Application to the National Competition Council for a Recommendation on the Effectiveness of the AustralAsia Railway (Third Party Access) Code

Trade Practices Act 1974
Section 44M(2)

In accordance with Regulation 6B
Trade Practices Regulations

Northern Territory and South Australian Governments
8 March 1999

DEFINED EXPRESSIONS

Access Code	Means the AustralAsia Railway (Third Party Access) Code that will become law in the Northern Territory and South Australia following the passing and commencement of the Bill.
Access Holder	Means a person who has a right of access to Railway Infrastructure Services.
Access Provider	Means the person who provides or is in a position to provide access to Railway Infrastructure Services.
Access Seeker	Means a person who wants access to Railway Infrastructure Services or wants to vary an access contract in a significant way or to a significant extent.
Arbitrator	Means the arbitrator appointed under clause 15 of the Access Code.
Bill	Means the AustralAsia Railway (Third Party Access) Bill 1999 (NT) and the AustralAsia Railway (Third Party Access) Bill 1999 (SA).
Concession Period	Means the period beginning on the date on which financial close is achieved and ending on a date to be agreed between the Corporation and the successful consortium. It is expected that the Concession Period will be in the order of 50 years.
Construction Period	Means the period beginning on the first day of the Concession Period and ending on the date of completion of construction of the New Railway.
Corporation	Means the AustralAsia Railway Corporation, a special purpose statutory corporation established by the Governments of the Northern Territory and South Australia to facilitate the implementation of the Project.
CIPR	Means the Competitive Imputation Pricing Rule.
CPA	Means the Competition Principles Agreement.
Existing Railway	Means the existing railway between Tarcoola and Alice Springs.
NCC	Means the National Competition Council.
New Railway	Means the new railway to be constructed between Alice Springs and the new deepwater port at East Arm, Darwin.

Operation Period

Means the period commencing on the date of completion of construction of the New Railway and ending on the last day of the Concession Period.

Project

Means the project known as the AustralAsia Railway Project, comprising the following components:

- financing, designing and constructing the New Railway between Alice Springs and the new deep water port at East Arm, Darwin and integrating the New Railway with the new port and the national rail network;
- operating, maintaining and repairing the Existing Railway between Tarcoola and Alice Springs during the Construction Period;
- operating, maintaining and repairing the entire Railway between Tarcoola and Darwin during the Operation Period; and
- transferring the Railway back to the Corporation at the end of the Concession Period.

Railway

Means collectively each of the Existing Railway and the New Railway.

Railway Infrastructure Facilities

Means the facilities necessary for the operation or use of the Railway, including:

- the Railway track;
- stations and platforms;
- the signalling systems, train control systems and communication systems;
- such other facilities as may be prescribed,

but not including:

- rolling stock; or
- such other facilities as may be prescribed.

Railway Infrastructure Service

Means the service of providing, or providing and operating, Railway Infrastructure Facilities necessary for the operation and use of the Railway by a person for the purpose of the person providing a service of carrying passengers or freight.

Regulator	means the authority, officer or person to whom the functions of the regulator under the Access Code are assigned under clause 5 of the Access Code.
TPA	Means the Trade Practices Act 1974 (Cth).
$	Means Australian dollars.

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1 APPLICATION AND PRESCRIBED INFORMATION

1.1 Application

This Application is made under section 44M(2) of the Trade Practices Act 1974 (Cth) and the following supporting information is submitted for the National Competition Council's consideration in accordance with Regulation 6B of the Trade Practices Regulations. It seeks a recommendation from the National Competition Council to the Commonwealth Treasurer that the AustralAsia Railway (Third Party Access) Code is an effective access regime in relation to the service of providing, or providing and operating, Railway Infrastructure Facilities necessary for the operation and use of the Railway by a person for the purpose of the person providing a service of carrying passengers or freight.

1.2 Applicant State and Territory

This Application is made jointly by the Northern Territory and State of South Australia.

1.3 Responsible Ministers

The Responsible Ministers concerning this Application are:

Northern Territory	**South Australia**
The Hon. Denis G. Burke, MLA Chief Minister of the Northern Territory	The Hon. John W. Olsen, MP Premier of South Australia
.....	.....
Hon. Denis G. Burke, MLA	Hon. John W. Olsen, MP

1.4 Contact Officers

Contact Officers concerning this Application are:

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1.5 Addresses of Responsible Ministers

The Responsible Ministers' addresses for the delivery of documents, including the notification of any decision of Commonwealth Treasurer or the NCC, relating to this Application or the recommendation are:

Northern Territory

The Hon. Denis G. Burke, MLA
Chief Minister of the Northern Territory
Parliament House
DARWIN NT 0800

South Australia

The Hon. John W. Olsen, MP
Premier of South Australia
Parliament House
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1.6 Description of access regime

As required under Regulation 6B(e), this Application includes a description of the access regime established by the Northern Territory and the State of South Australia (see section 3 of this Application) including a copy of the relevant legislation (see **Annexure 1** and **Annexure 2**).

1.7 Description of the services

As required under Regulation 6B(f), this Application includes a description of the services covered by the access regime (see section 3.3 of this Application).

1.8 Grounds in support of Application

As required under Regulation 6B(g), this Application includes argument in support of the Application (see section 4 of this Application).

2 BACKGROUND

2.1 AustralAsia Railway Project

The Governments of the Northern Territory and South Australia have sought detailed underwritten submissions from the private sector in relation to the design, construction, financing, operation and maintenance of a New Railway linking the Existing Railway between Tarcoola and Alice Springs with the new deepwater port presently under construction at East Arm, Darwin. This project, known as the AustralAsia Railway Project, is being co-ordinated on behalf of the Governments of the Northern Territory and South Australia by a special purpose statutory corporation, the AustralAsia Railway Corporation.

The Project is to be structured as a build, own, operate and transfer (BOOT) scheme. The successful consortium will be responsible for:

- financing, designing and constructing the New Railway between Alice Springs and the new port at Darwin; and

- operating, maintaining and repairing the entire Railway between Tarcoola and Darwin.

At the end of the Concession Period, which is currently expected to be in the order of 50 years, the successful consortium will be required to return the Railway to the Corporation, who will, in turn, be required to return the Existing Railway to its current owner, the Australian Rail Track Corporation.

During the Concession Period, the successful consortium will be required to bear all major project risk, including demand risk for the Railway.

2.2 Project Economics

The Railway will comprise the Existing Railway between Tarcoola and Alice Springs (of approximately 830 kms) and the New Railway to be constructed between Alice Springs and Darwin (of approximately 1415 kms). The cost of constructing the New Railway between Alice Springs and Darwin has previously been estimated by BHP Engineering at approximately $1 billion. Additional investment will also be required for terminals and rolling stock at a cost of at least $100 million. The cost of replacing the Existing Railway between Tarcoola and Alice Springs is estimated in the order of $500 million.

When completed, the Railway will provide an integrated link between the new deepwater port at East Arm, Darwin and the balance of the national rail network. This will enable the rail facility to be used for "land bridging" of freight to and from overseas markets as well as for domestic freight and passenger services.

A 1997 study by Booz Allen & Hamilton estimated the base domestic freight task in 1996 at 1.26 million tonnes and 2.6 billion net tonne kilometres. The freight task was estimated to grow at 4% per annum until 2005 and at 3% per annum thereafter.

There are significant benefits to the Northern Territory, South Australian and national economies from the Project proceeding. A 1995 Study by Symonds Travers Morgan showed that based on the base domestic freight task alone, the ratio of economic benefits to costs arising from the Project was 1.27.

Despite these economy wide benefits, the internal financial returns to the Project have, to date, been insufficient to enable the private sector to undertake the Project. In recognition of the fact that many of the benefits of the Project will be external to the Project developer, the Governments of the Northern Territory, South Australia and the Commonwealth have each committed $100 million in financial contributions to enable the private sector to undertake the Project on a BOOT basis.

While the Government financial contributions improve the financial fundamentals, the AustralAsia Railway Project is a greenfields project which carries significant risks for its private sector developers. As noted in the attached discussion paper by Professor Rodney Maddock and Dr Stephen King (see **Annexure 3**), one key difficulty with investments in new, greenfields Projects is that the flow of revenues that might result is difficult to estimate.

Given this risk, and the nature of financial returns to the AustralAsia Railway Project, the Governments of the Northern Territory and South Australia consider that the Access Code provides certainty on access arrangements and thus enhances the probability of the Project proceeding (and so increases inter-modal competition in the corridor) while conforming to the requirements for an effective access regime set out in clause 6 of the Competition Principles Agreement.

3 OVERVIEW OF ACCESS CODE

3.1 Introduction

The Access Code is embodied in a Schedule to the AustralAsia Railway (Third Party Access) Bill (NT) 1999 (**Annexure 1**) and in mirror legislation of the same name in South Australia (**Annexure 2**). When the legislation comes into operation, the Access Code will apply as a law of both the Northern Territory and South Australia.

The legislation was introduced in the Legislative Assembly in the Northern Territory in February 1999 and will be introduced in the Parliament of South Australia in March 1999. It is envisaged that the legislation will be passed in both jurisdictions by mid 1999.

The Access Code will apply to so much of the Railway that has been constructed between Tarcoola and Darwin to the extent that is prescribed by the Northern Territory Minister and the South Australian Minister jointly by notice in the Gazette.

The legislation can be proclaimed to come into operation on a date to be decided. The Access Code will have no application to the Railway until this time. It is envisaged that the Access Code will apply to the Existing Railway from 1 July 2003 and to the New Railway progressively as it is constructed and becomes operational.

3.2 AustralAsia Railway (Third Party Access) Bill 1999

The body of each AustralAsia Railway (Third Party Access) Bill 1999 is quite short. The key provisions are:

- section 3, which applies the Access Code as a law of the Territory and of South Australia;
- section 4, which provides that the Crown will be bound by the Bill and the Access Code; and
- section 5, which makes it clear that the Commercial Arbitration Act does not apply to an arbitration under the Access Code.

The Access Code, which is attached as a Schedule to each Bill, contains the following main components:

- Part 1, Division 2 sets out the powers and functions of the Regulator;
- Part 2, Division 1 establishes the Access Seeker's right to negotiate an access proposal with the Access Provider;
- Part 2, Divisions 2 and 3 establish a procedure for the referral of access disputes to conciliation (if the parties agree) or arbitration (if the parties do not agree to conciliation or the conciliation fails to resolve

the dispute);

- Part 2, Division 4 sets out the matters which the Arbitrator must take into account and the parameters and restrictions on the award the Arbitrator may make;

- Part 2, Division 5 establishes the pricing principles by which access charges are to be calculated;

- Part 2, Division 6 establishes the procedures for arbitrating access disputes;

- Part 2, Division 7 sets out the effect of awards made by the Arbitrator;

- Part 2, Division 8 sets out the powers of the Regulator to either vary or revoke an award or refer disputes as to proposed variations to arbitration;

- Part 2, Division 9 establishes the right to appeal to the Supreme Court on questions of law;

- Part 3 prohibits persons from preventing or hindering access to a Railway Infrastructure Service;

- Part 4 contains provisions relating to the Regulator's ability to obtain information and documents, and the Regulator's duty to report to the relevant Northern Territory and South Australian Ministers;

- Part 5 addresses the enforcement of awards made by the Arbitrator under the Access Code and gives the Supreme Court power to make various orders including the grant of a mandatory or restraining injunction or the payment of compensation;

- Part 6 deals with various miscellaneous matters including the segregation of the Access Provider's accounts and records, the Regulator's ability to remove or replace an Arbitrator, amendments to the Code and the ability of the Northern Territory and South Australian Ministers to jointly prescribe matters for the purposes of the Access Code.

3.3 Services covered by the Access Code

The Northern Territory and South Australia request the NCC to recommend that the Commonwealth Treasurer decide that the Access Code is an "effective" access regime under Part IIIA of the TPA in relation to the service by a person (an **"Access Provider"**) of providing, or providing and operating, Railway Infrastructure Facilities (**"Railway Infrastructure Services"**) for the purpose of another person (the **"Access Seeker"**) providing a service of carrying passengers or freight by means of the Railway.

3.4 Rationale for Pricing under the Access Code

Currently, transport to the region north of Alice Springs is provided by road and sea. Construction of the Railway will create additional competition for transport services in the region. In partnership with road and sea, competition for transport services in such important areas as the Carpentaria mineral region, the Timor Sea energy region and the Ord River region will be enhanced. The Railway's links with the port of Darwin will also create an additional channel for international cargo distribution in Australia.

In recognition of the significance of the Project to the economic development of the region, the 3 Governments have agreed to provide financial contributions totalling $300 million to the Project. The remainder of the Project construction cost is to be met by the private sector, most likely using non-recourse Project finance, with Project debt secured only by the cash flows from the Project. Revenue, demand and operational risk will be borne entirely by the successful consortium and its underwriters.

Taking into account the specific nature of the Project, the Northern Territory and South Australian Government's have adopted an access pricing approach based on the Competitive Imputation Pricing Rule (CIPR). Under CIPR access prices are market based and set at a level where the Railway owner earns the same net income from the transport of freight on the Railway whether or not the freight is transported by the Railway owner's own "above rail" services or those of a third party.

In selecting this pricing approach, the Governments acknowledge that the access regime does not support competition for competition's sake. There will only be incentive for third party competition if the new entrant can operate more efficiently than the Railway owner and/or can access new markets that the Railway owner cannot, i.e. the third party entrant can *bring value* to the rail transport markets in the region. The Access Code does not facilitate competitive situations which merely transfer value away from those taking the initial risks by constructing the Railway or indeed facilitate competitive situations which destroy value by allowing new entrants to "cherrypick" markets of the Railway owner.

The pricing approach has been designed to protect the cash flow stream which underpins the original investment in the Railway while adhering to the principles of the CPA, thereby satisfying the requirements of the Project financiers within the present regulatory framework.

4 GROUNDS IN SUPPORT OF THE APPLICATION

4.1 Introduction - Consistency with CPA

This section addresses the consistency of the Access Code with each of the principles in clause 6 of the CPA which are relevant to an assessment of the "effectiveness" of an access regime under Part IIIA of the TPA. It is submitted that the Access Code should be certified as effective because it:

- complies with clauses 6(2) and 6(3) of the CPA; and
- incorporates the principles set out in clause 6(4) of the CPA.

In this regard it is noted that section 44DA of the TPA requires the NCC to treat each relevant principle of the CPA as having the status of a guideline rather than a binding rule.

Each of these matters is discussed below.

4.2 Clause 6(2) of the CPA

> *The regime to be established by Commonwealth legislation is not intended to cover a service provided by means of a facility where the State or Territory Party in whose jurisdiction the facility is situated has in place an access regime which covers the facility and conforms to the principles set out in this clause unless:*
>
> *(a) the Council determines that the regime is ineffective having regard to the influence of the facility beyond the jurisdictional boundary of the State or Territory; or*
>
> *(b) substantial difficulties arise from the facility being situated in more than one jurisdiction.*

The Railway is situated in both South Australia and the Northern Territory, and the Access Code will apply equally to Railway Infrastructure Services provided by means of the Railway in both jurisdictions. The Access Code only applies to Railway Infrastructure Services provided by means of the Railway, it does not apply to services provided by means of any other railway within the Northern Territory, South Australia or elsewhere. Importantly, the Access Code adopts a single set of rules for regulating access arrangements regardless of whether the services are provided in one or other or both jurisdictions - for instance the Ministers will jointly appoint one Regulator so the Access Provider, Access Seekers and Access Holders will have one point of statutory contact for both jurisdictions.

Users of the Railway will need to enter into appropriate access arrangements with the owners/operators of other relevant sections of the interstate railway network in Australia to the extent that they interconnect with the Railway at Tarcoola. The need to negotiate those arrangements will apply equally to the owner/operator of the Railway and to third party access seekers who obtain a right to use the Railway.

At present, the main body responsible for providing access to the interstate railway networks that interconnect at Tarcoola is Australian Rail Track Corporation Limited (**"ARTC"**).

In the circumstances (of a single access regime applying to the Railway north of Tarcoola and that whatever access arrangements and interfacing arrangements are required south of Tarcoola will apply equally to all Railway users) no substantial difficulties should arise from the proposed access regime and the fact that the Railway is situated in more than one jurisdiction.

4.3 Clause 6(3) of the CPA

> *For a State or Territory access regime to conform to the principle set out in this clause, it should:*
>
> *(a) apply to services provided by means of significant infrastructure facilities where:*
>
> *(i) it would not be economically feasible to duplicate the facility;*
>
> *(ii) access to the facility is necessary in order to permit effective competition in a downstream or upstream market; and*
>
> *(iii) the safe use of the facility by the person seeking access can be ensured at an economically feasible cost and, if there is a safety requirement, appropriate regulatory arrangements exist; and*
>
> *(b) incorporate the principles referred to in subclause (4).*

The service to which the Access Code applies is the service of providing, or providing and operating, Railway Infrastructure Facilities necessary for the operation and use of the Railway by a person for the purpose of the person providing a service of carrying passengers or freight by means of the Railway.

(a) Significant infrastructure facility

The Railway will comprise the Existing Railway between Tarcoola and Alice Springs (of approximately 830 kms) and the New Railway to be constructed between Alice Springs and Darwin (of approximately 1415 kms) . As indicated earlier, the cost of constructing the New Railway between Alice Springs and Darwin has been estimated at approximately $1 billion. The cost of replacing the Existing Railway between Tarcoola and Alice Springs is estimated to be in the order of $500 million.

The entire Railway once completed will for the first time provide a rail link between the new deepwater port at East Arm, Darwin and the balance of the national rail network. A previous study undertaken by Booz Allen & Hamilton for the Corporation estimated the 1996 base domestic freight task of 1.26 million tonnes of freight with annual growth rates of 4% until 2005 and 3% thereafter.[1]

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[1] The NCC has previously considered that rail track and associated infrastructure was of national significance (see for example *Re Specialised Container Transport (1997) ATPR 70-004* at *70, 355*, *Re NSW Minerals Council Limited (1997) ATPR 70-005* at *70, 404* and *Re Specialised Container Transport No. 2 (1997) ATPR 70-006* at *70,446* and *70,447*.

(b) Economic feasibility of duplicating the Railway

It will generally not be economically feasible to duplicate an infrastructure facility where a single infrastructure facility can meet market demand at less cost than two or more facilities.

Given the significant capital costs which would be incurred in constructing a second railway between Tarcoola and Darwin, and the freight revenues which the Tarcoola to Darwin corridor is expected to generate, this suggests it would not be economically feasible to duplicate the Railway.[2]

(c)Effective competition

The issue is whether access to the Railway Infrastructure Services is necessary in order to permit effective competition in at least one identifiable downstream or upstream market (ie: a market other than the market which incorporates the Railway Infrastructure Services themselves). The question of what constitutes the market for the service and what goods or services might therefore be in a different (upstream or downstream) markets is a threshold issue.

The boundaries of a market can normally be defined by the degree of substitutability between different goods and services (ie: within the bounds of a market there is the strong possibility of substitution between one source of supply and another given a sufficient price/product/service incentive). It is recognised, however, that within a single market, submarkets will often exist where substitution possibilities are more intense or more immediate.

As noted in section 3 above, the services covered by the access regime are the Railway Infrastructure Services, being the service of providing, or providing and operating, Railway Infrastructure Facilities necessary for the purpose of another person providing a service of carrying passengers or freight by means of the Railway. Access to railway track and associated facilities are obviously inputs into freight and passenger transport services (that is, the modal transport component of passenger transportation or freight forwarding services, depending upon the purpose for which access is sought, namely passengers or freight). The NCC has previously recognised that this does not mean that access to rail track and associated facilities is in the same product market as passenger transport services or freight transport services.[3] In the case of access to railway track for the purpose of transporting freight, the relevant customer will usually be

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2 The NCC has previously considered whether it would uneconomical for anyone to develop alternative facilities in the context of Part IIIA. The NCC has previously decided that it would be uneconomical to duplicate rail lines between Sydney and Broken Hill, in the Hunter Valley and the Kalgoorlie - Perth rail line (see the cases referred to in footnote 1).

3 See *Re Specialised Container Transport (1997) ATPR 70-004* at *70,343.*

required to provide their own rolling stock and organise the necessary accreditation to become a rail operator as well as all the logistical aspects of moving freight. The same applies to passenger services. The NCC has accordingly previously considered that access to rail track and freight transport are in different product markets, and access to rail track is not substitutable for freight transport services.[4]

It is submitted, however, that the question of market definition is dependant upon the purpose for which the access seeker requires access to the relevant Railway Facilities. The relevant market which incorporates the provision of the Railway Infrastructure Services could, depending upon the proposed usage of the Railway, cover at least the *rail* (linehaul) transport market[5] but possibly the transport market more broadly (eg: the market for the (linehaul) transport of freight and passengers in the region).

In some cases, the boundaries of the market may extend across functional (modal) boundaries to include transport of freight or passengers by either road or rail. For general containerised freight, road and rail transport are close substitutes with relatively low switching costs between operators and modes. This is evidenced by the strong rivalry and intense competition between interstate rail operators and road transport operators. In other cases, the boundaries of the market of the service may not extend across function (modal) boundaries and therefore the market will be restricted to transport of freight by the rail mode (ie: for the transportation of some freight products the substitution possibilities which define a market do not extend across modes). Examples might include the transport of certain types of freight where rail has such a clear technical superiority that the possibility of substitution by road transport is not strong.[6]

The relevant market which incorporates the market for the service will accordingly vary depending on the type of access sought and the purpose for which such access is sought - in some cases, the market will be the market for *rail* (linehaul) transport services, however, in other cases, because of the strong substitution possibilities between modes, the relevant market will be the broader market for (linehaul) transport services and possibly for transport services generally.

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4 Presumably access to rail infrastructure would also not be substitutable for rail passenger services.

5 A (linehaul) transport service is taken to be the consolidated movement of freight or passengers from a major origin to a major destination in or near the Railway corridor, but excludes other aspects of the door-to-door freight transport service such as logistics management, warehousing and local distribution.

6 It may be that for some freight products, such as bulk minerals, transportation by rail over a long haul distance will not have a close substitute from other transport modes.

A market characterised by effective competition can be taken to be one where prices are flexible, reflecting the forces of demand and supply, and where there is independent rivalry in all dimensions of the price-product-service packages offered to consumers and customers.[7] The issue then is whether access to Rail Infrastructure Services is necessary for these characteristics to exist in at least one upstream or downstream market.

Whether access is necessary to permit effective competition in an identifiable upstream or downstream market is more difficult to establish when access relates to the broader definition of the market (ie: the transport market generally), such as access for the purpose of transporting general containerised freight products. The market for such freight services in the Railway corridor is already highly competitive. Indeed road transport currently has 100% of the market north of Alice Springs. Access to the railway is therefore unlikely to be *necessary* to permit *effective competition* in an upstream or downstream market.[8]

However, for some bulk freight traffics, road (sea or air) transport may not be an effective competitor to the Railway, and therefore the market for the service will effectively be the *rail* transport market (ie: alternative transport modes are unlikely to generate the rivalry of the sort which characterises effective competition). In such cases, access to the Railway Infrastructure Services would be necessary to permit effective competition in an upstream/downstream market, namely the market for the transport of the (bulk) freight traffic from its origin to its destination. Access to the Railway Infrastructure Facilities to enable an Access Seeker to operate a freight train on the Railway route would be necessary in order to permit effective competition, because it would provide an entirely new freight train service on the route (or allow for an alternative provider of an existing freight train service), where another mode of transportation of the bulk freight product on the route may not be a viable alternative. In other words, access for third party operators would introduce rail competition for bulk freight on the route. In this instance the Railway Infrastructure Services and the transportation of the bulk freight on the Railway are both in different product markets and in different functional markets. This will be the case since access to the rail track and associated facilities and (freight or passenger) transport services are in different functional markets, because the specific assets needed for use of the rail track and associated facilities cannot be readily transferred to freight or passenger transport

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7 From *Re Queensland Co-operating Milling Association Ltd; Re Defiance Holdings Ltd (1976) 25 FLR 169*.

8 It is noted that in previous rail declaration applications dealing with access for the purposes of conducting general freight services, the NCC concluded that access would promote competition in these markets. It is unclear, however, whether the much higher test of access being necessary in order to permit effective competition would have been met.

services.

(d) Safe use

The safe use of the Railway will be ensured by the following legislation:[9]

- Northern Territory Rail Safety Act 1998 (NT) (see **Annexure 4**); and
- Rail Safety Act 1996 (SA) (see **Annexure 5**).

Both Rail Safety Acts adopt the Australian Rail Safety Standard and importantly both also contain a safety accreditation regime for railway operators and railway owners and a mechanism for mutual recognition of accreditation between jurisdictions[10]. Railway operators and railway owners are required to hold accreditation and have in place a comprehensive safety management plan that:

- identifies significant potential risks;
- specifies the systems, audits, expertise and resources to be employed to address those risks; and
- specifies the person responsible for the implementation and management of the plan.

Railway operators and railway owners must revise their safety management plans on an annual basis.

4.4 Clause 6(4) of the CPA

Clause 6(3)(b) of the CPA specifically requires that all of the principles referred to in clause 6(4) be incorporated in an access regime. It is noted in this regard, however, that such principles are no longer to be considered as binding rules, but merely applied as guidelines when assessing whether an access regime is effective.[11] The principles set out in clause 6(4) of the CPA and the extent to which they are addressed in the Access Code are discussed below:

4.4.1 *Clauses 6(4)(a)-(c) of the CPA*

A State or Territory access regime should incorporate the following principles:

9 It is noted that the NCC has previously concluded that access to rail track could be provided without undue risk to human health and safety. In the case of the Railway the legislation dealing with Rail Safety in the Northern Territory and South Australia should facilitate the safe use of the Railway by persons seeking access on a non-discriminatory basis.

10 The requirement of mutual recognition of accreditation of railway operators is also recognised in the Inter Governmental Agreement on Rail Safety, to which both the Northern Territory and South Australia are parties.

11 Section 44DA of the TPA.

(a)	*Wherever possible third party access to a service provided by means of a facility should be on the basis of terms and conditions agreed between the owner of the facility and the person seeking access.*
(b)	*Where such agreement cannot be reached, Governments should establish a right for persons to negotiate access to a service provided by means of a facility.*
(c)	*Any right to negotiate access should provide for an enforcement process.*

These 3 clauses should be considered together because they establish a framework under which actual negotiations should be handled in an effective access regime. In addition, whilst paragraph (a) indicates a preference for commercial negotiation to provide the basis for parties to arrive at access arrangements, it is supported by paragraphs (b) and (c) which require that the parties have recourse to an enforceable dispute resolution process where negotiations fail to result in agreement.

The Access Code is primarily intended to apply in circumstances where commercial negotiations between third party access seekers and the owner/operator of the Railway are not successful. In this context, it is emphasised that the access regime in no way precludes parties from negotiating commercial arrangements that suit their particular needs and circumstances.

The Access Code encourages third party access to be achieved through commercial negotiation to the maximum extent possible in accordance with clause 6(4)(a) of the CPA. This is achieved by Division 1 of Part 2 which:

- permits an Access Seeker to put a written access proposal to the Access Provider. (If the access proposal requires an addition or extension to Railway Infrastructure Facilities, the access proposal may include a proposal for that addition or extension);

- requires the Access Provider and the Access Seeker (and any Access Holder) to negotiate in good faith with a view to reaching agreement on the access proposal.

Moreover, the Access Code places no restrictions upon the ability of the parties to seek resolution of their disputes through avenues which they can agree upon (such as mediation or conciliation).

The scope for commercial negotiation is emphasised by clause 24 of the Access Code which expressly permits the Access Provider to enter into an access contract for an amount that is not in accordance with the pricing principles of Part 2, Division 5.

However, to the extent that commercial arrangements cannot be reached in relation to any aspect of access to a Railway Infrastructure Service, Part 2 of the Access Code contains a dispute resolution process which can be invoked by either party requesting that the Regulator refer an "access dispute" to arbitration. In this regard, clause 13 of the Access Code provides that an access dispute exists if:

- the Access Provider or an affected Access Holder refuses or fails to enter into good faith negotiations with the Access Seeker within 30 days;

- the Access Seeker and the Access Provider fail (within 180 days of the receipt of the access proposal) to reach agreement on the access proposal after making reasonable attempts to do so; or

- the parties agree that there is no reasonable prospect of reaching agreement.

On receiving the request, the Regulator must either:

- if the parties to the dispute agree, attempt to settle the dispute by conciliation; or

- if the parties do not agree, or they agree but the Regulator fails to settle the dispute by conciliation after having made reasonable attempts to do so, appoint an Arbitrator or Arbitrators and refer the dispute to them.

The Regulator is not obliged to attempt to settle the dispute by conciliation or refer it to arbitration if the subject matter of the dispute is trivial or lacking in substance or if the person seeking arbitration has not negotiated in good faith or if the Regulator is satisfied that there are good reasons why the dispute should not be referred to arbitration.

In making a decision, the Arbitrator must take into account the matters set out in clause 21 of the Access Code, including the pricing principles contained in Part 2, Division 5. The matters to be considered by the Arbitrator are consistent with those listed in clause 6(4)(i) of the CPA - as to which see section 4.4.7 below.

The award of the Arbitrator takes effect 21 days after the award is made, unless the Access Seeker, before that time, elects not to be bound by it. If the Access Seeker elects not to be bound by the award, the award is rescinded and the Access Seeker is precluded from making another access proposal for 2 years (unless the Regulator authorises otherwise).

The ability to vary or revoke an award is set out in clause 36 of the Access Code. In particular, the Regulator may vary or revoke an award if all the parties to the award agree. If the parties are unable to agree on a proposed variation of an award, the Regulator may refer the dispute to arbitration. However, the Regulator must not refer the dispute to arbitration if it is of the opinion that there is no sufficient reason for varying the award having regard to matters which the Regulator considers relevant, including:

- whether there has been a material change in circumstances;
- the nature of the matters in dispute; and
- the time that has elapsed since the award was last made or varied.

In addition, a party to an arbitration may appeal to the Supreme Court, on a question of law, from a decision of the Arbitrator.

The Access Code provides for the enforcement by the Supreme Court of both the Code and awards under the Code. Under Part 5 of the Access Code, the Supreme Court may, grant an injunction:

- restraining a person from contravening a provision of the Access Code or a provision of an award; or
- requiring a person to comply with a provision of the Access Code (such as the obligation to negotiate access in good faith) or a provision of an award.

The Supreme Court may also order the payment of compensation to persons who have suffered loss or damage as a result of a contravention. Further, clause 45 of the Access Code makes it clear that access contracts are specifically enforceable.

4.4.2 *Clause 6(4)(d) of the CPA*

Any right to negotiate access should include a date after which the right would lapse unless reviewed and subsequently extended; however, existing contractual rights and obligations should not be automatically revoked.

The Access Code imposes various time limits on parties involved in the negotiation of access. Relevantly, clause 10 provides that following receipt of an access proposal, the Access Provider must give notice of the proposal to various people, including people with existing rights of access (namely, Access Holders) as well as any other Access Seekers who might simultaneously be seeking access where their prospective rights under their access proposals would be affected by implementation of the access proposal under consideration.

The Access Code also imposes a duty to negotiate in good faith on various parties involved and with an interest in the access negotiations (see clause 11).

Importantly, the Access Code also imposes time limits as to when responses to access proposals must be made and when access contracts must be reached. If those deadlines are breached, then an access dispute is deemed to exist and the Access Seeker may by written notice to the Regulator request the Regulator to refer the matter in dispute to arbitration (see clauses 13 and 14). In effect, once the deadlines have passed, the Access Seeker's statutory right to negotiate access lapses and in its place the Access Seeker obtains a right to refer the matter to arbitration.

4.4.3 *Clause 6(4)(e) of the CPA*

The owner of a facility that is used to provide a service should use all reasonable endeavours to accommodate the requirements of persons seeking access.

As noted at section 4.4.1 above, clause 11 of the Access Code imposes an obligation on the Access Provider to negotiate in good faith. In particular, clause 11 expressly requires the Access Provider to endeavour to accommodate the Access Seeker's reasonable requirements in relation to access and (under clause 9) to provide any person (including an Access Seeker) with information including technical information relevant to the Access Seeker's request for access as well as information concerning the extent to which the Railway Infrastructure Facilities are being used and whether Railway Infrastructure Services are able to be provided by the Access Provider. This duty is supported by clauses 13 and 14 of the Access Code which entitle the Access Seeker to request the Regulator to refer an access dispute to arbitration if the Access Provider refuses or fails to enter into good faith negotiations with the Access Seeker within 30 days.

The dispute resolution procedures will also ensure that the Access Provider uses all reasonable endeavours to accommodate the requirements of Access Seekers.

4.4.4 *Clause 6(4)(f) of the CPA*

Access to a service or persons seeking access need not be on exactly the same terms and conditions.

The Access Code provides the flexibility for the parties to negotiate their own arrangements for access. For example, clause 24 of the Access Code explicitly provides that the pricing principles contained in Part 2, Division 5 do not prevent the Access Provider from entering into an access contract on terms that do not reflect those pricing principles.

4.4.5 *Clause 6(4)(g) of the CPA*

Where the owner and a person seeking access cannot agree on terms and conditions for access to the service, they should be required to appoint and fund an independent body to resolve the dispute, if they have not already done so.

The Access Code provides a regime that encourages parties to negotiate and reach agreement upon terms and conditions of access (see section 4.4.1 above). In the event that the relevant parties cannot agree on terms and conditions for access, a dispute resolution process is available to the parties involving potentially two bodies (a Regulator and an Arbitrator or Arbitrators). Details of the dispute resolution processes, the roles of the Regulator and of the Arbitrators and their independence of the parties to the dispute and of government are set out below.

The Access Code provides that parties are free to seek resolution of their disputes through any avenues which they can agree upon (such as mediation or conciliation), or through the dispute resolution process contained in Part 2 of the Access Code.

Under the dispute resolution process contained in the Access Code, where an access dispute exists, the Access Seeker may request that the Regulator refer the access dispute to arbitration.

On receiving the request, the Regulator must either:

- if the parties to the dispute agree, attempt to settle the dispute by conciliation; or
- if the parties do not agree, or they agree but the Regulator fails to settle the dispute by conciliation after having made reasonable attempts to do so, appoint an Arbitrator or Arbitrators and refer the dispute to them.

The Regulator is not obliged to attempt to settle the dispute by conciliation or refer it to arbitration if the subject matter of the dispute is trivial or lacking in substance or if the person seeking arbitration has not negotiated in good faith or if the Regulator is satisfied that there are good reasons why the dispute should not be referred to arbitration.

Unless the Arbitrator terminates the arbitration under clause 22 of the Access Code, the Arbitrator must make a written award on access to the Service by the Access Seeker.

In making an award, the Arbitrator must take into account the matters listed in clause 21 of the Access Code. As discussed at section 4.4.7 below, the matters to be considered by the Arbitrator are consistent with those listed in clause 6(4)(i) of the CPA.

Before making an award, the Arbitrator must give a draft award to the parties and may take into account representations that any of them may make on the proposed award. When the Arbitrator makes an award, the Arbitrator must give the parties and the Regulator the Arbitrator's reasons for making the award.

The procedures to be followed when conducting an arbitration are contained in Division 6 of Part 2 of the Access Code. In summary:

- arbitrations are to be conducted in private, unless the parties otherwise agree;
- the parties to the arbitration may appear in person or may be represented by others;
- the Arbitrator:
  - is not bound by technicalities, legal forms or rules of evidence;
  - must act as speedily as a proper consideration of a dispute allows; and
  - may inform him or herself of any matter relevant to the dispute in any way the Arbitrator thinks appropriate.

In relation to the independence of the Regulator, clause 5 of the Access Code acknowledges that the Regulator is subject to the control and direction of the two Ministers, however, no Ministerial direction can be given in relation to the Regulator's functions relating to dispute resolution. As regards the independence of the Arbitrator, clause 16 of the Access Code expressly provides that an Arbitrator:

- must be independent of the parties to the dispute;
- must not be subject to the control or direction of the South Australian or Northern Territory Governments; and
- must not have any direct or indirect interest in the outcome of the dispute.

In relation to who bears the cost of arbitration, clause 34 of the Access Code states that the costs of an Arbitrator are to be borne by the parties in equal proportions, unless the Arbitrator decides otherwise. However, if the Access Seeker terminates an arbitration or elects not to be bound by an award, the Arbitrator's costs are to be borne by the Access Seeker alone.

4.4.6 *Clause 6(4)(h) of the CPA*

The decisions of a dispute resolution body should bind the parties; however, rights of appeal under existing legislative provisions should be preserved.

Under clause 35(2) of the Access Code, the award of the Arbitrator takes effect 21 days after it is made, unless the Access Seeker, before that time, elects not to be bound by it.

An Access Seeker may elect not to be bound by the award by giving written notice to that effect to the Regulator within 7 days after the making of the award (or such further time as the Regulator might allow). If the Access Seeker elects not to be bound by the award, the award is rescinded and the Access Seeker is precluded from making another access proposal for 2 years (unless the Regulator authorises otherwise).

The power to vary or revoke an award is addressed in Part 2, Division 8. In particular, the Regulator may vary or revoke an award if the parties to the award agree. If the parties are unable to agree on a proposed variation of an award, the Regulator may refer the dispute to arbitration. The Regulator must not, however, refer the dispute to arbitration if it is of the opinion that there is no sufficient reason for varying the award. In deciding whether to refer a dispute to arbitration, the Regulator must have regard to all matters the Regulator considers relevant, including:

- whether there has been a material change in circumstances;
- the nature of the matters in dispute; and
- the time that has elapsed since the award was made or last varied.

The provisions of Part 2 relating to the arbitration of disputes arising from an access proposal apply, with the necessary modifications, to a dispute about a proposed variation of an award.

The decisions of the Arbitrator are enforceable under Part 5 of the Access Code. The Regulator or any interested party may bring proceedings seeking compliance with a provision of either the Access Code or an award of an Arbitrator in the Supreme Court of the Northern Territory or the Supreme Court of South Australia. The Supreme Court may:

- grant an injunction restraining the relevant person from contravening the Access Code or an award (as the case may be) or requiring the relevant person to comply with the Access Code or an award (as the case may be).
- make an order requiring the payment of compensation to persons who have suffered loss or damage as a result of the contravention.

In addition, where a person fails to comply with an order, direction or requirement of an Arbitrator, the Arbitrator may certify the failure to the Court who may inquire into the case and make such orders as may be appropriate in the circumstances.

Clause 37 of the Access Code also provides a further right of appeal to the Supreme Court from an award or a decision not to make an award, on a question of law. On an appeal, the Supreme Court may:

- vary or revoke the award or decision;
- make an award or decision that should have been made in the first instance;
- remit the matter to the Arbitrator for the further consideration; and/or
- make incidental or ancillary orders, including orders for costs.

An appeal to the Supreme Court does not suspend the operation of an award, unless the Supreme Court decides otherwise.

4.4.7 *Clause 6(4)(i) of the CPA*

In deciding on the terms and conditions for access, the dispute resolution body should take into account:

(i)	*the owner's legitimate business interest and investment in the facility;*
(ii)	*the costs to the owner of providing access, including any costs of extending the facility but not costs associated with losses arising from increased competition in upstream or downstream markets;*
(iii)	*the economic value to the owner of any additional investment that the person seeking access or the owner has agreed to undertake;*
(iv)	*the interest of all persons holding contracts for the use of the facility;*
(v)	*firm and binding contractual obligations of the owner or other persons (or both) already using the facility;*
(vi)	*the operational and technical requirements necessary for the safe and reliable operation of the facility;*
(vii)	*the economically efficient operation of the facility; and*
(viii)	*the benefit to the public from having competitive markets.*

The matters the dispute resolution body (namely, the Arbitrator) should take into account are central to the effectiveness of the access regime.

All elements of clause 6(4)(i) of the CPA are contained in clause 21 of the Code as matters that the Arbitrator is obliged to take into account when making a decision about an access dispute. In particular, clause 21 requires the Arbitrator to apply the pricing principles set out in the Schedule to the Code (which principles incorporate competitive imputation pricing).

Annexure 3 to this Application contains an advice from Dr Stephen King and Professor Rodney Maddock on the effectiveness of Competitive Imputation Pricing in meeting the requirements of clause 6(4)(i) of the CPA in terms of the AustralAsia Railway Project.

The King/Maddock advice on the competitive imputation approach includes the following conclusions:

- the "underlying concept... is that access prices are capped by prices set by competing transport modes.... In this sense the rule imitates the normal working of a competitive market....";

- in relation to losses arising from increased competition from upstream and downstream markets, "... CIPR... only compensates the rail owner for the legitimate costs of investment including the ex-ante risk of investment";

- in relation to more efficient above-rail access seekers, "... CIPR explicitly does not allow the rail owner to seize any of the benefits of this improved efficiency", and later, "The market should be characterised by efficient operation"; and

- "... [CIPR] increases the likelihood that the Project will actually go ahead. The public interest would be better served by the railway being constructed than the opposite."

4.4.8 *Clause 6(4)(j) of the CPA*

The owner may be required to extend, or to permit extension of, the facility that is used to provide a service if necessary but this would be subject to:

(i) *such extension being technically and economically feasible and consistent with the safe and reliable operation of the facility;*

(ii) *the owner's legitimate business interests in the facility being protected; and*

(iii) *the terms of access for the third party taking into account the cost borne by the parties for the extension and economic benefits to the parties arising from the extension.*

Clause 19(2) of the Access Code permits an award to deal with any matter relating to access to the Railway Infrastructure Service. In particular, clause 19(2)(d) specifically acknowledges that an award may require the Access Provider to extend the Railway Infrastructure Facilities so long as the effect of the award would not be to require the Access Provider to bear any of the cost of any addition or extension to the Railway Infrastructure Facilities, unless the Access Provider agrees (see clause 20(1) of the Access Code).

4.4.9 ***Clause 6(4)(k) of the CPA***

> *If there has been a material change in circumstances, the parties should be able to apply for a revocation or modification of the access arrangement which was made at the conclusion of the dispute resolution process.*

As noted at section 4.4.6 above, Part 2 Division 8 of the Access Code sets out a regime for the variation or revocation of an award of an Arbitrator.

In particular, the Regulator may vary or revoke an award if all the parties to the award agree. If the parties are unable to agree on a proposed variation of an award, the Regulator may refer the dispute to arbitration. The Regulator must not, however, refer the dispute to arbitration if it is of the opinion that there is no sufficient reason for varying the award. In deciding whether to refer a dispute to arbitration, the Regulator must have regard to such matters as the Regulator considers relevant, including:

- whether there has been a material change in circumstances;
- the nature of the matters in dispute; and
- the time that has elapsed since the award was made or last varied.

Further, the Access Code does not preclude parties from determining what may constitute a material change in their particular circumstances and incorporating provisions to this effect in their access contracts. In addition, where the parties cannot agree on terms in this regard, the dispute resolution process contained in Part 2 of the Access Code could be used to resolve the issues.

4.4.10 ***Clause 6(4)(l) of the CPA***

> *The dispute resolution body should only impede the existing right of a person to use a facility where the dispute resolution body has considered whether there is a case for compensation of that person and, if appropriate, determined such compensation.*

Clause 20(2) of the Access Code provides that the Arbitrator cannot make an award that would prejudice the rights of an Access Holder under an earlier access contract or award unless the Access Holder agrees, or the Arbitrator is satisfied that:

- the Access Holder's entitlement to access exceeds the entitlement that the Access Holder actually needs and there is no reasonable likelihood that the Access Holder will need to use the excess entitlement; and

- the Access Seeker's requirements cannot be satisfactorily met except by transferring the excess entitlement (or some of it) to the Access Seeker and the Access Holder will be compensated for any loss suffered as a result of the transfer.

4.4.11 ***Clause 6(4)(m) of the CPA***

The owner or user of a service shall not engage in conduct for the purpose of hindering access to that service by another person.

Clause 38 of the Access Code makes it an offence for a person to engage in conduct for the purpose of preventing or hindering access to a Railway Infrastructure Service by any person who has a right to use that service. Moreover, the Supreme Court has powers to grant injunctions and/or order compensation where a person contravenes a provision of the Access Code (see section 4.4.6 above).

4.4.12 ***Clause 6(4)(n) of the CPA***

Separate accounting arrangements should be required for the elements of a business which are covered by the access regime.

Clause 46 of the Access Code requires the Access Provider to keep accounts and records of its business consisting of the provision of Railway Infrastructure Services in relation to the Railway so as to give a true and fair view of that business as distinct from other businesses carried on by the Access Provider or any of its related bodies corporate or associates. In addition, the Access Provider must cause similar accounts and records in relation to the business of a related body corporate or associate of the Access Provider to whom a Railway Infrastructure Service is provided by the Access Provider.

In addition to the ring fencing obligations described above, Part 4 of the Access Code confers power on the Regulator to require the Access Provider to provide to it information or documents related to the provision of Railway Infrastructure Services to which the Access Code applies and any other activity in relation to the Railway engaged in by the Access Provider or its related bodies corporate or associates. The Arbitrator also has broad powers to require parties to a dispute to produce information relevant to that dispute (see

section 4.4.13 below).

4.4.13 ***Clause 6(4)(o) of the CPA***

The dispute resolution body, or relevant authority where provided for under specific legislation, should have access to financial statements and other accounting information pertaining to a service.

As described in section 4.4.12 above, Part 4 of the Access Code confers power on the Regulator to require the Access Provider to provide to it, information or documents related to the provision of Railway Infrastructure Services to which the Access Code applies and any other activity in relation to the Railway engaged in by the Access Provider or its related bodies corporate or associates.

Failure by the Access Provider to comply (without reasonable excuse) with the requirements of the Regulator in this context is an offence carrying a penalty of $100,000 and $10,000 for each day during which the offence continues.

Part 4 also contains provisions requiring the Regulator to maintain the confidentiality of confidential information obtained under Part 4. However, this confidentiality obligation does not prevent the Regulator from disclosing confidential information:

- to the relevant Northern Territory or South Australian Minister, if either directs that it is in the public interest for the Regulator to do so; or

- to the Arbitrator in the course of an arbitration.

The provisions of Part 4 also require the Regulator to report to the relevant Northern Territory and/or South Australian Minister on the costs or other aspects of the provision of Railway Infrastructure Services or on any aspect of the operation of the Access Code, when requested.

The procedural powers of the Arbitrator under the Access Code are contained in Part 2, Division 6 of the Access Code. Under Division 6, the Arbitrator is empowered to:

- inform him or herself of any matter relevant to the dispute in any way the Arbitrator thinks appropriate (clause 27(1)(c));

- require evidence or argument to be presented in writing, and may decide the matters on which it will hear oral evidence or argument (clause 27(3)); and

- summon a person to appear before the Arbitrator to give evidence and to produce documents (clause 29(2)).

Failure (without reasonable excuse) to appear as a witness before the Arbitrator or to answer questions or produce documents

constitute offences attracting a penalty of $50,000.

Division 6 of Part 2 also contains provisions dealing with the handling of confidential information. These provisions permit a party to the arbitration to request that the Arbitrator not give parts of documents containing confidential commercial information to other parties. On receiving such a request, the Arbitrator must inform the other party or parties of the request and of the general nature of the matters to which the relevant part of the document relates and ask the other party or parties whether there is any objection to the Arbitrator complying with the request. If there is an objection, the Arbitrator may, after considering the request and any objections or further submissions made in relation to the request, decide not to give the other party or parties a copy of so much of the document as contains confidential commercial information that the Arbitrator thinks should not be so given (clause 33).

4.4.14 *Clause 6(4)(p) of the CPA*

> *Where more than one State or Territory access regime applies to a service, those regimes should be consistent and, by means of vested legislation or other co-operative legislative scheme, provide for a single process or persons to seek access to the service, a single body to resolve disputes about any aspects of access and a single forum for enforcement of access arrangements.*

To incorporate the requirements of this clause (and clause 6(2) of the CPA) where a service is subject to access regimes in more than one State or Territory, those regimes should be consistent and should provide a single process, a single dispute resolution body and a single enforcement forum.

As discussed at section 4.2 above in relation to clause 6(2) of the CPA, the Access Code will apply equally to the Railway Infrastructure Services provided by means of the Railway in both South Australia and the Northern Territory and provides for a single dispute resolution process, Regulator and enforcement regime that will apply to the Railway. Moreover, the access arrangements applying to Railway users south of Tarcoola will apply equally to all such Railway users (irrespective of whether the user is the owner/operator of the Railway or a third party with access rights to the Railway).

4.5 No additional matters that are inconsistent with the CPA

Section 44DA of the CPA provides that an effective Access Code may contain additional matters that are not inconsistent with the principles of the CPA.

One such additional matter that is incorporated in the Access Code concerns a mechanism for the Code to be reviewed. Clause 50 of the Access Code provides that the Code is to be reviewed within 12 months of the expiry of the period of certification under section 44N of the TPA and may be reviewed earlier than that period if thought appropriate.

The Access Code does not contain any additional matters that are inconsistent with the principles of the CPA.

5 DURATION OF CERTIFICATION

The Applicant seeks a recommendation from the NCC that the access regime be recognised as effective for the purposes of Part IIIA of the TPA for a minimum of 30 years.

The commercial viability of the Project is sensitive to movements in both revenues and costs (including capital as well as recurrent costs such as debt servicing costs). In that regard, the viability of the Project will be enhanced by an ability to access the most appropriate equity and debt financing products. One expected method of financing the Project, particularly after construction of the New Railway is completed, will be the use of capital market products (such as indexed linked bonds with the possibility for repayment periods exceeding 25 years, perhaps by a further 5 years). Such products are well suited to projects, such as this Project, that may (and could be expected to) deliver a shortfall of cash flows in the early years of the project. In this situation the term of the capital market product can often be extended to up to 30 years to "top up" the cash flow shortfall from cash flows in later years. Such debt financing products are substantially more cost effective for such projects when compared to shorter term debt funding (for example bank debt). In that regard a number of "greenfields" infrastructure projects in recent years (such as toll roads) have used capital markets products with financing periods of around 30 years.

A 30 year certification period is accordingly sought having regard to the likelihood of the successful consortium using capital markets products of the type described above and used in connection with numerous greenfields infrastructure projects in recent times. A certification period corresponding to the period over which the Project debt is likely to be repaid is essential in order for the finance and its repayment to be given a level of certainty regarding cash flows, particularly in the later years of the Project and the debt repayment period.

ANNEXURE 1

(AustralAsia Railway (Third Party Access) Bill 1999 (NT))

ANNEXURE 2

(AustralAsia Railway (Third Party Access) Bill 1999 (SA))

ANNEXURE 3

(Access Pricing Paper - King & Maddock)

ANNEXURE 4

(Northern Territory Rail Safety Act 1998 (NT))

ANNEXURE 5

(Rail Safety Act 1996 (SA))

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