SOUTH AUSTRALIAN RAIL ACCESS REGIME: PROPOSED CHANGES TO REGULATOR COMPONENTS

DRAFT DECISION

August 2005

The Essential Services Commission of South Australia
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REQUEST FOR SUBMISSIONS

The Essential Services Commission of SA (the Commission) invites written submissions from interested parties in relation to the issues raised in this paper. Written comments should be provided by **Tuesday, 27 September 2005**. It is highly desirable for an electronic copy of the submission to accompany any written submission.

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

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

Responses to this paper should be directed to:

SA Rail Access Regime: Regulator Components Draft Decision

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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

THE ACCC	Australian Competition and Consumer Commission
THE ACCESS REGIME	The South Australian Rail Access Regime, as established under the ROA Act
THE COMMISSION	The Essential Services Commission of South Australia, established under the ESC Act
ESC ACT	*Essential Services Commission Act 2002*
GTK	Gross Tonne Kilometre
INFORMATION BROCHURE	A document containing information relevant to access that an Operator is obliged to prepare and provide in accordance with s. 28 of the ROA Act
INFORMATION KIT	The Commission's primary publication concerning the Access Regime
OPERATOR	Defined in s. 4 of the ROA Act to mean a person who provides, or is in a position to provide, railway services in relation to the railway network
RAILWAY NETWORK	Defined in s. 4 of the ROA Act to mean the railways to which the ROA Act applies
RAILWAY SERVICE	For the purposes of the Access Regime a railway service is a service brought into the ambit of the Access Regime by proclamation, pursuant to s. 7 of the ROA Act
ROA ACT	*Railways (Operations and Access) Act 1997*

1 INTRODUCTION

The South Australian Rail Access Regime (the Access Regime) is set out in Parts 3 to 8 of the *Railways (Operations and Access) Act 1997* (the ROA Act). It establishes a framework for the negotiation of access to certain railway services, generally intrastate services, and for the resolution of access disputes that may arise between Operators (access providers) and proponents (access seekers).

The Essential Services Commission of South Australia (the Commission) became the regulator for the Access Regime on 18 March 2004. Prior to that date the regulator had been the Executive Director, Transport SA.

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

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

The current arrangements covering the three areas above are set out in the Commission publication *South Australian Rail Access Regime: Information Kit* (the *Information Kit*), which is available on the Commission's website: www.escosa.sa.gov.au.

Readers are advised to consult the ROA Act and the *Information Kit* to better understand the Access Regime – including what it covers (whether track, yards, terminals, etc).[1]

1.1 Why this review?

The current *Information Kit* was developed by the previous regulator and released in January 2000. The Commission re-published the *Information Kit*, with some minor revisions, under its own banner on 9 June 2004.

The various requirements of the current *Information Kit* were developed through 1998 and 1999, not long after the Access Regime was introduced. Rail access regulation practices have evolved considerably around Australia since then, hence the Commission can now access a greater pool of knowledge and experience about which regulatory practices work effectively in rail access.

Therefore, the Commission considered it timely to review the regulator components of the *Information Kit*, enabling it to update components of the Access Regime, as necessary, to better reflect recent developments in the administration and design of rail access regimes

[1] The Access Regime does not apply to the ARTC controlled interstate railways, nor does it cover the Tarcoola – Darwin railway, access to which is covered by the AustralAsia Railway (Third Party Access) Code, for which the Commission is also the regulator. A proclamation under the ROA Act also excludes, amongst other things, services associated with the Glenelg tramline, the Leigh Creek Line and OneSteel's track on the Eyre Peninsula (servicing Whyalla).

and the current conditions in the Australian rail sector. Ultimately, the Commission is proposing changes that will best enable the regime to achieve its objectives.

Accordingly, the Commission released an Issues Paper, *South Australian Rail Access Regime: Review of Regulator Components*, on 4 May 2005. The Issues Paper outlined the matters under review and invited submissions from interested parties. The Commission received four submissions, from:

- Australian Railroad Group Pty Ltd (ARG);[2]
- ABB Grain Storage & Handling (ABB Grain);[3]
- Pacific National Pty Ltd (PN); and
- Australian Rail Track Corporation Ltd (ARTC).

The submissions are available on the Commission's website.

1.2 Legislative Objectives

In conducting this review and reaching the draft decisions contained herein, the Commission has had regard to both the objects of the ROA Act and the Commission's objectives as set out in the *Essential Services Commission Act 2002* (ESC Act).

Section 3 of the ROA Act provides that the objects of the Act are to:

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

(b) provide for the operation of railways;

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

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

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

Section 6 of the ESC Act provides that in performing its functions, the Commission must:

(a) have as its primary objective protection of the long term interests of South Australian consumers with respect to the price, quality and reliability of essential services; and

(b) at the same time, have regard to the need to:

  i) promote competitive and fair market conduct;

  ii) prevent misuse of monopoly or market power;

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2 ARG operates railway services in South Australia through its subsidiary Australia Southern Railroad Pty Ltd (ASR) which is, accordingly, a regulated "Operator" for the purposes of the Access Regime.

3 ABB Grain Storage & Handling is the business name of AusBulk Ltd, which is, in turn, a fully owned subsidiary of ABB Grain Ltd.

iii) facilitate entry into relevant markets;

iv) promote economic efficiency;

v) ensure consumers benefit from competition and efficiency;

vi) facilitate maintenance of the financial viability of regulated industries and the incentive for long term investment; and

vii) promote consistency in regulation with other jurisdictions.

Section 3 of the ESC Act provides that rail services are essential services.

The ROA Act does not declare the provision of railway services to be a regulated industry for the purposes of the ESC Act. This means that the first part of Commission objective (b)(vi), with its reference to regulated industries, does not apply here. The practical effect of this is limited as the interests of access providers are relevant considerations through the various other objectives.

1.3 Review scope

In this review the Commission is examining certain, specific components for which it is responsible. This is not a review of the whole ROA Act or Access Regime.

This is a significant consideration in understanding this review, as implementing some of the suggestions contained in the submissions would likely require legislative change. While some changes may indeed have desirable effects, legislative change is a matter for the South Australian Government and Parliament, not the Commission.

Therefore, the Commission has reached its draft decisions taking the ROA Act, and the legislative scheme therein, as it is, not as it might be.[4]

1.4 Compliance role

Recent amendments to the ROA Act came into effect on 1 July 2005. These have, amongst other things, conferred upon the Commission the function of monitoring and enforcing compliance with the ROA Act (other than Part 2).[5]

As envisaged in the Issues Paper this has implications for the content of the Information Kit, as the Commission now needs to set out its approach to compliance. Compliance is therefore addressed in this Draft Decision.

1.5 Structure of this paper

This Draft Decision sets out the Commission's reasoning for each area under review. The Commission invites submissions from all interested parties on areas of interest to them

[4] However, the Commission intends to inform the Government of the various suggestions for change arising in the submissions.

[5] Section 9(2) of the ROA Act.

and encourages comments on the Commission's draft decisions – including comments on matters of detail.

Section 2 discusses the Pricing Principles that the Commission proposes to establish.

Section 3 discusses the Information Brochure content requirements that the Commission proposes to establish.

Section 4 deals with the Commission's proposed Regulatory Information Requirements – that is, the information Operators will need to report to the Commission.

Section 5 discusses the Commission's proposed approach to compliance.

Section 6 discusses the *Information Kit*.

Section 7 sets out the Next Steps for this review.

A draft revised *Information Kit*, containing the proposed changes, accompanies this paper. Ultimately, a new *Information Kit* will be released, replacing the current one.

2 PRICING PRINCIPLES

2.1 The role of the pricing principles in this Access Regime

In reaching its draft decision, the Commission has considered the role of pricing principles in this Access Regime by examining the legislative scheme as a whole.

Section 27 of the ROA Act provides:

> ***Pricing principles***
>
> *27. (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 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.*

Section 27 only envisages the Commission establishing pricing principles, not floor and ceiling prices themselves. Any pricing principles established in this Access Regime have two main roles: arbitration and price signalling.

2.1.1 Arbitration role

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 (s. 38(1)(g)). 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. An arbitrator would also need to be satisfied that the intended arbitration outcome met the requirements of s. 27(4).

2.1.2 Price-signalling role

Section 28 of the ROA Act sets out the requirements of an Information Brochure, which is a document that an Operator must provide to an Industry Participant on request. In summary, the role of the Information Brochure is to provide to an access seeker some information about access to the Operator's railway services, including the terms and conditions on which it is prepared to make its railway infrastructure available for use by others.[6]

[6] The Information Brochure is discussed in more detail later in this paper.

In accordance with s. 28(5) of the ROA Act, the Information Brochure must refer to any relevant pricing principles established by the Commission and show how the terms and conditions it contains relate to, or compare with, the pricing principles. This provides some pricing information to the Industry Participant (which may be considering seeking access) and hence may assist with the access process.

Therefore, establishing pricing principles also has the effect of providing some additional guiding information in the early stages of an access negotiation.

It should also be recognised that s. 27(3) permits the parties to an access contract to agree to terms outside the bounds set by any applicable floor and ceiling prices. This indicates that the pricing principles in this Access Regime are not intended to bind behaviour to the extent that they might in other access regimes.[7]

2.2 Current arrangements

Chapter 3 of the current *Information Kit* sets out the current pricing principles. These contain considerable detail and instruction on how floor and ceiling prices are to be calculated. Examples are also provided of their application.

2.2.1 Floor

The current floor pricing principles are based on incremental cost, which is the total additional cost incurred by the Operator in granting the specific access sought. These can also be thought of as costs that otherwise would not have been incurred by the Operator.

Pricing at incremental cost provides that the Operator will not make a loss – as per s. 27(2). The definition of incremental cost used includes some operating costs and a proportion of additional capital costs. The percentages of various categories of operating costs to be included are fixed in the current *Information Kit*.

The current floor pricing principles require that a floor price be presented as a price per unit of consumption (e.g. $ per GTK) and that separate floor prices be determined for each distinct category of the service or facility.

2.2.2 Ceiling

The current ceiling pricing principles are based on full economic cost, which is the total cost of providing the minimum facility or service necessary to meet the specific needs of the access applicant, including a risk-reflective return on investment.

Pricing at full economic cost sets a maximum price on the assumption that charging beyond that would provide incentive for the access seeker to (unnecessarily) bypass the facilities (e.g. to construct its own). The undesirability of

[7] The Operator would need to ensure that it remained in compliance with s. 23 of the ROA Act ("Unfair discrimination").

such an outcome means that pricing at no more than full economic cost may be considered a fair maximum. It can also represent an assessment of a fair maximum (as per s. 27(2)) in so far as it provides a full return on investment.

The definition of full economic cost used includes operating costs, overhead costs and capital costs. The percentages of various categories of operating and overhead costs to be included are fixed.

The current ceiling pricing principles require that a ceiling price be presented as a total price per year (more of a maximum revenue than a price), and as a price per unit of consumption if possible. A separate ceiling price is to be determined for each distinct category of the service or facility.

The current pricing principles set fixed discount rates and asset lives for use in determining capital charges.

2.3 Issues Paper

The Commission posed the following questions in relation to pricing principles in the Issues Paper.

- Is there any merit in the Commission not establishing any pricing principles, that is, simply abolishing the existing ones?
- How should the Commission design the floor pricing principles to best reflect the requirements of the ROA Act, and why?
- How should the Commission design the ceiling pricing principles to best reflect the requirements of the ROA Act, and why?
- Should the Commission establish different pricing principles for different classes of railway services (including the option of not establishing pricing principles for some classes of railway services)?
- Which pricing principles should apply to which classes of railway services, and why?
- Which practices from other access regimes are or are not applicable to the pricing principles in the South Australian Rail Access Regime, and why?

2.4 Submissions

Each of the four submissions addressed the pricing principles issue and each was generally supportive of retaining pricing principles.

ARG submitted that pricing principles are important in a negotiate/arbitrate regime as they establish the boundaries for negotiation. ARG therefore argued for the retention of the current pricing principles, albeit with some minor modifications. The modifications related mainly to the calculation of capital charges.

ARG also queried the requirement to express floor and ceiling prices in specific ways (e.g. price per unit of consumption), noting that different services require different expression.

ABB Grain submitted that pricing principles should be used, as long as the principles could provide sufficient definition and comfort to an access seeker about the price range for negotiation.

ABB Grain queried the derivation and merit of the specific percentage cost allocations currently used for the floor price, and noted that the ceiling approach led to a range between floor and ceiling of such breadth as to be of little guidance to an access seeker. It pointed to the Victorian experience where it suggested the lack of adequate price determination guidelines led to a delayed access process. ABB Grain suggested that if the price range were to be narrowed then some differentiation might be required between classes of railway services.

PN submitted that pricing principles should be retained as they provide information to access seekers about potential access charges, although it noted that specific price information is also required. PN supported retaining the current floor pricing principles, but suggested considering changes to the ceiling, such as using the competitive imputation model or reducing the asset base to lower pricing outcomes. It also suggested considering different pricing principles for some different classes of service.

Overall, PN pointed to non-discrimination and transparency as being more important than pricing principles for a successful regime. It pointed to its experience with rail access regimes in various jurisdictions in this respect.

ARTC submitted that pricing principles should be retained due to issues with vertical integration in South Australian rail (e.g. where the track operator is also a track user) and for jurisdictional consistency. ARTC supported using the incremental cost concept for floor prices, though it noted concerns with the fixed percentage allocations used in the current principle. ARTC also supported the current approach to ceiling prices, noting that competing mode approaches (e.g. competitive imputation) would not always be feasible.

ARTC did not support application of different pricing principles to different classes of railway services, nor the non-application of pricing principles to some services.

ARTC considered that consistency across jurisdictions was important, as it could simplify the access process where access seekers needed to deal with more than one regime. It also noted that experience in other regimes pointed to the importance of pricing transparency in a negotiate/arbitrate regime.

2.5 Discussion

2.5.1 Whether to establish pricing principles

As indicated in the Issues Paper, the Commission considered the option of not establishing pricing principles. The basis for this was the notion that pricing

principles would provide little practical effect in an arbitration, noting the low likelihood of a reasonable arbitrator ever setting a price lower or higher than a reasonably set floor or ceiling.

The Commission remains of the view that establishing pricing principles would most likely provide only limited value, in this Access Regime, in respect of their role in guiding a reasonable arbitrator (noting that the Commission selects the arbitrator in any access dispute). Indeed, they could even slow the arbitration as pricing principles add to the number of matters that an arbitrator must take into account.

However, the Commission does recognise that, as explained in section 2.1 above and as argued in the submissions, establishing pricing principles in this Access Regime can assist with pricing transparency early in the access process, which will provide some benefit to access providers and seekers in their negotiations. This is consistent with the objects of the ROA Act. The Commission also notes the importance placed on pricing principles in the Productivity Commission's review of the National Access Regime[8], and resulting moves by the Commonwealth to include provision for pricing principles in that regime.[9]

Hence the Commission will establish s. 27(1) pricing principles.

2.5.2 Basic approach

The Commission also recognises that the basic concepts underlying the current pricing principles – incremental cost and full economic cost – are generally supported in the submissions and are applied across other access regimes.[10]

In each case they provide concepts that are consistent with the requirements for floor and ceiling pricing principles as set out in s. 27(2) of the ROA Act. This is important, as once the Commission decides to establish pricing principles it must do so in accordance with s. 27(2), which uses specific words such as "lowest price" and "highest price" rather than just "some price" or "a price".

The result is highly likely to be a wide range between the floor and ceiling price for some services, which can reduce their value to the negotiation process. However, this is a feature of the Access Regime, and as noted earlier the Commission must work with the Access Regime as it is, not as it might be. It would be inappropriate for the Commission to modify the pricing principles merely to narrow the range, for example, by adopting principles that add costs to the floor and/or remove costs from the ceiling, without having regard to the legislation.

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8 Productivity Commission 2001, *Review of the National Access Regime*, Report no. 17, AusInfo, Canberra.

9 Trade Practices Amendment (National Access Regime) Bill 2005 (Cwlth).

10 See for example the summaries of rail access regimes' floor and ceiling price approaches in: Bureau of Transport and Regional Economics [BTRE] 2003, *Rail infrastructure pricing: principles and practice*. Report 109, BTRE, Canberra ACT., pp.75 – 77.

As the Commission noted in its Issues Paper, and as PN suggested, other approaches to pricing principles could be considered, such as the competitive imputation model. This approach, which determines a price based on competing modes, is applied in the AustralAsia Railway (Third Party Access) Code, covering the Tarcoola-Darwin railway, for which the Commission is also the regulator.

The approach has some merit, in so far as it recognises that the risk of bypass could be bypass by another mode of transport. However, as the ARTC pointed out, it relies on a competitive alternative mode being available, which will not always be the case. As a result, the Commission does not propose to adopt it as a ceiling pricing principle for this Access Regime.[11]

Hence the Commission will retain the current pricing principles – in concept.

2.5.3 Detailed construction – floor price

Some of the submissions noted concerns with aspects of the current pricing principles.

In the case of the floor price the major query was the specification of percentages for operating and overhead costs.

The Commission shares the concerns with the specification issue. While such an approach may provide increased certainty, it does appear anomalous to set such rigidity for determining an incremental cost, when the point of incremental cost is to recover costs that vary with the access request, whatever they might be. It is not really possible to decide what costs are incremental until the service at issue is known. A better approach would be to require such decisions to be made at the relevant time, rather than being arbitrarily set in advance.

Another issue is the inclusion of capital costs. An interpretation of incremental cost could exclude all aspects of capital costs on the basis that such costs do not vary. However, the words of s. 27(2) do not explicitly exclude such costs, nor do they show any intent to do so. The current pricing principles include a share of capital costs to the extent that they are incremental and required to provide the access requested.

The Commission agrees with this latter proposition, and indeed considers that capital costs should also include those brought forward by the provision of access. This recognises that access may have some effects that are observed outside the access period, but which are clearly attributable to the access in question. In practice such costs may not be great, but they are incremental. The Commission adopted this approach under the AustralAsia Railway (Third Party Access) Code.[12]

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11 Of course, an arbitrator could elect to use the competitive imputation model in its determination of an access dispute.

12 See the Commission publication: Rail Industry (Tarcoola-Darwin) Guideline No. 2.

The Commission proposes to modify the current floor pricing principles to incorporate the above points. The Commission also proposes some rewording to provide additional clarity. The new words proposed are set out in 2.6 below.

2.5.4 Detailed construction – ceiling price

In the case of the ceiling pricing principles, queries included the fixing of asset lives, potentially high price levels and potential windfall gains to Operators.

The issue of asset lives relates to the specification issue raised in section 2.5.3. The Commission proposes to address this in the same manner as for the floor price, by removing undue and unnecessary advance specification – instead requiring such decisions to be made at the relevant time, and when they can be made more reasonably.

The current pricing principles set out that asset valuation is to be based on depreciated optimised replacement cost. The Commission intends to retain this approach, but is aware that there can be some fluidity in the methodology. As a result, the Commission proposes to use the valuation methodology as applied to ARTC as the appropriate benchmark, as it has done under the AustralAsia Railway (Third Party Access) Code. This will provide consistency with a relevant, related regime, improve certainty, and removes, for example, any need for advance specification of asset lives.[13]

The issue of high ceiling prices and potential windfall gains that might arguably arise from them relates to the structure of this Access Regime – which sets that the ceiling is to be the "highest price". While the Commission can, and proposes to, make improvements to the pricing principles, it will not modify them to undermine the design of the Access Regime.

The Commission proposes to modify the current ceiling pricing principles to incorporate the above points. The Commission also proposes some rewording to provide additional clarity. The new words proposed are set out in 2.6 below.

2.5.5 Other matters

As the Commission intends to reduce the degree of specification in the pricing principles from those applying currently, it expects that they will be suitable for general application to all classes of railway services. Hence variations or exclusions will not be necessary.

The Commission will not specify the terms on which floor or ceiling prices must be expressed (e.g. $ per unit), noting that the appropriate terms will vary in each case.

[13] Note that this is only a statement of principle; it does not imply that a valuation need use exactly the same parameters as ARTC if there are sensible reasons to use different parameters.

However, the Commission does propose to require that prices be expressed in terms ordinarily and reasonably used in the rail industry for the service in question.

The current pricing principles specify the "discount" rates, or rates of return, to be applied. The Commission does not consider it appropriate to specify a discount rate in advance of knowing what services, or bundle of services, might be sought at any particular time – especially as the Access Regime covers a very wide variety of services and infrastructure. However, the Commission does propose to set out what an applicable rate of return should reflect by adopting the words proposed by the Productivity Commission for the National Access Regime in this respect:

"… a return on investment commensurate with the regulatory and commercial risks involved".[14]

2.6 Draft Decision

The Commission intends to establish the pricing principles set out below. Once finalised the Commission also expects to provide examples of their application in the *Information Kit*.

2.6.1 Floor Price

The floor price should reflect the lowest price at which the Operator could provide the relevant services without incurring a loss.

For the purposes of determining a floor price, the incremental cost of providing the relevant service prudently must be determined.

Cost calculations for floor price purposes must include any additional:

- operating costs (e.g. maintenance and operations) arising, if and only if the additional operating costs are a direct result of providing the relevant service prudently; and
- overhead costs arising, if and only if the additional overhead costs are a direct result of providing the relevant service prudently; and
- proportion of capital costs arising, if and only if the additional capital costs are a direct result of providing the relevant service prudently, and where included capital costs are limited to costs:
  - arising because the prudent replacement of railway infrastructure is brought forward by provision of the relevant service; and/or
  - incurred by providing specific infrastructure enhancements for the traffic in question.

[14] Productivity Commission 2001, *Review of the National Access Regime*, Report no. 17, AusInfo, Canberra, p.338.

For the purposes of determining a floor price, the above costs are only to be included if they are directly attributable to (though not necessarily incurred in) the period for which access is sought.

A "relevant service" is a railway service to which access is being sought.

"Prudent" costs are those incurred by an efficient operator acting efficiently in accordance with good industry practice to achieve the lowest sustainable cost of delivering the service in question, taking into account the circumstances and obligations of the operator.

Any asset values required for the purposes of determining a floor price must be based upon a depreciated optimised replacement cost consistent with the principles and methodologies applied in the independent valuation of ARTC's Interstate Network assets approved by the ACCC, though notwithstanding that land and formation works shall be valued at no more than historical cost.

Any return on investment required for the purposes of determining a floor price must be commensurate with the regulatory and commercial risks involved.

Floor prices must be expressed in terms ordinarily and reasonably used in the rail industry for the railway service in question.

2.6.2 Ceiling Price

The ceiling price should reflect the highest price that could fairly be asked by an Operator for provision of the relevant services.

For the purposes of determining a ceiling price, the full economic cost of providing the relevant service prudently must be determined.

Cost calculations for ceiling price purposes must include:

- operating costs (e.g. maintenance and operations) arising from providing the relevant service prudently; and
- overhead costs arising from providing the relevant service prudently; and
- capital costs arising from providing the relevant service (including new capital) prudently, including both depreciation and a return on investment.

A "relevant service" is a railway service to which access is being sought.

"Prudent" costs are those incurred by an efficient operator acting efficiently in accordance with good industry practice to achieve the lowest sustainable cost of delivering the service in question, taking into account the circumstances and obligations of the operator.

Any asset values required for the purposes of determining a ceiling price must be based upon a depreciated optimised replacement cost consistent with the

principles and methodologies applied in the independent valuation of ARTC's Interstate Network assets approved by the ACCC, though notwithstanding that land and formation works shall be valued at no more than historical cost.

Any return on investment required for the purposes of determining a ceiling price must be commensurate with the regulatory and commercial risks involved.

For the purposes of determining a ceiling price an arbitrator must take account of and adjust for other use (including the Operator's own use) of the relevant services and/or associated facilities.

Ceiling prices must be expressed in terms ordinarily and reasonably used in the rail industry for the railway service in question.

3 INFORMATION ABOUT ACCESS

3.1 Access information in this Access Regime

Division 2 of Part 4 (ss. 28-30) of the ROA Act establishes requirements for the initial provision of information by an Operator to a prospective access seeker. The division deals with information requests and exchanges that might typically arise prior to a specific access proposal being lodged, and includes a requirement for an Information Brochure.

Section 28 of the ROA Act provides:

> ***Information brochure***
>
> *28. (1) An operator 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.*
>
> *(2) The information brochure must be provided within 30 days (or a longer period allowed by the regulator) after the operator receives the application.*
>
> *(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.*
>
> *(4) The form of the information brochure must comply with requirements imposed by the regulator.*
>
> *(5) The operator must, within 14 days after providing an industry participant with the information brochure, give a copy to the regulator.*
>
> *(6) If the operator fails to comply with this section in any respect, the operator is guilty of an offence.*
>
> *Maximum penalty: $20 000.*

Section 29 of the ROA Act provides:

> ***Operator's obligation to provide information about access***
>
> *29. (1) An operator 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.

(2) The operator may make a reasonable charge (to be determined on a basis decided or approved by the regulator) for providing information under this section.

(3) If the operator makes a charge for providing information under this section, the operator must give the regulator written notice of the amount of the charge and the nature of the information provided.

Each section concerns a distinct and separate phase of the overall access negotiation process. Section 28 deals with information provided before any access is sought, or even discussed. Section 29 deals with information exchanges once an access proposition is being discussed, but before any formal request has been made. Hence both sections arise in the formative stages of an access negotiation.

Division 2 establishes minimum rights and obligations to facilitate the exchange of preliminary information about access. However, it does not dictate how a party must start or conduct its commercial negotiations, other than requiring that the obligations be met as required. For example, a prospective access seeker does not necessarily have to request the Information Brochure available under s. 28, nor further information under s. 29, before lodging an access proposal under s. 31 (although it might be well advised to do so).

3.2 Current arrangements

Chapter 5 of the current *Information Kit* sets out the current requirements for the Information Brochure. The requirements are quite comprehensive and 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.

These requirements are in addition to the various mandatory requirements in s. 28.

3.3 Issues Paper

The Commission posed the following questions in relation to access information requirements in the Issues Paper.

- What additional content, beyond that mandated in the ROA Act, should the Commission require in the Information Brochure, and why?

- What role is there for reference tariffs in the Access Regime and how might they be constructed?
- What should be considered a reasonable charge for s. 29 information, and why?

3.4 Submissions

ARG suggested that information should be provided on an "as requested" basis as occurs in the Western Australian regime. It suggested that the current reference tariffs were not a meaningful indication of access prices. It also suggested that as no two information requests will be the same, the cost of information should reflect the information requested.

ABB Grain queried the status of the current reference tariffs, noting that they appeared to have no status, and hence their role was unclear.

PN commented on a lack of transparency in the Access Regime, particularly in relation to access prices and track capacity/utilisation, noting that other jurisdictions provide more information to access seekers. It argued that reference tariffs, and details of their derivation, would be useful for the major tasks on the network as they provide important information to access seekers. PN argued that, in the absence of reference tariffs, an Operator should be obliged to publish the access prices it charges its own above-rail business.

PN also indicated its support for the information charge factors suggested on page 13 of the Issues Paper.

ARTC supported the provision of up-front information to an access seeker, noting that this should help simplify the negotiation process. It suggested the type of information that would be useful, by listing that which it publishes on its website.

ARTC commented on the role that reference tariffs can play, and suggested that a starting point could be based on the notional price that an Operator charges its own above-rail business. ARTC supported publication of a full set of prices for network services.

ARTC indicated that it makes no charge for providing access information, noting that those costs will otherwise be absorbed into overall access costs. However, it considered that an access provider should be able to charge for the efficient preparation of information, so long as such costs were not also recouped elsewhere.

3.5 Discussion

Any decision by the Commission in relation to the Information Brochure must take account of the role of the Information Brochure in this Access Regime and the content obligations that the ROA Act already provides.

An Information Brochure in this Access Regime appears at the very first stage of an access seeker's enquiries. This means that it is only reasonable to expect the Information

Brochure to provide high level, generic or indicative information, as it could not be possible for the Operator to anticipate the specifics of most access requests.

However, the timing of the Information Brochure in the Access Regime also indicates that it is to serve an important role in the Access Regime – in so far as it is intended to give initial guidance to an access seeker. This means that the Information Brochure should provide sufficient detail for an access seeker to formulate the starting point for an eventual access proposal anywhere on the covered network.

Accordingly, preparing an Information Brochure could entail significant effort on the part of an Operator. However, as an Information Brochure will be a relatively stable document (it need not vary greatly over time) much of that effort should only be required once. Its production is, in any case, a non-negotiable requirement of the Access Regime.

Section 28 of the ROA Act already provides significant content obligations for an Information Brochure. For example, a vertically integrated Operator (which is the case for each of the current three Operators) must provide, under s. 28(1)(a), a statement of the terms and conditions on which it provides passenger or freight services.

Under s. 28(1)(b), an Operator must then provide the terms and conditions on which it is prepared to make its railway infrastructure available for use by others. Also, under s. 28(3) it must refer to any relevant pricing principles and show how the terms and conditions relate to, or compare with, the relevant pricing principles. The implication here is that the Information Brochure should include some meaningful pricing information. Remaining mindful that the Information Brochure appears at the earliest stage in the access process, meaningful pricing information is likely to involve at least some indicative prices.

The significance of the Information Brochure is demonstrated by the ROA Act providing a substantial maximum pecuniary penalty for breaching this section.

The requirement to provide terms and conditions can be read broadly as covering all aspects of access (that is, a full railway service quality description including pricing information). However, as it might also be read more narrowly, the current Information Kit provides for additional comprehensive information – thereby achieving the effect of a broader interpretation. The Commission intends to continue this practice, with some modifications.

On the technical side, the Commission has identified some additional information that it proposes would be reasonable to include in the Information Brochure, concerning track descriptions and capacity. The main intent here is to allow a potential access seeker to have further meaningful indication of the total and spare capacity that might be available around the network. These changes are set out in 3.6 below.

3.5.1 Reference tariffs

The requirement to include reference tariffs is problematic. While the Commission recognises their potential value in an access regime, this Access Regime makes

no clear provision for the Commission to require reference tariffs as they are usually understood in such regimes – that is, a tariff at which a defined reference service is available and having a binding effect such that an Operator cannot otherwise refuse to offer the defined service at the published price.

However, the effect of ss. 28(1)(b) and 28(3), as discussed above, is that a complying Information Brochure will need to contain some pricing information that has some of the character of reference tariffs.

Hence the Commission proposes to remove the current regulator imposed requirement for reference tariffs and instead focus on compliance with those "equivalent" obligations already in the ROA Act.

3.5.2 Floor and ceiling prices

A requirement to include floor and ceiling prices in the Information Brochure is also problematic, given that no access request will yet be known. Hence any floor or ceiling prices will only be indicative, at best. This problem of relevance is the same that the Commission faced in deciding whether to establish any pricing principles.

However, as the Commission explained in its draft decision on pricing principles, floor and ceiling pricing principles can provide some guidance in the negotiation process. So can the publication of floor and ceiling prices. Whilst the specifics of any access request will not be known, an Operator should be in a position to identify significant railway services – being services it provides that are, or are highly likely to be, subject to access interest (e.g. major network tasks).

Hence the Commission proposes to alter the price requirements to require the publication of (indicative) floor and ceiling prices, based upon the pricing principles, for significant railway services. The Commission would retain the right to nominate significant services itself, but expects to discuss this matter with Operators and other industry participants.[15]

Also, as indicated in the previous Chapter, the Commission will require that any prices or price information provided by an Operator are expressed in terms ordinarily and reasonably used in the rail industry for the railway service in question. Further, any rate of return used will need to be disclosed.

The compliance program set out in Chapter 5 of this Draft Decision will require an Operator to provide the Commission with assurance that its Information Brochures comply with the relevant obligations, including that any floor and ceiling prices published are consistent with the pricing principles. Of course, it will remain open to a recipient of an Information Brochure to lodge a complaint with the Commission

[15] The Commission's views on what services are significant railway services would also have implications for the Commission's view on what services should have indicative prices presented in an Information Brochure to comply with ss. 28(1)(b) and 28(3).

about its content, in which case the Commission may investigate the matter further. The Commission will also examine Information Brochures as it receives them (which occurs under s. 28(5)) and may at such times consider their compliance with the various s. 28 obligations.

3.5.3 Form

The Commission proposes to not specify the form of the Information Brochure, noting that if an Operator were to provide it in an unusable form it would likely be in breach of s. 28 anyway. Similarly the Commission proposes to not specify the use of the internet as a delivery mechanism – noting that the ROA Act only provides that it be made available to an Industry Participant on written application, not that it be available generally. However, an Operator may elect to meet some of the content requirements by cross-referencing in its Information Brochure to suitably accessible, and maintained, ancillary information on its website.

3.5.4 Charges for information

The Commission has also considered the issue of reasonable charges for information provided under s. 29. The Commission notes that it may appear peculiar for an Operator, nominally in the business of providing access, to charge its customers in the course of their seeking access. However, it is not a function of the Commission to decide whether an Operator may charge for s. 29 information.

Therefore, the Commission proposes to establish principles that will apply to any charges levied under s. 29. In essence, the principles set out in 3.6.4 below take account of the cost of preparing information and the competitive impact that any charges might have on access and the objects of the ROA Act.

This will provide both Operators and access seekers some guidance on what might constitute a reasonable charge. The compliance program set out in Chapter 5 of this Draft Decision will require an Operator to provide the Commission with assurance that any charges it has levied are consistent with the principles. Of course, an access seeker could also lodge a complaint with the Commission about a charge, in which case the Commission may investigate the charge further.[16]

Note that the absence of an equivalent provision for making charges in s. 28 means that an Operator cannot charge for an Information Brochure.

3.6 Draft Decision

The Commission intends to establish the Information Brochure and other requirements set out below.

[16] The Commission would be more likely to investigate a credible complaint – one supported with documentary evidence- rather than a mere claim.

3.6.1 Non-price information

The Commission will retain the existing technical, operational, contractual and corporate information requirements, with the addition of the following track information:

- average transit times;
- minimum radius curves and ruling grades;
- estimated available capacity; and
- available train paths.

All such information must be reported by track section or other division as reasonable and appropriate.

3.6.2 Price information

The Commission will retain the existing ancillary pricing information requirements, with the addition of the following:

- An Operator must provide indicative floor and ceiling prices for all significant railway services – being services it provides that are, or are highly likely to be, subject to access interest (e.g. major network tasks) – that it offers and which are subject to the Access Regime.
- The Commission may identify railway services to be significant railway services.
- The indicative floor and ceiling prices provided must be accompanied by statements explaining how the floor and ceiling prices relate to the pricing principles, including disclosing any rate of return used.
- Any prices or price information provided by an Operator are to be expressed in terms ordinarily and reasonably used in the rail industry for the railway service in question.

3.6.3 The form of the Information Brochure

An Operator may elect to meet some of the content requirements by cross-referencing in its Information Brochure to suitably accessible, and maintained, ancillary information on its website.

3.6.4 Section 29 charges

The reasonableness of a charge for information provided under s. 29 is to be assessed against the following principles:

- The charge should not exceed the efficient cost of gathering and providing the necessary information.

- The charge should be consistent with a competitive market for the provision of railway services.
- The charge should not serve as a hindrance to access.
- The charge should reflect the s. 30 non-discriminatory provision of information.

4 REGULATORY INFORMATION REQUIREMENTS

4.1 Information gathering in this Access Regime

Part 7 of the ROA Act provides the Commission with information collection powers.

Sections 60 to 63 of the ROA Act provide:

Regulator's power to monitor costs

60. (1) The regulator may, by written notice to an operator, require the operator to provide, within a period stated in the notice, specified information relevant to monitoring the costs of railway services provided by the operator.

(2) An operator must comply with a requirement imposed under this section.

Maximum penalty: $60 000.

Copies of access contracts to be supplied to regulator

61. An operator must provide the regulator, on a confidential basis, with a copy of every access contract made with the operator –

(a) if the contract was made before the commencement of this Part – within 30 days after the commencement of this Part; and

(b) if the contract is made after the commencement of this Part – within 30 days after the making of the contract.

Maximum penalty: $60 000.

Operator's duty to supply information and documents

62. (1) The regulator may, by written notice, require an operator to give the regulator, within a stated time or at stated intervals, specified information or copies of specified documents related to the provision of railway services by the operator.

Examples –

The regulator might require the operator to provide the regulator with financial statements and reports referred to in section 316 of the Corporations Law together with any further information that might be necessary to enable the regulator to assess the impact of this Act on the operator's financial position and business interests.

The regulator might require the operator to provide the regulator with periodic reports on the extent to which transactions that were not entered into at arm's length are affecting the operator's financial position.

(2) An operator must not, without reasonable excuse, contravene, or fail to comply with, a notice under this section.

Maximum penalty: $60 000.

Confidentiality

63. (1) The regulator must maintain the confidentiality of confidential information obtained under this Part.

(2) However, the regulator may disclose confidential information to the Minister if it is in the public interest to do so.

4.2 Current arrangements

Chapter 6 of the current *Information Kit* sets out the current reporting obligations, in addition to the mandatory requirement to supply copies of all access contracts to the Commission in s. 61. The current obligations require six monthly reporting to the Commission of information about:

- the extent and nature or railway services provided;
- railway use;
- recurrent and capital expenditures; and
- the Operator's corporate profile.

4.3 Issues Paper

The Commission posed the following question in relation to regulatory reporting in the Issues Paper: What information should the Commission require an operator to report on an ongoing basis, and why?

4.4 Submissions

ARG considered that the current arrangements were sufficient.

ABB Grain made no specific comment on this matter.

PN suggested that an Operator be required to disclose relevant price and costing information to the Commission to allow it to verify compliance with the discrimination provisions of the ROA Act and with the pricing principles. PN then listed some of the information that would be necessary for this task.

ARTC submitted that the Commission should seek sufficient information to enable it to monitor compliance with the discrimination provisions of the ROA Act. It noted that the type of information required to do this is not inconsistent with that sought in other such access regimes.

4.5 Discussion

The current reporting obligations are relatively simple, and impose low compliance costs on Operators. However, the purpose served by the current reporting is not clear. As the Commission commented in the Issues Paper, it is of the view that it should only collect

relevant information. Relevant in this case means relevant to a legitimate function or interest of the Commission under the Access Regime.

The Commission does not consider it appropriate to merely collect information "just in case". That is not because such information could not be useful, but because it is highly likely to turn out to not be useful, noting the difficulty of predicting exactly what information might be desirable in advance and the costs that can surround information collection.

The Commission has therefore begun its consideration here by identifying four particularly relevant functions or interests that could give rise to information collection requirements (aside from a Ministerial request under s. 64):

- knowledge of Operators;
- monitoring compliance with the pricing principles;
- monitoring compliance with s. 22 (segregation of accounts and records); and
- monitoring compliance with s. 23 (unfair discrimination).

The Commission's general approach to compliance is outlined in the next chapter. The discussion below examines compliance with respect to these specific matters, where specific compliance responses could be warranted. The matters identified below are not exhaustive; the Commission's compliance responsibility covers the whole Access Regime and therefore it could need to collect information on any compliance matter.

The Commission also proposes to make explicit provision for it to allow an Operator an exemption to some or all of the reporting requirements to provide appropriate flexibility.

4.5.1 Knowledge of Operators

The Commission must maintain communications with the rail industry to administer its obligations under the Access Regime. This requires the Commission to keep up to date with the details of the various Operators. Therefore, the Commission requires basic corporate information – as is already collected in section 6.7 of the current *Information Kit*, and which the Commission proposes to continue to collect.

4.5.2 Pricing principles compliance

Monitoring compliance with the pricing principles is more problematic given their place in this regime. Certainly the Commission can query the explanations an Operator provides in an Information Brochure in considering compliance with its s. 28(3) obligations. However, as that only requires the Operator to "show how the terms and conditions relate to, or compare with" the pricing principles, it is not clear that the Commission would necessarily need additional cost information.

The proposed requirement to publish indicative floor and ceiling prices (see previous chapter) for significant railway services may also trigger a need for cost information if the Commission were to be examining compliance in this area (e.g. if

a credible complaint were lodged that caused the Commission to decide to investigate). Hence the Commission flags here that it may need to seek information to monitor such floor and ceiling prices, but it is not feasible to define that information need now.

4.5.3 Section 22 compliance

Section 22 requires that an Operator keep distinct accounts and records of its business of providing railway services to which the Access Regime applies. This type of obligation arises in each of the three transport access regimes that the Commission administers (as well as in other regulated industries) and involves the creation of what are usually known as “regulatory accounts”.

Regulatory accounts play an important role in negotiate/arbitrate access regimes because they form the information base that an arbitrator will call upon in case of a dispute. They also form the information base that the Commission would use for its various monitoring and reporting tasks. A failure to properly keep regulatory accounts can therefore threaten the effectiveness of the access regime.

The Commission normally monitors compliance with this type of obligation by requiring annual reporting by an Operator of its “regulatory accounts”. The Commission proposes to adopt this approach here, requiring an Operator to supply relevant reports (Accounting Statements and Associated Reports) that show that it has kept appropriate accounts and records.

The Commission also proposes to require that separate assurance be attached to these reports. As it has done for regulatory accounts under the AustralAsia Railway (Third Party Access) Code, the Commission proposes to require a Statement of Compliance containing assurance that the Accounting Statements and Associated Reports provided have been prepared in accordance with s. 22. The statement shall be signed by at least two Directors of the Operator, one of whom must be a Non-Executive Director.

The reports will be required within four months of the end of the Operator’s usual financial year.

4.5.4 Section 23 compliance

Section 23 requires that an Operator not unfairly discriminate between proponents in preferring access proposals or providing access. The main (but not necessarily sole) focus of the section is on discrimination between the Operator itself and third party access seekers.

The Commission did not specifically mention mechanisms for compliance with s. 23 in the Issues Paper, noting that at that time the Commission did not have a

general compliance function in the Access Regime and therefore had no role in relation to s. 23.

However, that compliance role has now arisen, and therefore s. 23 compliance also arises. It was also raised as a significant issue in the submissions.

The Commission agrees that s. 23 is a very significant provision in this Access Regime, particularly noting that each Operator is vertically integrated. It also recognises that other jurisdictions are or have already taken steps to improve compliance with their equivalent provisions – in some cases making legislative changes to their regimes.

The words in s. 23 focus primarily on preferential self-dealing, which is where an Operator gives or offers itself a better access deal than it gives or offers third parties. The result can be a diminution of competition, which would be at odds with the objects of the ROA Act.

Whilst this would be a concern, the Commission was not presented with evidence to suggest that s. 23 is being breached. Therefore, at this point, the Commission proposes that it will rely primarily on the general compliance arrangements set out in the next chapter in dealing with s. 23.

In doing so the Commission notes that it retains the power to investigate compliance as it requires, including in response to credible complaints lodged by third parties seeking access. Such investigations would involve the Commission collecting cost information at the time.

The Commission also notes that the mandatory supply of access contracts to it under s. 61 is relevant to its compliance effort on this issue. The Commission may consider other responses if non-compliances with s. 23 (and 24 “Preventing or hindering access to railway services”) arise.

Non-compliances would also come to the immediate attention of the Minister as the Commission is required to report contraventions of ss. 22-24 to the Minister under s. 25 of the ROA Act. The Minister may consider a response to such a situation.

4.6 Draft Decision

The Commission proposes to establish the reporting requirements set out below. Notwithstanding these, the Commission of course retains the power to request any other relevant information under ss. 60 and 62 when circumstances so require.

4.6.1 Organisational information

In accordance with s. 62 of the ROA Act, an Operator must provide the Commission with an annual statement containing the following information:

- the names and positions of senior office holders;
- the locations and addresses of major sites of business;

- the organisation's legal name, ABN if such exists, and registered office address;
- the names, addresses and ABNs of any subsidiaries;
- details of quality / safety accreditation and any changes since the last report;
- a description of its business of providing railway services (to which the Access Regime applies);
- a summary of each provision of railway services (to which the Access Regime applies) to third party users; and
- name, title, address, email, phone and fax numbers for the contact person in respect to the matters covered in the report.

An Operator must advise the Commission in writing of any significant change to the information provided in its previous annual statement as soon as practicable after the change has occurred.

4.6.2 Accounts and records

An Operator must provide the Commission with Accounting Statements and Associated Reports that:

- give a true and fair view of its business of providing railway services to which the Access Regime applies; and
- 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.

4.6.3 Reporting Periods

An Operator must provide the Commission with its Annual Statement, Accounting Statements and Associated Reports as soon as possible after production and no later than four months after the end of the financial year to which they relate.

4.6.4 Assurance

An Operator must provide an accompanying Statement of Compliance, containing assurance that its Accounting Statements and Associated Reports have been prepared in accordance with the requirements herein. The statement shall be signed by at least two Directors of the Operator, one of whom must be a Non-Executive Director.

4.6.5 Exemption

The Commission may exempt an Operator from all or part of these Chapter 5 requirements should circumstances so require. An Operator will be informed of its exemption, and the duration of that exemption, by the Commission, in writing.

5 COMPLIANCE

5.1 Compliance monitoring in this Access Regime

The recently amended s. 9(2) of the ROA Act provides that:

> *The regulator has the function of monitoring and enforcing compliance with this Act (other than Part 2).*

5.2 Current arrangements

As this is a new function, there are no current arrangements. However, the Commission has published a compliance guideline in respect of its role as regulator under the AustralAsia Railway (Third Party Access) Code.[17]

5.3 Issues Paper

The Commission discussed the possibility of compliance being considered in section 1.2 of the Issues Paper. It also noted the possible use of the approach adopted under the AustralAsia Railway (Third Party Access) Code.

5.4 Submissions

The submissions noted the importance of compliance with the various elements of the ROA Act. ARG also noted that compliance systems have costs, which will be reflected in costs to end users.

5.5 Discussion

The primary concern for the Commission is how to establish an arrangement by which it can efficiently and effectively fulfil its obligation to monitor and enforce compliance with the ROA Act (excluding Part 2). The Commission faced the same issues when developing its compliance approach to the AustralAsia Railway (Third Party Access) Code.

The approach used in that Code provides a framework for self-reporting with appropriate assurance. This allows for a more light handed approach than having the Commission conduct ongoing audits and investigations, but still permits the Commission to conduct such activities if required, and in a targeted manner.

The guideline identifies AS 3806-1998 as being an appropriate standard for a compliance system. However, it does not mandate the use of that standard, allowing the application of any credible compliance standard. This provides some flexibility, although it should be noted that AS 3806-1998 is, in any case, only a guide. That is, it sets out the elements of an effective compliance program but does not dictate the actual system to be used.

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[17] Railway Industry (Tarcoola-Darwin) Guideline No. 4 is available on the Commission website at: http://www.escosa.sa.gov.au/webdata/resources/files/050428-D-TDRailGuideline4.pdf.

The Commission's focus in this model is on the nature and degree of compliance and assurance being provided. The Commission considers effective compliance systems, and the associated assurance, as being an important part of its regulatory responsibilities. This is particularly so for an access regime such as that in the ROA Act, where compliance problems may remain otherwise undiscovered until a dispute arises, causing an effective failure of the regime. Hence the significance of the assurance received through compliance reporting.

As was discussed in the previous chapter, there are some elements of the ROA Act for which this general compliance model may not be sufficient. Separate arrangements will be established in such cases (e.g. s. 22 compliance).

The Commission also stresses that the s. 9(2) amendment does not affect an Operator's obligations – these were already set in the ROA Act. The amendment merely provides the Commission with the power to monitor and enforce compliance.

5.6 Draft Decision

The Commission proposes to introduce the compliance systems and reporting approach it applies in the AustralAsia Railway (Third Party Access) Code into this Access Regime, with appropriate modifications.

The draft revised *Information Kit* contains the proposed requirements.

6 THE *INFORMATION KIT*

The *Information Kit* is the Commission's principal regulatory publication in relation to the Access Regime. The current *Information Kit* is a combination of what the Commission would otherwise publish separately as an Information Paper and Guidelines. As the Commission explained in the Issues Paper, it intends to continue with the practice of publishing a single *Information Kit* for this Access Regime.

The "guideline" elements of the *Information Kit* have legal effect. They are made pursuant to provisions of the ROA Act and an Operator must abide by the obligations in those parts of the *Information Kit*.

In the Issues Paper, the Commission flagged that it intended to add further information to the *Information Kit*, including guidance on some of the procedural requirements of the Access Regime. This was in addition to any changes flowing from this review (such as new pricing principles).

A revised draft *Information Kit* accompanies this Draft Decision. It incorporates the changes flowing from the review and includes the new procedural information referred to above in its Appendix B. It is provided at this point to assist interested parties respond to this Draft Decision. However, the revised draft *Information Kit* does not have any formal status as yet – the *Information Kit* dated May 2004 is still the current *Information Kit*.

7 NEXT STEPS

The Commission invites submissions on this Draft Decision and the accompanying draft revised *Information Kit*. Submissions are due by **Tuesday, 27 September 2005**.

The Commission will consider all submissions received and prepare a Final Decision and new *Information Kit* (replacing the current one).

The Commission intends to publish its Final Decision and new *Information Kit* by the end of October 2005.

Note that the current *Information Kit* continues in effect until changed.