Government
of South Australia

Certification of the South Australian Rail Access Regime

Submission to the National Competition Council

December 2010

TABLE OF CONTENTS:

Application and Contact Details

This application is made under section 44M(2) of the Trade Practices Act 1974(Cth) (**TPA**) and the following supporting information is submitted for the National Competition Council's (**NCC**) consideration in accordance with Regulation 6B of the Trade Practices Regulations 1974 (Cth).

Applicant

The application is made on behalf of the State of South Australia.

Responsible Minister

The Responsible Minister for South Australia concerning this application is the Hon Mike Rann MP, Premier.

Contact Officer

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Background

South Australia's key railways are owned and managed by a combination of government owned entities and private companies. Railway ownership is vertically integrated, meaning that the owner of the below-rail infrastructure is also a provider of above-rail services on the lines.

To ensure other operators could offer above-rail services to customers and compete with the owner/operator by obtaining access to the railways on commercial terms, in July 1997, the South Australian Parliament passed the *Railways Operations and Access Act 1997* (ROA Act). This Act established the legislative framework for the South Australian rail access and management regime.

The ROA Act established the price and access regulation to be applied to the proclaimed rail services, with ongoing monitoring and control being the responsibility of South Australia's independent economic regulator, the Essential Services Commission of South Australia (ESCOSA).

The state access regime applies to certain intrastate railways in South Australia, with the specific exception of the ARTC and Genesee and Wyoming Pty Ltd (acquired Freight Link Pty Ltd) interstate mainlines, the Glenelg tramline, the lines owned by OneSteel, the Leigh Creek line and tourist or heritage railways lines. The railway services covered by the access regime include those provided by rail track and yards, but exclude freight terminals and private sidings and the services needed for the operation of these.

In February 2006 the Council of Australian Governments (COAG) signed the Competition and Infrastructure Reform Agreement (CIRA), aimed at achieving a simpler and more consistent national approach to the economic regulation of significant infrastructure.

In April 2007 the, COAG agreed, CIRA implementation plan committed South Australia to reviewing the railways access regime and amending it to ensure it is consistent with the principles of the CIRA, followed by seeking certification under the *Trade Practices Act 1974* (TPA).

An inquiry into the rail access regime was conducted by ESCOSA in 2009 to determine CIRA compatible amendments required. ESCOSA concluded that the rail access regime was generally consistent with the relevant CIRA principles, although it identified three areas where greater consistency could be brought about, as well as some general improvements to the access regime

The *Railways (Operations and Access) (Miscellaneous) Amendment Bill 2010,* based on ESCOSA's recommendations, was passed by Parliament in August 2010 and proclaimed to commence on 1 September 2010.

Having completed the process necessary to ensure that the State rail access regime is consistent with the CIRA, South Australia is now seeking certification of the access regime.

Overview of the South Australian Rail Access Regime

The South Australian rail access regime is embodied in the ROA Act, which was assented to on 31 July 1997 (see Attachment 1). The Act came into operation on 11 September 1997.

The ROA Act aims to ensure access to regulated services on fair commercial terms through a negotiate-arbitrate access regime. This light-handed form of access regulation is intended to strike the right balance between promoting competition and facilitating timely investment in rail infrastructure.

The scope of the services covered by the access regime is determined by proclamation. These services can be varied by further proclamation. The access regime currently applies to all intrastate railways in South Australia, with the exception of certain railways such as the Glenelg tramlines, tourist or heritage railway lines and other privately owned rail sidings.

In accordance with section 7 of the ROA Act the Governor may, by proclamation, declare operators and railway services to be subject to the access regime or vary or revoke a declaration in force.

"Railway services means—

(a) passenger or freight services; or

(b) service of providing (or providing and operating) railway infrastructure for another industry participant.

"railway infrastructure means—

(a) fixed railway infrastructure; and

(b) other installations, plant and equipment (whether fixed or moveable) used or available for use in connection with the operation of the railway network to the extent that it is brought within the ambit of this Act by proclamation,

but does not include a private siding within the meaning of the *Rail Safety Act 2007*, other than a private siding prescribed by the regulations to be railway infrastructure for the purposes of this Act.

fixed railway infrastructure means—

(a) railway track; and

(b) buildings, installations and equipment for—

(i) the operation and use of railway track; or

(ii) the embarkation and disembarkation of passengers; or

(iii) the loading and unloading of goods."

In accordance with section 7 of the ROA Act, on 7 May 1998 the Governor declared that all provisions of the access regime under the Act apply to any railway services associated with the provision of any railway infrastructure by any operator, but not to:

(a) services associated with the Interstate Mainline Track as defined by the Railways agreement set out in the schedule to the Non-Metropolitan Railways (Transfer) Act 1997
(b) services associated with the tram track from Victoria Square (Adelaide) to Glenelg; or
(c) services associated with any track on Eyre Peninsula owned by BHP (Or a subsidiary of BHP); or
(d) services associated with the Leigh Creek Line; or
(e) freight terminals; or
(f) private sidings;
(g) services established on a non-profit basis-
    a. for heritage value or amusement; or
    b. to provide services to tourists.

Structure of the Rail Access Regime

The ROA Act establishes an access regime which contains the following main components:

Part 1, section 3 of the ROA Act provides that the objects of the Act are to:

(a) promote a system of rail transport in South Australia that is efficient and responsive to the needs of industry and the public;
(b) provide for the operation of railways;
(c) facilitate competitive markets in the provision of railway services;
(d) promote the efficient allocation of resources in the rail transport segment of the transport industry; and
(e) provide access to railway services on fair commercial terms and on a non-discriminatory basis.

Part 1, section 7 provides that the access regime applies in relation to operators and railway services to the extent that it is declared by proclamation to apply.

Part 1, section 9 establishes that the Regulator under the ROA Act is the Essential Services Commission of South Australia.

Part 3 provides general rules for the conduct of operator's business (division 1) and the appointment of an administrator (division 2).

Part 4 sets out the pricing principles (division 1) and information about access (division 2): information brochure, operator's obligation to provide information about access (s 29) and that the information be provided on a non-discriminatory basis (s 30).

Part 5 provides for negotiation of access: access proposal (section 31), duty to negotiate in good faith (section 32) and limitation on operator's right to contract to provide access.

Part 5 deals with confidential information. Section 33A(1) and (2) states the information obtained under section 29 or part 5, that could affect the competitive position of a proponent or respondent or is commercially valuable or sensitive for some reason, is to be regarded as confidential information.

Part 6 establishes the regime for arbitration of access disputes: division 1 deals with access disputes and requests for arbitration, division 2: conciliation and reference to arbitration, division 3 provides the principles of arbitration, division 5 details the conduct of arbitration proceedings, division 7 – awards. Section 50A establishes a time limit for arbitration of 6 months, with a stop clock provision for the obtaining of information.

Part 7 provides for the monitoring powers of the Regulator in relation to costs (section 6), confidentiality (section 63) and duty to report to Minister (section 64).

Part 8 provides for the enforcement of the Act. Section 65 states the conditions for injunctive remedies, section 66 deals with compensation and section 67 details the enforcement of arbitrator's requirements.

South Australian Rail

There are three different track gauges in SA. These are: broad gauge at 1600mm width, standard gauge at 1435mm width, and narrow gauge at 1067mm width. The South Australian intrastate railways are largely short haul, bulk transport lines with fewer users than the interstate network.

The six main owners of railway track and related infrastructure in South Australia are:

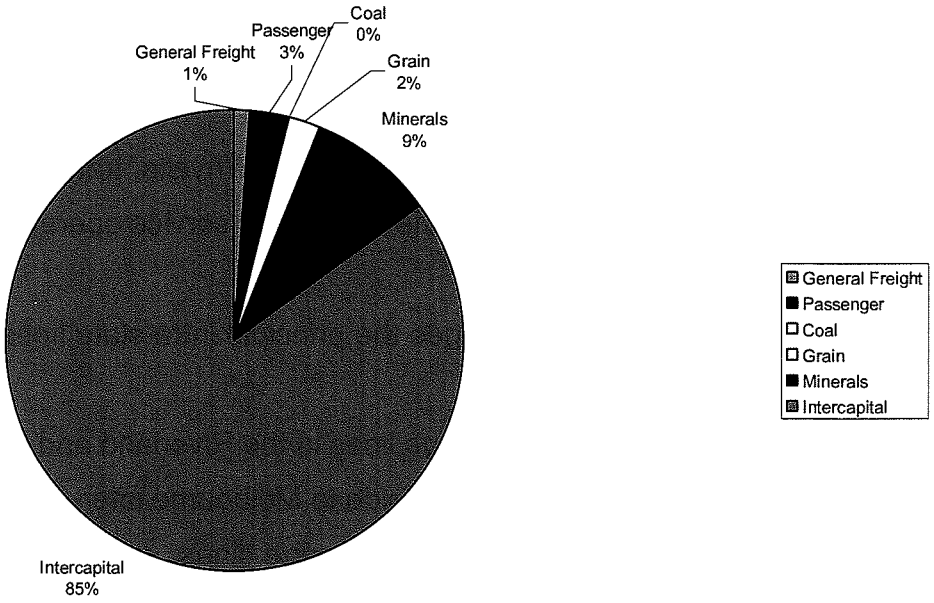
- ARTC;
- Flinders Power;
- OneSteel;
- GWA; and
- Public Transport Services (formerly TransAdelaide).

The major segments of the rail freight task in SA are:

- Intermodal freight with Adelaide as the point of origin or destination
- Intermodal freight, which passes through Adelaide
- Bulk freight on the interstate network, with the main freight products being:
    - Steel products, particularly from Whyalla to Melbourne and Newcastle
    - Grain, along the length of the Melbourne – Adelaide line, and north from Adelaide to Crystal Brook
    - Lead concentrate between Broken Hill and Port Pirie
    - Mineral sands between the Bemax siding at Kanandah (Broken Hill) and Port Pirie.
- Bulk freight on the intrastate network with the main freight products being:
    - Grain
    - Steel
    - Minerals, gypsum, limestone and coal.

The percentage of each freight category carried along the East-West Interstate rail corridor is identified below:[1]

Percentage of each freight category carried along the East-West Interstate Rail Corridor in 2007/09



The ARTC owns and manages the three inter-state standard gauge lines linking South Australia to Victoria, New South Wales and Western Australia, and a spur line from Port Augusta to Whyalla. Within metropolitan Adelaide, the inter-state network includes a north-south standard gauge line adjacent to the urban lines as well as a dual gauge spur line from Dry Creek to Port Adelaide and Outer Harbor. It should be noted that ARTC does not own the Port Adelaide to Glanville section of this spur line, which is part of Public Transport Services' metropolitan network.

[1] ARTC 2008-2024 Interstate and Hunter Valley Rail Infrastructure Strategy

NRG Flinders owns the standard gauge line connecting Leigh Creek with Port Augusta. The line is used mainly to haul coal between NRG Flinders' coalfields at Leigh Creek and its power stations at Port Augusta. Pacific National is the contracted service operator here.

OneSteel owns the rail lines around Whyalla, transporting raw steel in billet form for processing. GWA is the contracted service operator.

GWA owns and manages the principal intra-state lines in South Australia. These are:

- the standard gauge lines in the Riverland and Murray-Mallee region, which connect to the Adelaide to Melbourne inter-state mainline at Tailem Bend;
- the Mid-North broad gauge lines, which connect to Public Transport Services' (Department for Transport, Energy and Infrastructure- DTEI) metropolitan network; and
- the stand-alone narrow gauge network on the Eyre Peninsula.

GWA also owns and manages the inter-state standard gauge line from Tarcoola to Darwin. This line connects to the ARTC network at Tarcoola.

Public Transport Services (DTEI) owns and operates the broad gauge heavy rail network within metropolitan Adelaide. This network is used mainly by urban passenger train services, but is also traversed by both interstate and intrastate passenger and freight services. Public Transport Services controls all rail traffic using the metropolitan broad gauge system, as well as rail traffic on the inter-state standard gauge lines where these interface with it. It also owns and operates the metropolitan tram/light rail passenger lines.

In addition, Great Southern Railway Ltd (GSR) owns and operates the passenger terminal at Keswick.

The South Australian Government, through DTEI, owns some currently disused lines in South Australia, such as the Wolseley to Mt. Gambier broad gauge line, which could be reopened if there were sufficient demand.

A number of other businesses operate terminals, yards or sidings around the state, and there are some short historical rail lines in operation as tourist services.

Pursuant to section 7 of the ROA Act, the scope of the access regime was determined by proclamations on 7 May 1998. The railway services covered by Parts 3 to 8 of the ROA Act are:

- rail track and yards, but excluding freight terminals and private sidings;
- passenger railway stations; and
- the services needed for the operation of these, such as train control.

As indicated above, railway services are:

- a passenger service or a freight service;
- the service of providing (or providing and operating) railway infrastructure for another industry participant.

The access regime in South Australia, following the proclamation, applies to the metropolitan heavy rail passenger network, the freight Eyre Peninsula lines, the freight Mid North and Murray and Mallee region lines, the dormant lines in the South East of the state connecting to the interstate rail network at Wolseley and Penola, Mount Gambier and Millicent and the dormant lines in the mid north from Wallaroo to Snowtown.

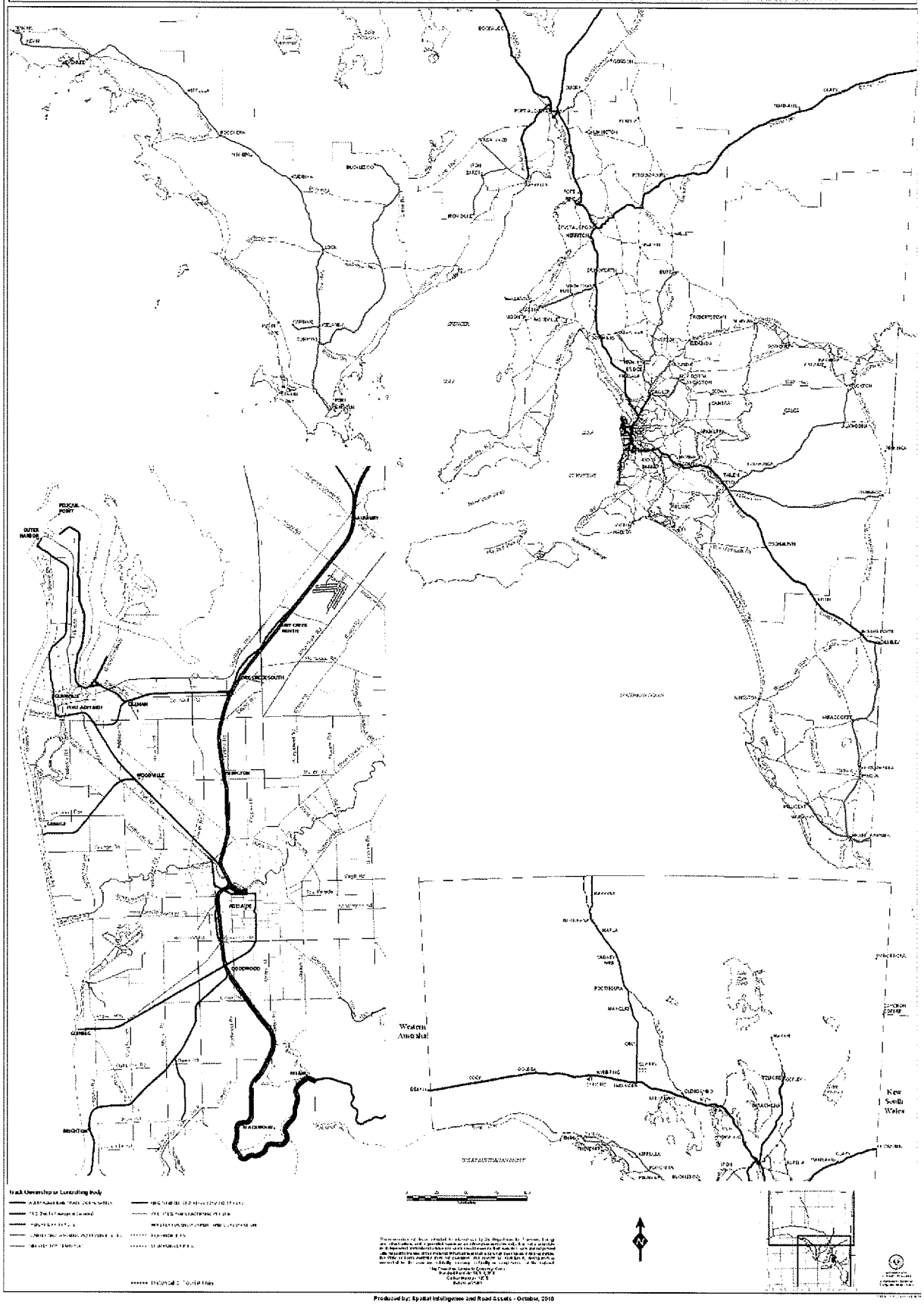
The table below sets out the rail ownership and coverage of rail in South Australia and the following two maps detail the track and ownership types.

RAIL in SOUTH AUSTRALIA[2]				
Line description	***Gauge***	***Owner***	***Managed by /leased to***	***Covered by***
Metropolitan heavy rail passenger network	Broad	SA Government	Public Transport Services(DTEI)	State Access regime- *Railways Operations and Access Act 1997(ROA Act)*
Metropolitan light rail tram line	Standard	SA Government	Public Transport Services (DTEI)	Glenelg tram is not covered by ROA ACT
Freight Eyre Peninsula lines	Narrow	Genesee and Wyoming Australia (GWA)	GWA	State Access regime- *Railways Operations and Access Act 1997*
Freight Mid North lines	Broad	GWA	GWA	State Access regime- *Railways Operations and Access Act 1997*
Freight Murray-Mallee Region	Standard	GWA	GWA	State Access regime- *Railways Operations and Access Act 1997*
Whyalla steel works lines	Narrow	OneSteel	OneSteel	Indenture :*Whyalla Steel Works Act 1958*
Dormant rail lines in the south east of the state connecting to the interstate rail network at Wolseley (near Bordertown) and Penola, Mount Gambier and Millicent	Broad	SA Government	NOT OPERATIONAL	State Access regime- *Railways Operations and Access Act 1997*
Dormant rail lines in mid north, from Wallaroo to Snowtown	Broad	SA Government	NOT OPERATIONAL	State Access regime- *Railways Operations and Access Act 1997*
Heritage rail lines (Victor Harbor, Pichi Richi)	Broad and Standard	SA Government	Steam Ranger & Pichi Richi Railway	Not covered by ROA Act
Port Augusta to Leigh Creek coal haulage	Standard	SA Government	Flinders Power/ Alinta Energy P/L	Lease from SA Government with access provisions

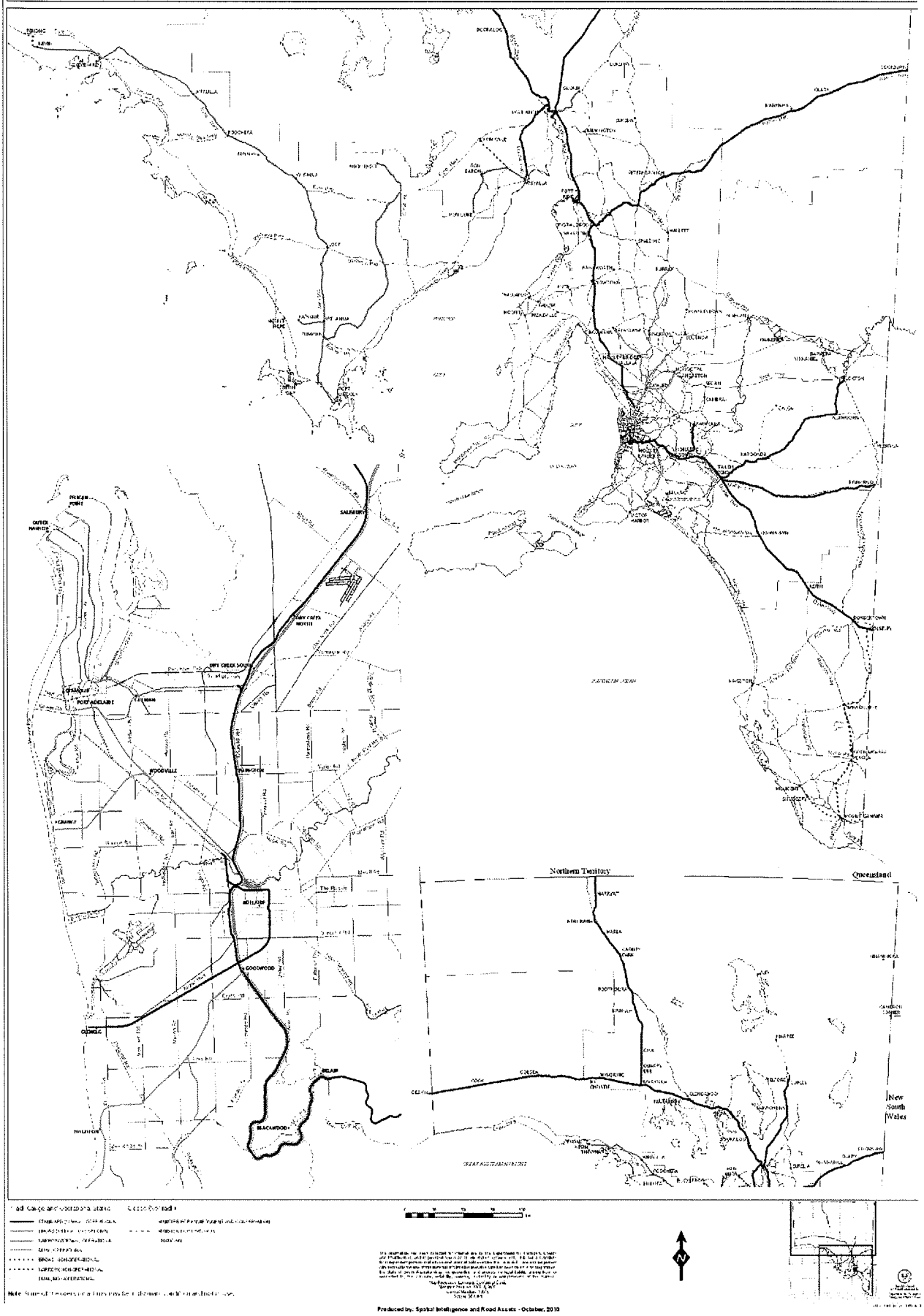
[2] DTEI internal data collation

RAIL in SOUTH AUSTRALIA- continued				
Line description	*Gauge*	*Owner*	*Managed by /leased to*	*Covered by*
Adelaide to Wolseley on Adelaide to Melbourne corridor	Standard	Australian Rail Track Corporation Ltd (ARTC)	ARTC	Trade Practices Act 1974- National Access Regime
Adelaide via Port Augusta to Kalgoorlie on the Adelaide to Perth corridor	Standard	ARTC	ARTC	Trade Practices Act 1974- National Access Regime
Port Augusta to Whyalla spur on the Adelaide Perth corridor	Standard	ARTC	ARTC	Trade Practices Act 1974- National Access Regime
Crystal Brook to Broken Hill on the Adelaide to Sydney Corridor	Standard	ARTC	ARTC	Trade Practices Act 1974- National Access Regime
Adelaide to Crystal Brook - shared by Adelaide Sydney and Adelaide Perth Corridors	Standard	ARTC	ARTC	Trade Practices Act 1974- National Access Regime
Dry Creek to Outer Harbor	Dual or mixed	ARTC	ARTC	Trade Practices Act 1974- National Access Regime
Tarcoola to Darwin line	Standard	ARTC	GWA (assuming the takeover of Freightlink is complete)	Australasia Railways (Third Party Access) Code

Railway Lines in South Australia - Track Ownership or Controlling Body



Railway Lines in South Australia – Track Gauge and Operational Status



Regulator

The ROA Act assigns the following specific functions to ESCOSA:

- monitoring and enforcing compliance with all Parts but Part 2 of the Act (section 9(2)) and reporting to the Minister if an operator or other person has contravened or failed to comply with Division 1 of Part 3;
- monitoring the costs of rail services under the Act (part 7 section 60);
- making an application to the Supreme Court for appointment of an administrator where a rail operator becomes insolvent, ceases to provide railway services or fails to make effective use of the infrastructure of the State (part3, division 2, section 26);
- establishing pricing principles (part 4 division 1, section 27);
- establishing requirements for information about access to rail services and determining the price to be charged for such information(part 4 division 2);
- conciliation of access disputes and referral of disputes to arbitration (part 6, division 2).

In accordance with section 7 of the Essential Services Commission Act 2002, ESCOSA is independent; it is not subject to Ministerial direction in the performance of its functions. ESCOSA must however forward to the Minister a report of the work carried out under the ROA Act each financial year (section 9A of the ROA Act) and must also, at the request of the Minister, report on the costs of railway services or any aspect of the operation of the ROA Act (section 64 of the ROA Act).

ESCOSA has released an Information Kit, explaining the principal features of the access regime under the ROA Act and communicating the pricing principles, information brochure requirements and reporting requirements established by ESCOSA.

Pricing Determination by the Regulator

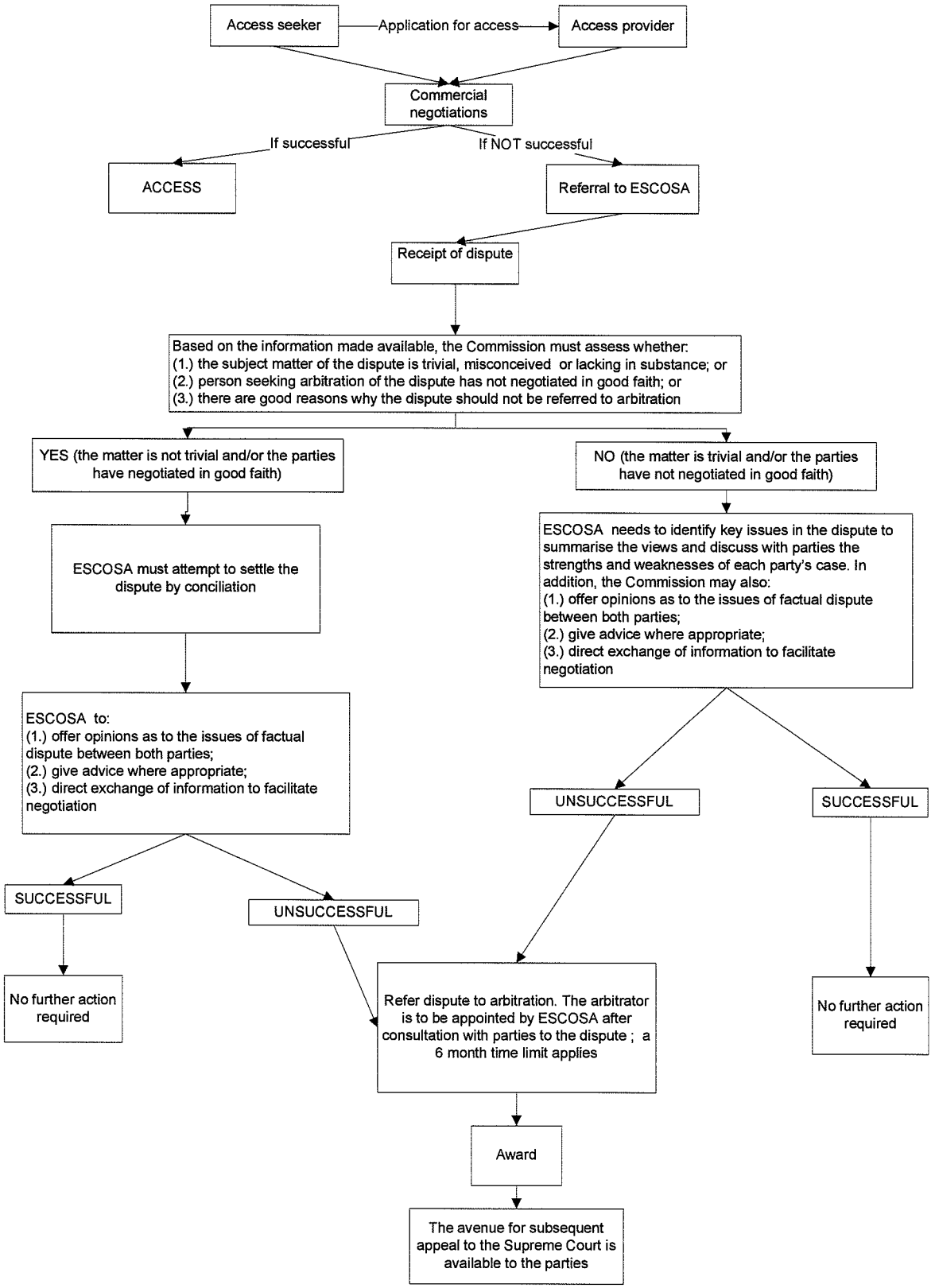
Railways services as defined under the ROA Act are a regulated industry for the purposes of the *Essential Services Commission Act 2002*.

The ROA Act does not impose direct price control for intrastate rail services. Rather part 4, division 1 of the ROA Act provides that the regulator may establish pricing principles for fixing a floor and ceiling price for the provision of railway services generally or railway services of a particular class. Any pricing principles established in this access regime have two main roles: arbitration and price signalling.

ESCOSA considered the introduction of price regulation and whether price monitoring would be the appropriate response, during the 2009 Inquiry. The ESCOSA finding was that this is not currently required.

The diagram below details how the access regime operates in South Australia:

OPERATION OF STATE ACCESS REGIME FOR SOUTH AUSTRALIAN RAIL



2009 ESCOSA Review

ESCOSA conducted an inquiry into the access regime that applies to the major intrastate railways in South Australia, pursuant to the Treasurer's request in accordance with section 35(1) of the *Essential Services Commission Act 2002* in 2009. The request was made in order for ESCOSA to advise on potential amendments to the *Railways (Operations and Access) Act 1997 (*ROA Act*)* required to achieve greater consistency with the CIRA. The inquiry also considered whether or not the access regime could otherwise be generally improved.

ESCOSA released in issues paper and invited submissions from interested parties. The draft report was released on 10 July 2009 following receipt of seven submissions from the relevant stakeholders. Following consideration of further four submissions and consultations, the ESCOSA prepared a final inquiry report. The industry views were reflected in the final report on the basis of the submissions received.

The Commission has concluded that the access regime is generally consistent with the requirements of clause 2 of the CIRA, although the Commission recommended that certain amendments to the access regime could be made to achieve greater consistency, and that there are some minor modifications that could be made to otherwise improve the manner in which the access regime operates.

In response to ESCOSA's 2009 review the South Australian Government approved amendments to the ROA Act. The *Railways (Operations and Access) (Miscellaneous) Amendment Act 2009* was passed by the SA Parliament in August 2010 and proclaimed to commence on 1 September 2010. The following amendments were made to achieve consistency of the legislation with specific clauses of the CIRA and improve the access regime:

- Expanded the objects clause 3(c) to better reflect the concept of economic efficiency
- Introduced additional pricing principles to be taken into account by the arbitrator in section 38 and section 4- amended definition of pricing principles
- Inserted a six month time limit into the conciliation-arbitration framework (section 50A)
- Added a definition of 'private siding' consistent with that in other legislation to clarify when a private siding is covered by the access regime (section 4)
- Inserted a confidentiality provision to protect commercially sensitive information being exchanged during access negotiations (part 5A)
- Amended the definition of access contract to reduce access notification requirements on access providers (section 31 (3a))
- Amended section 21 to remove the current restriction on businesses that rail operators can conduct and to require rail operators to provide independent accounts for their rail operations.

Part IIIA of the Trade Practices Act 1974

South Australia's application for certification is made under section 44 M of the TPA. It addresses the objects of Part IIIA of the TPA, section 44AA below, with the analysis of clause 6 principles of the Competition Principles Agreement (CPA) following.

South Australia submits that certification of the rail access regime will promote the objects of part IIIA as set out in s 44AA. The objectives of the access regime, as specified in the ROA Act, are (among other things) to facilitate competitive markets in the provision of railway services (which incorporates above rail services) through the efficient use and operation of, and investment in, railway services.

The purpose of the ROA Act is to facilitate commercial negotiations, such that the terms and conditions for access may better reflect mutual requirements. The access regime seeks to ensure that access seekers are able to gain access to railway services on fair commercial terms, by setting out general rules governing the conduct of railway operators and processes relating to the negotiation of access, in order to prevent unfair discrimination and hindering of access to railway services. To achieve this, the access regime establishes a framework for the resolution of access disputes through conciliation and arbitration. With respect to the latter, the ROA Act provides guidance by setting out certain principles that an arbitrator must take into account in the event of arbitration. The conciliation/arbitration process provides an important safety net to access seekers, and ensures that all participants in the above-rail market are safeguarded from the potential for misuse of market power by the access provider.

To strike an appropriate balance between achieving the objectives of ROA and the need to ensure that regulatory costs do not outweigh the benefits of

regulation, the access regime places a strong emphasis on promoting commercially agreed outcomes in the first instance. On the basis that parties are free to negotiate prices and services, subject to the requirements of the access regime relating to matters such as conduct, information provision and minimum terms and conditions, decision making on matters such as service standards and the level of investment in infrastructure can be better tailored to the specific access requirements, leading to more efficient use and operation of railway infrastructure. The principal function of setting out requirements relating to preliminary information about access is to provide a starting point for meaningful commercial negotiations to occur, and is not intended to limited the extent or scope of the commercial negotiation process.

ESCOSA note in the Issues Paper to the 2009 Inquiry that ESCOSA had not been notified of any intrastate rail access disputes[3] which may indicate that the Access Regime has been successful in encouraging commercial negotiations and that access seekers and access providers have been able to agree to terms and conditions of access to suit their individual requirements. Given that the declared object of the ROA Act is to promote competition and that ESCOSA must report yearly to the Minister on their work under the ROA Act if any issues appear these would be raised in the report. Therefore South Australia argues that the access regime will promote the object of part (a) of clause 44AA of the TPA.

Further, the rail access regime incorporated in the ROA Act is consistent with part (a) of clause 44AA of the TPA by virtue of the principle incorporated in section 3(c) of the ROA Act: [an object of this Act is] "to facilitate competitive markets in the provision of railway services through the promotion of the economically efficient use and operation of, and investment in, those services". This matter is further developed under clause 6.5 (a) below.

Part (b) of clause 44AA of the TPA is satisfied as a result of incorporating the CIRA principles into the ROA Act. In signing the CIRA, COAG's intention, as

[3] As per 2009 Rail Access Regime Inquiry Issues paper (February 2009)

stated in the preamble is to achieve a simpler and consistent national approach to the economic regulation of significant infrastructure. The two main mechanisms employed by the CIRA to deliver this outcome are: the commitment to adopt certain consistent regulatory principles in all access regimes; and the commitment that all state access regimes will be submitted for certification under the national access regime.

There are benefits derived from using the ROA Act to regulate the covered railway services instead of the National Access Regime set out in Part IIIA of the TPA. As ESCOSA noted in their final report to the 2009 inquiry "an Access Regime should be sufficiently flexible as to recognise the particular circumstances in which the railway industry operates, reflective of the state of any intermodal competition within a jurisdiction and should strike an appropriate balance between the interests of all stakeholders". As contexts to regulation can differ between jurisdictions, it remains an important factor to take into consideration and consistency of regulation where contexts are similar is the desired outcome.

While the South Australian rail access regime is more light- handed compared to other access regimes (eg ARTC-TPA) this in part reflects the different market conditions and industry structures. For the most part, railway lines covered by the South Australian regime do not link with railway lines covered by other access regimes or rail which is not covered. Therefore regulatory interface issues do not arise. The South Australian railways are largely shorter-haul, bulk transport lines with fewer users relative to the interstate network.

None of the principles underpinning the South Australian rail access regime are in conflict with principles underpinning other access regimes, ESCOSA states.

South Australia submits that the access regime is consistent with the objects of part IIIA of the TPA in delivering efficient outcomes.

Analysis of Clause 6 of the Competition Principles Agreement principles

This section addresses the consistency of the South Australian rail access regime 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 regime should be certified as effective because it:

- complies with clauses 6(2) and 6(3) of the CPA
- incorporates the principles set out in clause 6(4) and 6(5) 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.

Clause 6(2)

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.*

Clause 6(2)(a)

South Australian railway infrastructure, the subject of the South Australian rail access regime is a crucial transport component for, and services the needs of

importers and exporters. The *Railways (Operations and Access) Act 1997* (ROA Act) applies to major intrastate railways and associated infrastructure within South Australia with the exception of certain railways such as the Glenelg tramlines, tourist or heritage railway lines, and other privately owned rail sidings.

Clause 6(2)(b)

The South Australian rail access regime only applies to railways which are entirely located in South Australia and fall under the interpretation of *railway infrastructure* pursuant to Division 3 of the ROA Act. Accordingly the question of whether substantial difficulties arise from facilities being situated in more than one jurisdiction does not arise.

Clause 6(3)

For a State or Territory access regime to conform to the principles 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 service is necessary in order to permit effective competition in a downstream or upstream market

(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

(b) reasonably incorporate each of the principles referred to in subclause (4) and (except for an access regime for: electricity or gas that is developed in accordance with the Australian Energy Market Agreement; or the Tarcoola to Darwin railway) subclause (5).

Division 4 of the ROA Act states that the access regime applies in relation to operators and railway services to the extent that it is declared by proclamation. The access regime does not (and cannot) apply to the railway to which the

AustralAsia Railway (Third Party Access) Act 1999 applies (and accordingly no proclamation can be made under the ROA Act in relation to the railway to which that Act applies).

An 'operator' is defined as a person who provides, or is in a position to provide, railway services in relation to the railway network.

A 'railway service' is defined as a passenger service or a freight service, or the service of providing (or providing and operating) railway infrastructure for another industry participant.

The infrastructure facilities by which railway services are provided comprise railway track, and buildings, installations and equipment for:

- the operation and use of railway track; or
- the embarkation and disembarkation of passengers; or
- the loading and unloading of goods.

Other infrastructure includes installations, plant and equipment (whether fixed or moveable) used or available for use in connection with the operation of the railway network to the extent that it is brought within the ambit of the ROA Act by proclamation. This does not include a private siding within the meaning of the *Rail Safety Act 2007*, other than a private siding prescribed by the regulations to be railway infrastructure for the purposes of the ROA Act.

Clause 6(3)(a) Significant infrastructure facility

The intrastate rail lines covered by the access regime play a significant role in supporting movement of export freight to ports for key industries:

- The Eyre Peninsula narrow gauge rail system is used extensively for the movement of export grain and gypsum to regional ports.

- The mid north broad gauge line supports the movement of limestone to Penrice, a major business in South Australia and the only Australian manufacturer of soda ash, which is a vital ingredient in products ranging from glass containers (especially wine bottles) to washing powder and sodium bicarbonate used in applications as diverse as animal feed, food and pharmaceuticals.
- The Murray and Mallee standard gauge lines support movement of grain to Port Adelaide for export.
- The currently dormant south east broad gauge lines in the Green Triangle (south east) region have potential to support transport of significant tonnages of export wood and forestry products north to Port Adelaide and east to Portland.

A key factor currently affecting the use of the intrastate lines is the existence of three different rail gauges in South Australia and limited connectivity to the interstate rail corridors. Some data on recent freight movements is presented below.

Regional tonnage on South Australian railways from 2008/09(GWA)[4]

Line	Tonnage	Item
Thevenard - Kevin line	1.75m tonnes	Gypsum
Port Lincoln - Cummins - Thevenard line	500,000 tonnes	Grain
Port Lincoln - Cummins - Kimba line	300,000 tonnes	Grain
Birkenhead - Penrice quarry (Angaston)	520,000 tonnes	Limestone
Tailem Bend - Tookayerta (Loxton)	80,000 tonnes	Grain
Tailem Bend - Pinnaroo line	80,000 tonnes	Grain

[4] DTEI internal data collection

Improvements to South Australia's regional rail freight networks will continue to lift the productivity and competitiveness of our export industries, allowing for more efficient rail services. The development of more efficient national land-based freight transport links to overseas markets is critical for South Australia's economy. The rail industry is being encouraged to upgrade the freight rail network through Adelaide to reduce conflict with passenger transport, as well as upgrading the Adelaide-Melbourne link. This is being supported through the expansion and development of intermodal facilities.

South Australia is also contributing to the preparation of a National Freight Network Strategy by Infrastructure Australia which aims to enhance national planning and development of a seamless interconnected network.

Improving rail freight means the development of a connected metropolitan, regional and interstate rail network to support the efficient movement of export freight. A shift to rail transport for passenger and freight movements is being encouraged where justified by environmental, economic or social imperatives.

South Australia will implement national transport reforms, led by the Australian Transport Council and COAG to increase the productivity and competitiveness of the national transport system, taking into consideration the networks between capital cities and major regional centres, and other important domestic and international connections.

South Australia submits that the railway infrastructure facilities are significant, and that accordingly clause 6(3)(a) of the CPA is satisfied.

Clause 6(3)(a)(i) Economic feasibility of duplicating South Australian railway infrastructure facilities

The Australian Competition Tribunal in the Duke Easter Gas Pipeline decision states that it would be 'uneconomic' to develop another gas pipeline if a single

pipeline could meet market demand at less cost (after accounting for productive, allocative and dynamic effects) than that of two or more pipelines. Extrapolating, it will 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. As the NCC has found previously, the test to determine whether this criterion is met is a social test that focuses on identifying whether a facility has natural monopoly characteristics. Railways have these characteristics due to the large cost of construction and demand risk.

It is submitted that, in relation to the South Australian access regime covered railway services, duplication of the service by a prospective service provider would generally not be economically feasible.

Clause 6(3)(a)(ii) Effective competition

The ROA Act provides for the South Australian access regime a mechanism based on the "negotiate, conciliate and arbitrate" model that is designed to facilitate both access to facilities and a process of negotiation between parties on fair commercial terms.

Clause 6(3)(a)(iii) The safe use of railways

South Australia submits that safe access to the railways and rail services is ensured through the operation of the *Rail Safety Act 2007.* This Act establishes a safety regulatory regime for all rail owners and operators in SA. Safe use of railways will be further enhanced through the establishment of the national rail safety regulator which will be headquartered in Adelaide.

Clause 6(3)(b) Incorporation of principles referred to in CPA clause 6(4)

Clause 6(3)(b) of the CPA specifically requires that all principles referred to in clause 6(4) be incorporated in an access regime. It is noted in this regard, however, that such principles are not binding rules, but are simply guidelines for

use in assessing whether an access regime is effective. The principles set out in clause 6(4) of the CPA and the extent to which they are addressed in the South Australian rail access regime are discussed below.

Clause 6(4)(a)-(c)

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

(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.

Clause 6(4)(a) Agreed access

The South Australian rail access regime encourages third party access through commercial negotiation to the maximum extent possible, in accordance with clause 6(4)(a) of the CPA.

Section 3 of the ROA Act provides that an object of the ROA Act is to provide access to railway services on fair commercial terms and on a non-discriminatory basis. An operator or industry participant must provide access to regulated services by agreement with the customer on fair commercial terms.

Negotiation under the access regime must occur as follows:

- section 31 of the ROA Act permits a proponent to put a written access proposal to the regulated operator. (If the access proposal requires an addition or extension to rail infrastructure facilities, the access proposal may include a proposal for that addition or extension)

- section 32 requires the regulated operator and the proponent (and any interested third party) to negotiate in good faith with a view to reaching agreement on the access proposal.

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

Clause 6(4)(b) Right to negotiated access

Part 5 of the ROA Act establishes the right for proponents to negotiate access, either on terms agreed with the operator, or on fair commercial terms determined by enforceable arbitration. To the extent that commercial arrangements cannot be otherwise agreed in relation to any aspect of access to a rail service, Part 6, Divisions 1 to 10 of the ROA Act contain a dispute resolution process which can be invoked by either party requesting that ESCOSA settle the dispute through referring an "access dispute" to arbitration.

In this regard section 35 of the ROA Act provides that:

- a proponent may, by written notice given to the regulator, ask the regulator to refer an access dispute to arbitration; and
- a copy of a notice under this section must be given to all respondents to the access proposal.

On receiving the request, ESCOSA:

- must, in the first instance, attempt to settle the dispute by conciliation (section 36(1)(a)) or appoint an arbitrator and refer the dispute to the arbitrator (section 36(1)(b); and
- must, if the dispute is not resolved by conciliation, after reasonable attempts at conciliation, refer the dispute to arbitration.

ESCOSA 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, misconceived or lacking in substance, or if the person seeking arbitration has not negotiated in good faith, or if the Commission 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 section 38 of the ROA Act. These matters are consistent with those listed in clause 6(4)(i) of the CPA .

Clause 6(4)(c) Enforcement

An arbitrator's award is enforceable as if it were a contract between the parties to the award. A proponent may within 7 days after the making of the award elect not to be bound by the award. If the proponent does so, the award is rescinded and the proponent is precluded from making another access proposal for 12 months (unless ESCOSA authorises otherwise).

The ability to terminate or vary an award is set out in section 55 of the ROA Act.

An award may be terminated or varied by agreement between all parties to the award. If a material change in circumstances occurs, a party to an award may propose termination or variation of the award.

The provisions of Part 6 Division 9 of the ROA Act apply to a dispute arising from a proposal to vary an award.

In addition, a party to arbitration may appeal to the Supreme Court, from a decision regarding an award, or a decision not to make an award, on a question of law (section 56).

The access regime provides for the enforcement by the Supreme Court of awards made pursuant to arbitration.

Under Part 8 of the ROA Act, the Supreme Court may grant an injunction:

- restraining a person from contravening a provision of the Act or of an award; or
- requiring a person to comply with a provision of this Act or the 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 of an award. Further, section 67 of the ROA Act makes it clear that an award is enforceable as if it were a contract between the parties to the award.

Clause 6(4)(d)

Any right to negotiated 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 right to negotiate access came into effect when the *ROA Act* was proclaimed. If an award confers a right of access, section 51(3) (a) requires that it states the period for which the proponent is entitled to access and further, in accordance with s 56(4), unless the Supreme Court specifically decides to suspend the operation of an award until the determination of an appeal, the appeal does not suspend the operation of an award.

Existing awards are enforceable as if they were contracts, and will thus be unaffected by a change in the access regime, as will any commercially negotiated access arrangements.

The expiry or revocation of a coverage declaration does not affect existing access rights and obligations.

While the ROA Act does not provide for a periodic review of the access arrangements set out under the Act, section 64 (b) states that ESCOSA must, at the request of the Minister, report to the Minister on any aspect of the operation of the ROA Act – this can include whether or not a periodic review of the ROA Act is required.

Section 9A (1) states that the regulator must forward yearly to the Minister a report of the work carried out under the Act, which must be tabled in Parliament according to section 9A(2). Section 25 also states that if any operator or any other person has contravened or failed to comply with the general rules for business division of the ROA Act ESCOSA must report on the matter to the Minister. Both these sections allow ESCOSA to raise issues with the Minister and instigate a review or change if required.

Clause 6(4)(e)

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.

Section 32 of the ROA Act imposes an obligation on the operator to negotiate in good faith. In particular, section 32(1) expressly requires the regulated operator to endeavour to accommodate the proponent's reasonable requirements in relation to access and (under section 29) to provide an intending proponent with information reasonably requested, including:

- the extent to which the regulated operator's railway infrastructure subject to the access regime is currently being utilised;

- 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
- 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.

This duty is supported by sections 34 of the of the ROA Act, which in practice would entitle the proponent to refer an access dispute to ESCOSA for arbitration if the regulated operator refuses or fails to enter into good faith negotiations with the proponent within 30 days after the receipt of the access proposal.

The dispute resolution procedures also ensure that the regulated operator uses all reasonable endeavours to accommodate the requirements of the proponent.

Clause 6(4)(f)

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

The access regime as established by the ROA Act provides the flexibility for the parties to negotiate their own arrangements for access. Failing agreement between the regulated operator and the customer, access on fair commercial terms may be determined by arbitration. In both cases, different terms and conditions may result for different users.

There are no constraints on the terms and conditions that might be arrived at but, in the case of arbitrated awards, the arbitrator must take into account the principles set out in section 38 of the ROA Act.

However, these matters do not preclude the making of awards on different terms and conditions for different users.

Clause 6(4)(g)

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 regime as established by the ROA Act provides a process that encourages parties to negotiate and reach agreement upon terms and conditions of access. This includes the parties resorting to their own chosen dispute resolution process if they wish.

In the event that the parties cannot agree on terms and conditions for access, they can rely on the processes afforded by the access regime, including a dispute resolution process which involves potentially two bodies: ESCOSA and an arbitrator (or arbitrators).

ESCOSA, as the industry regulator, must in the first instance attempt to resolve an access dispute by conciliation.

If the dispute is not resolved by conciliation (after making a reasonable attempt to do so), section 36 of the MSA Act provides that ESCOSA refer the dispute to arbitration. The time limit for arbitration is six months. This amendment regarding the six month time limit was made to the MSA Act to ensure that the access regime is compliant with section 2.6 of the CIRA.

The arbitrator is to be a person selected by ESCOSA after consultation with the parties to the dispute. ESCOSA's own independence, together with the right of the parties to consult with it in choosing an arbitrator should ensure that the arbitrator appointed is sufficiently independent. The arbitrator has the power to resolve the dispute through making a binding award. The parties and the industry regulator must be provided with the arbitrator's reasons for making an award.

The procedures to be followed when conducting an arbitration are contained in Division 3 of Part 6 of the ROA Act. Section 57 of the ROA Act provides that the costs of arbitration are to be borne by the parties in equal proportions, unless the arbitrator decides otherwise. However, if the proponent terminates arbitration or elects not to be bound by an award, the entire cost of arbitration is to be borne by the proponent.

Clause 6(4)(h)

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

Decisions of Industry Regulator

ESCOSA, as the industry regulator, must attempt to resolve disputes through conciliation in the first instance. If a dispute is resolved in that way, the parties effectively reach agreement on a commercial basis and may enforce the agreement contractually.

The ROA Act makes no provision for appeal against decisions of the industry regulator concerning access disputes, i.e. whether a dispute exists and whether a dispute should be referred to an arbitrator. Common law administrative law principles may, however, apply.

Decisions of Arbitrator

Section 56(3) of the ROA Act provides that arbitrated awards are enforceable and cannot be challenged or called into question except by appeal to the Supreme Court. Sections 65 and 66 of the ROA Act provide that injunctive remedies and orders for compensation are available from the Supreme Court in relation to contravention of, or non-compliance with, awards. This is consistent with the *Commercial Arbitration and Industrial Referral Agreements Act 1986,* which does not apply to arbitration under the ROA Act – section 59. "The decisions of a dispute resolution body should bind the parties; however, rights of appeal under existing legislative provisions should be preserved" which applies (by virtue of section 56) to arbitrations under the ROA Act.

Section 67 provides for the enforcement of arbitrator's requirements:

- subsection (1):non-compliance with an order, direction or requirement of an arbitrator may be certified to the Supreme Court and
- subsection (2): the Supreme Court may inquire into the case and make such orders as appropriate in the circumstances.

There are no other existing legislative rights of appeal against a decision of the arbitrator, since the ROA Act creates new rights in relation to negotiated access to railway services.

Clause 6(4)(i)

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 interests 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.

All of the above matters are replicated in Part 6, division 3, section 38(1) of the ROA Act as principles which the dispute resolution body, namely, the arbitrator, should take into account in making an award.

Clause 6(4)(i)	Corresponding subsection 38(1)
i	c
ii	d
iii	e
iv	j
v	i
vi	k
vii	f
viii	l

Clause 6(4)(j)

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.

Sub-section 52(1) of the ROA Act specifically provides that an arbitrator cannot make an award that would have the effect of requiring the operator to bear any of the capital cost of any addition or extension to railway infrastructure unless the operator agrees. Further, subsection 52(2) specifies that an award cannot be made which would prejudice the rights of an existing industry participant (rights existing under an earlier contract or award) unless the third party is in agreeance.

Clause 6(4)(k)

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.

The ROA Act does not preclude parties who negotiate their own access arrangements from determining what may constitute a material change in their particular circumstances and incorporating provisions to this effect in their access contracts.

Part 6, Division 9 Section 55 of the ROA Act sets out the process for the termination or variation of an award. If all parties to the award agree the regulator may vary or revoke an award - section 55(1).

Pursuant to subsection 55(4) of the ROA Act, if a material change in circumstances occurs, the regulator may refer the dispute to arbitration under this section and if a proposal for termination or variation results in a dispute, the dispute resolution provisions in Part 6 of the Act will apply.

Clause 6(4)(l)

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.

Sub-section 38(1)(i) of the ROA Act states that the arbitrator must take into account the interests of industry participants whose interests may be affected by the proposal. In addition sub-section 51(3)(c) provides that if an award confers a right of access it must resolve, or provide for the resolution of, all related and incidental matters.

A further restriction on awards is imposed by section 52(2) which provides that an arbitrator cannot make an award that would prejudice the rights of an existing industry participant under an earlier contract or award unless the participant agrees or the arbitrator is satisfied that the industry participant's entitlement to access exceeds the needed entitlement and the participant will not need the excess entitlement and the proponent's requirements cannot be met except by transferring the excess entitlement to the proponent.

If a person contravenes a provision of the ROA Act, the Supreme Court may, on application by the regulator or an interested person, order compensation of persons who have suffered loss or damage as a result of the contravention.

Clause 6(4)(m)

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

Pursuant to section 24 of the ROA Act, an operator or industry participant, or a body corporate related to an operator or industry participant, must not engage in conduct for the purpose of preventing or hindering access to railway services. Conduct, as defined in the ROA Act, includes negative conduct such as a failure or refusal to act or delay. Section 66 applies in cases where a person contravenes a provision of the ROA Act or award.

Clause 6(4)(n)

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

Part 3, Division 1 of the ROA Act requires the segregation of accounts and records relating to the provision of railway services as distinct from other businesses carried on by the operator. Pursuant to section 22 of the ROA Act, the operator must keep the accounts for regulated services separate from the accounts and records relating to other aspects of the operator's business.

Clause 6(4)(o)

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.

Section 62 of the ROA Act states that 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 section 22 of the ROA Act.

Failure to comply with the requirements of section 62 incurs a maximum penalty of $60,000.

Pursuant to section 63 of the ROA Act the information must be maintained confidential by the regulator, with the exception of public interest situations when the regulator can disclose it to the Minister.

Section 47 of the ROA Act provides for the information gathering powers of the arbitrator: following a written request from the arbitrator information must be produced within a stated period, the documents must be verified by a statutory declaration (if the arbitrator requires it), the documents can be copied or kept for as long as it is necessary for the purposes of the arbitration. The person providing the information must comply with subsections (1) or (2) and if they are required to appear as a witness must comply with further requirements to make an oath or affirmation or to answer questions. Failure to comply incurs a maximum penalty of $15,000.

Clause 6(4)(p)

Where more than one State or Territory access regime applies to a service, those regimes should be consistent and, by means of vested jurisdiction or other cooperative legislative scheme, provide for a single process for 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.

The *AustralAsia Railway (Third Party Access) Act 1999*(SA and NT) provides for access to the Tarcoola-Darwin railway under the AustralAsia Railway (Third Party Access) Code. Section 7(3) of the ROA Act provides that the access regime does not (and cannot) apply to the railway to which the *AustralAsia Railway (Third Party Access) Act 1999* applies (and accordingly no proclamation can be made under this section in relation to the railway to which that Act applies).

The Trade Practices Act 1974 governs the access for the ARTC interstate lines located in South Australia.

The railway services defined by proclamation under the ROA Act are separate to the other two access regimes above and therefore there is no more than one access regime which applies to them. South Australia submits that Clause 6(4)(d) is satisfied by virtue of this fact.

Clause 6.5

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

(a) Objects clauses that promote the economically efficient use of, operation and investment in, significant infrastructure thereby promoting effective competition in upstream or downstream markets.

(b) Regulated access prices should be set so as to:
- *(i) generate expected revenue for a regulated service or services that is at least sufficient to meet the efficient costs of providing access to the regulated service or services and include a return on investment commensurate with the regulatory and commercial risks involved*
- *(ii) allow multi-part pricing and price discrimination when it aids efficiency*
- *(iii) not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher*
- *(iv) provide incentives to reduce costs or otherwise improve productivity.*

(c) Where merits review of decisions is provided, the review will be limited to the information submitted to the original decision-maker except that the review body:
- *(i) may request new information where it considers that it would be assisted by the introduction of such information*
- *(ii) may allow new information where it considers that it could not have reasonably been made available to the original decision-maker*
- *(iii) should have regard to the policies and guidelines of the original decision-maker (if any) that are relevant to the decision under review.*

Clause 6.5 (a)

Section 3(c) of the ROA Act discusses facilitating competitive markets in the provision of railway services through the promotion of the economically efficient use and operation of, and investment in, those services. The definition of railway services includes "a passenger service or a freight service", it does not solely refer to services regulated under the Act. South Australia submits that therefore

competition is promoted in upstream or downstream markets and clause 6.5 (a) is satisfied.

Clause 6.5 (b)

Under the rail access regime, ESCOSA does not set prices for railway services. Rather, as discussed, the South Australian rail access regime is underpinned by a negotiate-arbitrate regulatory framework.

ESCOSA may establish pricing principles for fixing a floor and ceiling price for the provision of railway services generally or railway services of a particular class: section 27(1) of the ROA Act. ESCOSA have included their pricing principles in the Information Kit for the access regime. The decision maker can take into account regulatory risks in setting an access price: section 3.2.5 of the ESCOSA Information kit allows for a risk adjusted rate of return (recognising commercial and regulatory risks).

Sub-section 27(2) states that 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.

Further, sub-section 38(2) provides that the pricing principles relating to the price of access to a railway service are as follows:

(a) that access prices should allow multi-part pricing and price discrimination when it aids efficiency;
(b) that access prices should not allow a vertically integrated operator to set terms and conditions that would discriminate in favour of its downstream operations, except to the extent that the cost of providing access to others would be higher;
(c) that access prices should provide incentives to reduce costs or otherwise improve productivity.

South Australia submits that the access regime complies with clause 6.5 (b).

Clause 6.5 (c)

Section 56 of the ROA Act provides for an appeal on a question of law, and does not provide for a merits review.

Additional matters

Sub-section 44DA(2) of the CPA provides that an effective access regime may contain additional matters that are not inconsistent with the principles of the CPA.

The South Australian rail access regime does not contain any additional matters which are inconsistent with the principles of the CPA.

Duration of certification

Under section 44M(5) of the TPA, when the NCC makes a recommendation to the Commonwealth Minister that a decision on the certification of an access regime be made, the NCC must also recommend the period for which any certification should be in force.

South Australia submits that certainty for rail industries and those seeking access to rail facilities should be an important consideration in setting the duration of the certification sought.

It is requested that the NCC recommend to the Commonwealth Treasurer that the South Australian rail access regime be certified for at least ten years (provided it remains unchanged), or for a longer period deemed appropriate by the NCC.

Conclusion

The South Australian rail access regime has been put in place to promote competition in the delivery of rail services and encourage timely and efficient investment in, and use of rail facilities and infrastructure. It aims to ensure that the State's railways operate efficiently and competitively to support trade and economic growth.

South Australia submits that the access regime is effective in regard to the objects in Part IIIA of the TPA (section 44M94)(aa) and it complies with the clause 6 principles setting out the criteria for assessing the effectiveness of a state or territory access regime as part of a certification.

South Australia requests that the NCC make a recommendation to the Commonwealth Minister that the South Australian rail access regime be certified as an "effective" access regime under Part IIIA of the *Trade Practices Act 1974* (TPA) for a period of at least 10 years or longer as deemed appropriate by the NCC.

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ESCOSA *Rail Access Regime Inquiry*, 2009

COAG National Partnership Agreement to Deliver a Seamless National Economy: Report on Performance 2008–09

National Competition Council *A guide to Certification under Part IIIA of the Trade Practices Act 1974*

Millers Annotated Trade Practices Act, 32nd ed 2010

Attachment 1- Relevant Legislation

Legislation supporting the South Australian Rail Access Regime:

1. *Railways (Operations and Access) Act 1997*
2. *Railways (Operations and Access) (Evidentiary Provisions) Regulations 1998*
3. The South Australian Government Gazette 17 May 1998, pages 2115-6.
4. *Rail Safety Act 2007*
5. *Essential Services Commission Act 2002*
6. *Essential Services Commission Regulations 2004*