policies and day-to-day train management. The below-rail service provider must develop policies on how it will manage these issues. These policies are to be consistent with guidelines developed by the regulator.

2.2.5 Safeguards against favouring the access provider's train operator

The Code provides safeguards against the below-rail service provider favouring its affiliated above-rail operations at the expense of third-party above-rail operators:

- the pricing approaches either automatically treat all above-rail operators equally (in the "sustainable competitive approach") or specifically provide for comparison with the prices of similar rail services (in the "floor/ceiling" approach);
- commercially-sensitive information cannot be disclosed to those with a conflict of interest or misused for commercial gain or in any other way not provided for by the Code; and
- the below-rail service provider must keep separate records for its above- and below-rail businesses, which increases transparency and reduces the risks that access charges will be inflated.

3 KEY ISSUES

3.1 Issues identified by the Ministers

The Ministers, when reviewing the operation of the Code, are to consider its effectiveness in facilitating access by users to the Tarcoola to Darwin railway.

The Terms of Reference (Appendix A) identify a number of specific issues for consideration during the review:

- the adequacy of the Code provisions regarding the information to be given to an access seeker;
- the adequacy of the Code provisions regarding the policies to be developed and maintained by the access provider;
- the appropriateness of timeframes under the Code, particularly for the provision of information and notices required under the access negotiation and dispute resolution frameworks;
- the reasonableness of the Code provisions regarding any fees and charges payable;
- the adequacy of the Code provisions regarding the operation and consistency of pricing principles;
- the effectiveness of the Code provisions regarding dispute resolution processes; and
- the adequacy of the Code provisions regarding record-keeping requirements.

3.1.1 Information provisions

Under clause 9, the access provider must provide reasonably requested information to an access seeker including:

- current capacity utilisation;
- technical details and requirements;
- time-path allocation and reallocation policies in accordance with guidelines published by the regulator;
- service quality and train management standards in accordance with guidelines published by the regulator; and
- relevant prices and costs in accordance with guidelines published by the regulator.

This information can be sought before the access seeker finalises its proposal.

The access seeker can request further information. Clause 11 requires the access provider to accommodate the access seeker's requirements. Should the access seeker be unable to obtain the information it requires, it can direct the matter to the

regulator (clause 12B) for its decision on the reasonableness of the request. Also, in matters where the regulator is required to develop guidelines according to clause 45A, such as time-path and service quality matters, it can give directions that the access provider must follow.

The Commission notes that it has not received a clause 12B request.

On this issue, the NCC argued in its Final Report that:

> *If the information provided is too little or irrelevant, this can now be examined during the Ministerial review after three years of operations. (Final Report, p.27)*

Issue 1

Has the information given to access seekers been appropriate and sufficient? If not, please describe how you consider it to have been deficient.

3.1.2 Policy provisions

Under clause 9 of the Code, the access provider is required to develop and make available:

- time-path allocation and reallocation policies in accordance with guidelines published by the regulator;
- service quality and train management standards in accordance with guidelines published by the regulator; and
- relevant prices and costs in accordance with guidelines published by the regulator.

Issue 2

Are the policies developed and maintained by the access provider in accordance with guidelines appropriate and sufficient? If not, please describe how you consider them to have been deficient.

3.1.3 Timeframes

Under clause 10, access negotiations start with the access seeker submitting a proposal to the access provider. The access provider may, within 21 days, request further information. The access provider must, within 21 days, give details of the proposal to the regulator, any affected access holder and provide the affected access holder's details to the access seeker.

Under clause 13, an access dispute exists if (among other things) one of the parties fails to commence negotiations within 30 days of the response date (21 days after receiving a proposal).

On this issue, the NCC stated in its Final Report that:

> *Lengthy negotiations increase costs for all parties. Access seekers who anticipate lengthy negotiations would be deterred from seeking access. …Given the proposed Ministerial Review after three years of operations and the Regulator's powers and functions, the Council considers that there are sufficient opportunities to develop and review trigger points for dispute resolution. (Final Report, p.27)*

Under clause 35, an award made by the arbitrator has effect 21 days after it is made unless the access seeker, before that time, elects not to be bound by it. An access seeker may, within 7 days after the making of an award, or such further time as the regulator may allow, elect not to be bound by the award by giving written notice of the election to the regulator. The regulator must, within 7 days after receiving a notice of election not to be bound by the award, notify the access provider and the other parties to the arbitration.

Issue 3

Has the time taken to negotiate access been reasonable to date? Are timeframes under the Code appropriate, particularly for the provision of information and notices required under the access negotiation and dispute resolution frameworks? If not, please describe and explain what changes would be warranted.

3.1.4 Fees and charges imposed for information

Under clause 9(2), the access provider may make a reasonable charge for providing information to an access seeker under clause 9. Such a charge is to be determined on a basis decided or approved by the regulator.

Clause 49(2)(d) makes reference to fees being charged for the inspection of registers maintained under the Code (including about fees for such inspections). Such fees cover those that might be imposed by either the access provider or the regulator. The Commission has imposed no such fees to date.

Issue 4

Have there been any charges imposed on access seekers for information provided? On what basis should any allowed fees and charges be set?

3.1.5 Operation and consistency of pricing principles

Under the Code, access prices are to be set by negotiation between access seekers and the access provider. In the event of a dispute, prices will be set by an arbitrator. The Code provides that, if a price arbitration is required, the arbitrator

must comply with the pricing principles of the Code and any associated guidelines developed by the regulator.

The Code's pricing principles provide for two approaches to arbitrated pricing:

1. "sustainable competitive" pricing; and

2. "floor/ceiling" pricing.

For a freight service, the pricing schedule to the Code requires an arbitrator to use different approaches to setting the price depending upon the availability of alternative services:

- where there is an alternative mode of transport which can act as an effective constraint on the price able to be charged by the access provider: the "sustainable competitive" pricing approach; and
- where no credible alternative services exist: the "floor/ceiling" approach.

On receipt of an access proposal, a freight service will be tested to see whether there is an alternative mode of transport that can act as an effective constraint on the price able to be charged by the access provider.

Passenger services will always be priced under the floor/ceiling approach.

In its Final Report, the NCC stated that:

> *A public review of the whole Regime by the Ministers, assisted by the Regulator, is scheduled to occur three years after operations commence. This review should assess the operation of both pricing approaches as well as previewing how likely it is that the ceiling will be breached by the "floor/ceiling" revenues, in combination with the "sustainable competitive" revenues. This review should provide an opportunity to make the changes necessary to ensure the continuing effectiveness of the Regime. It should also provide the Regulator with sufficient information to adjust prices going forward, in anticipation of the 10 year review or provide sufficient information to request a change in that review timetable. (Final Report, p.31)*

Floor/ceiling pricing

If services do not meet the "sustainable competitive" conditions, access will be priced under the "floor/ceiling" approach.

A ***floor price*** in an access regime typically recovers all costs that could be avoided if the service was not provided. Unless avoidable costs are recovered, the access provider will be forced to either absorb these costs or recoup them from other operators through cross subsidies. Regimes avoid these two outcomes by setting avoidable costs as a minimum price.

A ***ceiling price*** in an access regime typically recovers all efficient forward-looking stand-alone costs of the infrastructure necessary to provide this service.

The Code's pricing principles provide that any relevant capital costs are to be calculated on assets valued on a "depreciated optimised replacement cost" (DORC) basis, adjusted where appropriate for the cash and asset subsidies provided by Governments. Such adjustment are to be not so great as to preclude the access provider from earning an appropriate return on the capital it has invested.

On this issue, the NCC stated in its Final Report that:

> *The Ministerial review after three years of operations, will provide a forum to assess this issue, in conjunction with other aspects of the pricing approaches. For instance, adjustment provisions for the cash and asset subsidies in S.2(8)(b) of the Pricing Schedule, require that any adjustment be "pro rated" over the below-rail infrastructure. This matter will need to be considered in the development of cost units. (Final Report, p.36)*

Under clause 50(4), the regulator must undertake periodic reviews to test for monopoly rents under the "floor/ceiling" approach (first after 10 years, and then after each successive five years). In such reviews, all revenues (relating to the assets used to provide the services priced under the "floor/ceiling" approach) are totalled and compared against the efficient stand-alone costs of the assets required to deliver the "floor/ceiling" services, to test for monopoly rents. If monopoly rents are found, the remedy (of reducing prices for the next period to remove anticipated monopoly rents for that period) will only be applied to the prices of the "floor/ceiling" services. There is no provision for similar review under the "sustainable competitive" approach as competition is expected to constrain monopoly pricing.

Issue 5

Have any features of the Code's floor/ceiling pricing approach caused difficulties for the parties when negotiating access? Has the Code's mandated treatment of capital costs caused any problems? Please describe and explain what changes would be warranted.

Sustainable competitive pricing

If "sustainable competition" exists the price of the non-rail service that is "effectively constraining" the subject rail service, becomes the benchmark total freight price. From this is deducted the above-rail avoidable costs (of the access provider in most cases), to determine the access price. This price represents the most that could be paid by an operator that will allow it to compete with both rail and non-rail services. This access price must lie within the floor/ceiling band applied consistently across all below-rail services under the Code.

The Code's sustainable competitive pricing approach is an adaptation of the "efficient component pricing rule" (ECPR) approach. ECPR and variants have

been applied in a number of regulatory decisions over past years, including those in the telecommunications area.

While based on ECPR, the "sustainable competitive" approach varies in as much as the total cost benchmark does not represent the combined costs of the access provider. It represents the price of a substitute service provided by a competitive non-rail mode of transport. The Code's pricing principles provide for some adjustment of these prices to ensure the integrity of the comparative exercise.

When certification of the Code was being considered, there were concerns expressed by some interested parties about the perceived complexity of the "sustainable competitive" approach, and whether:

- the complexity opened the approach to abuse, encouraging disputes and increasing negotiation costs; and
- the complexity made the approach impractical and so cumbersome and costly to go through the necessary steps, deterring access seekers from entry.

On this issue, the NCC argued in its Final Report that:

> *"…the "sustainable competitive" approach still embodies a less conventional approach to establishing rail prices within that band and the Council welcomes the Ministerial review proposed in S.50, where this issue can be canvassed in light of operational experience." (Final Report, p.95)*

Issue 6

Have any features of the Code's sustainable competitive pricing approach caused difficulties for the parties when negotiating access? Have problems arisen because of the complexity or uniqueness of the approach? Please describe and explain what changes would be warranted.

3.1.6 Dispute resolution

The effectiveness of the Code depends on the effectiveness of the provisions regarding dispute resolution processes.

Under clause 11, all parties have a duty to negotiate in good faith.

Under clause 12, all parties must be in agreement before contracts are finalised.

Under clause 12A, no unauthorised person can be provided with confidential information. No one can misuse confidential information gained in negotiation for competitive advantage.

Under clause 12B, any party can refer a negotiation matter to the regulator for advice or a direction. Penalties can apply if directions are not followed.

Under clause 14, an access seeker may request the regulator to refer an access dispute to arbitration.

Under clause 17, the parties to the arbitration of an access dispute are:

- the access seeker;
- the access provider;
- any other respondent to the access proposal;
- any other person who applies in writing to be made a party and is accepted by the arbitrator as having a sufficient interest; and
- the regulator.

Under clause 19, the arbitrator must make a written award. Before making an award, the arbitrator must give a draft to the parties and the regulator and may take into account their representations on the proposed award.

Under clause 35, unless the access seeker elects not to be bound by the award within 7 days, the award becomes effective in 21 days.

Under clause 37, appeals on questions of law regarding an award, or a decision not to make an award, lie with the Supreme Court.

Under clause 38, penalties can be imposed on any party hindering the access of another.

Under clause 42, the Supreme Court may grant an injunction restraining a person from contravening or requiring a person to comply with the Code.

There have been no access disputes to date under these provisions of the Code. Nevertheless, the Ministerial review provides the opportunity to ensure that these provisions are appropriate in light of the experience with the negotiations that have taken place so far.

Issue 7

Have aspects of the dispute resolution processes adversely impacted on the nature and pace of access negotiations? Please describe and explain what changes would be warranted.

3.1.7 Record-keeping requirements

Under clause 46, the access provider must keep the accounts and records for its below-rail business separate from its other businesses. The accounts and records must comply with the regulator's guidelines and give a true and fair view of relevant income, expenditure, assets and liabilities and sufficient information to enable the pricing principles to be applied in a reasonable manner.

Under clause 39, the regulator may require the access provider to provide specified information or documents related to any matter but including the access provider's own use of railway infrastructure facilities and financial information.

These record-keeping provisions are an important part of the safeguards provided under the Code against the below-rail service provider favouring its affiliated above-rail operations at the expense of third-party above-rail operators.

Issue 8

Have the record-keeping requirements under the Code been sufficient to ensure that the above-rail operator affiliated with the access provider is not advantaged by the access provider relative to third-party operators and access seekers? If not, please describe and explain what changes would be warranted.

3.2 Other issues

The list of issues provided in the Terms of Reference is not exhaustive. Interested parties can raise any other aspect of the Code if they so wish – in the context of the Terms of Reference (see Appendix A).

Among other possible issues are those nominated by the NCC in its Final Report recommending certification of the access regime.

In general, the NCC concluded that:

> *The review is an opportunity to consider whether implementation has been inappropriate or unexpected factors have emerged. There is no requirement to undertake a further comprehensive review until 12 months prior to the expiry of certification.*
>
> *… The Council considers that this early opportunity for public participation and scrutiny of the Regime, should alleviate concerns that the Regime will be inappropriately implemented and such implementation will be maintained throughout the [30 year] duration of the certification. (Final Report, pp.4,97)*

Besides matters encompassed by the issues listed in the Terms of Reference, the NCC's Final Report also made mention of the following issues that may be worthy of consideration in light of initial experience under the Code:

- whether the "railway infrastructure facilities" as defined under the Code include all the relevant assets (p.18);
- whether the fines payable under the Code are a sufficient deterrent to ensure that commercially-sensitive information provided to the access provider by an access seeker is not revealed to the above-rail operator affiliated with the access provider (p.29);
- whether the definition of "business interests" in clause 20(4), in light of the restrictions on the arbitrator in clauses 20(1) and 20(3), opens up too wide a range

of circumstances where the access provider need not be required to extend or expand the facilities (p.75);

- whether separate safety accreditation in the two jurisdictions has resulted in the access provider facing inconsistent processes and meeting differing standards to gain and maintain accreditation in each State (p.77);
- whether coordination with the role of the ACCC in the ARTC undertaking is capable of being taken into account (p.94); and
- whether the provisions in clause 10 aimed at ensuring that wholesalers, such as the ARTC, can onsell access arrangements negotiated under the Code have been effective (p.95).

Issue 9

Are there issues – in addition to the matters specifically mentioned in the Terms of Reference – that should be considered in this Ministerial review of the effectiveness of the Code? If so, please describe and explain your views and experiences on those issues.

4 NEXT STEPS

On behalf of the Ministers, the Commission invites submissions on this Issues Paper. Submissions are due by 17 March 2006.

The Commission will consider all submissions received and prepare a Draft Report for the Ministers' consideration. The Commission intends to release the draft on its website for further comment. This is expected to occur by early May.

The Commission will then forward its final report to the Ministers. This is expected to occur by June.

APPENDIX A: MINISTERS' LETTER & TERMS OF REFERENCE

17/2/2006

Dr Patrick Walsh
Chairman
Essential Services Commission of South Australia
GPO Box 2605
ADELAIDE SA 5001

Dear Dr Walsh

Under clause 50 of the AustralAsia Railway (Third Party Access) Code the Northern Territory and South Australian Ministers must review the operation of the Code by 30 June 2006. In order to assist with this review, officers from both jurisdictions have in consultation with the Essential Services Commission of South Australia prepared Terms of Reference to enable the preparation of a report for consideration by us. A copy of the Terms of Reference is attached.

You are hereby requested to proceed with the review of the Code on our behalf, in accordance with the Terms of Reference and the following process:

- the preparation of an issues paper;
- advertising a notice on behalf of us calling for submissions;
- production of a Draft Report for consultation with the inter-jurisdictional consultative committee before its release; and
- the production of a Final Report to be considered by us.

In the development of the report the AustralAsia Railway Corporation will provide the portal for communications in relation to this process and the inter-jurisdictional consultative committee.

We look forward to receiving the Final Report for consideration in time to complete the review. Should you have any queries in relation to this matter please contact Mr Brendan Lawson, Chief Executive Officer of the AustralAsia Railway Corporation, Department of the Chief Minister on 08-8946 9590.

Yours sincerely

CLARE MARTIN
Minister for the Australasia Railway
Northern Territory Government

PATRICK CONLON
Minister for Transport
Government of South Australia

AUSTRALASIA RAILWAY (THIRD PARTY ACCESS) CODE
TERMS OF REFERENCE
8 NOVEMBER 2005

Pursuant to clause 50(1) of the AustralAsia Railway (Third Party Access) Code both the Minister in the Northern Territory and the Minister in South Australia having responsibilities for railways are required to review the operation of the Code not later than 30 June 2006.

The Ministers, when reviewing the operation of the Code, are to consider its effectiveness in facilitating access by users to the Tarcoola to Darwin railway. In particular, the review is to consider:

- the adequacy of the Code provisions regarding the information to be given to an access seeker;
- the adequacy of the Code provisions regarding the policies to be developed and maintained by the access provider;
- the appropriateness of timeframes under the Code, particularly for the provision of information and notices required under the access negotiation and dispute resolution frameworks;
- the reasonableness of the Code provisions regarding any fees and charges payable;
- the adequacy of the Code provisions regarding the operation and consistency of pricing principles;
- the effectiveness of the Code provisions regarding dispute resolution processes; and
- the adequacy of the Code provisions regarding record keeping requirements.

In preparing the report any recommendations are to have regard to the requirements for certification under Part IIIA of the *Trade Practices Act 1974*.

In undertaking the review, the Ministers are to:

- follow the public consultation and reporting process set out in clause 50(3); and
- complete their report by 30 June 2006.

CLARE MARTIN MLA
Minister for AustralAsia Railway
Northern Territory Government
/ / 2006

PATRICK CONLON MP
Minister for Transport
Government of South Australia
17 / 2 / 2006