SOUTH AUSTRALIAN RAIL ACCESS REGIME: CHANGES TO REGULATOR COMPONENTS

FINAL DECISION

October 2005

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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 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);
- establishing Information Brochure requirements (s. 28);
- establishing regulatory reporting obligations (ss. 60 and 62); and
- monitoring and enforcing compliance (s. 9).

The arrangements covering the three areas above, and other areas, are set out in the Commission publication *South Australian Rail Access Regime: Information Kit* (the *Information Kit*). Both the previous and the current *Information Kit* are 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 previous *Information Kit* was developed by the previous regulator and released in January 2000. The Commission re-published that *Information Kit*, with some minor revisions, under its own banner on 9 June 2004.

The various requirements of the previous *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 was able to access a greater pool of knowledge and experience about which regulatory practices work effectively in rail access.

[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).

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

To initiate the review 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 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).

On 22 August 2005 the Commission released a Draft Decision, *South Australian Rail Access Regime: Proposed Changes to Regulator Components*. Accompanying that was a draft, revised Information Kit, which showed how the proposed changes would be set out, if adopted. The Commission received submissions on the draft, from:

- ARTC;
- ARG; and
- PN.

The submissions are available on the Commission's website.

1.2 Legislative Objectives

In conducting this review and reaching the 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 (not objectives) 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

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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.

(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;

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 examined certain, specific components for which it is responsible. This was 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 decisions taking the ROA Act, and the legislative scheme therein, as it is, not as it might be.[4]

[4] However, the Commission will bring to the Government's attention the various suggestions for change arising in the submissions.

1.4 Compliance role

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

As was explained in the Draft Decision this has had implications for the content of the *Information Kit*, as the Commission has now had to set out its approach to compliance. This matter is therefore addressed in this Final Decision.

1.5 Duration

A new and now current *Information Kit* (version 2.1), containing the Commission's new decisions, accompanies this paper. The new *Information Kit* replaces the previous one and takes effect immediately upon its release (31 October 2005).

The ROA Act sets no specific parameters regarding how often the Commission should review its decisions to establish, or subsequently vary, the various regulator components. The Commission recognises that it would be undesirable, and inconsistent with the relevant objectives, for it to continually review and change the regulator components of the Access Regime.

Therefore, in the absence of legislative changes, errors, or other significant external developments, the Commission would not expect to revisit the decisions set out herein for at least three years. However, the Commission would be obliged to consider acting sooner if, for example, it became apparent that one or more of the regulator components were causing the Access Regime to fail to meet its objectives.

5 Section 9(2) of the ROA Act.

2 PRICING PRINCIPLES

2.1 The role of the pricing principles in this Access Regime

In reaching its 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 Previous arrangements

Chapter 3 of the previous *Information Kit* set out the previous pricing principles. These contained considerable detail and instruction on how floor and ceiling prices were to be calculated. Examples were also provided of their application.

2.2.1 Floor

The previous floor pricing principles were 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 included some operating costs and a proportion of additional capital costs. The percentages of various categories of operating costs to be included were fixed.

A floor price had to 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 previous ceiling pricing principles were 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

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

(unnecessarily) bypass the facilities (e.g. to construct its own). The undesirability of 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 included operating costs, overhead costs and capital costs. The percentages of various categories of operating and overhead costs to be included were fixed.

The ceiling price also had to 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 was to be determined for each distinct category of the service or facility.

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

2.3 Draft Decision

In the Draft Decision the Commission proposed that it would (continue to) establish pricing principles, noting the value in their price signalling role. The Commission also proposed to retain the basic approach of the previous pricing principles, using the concept of incremental cost for the floor and full economic cost for the ceiling.

However, the Commission proposed some changes to the way the floor and ceiling pricing principles were expressed, most notably:

- reducing the degree of specification – noting that it was not realistic to specify cost shares until the service to which access is sought was known and itself specified;
- including a broader allowance of capital costs in the floor price; and
- providing further guidance on asset valuation.

2.4 Submissions to the Draft Decision

Each of the three submissions to the Draft Decision addressed the pricing principles issue and each was generally supportive of retaining pricing principles.

PN supported the retention of pricing principles.

ARG expressed concern at the less prescriptive nature of the proposed pricing principles and the use of “prudent” costs. ARG suggested the use of examples to help overcome some of the uncertainty.

ARTC supported the retention of pricing principles and supported the proposed changes to the specification of incremental cost. ARTC expressed concern at elements of the changes to the ceiling pricing principle, particularly noting issues in relation to asset valuation, depreciation and rate of return.

ARTC also queried the proposal to not specify the terms in which a floor and ceiling should be expressed, suggesting that standard terms could and should be developed for different traffics.

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 the value of it establishing pricing principles should not be overstated for this Access Regime.

However, the Commission recognises that establishing pricing principles in this Access Regime can assist with pricing transparency early in the access process. 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 has decided to establish s. 27(1) pricing principles.

2.5.2 Basic approach

The Commission also recognises that the basic concepts underlying the previous 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

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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.

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.

Hence the Commission has decided to retain the concepts underlying the previous pricing principles.

2.5.3 Detailed construction – floor price

The Commission's major concern with the previous floor pricing principle was the specification of percentages for operating and overhead costs.

While such an approach may provide increased certainty, it did 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 is 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.[11]

The Commission has modified the previous floor pricing principles to incorporate the above points. The Commission has also reworded the principles to provide additional clarity, as shown in 2.6 below.

2.5.4 Detailed construction – ceiling price

In the case of the ceiling pricing principle the Commission's queries included the fixing of asset lives, asset valuation and the rate of return.

The issue of asset lives relates to the specification issue raised in section 2.5.3. The Commission has addressed this in the same manner as for the floor price, by removing undue and unnecessary advance specification – instead requiring such

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

decisions to be made at the relevant time, and when they can be made more reasonably.

The previous pricing principles set out that asset valuation is to be based on depreciated optimised replacement cost. The Commission is retaining this approach, but is aware that there can be some fluidity in the methodology. As a result, the Commission has decided 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.[12]

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 specifies that the ceiling is to be the "highest price". While the Commission is making improvements to the pricing principles, it will not modify them to undermine the design of the Access Regime.

The Commission has decided to modify the current ceiling pricing principles to incorporate the above points. The Commission has also reworded the principles to provide additional clarity. The new words are set out in 2.6 below.

2.5.5 Other matters

As the Commission is reducing 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. However, the Commission is requiring that prices be expressed in terms ordinarily and reasonably used in the rail industry for the service in question – this requirement should address ARTC's concerns, in so far as the terms would need to consider what is typically used for particular traffic types.

The previous pricing principles specified the "discount" rate, or rate 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 has 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:

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[12] Note that this is only a statement of a 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.

"… a return on investment commensurate with the regulatory and commercial risks involved".[13]

To add further direction in this area, the Commission has added words requiring that in selecting a rate of return, regard be had to regulatory rates of return developed and used in other rail access regimes. This will also help to achieve consistency with other regimes as appropriate (noting that a requirement to have regard does not mean that one must simply adopt a rate of return used elsewhere).

The Commission notes that under this approach it cannot bind an arbitrator to accept a rate of return adopted by an access provider. Further, these requirements apply to floor and ceiling prices only. The Commission cannot bind an arbitrator to adopt a rate of return selected by an access provider for floor and ceiling purposes when determining an actual contract price.

The Commission also considered the provision of examples of the application of the pricing principles. However, it is wary that examples can easily be misconstrued as being methodological "directions", a particular concern where each rail access case can vary considerably. This would be at odds with the Commission's intent in the setting of the principles and therefore the Commission has decided to not include examples in the Information Kit.

The Commission has noted ARG's concerns with the term "prudent", but stresses that the consideration of prudent costs does not make actual costs redundant. Actual costs should continue to form a significant part of the development of floor and ceiling prices – to the extent that actual costs are prudent.

2.6 Final Decision

The Commission has decided to establish the pricing principles set out below.

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.[14]

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

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

14 These are the words from s. 27(2) of the ROA Act.

- 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.

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.

In selecting a return on investment required for the purposes of determining a floor price, regard is to be had to regulatory rates of return developed and used in other rail access regimes.

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.[15]

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

[15] These are the words from s. 27(2) of the ROA Act.

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.

In selecting a return on investment required for the purposes of determining a ceiling price, regard is to be had to regulatory rates of return developed and used in other rail access regimes.

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 Previous arrangements

Chapter 5 of the previous *Information Kit* set out the previous requirements for the Information Brochure. The requirements were quite comprehensive and included:

- 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 were in addition to the various mandatory requirements in s. 28.

3.3 Draft Decision

The Commission proposed to continue with the bulk of the previous arrangements, with the following changes:

- the removal of the previous "reference tariffs" (noting the limitations on the ability of the Commission to create effective reference tariffs);

- requiring floor and ceiling prices to be published for significant railway services only; and
- requiring some additional capacity information.

The Commission also proposed to reduce the specification of the form of the brochure and introduced principles for charging for s. 29 information.

3.4 Submissions to the Draft Decision

ARG queried some of the previous and proposed additional capacity information, noting that estimates of the manner in which forward use and improvements would change, may raise issues of confidentiality and might be better sought under the next stage of information exchange (e.g. under s. 29). It also noted some concerns with the requirement to include indicative floor and ceiling prices for significant railway services.

ARG proposed that the Information Brochure be updated annually.

PN discussed the importance of information in an access regime of this type, particularly in terms of assurance that the s. 23 unfair discrimination provisions are being met (s. 23 is addressed further in the next chapter). PN also supported the inclusion of additional capacity information.

ARTC queried whether the statutory obligations in s. 28 really amounted to reference tariffs and proposed that a requirement for a vertically integrated access provider to publish internal prices would result in better competition outcomes. ARTC supported the inclusion of additional capacity information.

3.5 Discussion

The Commission's decisions 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 a likely 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 previous Information Kit provides for additional comprehensive information – thereby achieving the effect of a broader interpretation. The Commission has decided to continue this practice, with some modifications.

The Commission considered ARG's suggestions in respect of the updating of the Information Brochure. While annual updating has merit, it is not strictly consistent with s. 28 which requires that a compliant brochure be delivered within 30 days of request. A compliant brochure will not necessarily be the same as one prepared months earlier, although it is not expected that significant changes would be required.

The Commission intends to liaise with ARG in respect of updating its existing Information Brochure to meet the new requirements as a starting point, and will also consider a process of annual renewal. However, this would not relieve an Operator of the obligation to maintain its Information Brochure on an ongoing basis.

3.5.1 Non-price information

On the technical side, the Commission has identified some additional, capacity-related information that it has decided is reasonable to include in the Information Brochure. 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.

However, the Commission also considered ARG's comments in this area, and agrees that some of the information sought may not be ideally placed in the

Information Brochure. In particular, the Commission agrees that the requirement to identify track and other infrastructure improvements over the next twelve months, and to identify users and their frequency over the next twelve months, is better left to s. 29 (which specifies that an Operator must provide more detailed information about access on the request of a person with a proper interest). Therefore, the Commission has modified these provisions to require a more generic response, removing the twelve month window and focusing only on major improvements foreshadowed. An intending access seeker will still have full right to seek such information under s. 29.

3.5.2 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 (though, as ARTC recognises, they are not strictly the same).

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

3.5.3 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 has decided 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.[16]

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 Final 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 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.

3.5.4 Form

The Commission has decided 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 has decided 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.

3.5.5 Charges for information

The Commission has 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 has decided to establish principles that 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.

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[16] 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).

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 Final 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.[17]

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 Final Decision

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

3.6.1 Non-price information

The Commission is retaining the bulk of 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.

The track and other infrastructure improvement requirement is modified to:

- major track and other relevant infrastructure improvement or upgrade plans, together with any track closures or limitations to availability expected;

The "existing use" requirement is removed, being replaced by the additions above.

3.6.2 Price information

The Commission is retaining 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 can offer and which are subject to the Access Regime.

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

- 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 Previous arrangements

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

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

4.3 Draft Decision

The Commission proposed to modify its reporting requirements as follows:

- retention of reporting of corporate information;
- replacing the previous cost and operational reporting requirements with reports showing compliance with the account and record keeping requirements in s. 22; and
- changing to annual reporting cycles and requiring Director level assurance.

4.4 Submissions to the Draft Decision

ARG queried the cost implications of reporting requirements, particularly if accounts and records have to be kept to detailed levels. It also sought time to make the necessary accounting system changes.

PN suggested that requiring more reporting should improve transparency and allow for the avoidance of arbitrations.

ARTC submitted that the Commission's proposals were a relaxation of existing requirements. It suggested that the Commission pursue increased transparency and argued that the proposed approach was not as likely to constrain anti-competitive conduct.

4.5 Discussion

The previous reporting obligations were relatively simple, and imposed low compliance costs on Operators. However, the purpose served by the previous reporting was 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 therefore began 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 has also decided 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 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 was already collected in section 6.7 of the previous *Information Kit*, and which the Commission has decided 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 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). The Commission flags now 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 has decided 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 has also decided 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 has decided 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 must 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.

The Commission will liaise further with Operators about reaching compliance with this reporting obligation, though noting that the obligation to keep records and accounts is not new – it has existed since 1997 – and noting that the first reports may not be required for some time (e.g. end of October 2006 for an Operator working to a 1 July 2005 – 30 June 2006 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 now has a compliance role and therefore s. 23 compliance also arises. It was raised as a significant issue in the submissions.

The Commission agrees with the sentiments of ARTC and PN in particular 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 would 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 has decided to 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.

Section 23 would be a primary candidate for such action given the serious effect that breaches would have on the effectiveness of the Access Regime. The Commission takes additional comfort in adopting this approach in so far as some potential access seekers should be well placed to detect possible breaches of s. 23 as they are access providers in other jurisdictions and therefore will have considerable experience in developing and assessing reasonable track access charges.

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 Final Decision

The Commission has decided 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. The Commission also notes its expectation that an Operator should be able to respond to more specific information requests (relating to a specific access request or dispute) within a reasonable timeframe.

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 must 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

Effective 1 July 2005, 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).*

The amended s. 9(2) does not affect an Operator's legislative obligations – these were already set in the ROA Act. The amendment only specifies that the Commission has the function of monitoring and enforcing compliance with those existing obligations.

5.2 Previous arrangements

As this is a new function, there were no previous arrangements. However, in April 2005 the Commission published a compliance guideline in respect of its role as regulator under the AustralAsia Railway (Third Party Access) Code.[18]

5.3 Draft Decision

In the Draft Decision the Commission proposed that it apply the same compliance system and reporting obligations to this Access Regime as it applies through the guideline referred to above in respect of the AustralAsia Railway (Third Party Access) Code.

5.4 Submissions to the Draft Decision

Both PN and ARG commented on compliance, although largely in respect of the regulatory accounting requirements discussed in the previous chapter. As it did in its submission to the Issues Paper, ARG again noted the resources that any upgraded compliance system would require.

ARTC queried the proposed compliance system, arguing that it, combined with the proposed regulatory reporting requirements, would not provide "an appropriate degree of transparency in the marketplace" (ARTC, 2nd sub, p.9). It also noted that the proposed approach appeared "to be significantly lighter handed than that applied in other vertically integrated jurisdictions" (ARTC, 2nd sub, p.8).

5.5 Discussion

The primary concern for the Commission is 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 for the AustralAsia Railway (Third Party Access) Code.

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[18] 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 approach used for 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.

In practice, the Commission would adopt a risk-based approach to determining when and where to conduct such audits and investigations – considering the likelihood of non-compliance, the effect of non-compliance and the likely effectiveness of an audit or investigation in identifying a non-compliance.

The Commission's AustralAsia 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.

The Commission's focus in this approach 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 is not sufficient. Separate arrangements have been established in such cases (e.g. s. 22 compliance).

5.6 Final Decision

The Commission has decided to apply the compliance systems and reporting approach it uses for the AustralAsia Railway (Third Party Access) Code into this Access Regime, with appropriate modifications.

The new and now current Information Kit (version 2.1) contains the compliance requirements.

The Commission acknowledges the concerns raised by ARTC. In response to this the Commission notes that it still retains the power to conduct audits and investigations of particular matters should concerns arise (e.g. through customer complaints or an Operator's own reporting of breaches). Indeed, the Commission's experience in its application of this type of compliance model to other regulated industries is that it enables a more focussed and effective use of such investigative efforts.

The Commission also notes that the compliance reporting system does not replace the Commission's enforcement functions and powers under the ROA Act.

6 THE *INFORMATION KIT*

The *Information Kit* is the Commission's principal regulatory publication in relation to the Access Regime. It is a combination of what the Commission might otherwise publish separately as an Information Paper and Guidelines. As the Commission explained in the Issues Paper, it is continuing 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 new and now current *Information Kit* (version 2.1), accompanies this Final Decision. It incorporates the changes flowing from the review and includes the new procedural information referred to above in its Appendix B. The new *Information Kit* replaces the previous one, dated May 2004.