NATIONAL
COMPETITION
COUNCIL

South Australian Rail Access Regime

Application for certification as an effective access regime – section 44M of the *Trade Practices Act 1974* (Cth)

Draft Recommendation

16 March 2011

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Abbreviations and defined terms

Abbreviation	Description
ACCC	Australian Competition and Consumer Commission
ARTC	Australian Rail Track Corporation
Asciano	Asciano Limited
ASC1	Asciano Limited's submission on the application, received 14 February 2011
CIRA	Competition and Infrastructure Reform Agreement
clause 6 principles	The principles set out in clauses 6(2)-6(5) of the Competition Principles Agreement, see Appendix A
conciliation	Settlement of a dispute by reference to ESCOSA
covered railway service	a railway service that is subject to the SA Rail Access Regime, as defined in paragraph 3.4
Council	National Competition Council
CPA	Competition Principles Agreement
ESC Act	*Essential Services Commission Act 2002* (SA)
ESCOSA	The Essential Services Commission of South Australia
ESCOSA CIRA Review	ESCOSA, *2009 SA Rail Access Regime Inquiry, Final Inquiry Report*, October 2009 (cited as ESCOSA (2009))
GWA	Genesee & Wyoming Australia Pty Ltd
GWA1	Genesee & Wyoming Australia Pty Ltd's submission on the application, received 14 February 2011
Minister	The Minister of the Government of South Australia with responsibility for administering the ROA Act
Executive Council	The Premier and Ministers of the Government of South Australia
Part IIIA	Part IIIA of the TPA
ROA Act	*Railways (Operations and Access) Act 1997* (SA)
regulated services	Railway services that have been proclaimed pursuant to s 7 of the ROA Act
SAG1	The South Australian Government's application for a recommendation for certification of the SA Rail Access Regime received 29 December 2010
SA Rail Access Regime/Regime	The regime for regulating access to railways in South Australia set out in the ROA Act
TPA	*Trade Practices Act 1974* (Cth)

1 Draft recommendation

1.1 In accordance with s 44M of the *Trade Practices Act 1974* (Cth) (**TPA**),[1] the Council has considered whether it should recommend that the South Australian Rail Access Regime (as described in chapter 3) (**SA Rail Access Regime**) be certified as an effective access regime.

1.2 The Council's preliminary view is that the SA Rail Access Regime meets the requirements for certification, although an issue arises in relation to the requirement that rights to negotiate access should lapse after a defined period. This issue is discussed in paragraphs 5.20-5.28. The Council's preliminary view is that it should recommend that the Commonwealth Minister certify the SA Rail Access Regime as effective for a period of five years, rather than the 10 years requested by South Australian Government. Should the South Australian Government formalise arrangements for periodic reviews of the Regime as discussed in paragraph 5.28, the Council would likely recommend that the Regime be certified for 10 years.

1.3 The Council's reasons for its draft recommendation are set out in this report.

Public consultation on the draft recommendation

1.4 The Council invites written submissions from interested parties on the draft recommendation. Information on making a submission is available on the Council's website (www.ncc.gov.au). The closing time and date for submissions is **5.00pm** on **Monday 18 April 2011**.

1.5 Submissions (with a completed cover sheet) should be emailed to the Council at sarail@ncc.gov.au (in both MS Word and PDF formats), with a hard copy sent to:

SA Rail Submissions
National Competition Council
GPO Box 250
Melbourne VIC 3001

1.6 The Council will consider submissions received by the closing date in developing its final recommendation to the Commonwealth Minister.

[1] See paragraph 2.7 below regarding the name of the TPA.

2 The certification application and public consultation

The application and public consultation

2.1 On 29 December 2010 the Council received an application from the Premier of South Australia, the Hon Mike Rann MP, for a recommendation pursuant to s 44M(2) of the TPA that the SA Rail Access Regime be certified as an effective access regime (**SAG1**).

2.2 The Council gave public notice of the application in 'The Australian' newspaper on 10 January 2011 and published the application and related documents on its website (www.ncc.gov.au). The Council invited interested parties to make written submissions in response to the application. The period for submissions closed on 14 February 2011 and submissions were received from:

- Asciano Limited (**Asciano**), dated February 2001 (**ASC1**), and
- Genesee & Wyoming Australia Pty Ltd (**GWA**), dated 14 February 2011 (**GWA1**).

2.3 Copies of the application and submissions are available on the Council's website.

2.4 The Council considered all submissions in developing its draft recommendation.

2.5 Asciano raises a number of concerns over the Regime's general effectiveness, as well as identifying potential areas for improvement that it says the Council should consider in deciding whether or not to recommend certification. The Council considers Asciano's submissions in chapter 6, which deals with the objects of Part IIIA, commencing at paragraph 6.9.

2.6 GWA notes its position in the South Australian rail industry and submits that 'the South Australian Government has made a good case for certification and that the South Australian Rail Access Regime meets the criteria for certification.' GWA supports the application for certification. The Council has taken GWA's support of the South Australian Government's submissions into account.

Renaming of the Trade Practices Act

2.7 The *Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010* (Cth) renamed the TPA the *Competition and Consumer Act 2010* (Cth) with effect from 1 January 2011. As the application was made under the TPA prior to its name change, this draft recommendation refers throughout to the TPA. References in this draft recommendation to the TPA or Part IIIA should be read as the legislation that was in effect on 29 December 2010 (the day on which the Council received the application), unless otherwise noted.

3 The SA Rail Access Regime

3.1 The SA Rail Access Regime for which certification is sought is established by the *Railways (Operations and Access) Act 1997* (SA) (**ROA Act**). A copy of the ROA Act can be found at http://www.legislation.sa.gov.au.

3.2 South Australia's application notes that '[r]ailway ownership [in South Australia] is vertically integrated, meaning that the owner of the below-rail infrastructure is also a provider of above-rail services on the lines,' and that South Australia enacted the ROA Act '[t]o ensure other operators could offer above-rail services to customers and compete with the owner/operator' (SAG1, p 4).

3.3 The key legislative definitions under the Act necessary to understand an explanation of its operation are set out in Appendix B.

3.4 Under the SA Rail Access Regime, 'operators' and 'railway services' are made subject to coverage under the Regime by proclamation of the Governor.[2]

3.5 The general effect of the Governor's proclamations is that all major intrastate railway services are covered by the Regime, excluding Adelaide trams, heritage and tourist rail services, and two railways associated with steel and coal operations (the latter of which is subject to access arrangements under a state lease). Interstate railways in South Australia are covered by an access undertaking under Part IIIA of the TPA given by the Australian Rail Track Commission (**ARTC**).

3.6 The Essential Services Commission of South Australia (**ESCOSA**) is South Australia's independent regulator for essential services. It has responsibility for enforcing and monitoring the SA Rail Access Regime.

3.7 South Australia states that '[t]he 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' (SAG1, p 5).

3.8 The ROA Act places various conduct rules on operators of covered railway services, including rules to ensure fair access to railway services. Where relevant they are detailed in the assessment section of this draft recommendation.

3.9 Operators of covered railway services must provide an 'information brochure' to an industry participant requesting one which sets out information about terms and conditions of access to that service by others, applicable 'pricing principles' for the service, and other information required by ESCOSA. ESCOSA may establish pricing principles for fixing a floor and ceiling price for railway services generally, or of a particular class. The pricing principles currently applicable are set out in ESCOSA's

[2] The Governor made proclamations setting the coverage of the Regime after the ROA Act was enacted but before it commenced (these are detailed in paragraphs 5.4-5.5).

Information Kit on the South Australian Rail Access Regime (**Information Kit**) (ESCOSA 2010).

3.10 The ROA Act obliges operators to respond to 'access proposals' with information reasonably requested by the applicant in relation to available capacity on the relevant railway infrastructure, the feasibility of capacity expansions for the benefit of the applicant, and the feasibility of access and general terms upon which access could be provided.

3.11 Operators must negotiate in good faith with the applicant or 'proponent' of an access proposal. If the proponent of an access proposal and the relevant operator(s) cannot reach agreement, then an access dispute arises. The proponent may refer access disputes to ESCOSA for resolution. ESCOSA may then seek to settle the dispute by conciliation. If reasonable conciliation attempts fail, ESCOSA may appoint an arbitrator and refer the dispute to him or her for resolution. The arbitrator must proceed as quickly as proper consideration allows, and is subject to a six month time limit, with the ability to 'stop the clock' to exercise information gathering powers.

3.12 The ROA Act obliges the arbitrator to take into account various principles relating to the parties' interests and the wider community's interests. The ROA Act regulates the conduct of arbitrations, such as by allowing informal proceedings and giving the arbitrator various procedural powers, including the power to obtain documents and information. At the conclusion of arbitration the arbitrator makes an award in relation to the access dispute. Parties aggrieved by an arbitration award may appeal to the Supreme Court of South Australia on a question of law. The way the ROA Act regulates access disputes is discussed in further detail in Chapter 5 of this draft recommendation (see in particular paragraphs 5.36-5.58). The access process under the Regime is summarised in diagrammatic form in Figure 1 below.

3.13 At various stages in the access request process, the operator(s), ESCOSA or the arbitrator may refuse to respond to an access request or terminate a dispute resolution process in response to behaviour that is unreasonable or lacking in good faith.

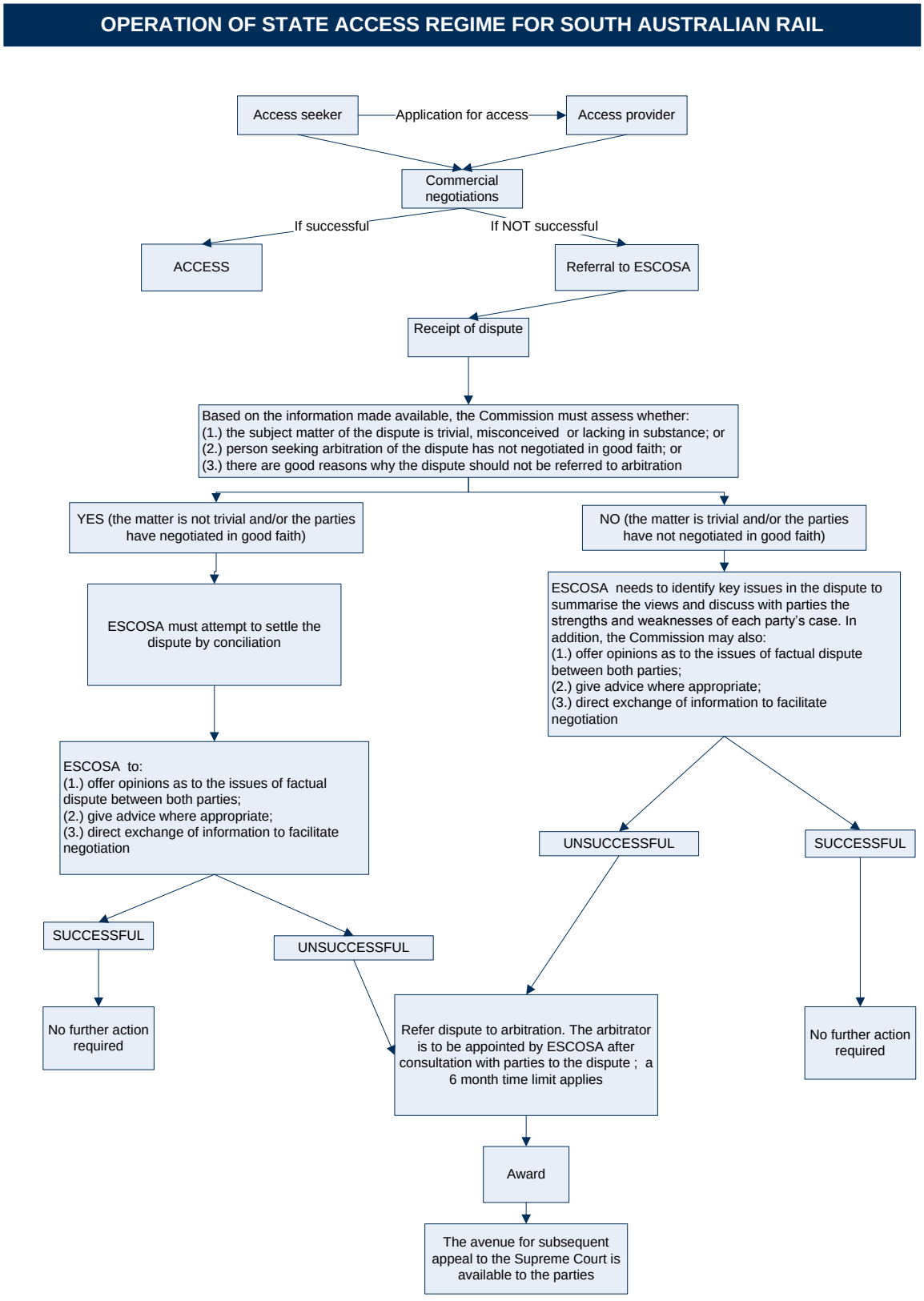
3.14 The Minister may require ESCOSA to report to him or her on the costs of railway services or any aspect of the operation of the ROA Act. ESCOSA may require information from operators to monitor the costs of railway services, and may require operators to provide documents related to the provision of railway services. ESCOSA must be provided with a copy of every access contract made by an operator. ESCOSA has established detailed reporting requirements for operators which are set out in the Information Kit.

3.15 Railways services are a regulated industry under the *Essential Services Commission Act 2002* (SA) (**ESC Act**). In 2009 the Acting Treasurer of South Australia directed ESCOSA pursuant to s 35(1) of the ESC Act to undertake an inquiry in relation to the ROA Act (**ESCOSA CIRA Review**) (ESCOSA 2009). The primary purpose of the ESCOSA CIRA Review was to consider whether the ROA Act was consistent with the principles for access regimes set out in the Competition and Infrastructure Reform Agreement

(**CIRA**) signed in February 2006, and to recommend any amendments required to bring the ROA Act into compliance with CIRA. The ESCOSA found that the SA Rail Access Regime 'was generally consistent with the relevant CIRA principles' (SAG1, p 5), while identifying some improvements and areas where greater consistency with CIRA could be brought about. As a result, South Australia enacted the *Railways (Operations and Access) (Miscellaneous) Amendment Act 2010* (SA).

3.16 While rail services are a regulated industry under the ESC Act, ESCOSA does not fix or monitor prices of such services pursuant to the ESC Act. The ESCOSA CIRA Review found that this was not currently required (SAG1, p 19).

Figure 1: Access under the SA Rail Access Regime



Source: SAG1, p 20.

4 Certifying an access regime

4.1 States and territories may establish their own regimes for access to services and for regulating the prices and other terms and conditions for such access. A state or territory that is a party to the Competition Principles Agreement (**CPA**) may apply to the Council for a recommendation to the Commonwealth Minister that an access regime be certified as an 'effective access regime'.

4.2 Where a state or territory regime is certified, that regime will govern regulation of access to the services to which it applies and those services cannot be declared under the provisions of the national access regime in Part IIIA of the TPA or subject to an access undertaking to the Australian Competition and Consumer Commission (**ACCC**).

4.3 To obtain certification the responsible Minister—the Premier of a state or Chief Minister of a territory—may apply, in writing, to the Council asking the Council to recommend that the Commonwealth Minister certify an access regime as effective. The requirements for application to the Council are prescribed in regulation 6B of the Trade Practices Regulations 1974 (Cth). The Council encourages applicants to support their application with explanations and evidence demonstrating how each of the clause 6 principles in the CPA is satisfied and how the regime has regard to the objects set out in s 44AA of Part IIIA of the TPA.

The Council's approach to considering an application for certification

4.4 Section 44M(4) of the TPA requires the Council,[3] in deciding whether to recommend that a regime be certified as effective, to:

- assess whether the access regime is an 'effective access regime' by applying the relevant principles set out in the CPA
- have regard to the objects of Part IIIA of the TPA (in s 44AA), and
- not consider any other matters (s 44M(4)(b) of the TPA).

4.5 The relevant principles are set out in clauses 6(2)–6(5) of the CPA (**clause 6 principles**).[4] There are 23 such principles, a number of which have several elements. An effective access regime must satisfactorily address each of the clause 6 principles.

4.6 The Council's consideration of whether the clause 6 principles are satisfied is subject to several other requirements:

- s 44DA(1) of the TPA provides that the Council must treat each principle as having the 'status of a guideline rather than a binding rule'

[3] Parallel requirements to those applying to the Council in making its recommendation, apply to the Commonwealth Minister in deciding whether to certify an access regime as effective.

[4] The clause 6 principles are reproduced at appendix A.

- s 44DA(2) provides that an effective access regime may contain additional matters that are not inconsistent with the clause 6 principles
- clause 6(3)(b) of the CPA requires that in order to conform with the clause 6 principles an access regime must 'reasonably incorporate' each of the principles in clause 6(4) of the CPA. Clause 6(3) also acknowledges that 'there may be a range of approaches available to a State or Territory Party to incorporate each principle.' The clause goes on to note that:

  > Provided the approach adopted in a State or Territory access regime represents a reasonable approach to the incorporation of a principle in subclause (4) or (5), the regime can be taken to have reasonably incorporated the principle for the purposes of paragraph (b).

- clause 6(3A) of the CPA provides that in assessing whether an access regime is an effective access regime the assessing body:

  > (a) should, as required by the Trade Practices Act 1974, and subject to s 44DA, not consider any matters other than the relevant principles in this Agreement. Matters which should not be considered include the outcome of any arbitration, or any decision, made under the access regime; and
  >
  > (b) should recognise that, as provided by s 44DA(2) of the Trade Practices Act 1974, an access regime may contain other matters that are not inconsistent with the relevant principles in this Agreement.

4.7 The objects of Part IIIA are set out in s 44AA, and provide that:

> The objects of this Part are to:
>
> (a) promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets; and
>
> (b) provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

4.8 In its Guide to Certification (NCC 2009b), and in a number of recommendations on applications for certification of state access regimes (see for example NCC 2009c, at 4.7), the Council has indicated its view that certification requires assessment only that the particular regime satisfactorily addresses the clause 6 principles and accords with the objects of Part IIIA.

4.9 A failure to secure certification of a particular access regime does not affect the enforceability or operation of a state or territory access regime. Indeed, the SA Rail Access Regime has been in existence since 1997. Certification does, however, remove the potential for a service(s) subject to a state or territory access regime to be, in addition, declared under Part IIIA of the TPA and therefore subject to overlapping

Commonwealth and state or territory access regimes. Certification is therefore likely to provide greater certainty to asset owners/service providers and access seekers.[5]

Structure of this draft recommendation

4.10 In assessing the application for certification, the Council has organised its consideration of the SA Rail Access Regime against the guiding clause 6 principles and the objects of Part IIIA of the TPA into six categories:

- the scope of the access regime–6(3), 6(4)(d)
- the treatment of interstate issues–6(2), 6(4)(p)
- the negotiation framework–6(4)(a)–(c), (e), (f), (g)-(i), (m), (n), (o)
- dispute resolution–6(4)(a)–(c), (g), (h), (i), (j), (k), (l), (o), 6(5)(c)
- efficiency promoting terms and conditions of access–6(4)(a)–(c), (e), (f), (i), (k), (n), 6(5)(a) and (b)
- the objects of Part IIIA in s 44AA of the TPA.

4.11 The Council considers that these categories provide a logical framework for analysis, and help to clarify how a regime addresses the necessary elements of an effective access regime. The categories do not however replace the clause 6 principles and the objects of Part IIIA as the basis for assessing a regime's effectiveness. The Council considers each clause 6 principle relevant to each of the categories, and, as required by clause 6(3A)(a) of the CPA, only the relevant clause 6 principles.

4.12 When the Council recommends the Commonwealth Minister make a decision to certify an access regime as effective, it must also recommend the duration for which the decision should be in force.

4.13 The Council's preliminary assessment of the SA Rail Access Regime against the clause 6 principles and objects of Part IIIA of the TPA is set out in chapters 5 and 6. The Council's draft recommendation on the duration of any certification is set out in chapter 7.

[5] Section 44H(4)(e)(ii) of the TPA provides that the designated Minister cannot declare a service if access to the service is already the subject of an effective access regime under section 44N of the TPA.

5 Assessment against the clause 6 principles and objects of Part IIIA of the TPA

The scope of the SA Rail Access Regime (clauses 6(3)(a) and 6(4)(d))

5.1 CPA clause 6(3)(a) requires that for a regime to be certified as effective its application be limited to a narrow range of infrastructure services—those that are provided by significant infrastructure that are not economically feasible to duplicate—and where access to the services removes barriers to competition in upstream and downstream markets. Access should be available only where any safety issues can be addressed at a reasonable cost.

5.2 CPA clause 6(4)(d) is intended to ensure there is periodic review of the need for access regulation to apply to a particular service. A facility might at the present time not be economically feasible to duplicate (so warranting access regulation) but this situation may change over time removing the need for access regulation. The review provision in clause 6(4)(d) relates to the point in time of the decision to make a particular service subject to a regime.

The SA Rail Access Regime

Services subject to the SA Rail Access Regime

5.3 The SA Rail Access Regime applies to operators and railway services to the extent it is declared by proclamation to so apply (ROA Act, s 7). The Governor has the power to declare by proclamation that operators and railway services are subject to the Regime (s 7(2)(a)), and to vary or revoke existing declarations (s 7(2)(b)). The Regime cannot apply to the railway to which the *AustralAsia Railway (Third Party Access) Act 1999* (SA) applies—that is, the Tarcoola to Darwin railway (ROA Act, s 7(3)).

5.4 On 7 May 1998 the Governor of South Australia made two declarations under the ROA Act in relation to the coverage of the Act. First, the Governor made a proclamation under s 4 of the Act to clarify the facilities within the ambit of 'railway infrastructure.' The following items were proclaimed to be 'railway infrastructure':

(a) Railway yards, sidings and crossings and passing loops (including associated level crossings, track structures, supports, lines, posts and signs); and

(b) Signalling, train control and communications systems (including signal boxes, huts and telegraph and transmission lines, instruments and circuitry) necessary for the safe and efficient movement of trains; and

(c) Installations and equipment that operates on a fixed line, track or runway.

5.5 Second, the Governor made a proclamation under s 7 of the ROA Act which defined the railway services that are subject to the SA Rail Access Regime. 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; or

(g) services established on a non-profit basis—

a. for heritage value or amusement value; or

b. to provide services to tourists (**covered railway services**) (SAG1, p 7).'

5.6 The overall effect of the Governor's 7 May 1988 proclamations is that all 'railway services' within the meaning of the ROA Act are covered by the Regime, except the services excluded in paragraphs (a)-(g) of the declaration. Details of each of the railways in South Australia, including which railways are subject to the SA Rail Access Regime, are set out on pp 14-15 of the application.

5.7 The services covered by the SA Rail Access Regime are not subject to any expiry date or scheduled for periodic review.

Application and submissions

5.8 The South Australian Government submits that the SA Rail Access Regime satisfies clause 6(3)(a) of the CPA. It submits that the railway facilities to which it applies are significant infrastructure facilities, and that they play a significant role in supporting the movement of export freight (particularly gypsum, grain and limestone) to ports for key industries in the state.

5.9 The South Australian Government notes that a 'key factor currently affecting the use of the intrastate lines [ie those covered by the Regime] is the existence of three different rail gauges in South Australia and limited connectivity to the intrastate rail corridors [which are not covered]' (SAG1, p 29).

5.10 Further, the applicant notes various planned improvements to the state's export industries, the preparation of a National Freight Network Strategy by Infrastructure Australia to which South Australia is contributing, and planned reforms to the intrastate network to improve its productivity and competitiveness. Taken together, the South Australian Government submits these matters establish that the Regime applies to 'significant infrastructure facilities' as required by the opening words of clause 6(3)(a) of the CPA.

5.11 In relation to the requirement that regimes apply where it would not be economically feasible to duplicate the facility, the South Australian Government notes the decision

of the Australian Competition Tribunal in *Duke Eastern Gas Pipeline*,[6] where it held that the test is satisfied where a single infrastructure facility can meet market demand at less cost than two or more facilities. The applicant also notes previous findings by the Council that 'the test to determine whether this criterion is met is a social test that focuses on identifying whether a facility has natural monopoly characteristics' and submits that 'railways have these characteristics due to the large cost of construction and demand risk' (SAG1, p 31).

5.12 The South Australian Government submits that, in relation to the covered railway services, 'duplication of the service by a prospective service provider would generally not be economically feasible' (SAG1, p 31).

5.13 Having regard to these matters, South Australian Government submits the SA Rail Access Regime satisfies clause 6(4)(i).

5.14 Regarding the clause 6(4)(ii) requirement that access be necessary for effective competition in an upstream or downstream market, the South Australian Government submits that the Regime creates a negotiate/arbitrate model designed to facilitate access to the covered facilities on fair commercial terms, and notes the importance of covered railway services to the movement of export freight.

5.15 Regarding the clause 6(4)(iii) requirement that provision be made for appropriate safety regulation of services to which access is given, the South Australian Government notes that any use of railway services accord with the *Rail Safety Act 2007* (SA).

The Council's assessment

5.16 The Council accepts that the facilities providing the railway services currently covered by the SA Rail Access Regime are significant infrastructure facilities, having regard to the size of the relevant railways and their importance to the South Australian economy. Covered railway infrastructure is likely to exhibit natural monopoly characteristics and is unlikely to be economically feasible to duplicate. The Council agrees that access to the regulated services covered by the SA Rail Access Regime is likely to be necessary to permit effective competition in dependent markets and that access can be provided safely.

5.17 An element of the SA Rail Access Regime that is of potential concern is the mechanism of coverage, being proclamation by the Governor, who acts on the advice of the Executive Council. There is no legislative or regulatory mechanism for an access seeker or other interested party to seek that a railway service not currently covered by Regime be covered under it. Nor is there any express mechanism for interested parties to be heard or consulted before any new railway is proclaimed to be covered under the Regime. This raises the possibility that services which technically fall within the definition of 'railway services,' and yet do not meet the requirements of clause 6(3)(a), may be proclaimed and subject to access.

6 *Re Duke Eastern Gas Pipeline Pty Ltd* [2001] ACompT 2

5.18 Notwithstanding this concern, it remains the case that the railway services currently covered by the Regime meet the requirements of clause 6(3)(a). If in future the services proclaimed to be covered under the Regime were changed significantly, such developments could possibly amount to 'substantial modifications' of the Regime for the purposes of s 44G(2)(e)(ii) of the TPA, meaning that certification may no longer present a bar to declaration of services covered by the Regime. Furthermore, if new railway services began to be provided in South Australia which were not proclaimed under the Regime and for which access issues were inadequately addressed, declaration and access may be available under Part IIIA of the TPA. While noting these possibilities, the Council considers that there is limited scope for developments that may raise access concerns. In any case, ESCOSA's regulatory role may be sufficient to address situations where coverage becomes inappropriate, as discussed further below in the context of clause 6(4)(d) of the CPA. The question of the appropriate coverage of the Regime was considered by ESCOSA in its 2009 Review, and ESCOSA recommended 'that coverage of the Access Regime remain unchanged' (ESCOSA 2009, p 24).

5.19 The Council considers that the SA Rail Access Regime satisfactorily addresses clause 6(3)(a).

Review of the right to negotiate access (clause 6(4)(d))

The SA Rail Access Regime

5.20 The SA Rail Access Regime includes several mechanisms under which its operation may be monitored and reviewed by ESCOSA, the Minister and Parliament. ESCOSA is obliged to monitor and enforce compliance with the SA Rail Access Regime (ROA Act, s 9(2)). ESCOSA must also report annually to the Minister responsible for the ROA Act on its (ESCOSA's) work under the Act, and the Minister must lay ESCOSA's annual reports before both of the Houses of Parliament of South Australia (ROA Act, s 9A).

5.21 Part 7 of the ROA Act provides for ESCOSA to require information from operators to monitor the costs of railway services (s 60), and require operators to provide documents related to the provision of railway services (s 62). ESCOSA must also be provided with a copy of every access contract made by an operator (s 61).

5.22 The Minister responsible for the ROA Act may require ESCOSA to report to him or her on the costs of railway services or any aspect of the operation of the ROA Act (s 64).

5.23 While these provisions facilitate monitoring of the SA Rail Access Regime's operation, there is no mechanism under which the services covered by the ROA Act (for which a right to negotiate access exists) 'lapse unless reviewed and subsequently extended'.

Application and submissions

5.24 The South Australian Government acknowledges that the ROA Act does not provide for periodic review of 'the access arrangements set out under the Act.' The South Australian Government notes, however, that the ROA Act allow the Minister to

require reports from ESCOSA on any aspect of the operation of the Act at any time as well as require ESCOSA to provide an annual report to the Minister on its work under the Act which is tabled in Parliament (SAG1, pp 35-36). The South Australian Government submits that Ministerial and Parliamentary oversight allows for consideration of 'whether or not a periodic review of the ROA Act is required.'

5.25 The South Australian Government further notes in relation to clause 6(4)(d) that arbitration awards under the ROA Act conferring access rights must specify the period for which the proponent is entitled to access.

5.26 In relation to the preservation of existing contractual rights, the South Australian Government submits that '[e]xisting awards are enforceable as if they were contracts, and thus will be unaffected by a change in the access regime, as will any commercially negotiated access arrangements (SAG1, p 35)'.

The Council's assessment

5.27 The SA Rail Access Regime does not provide that the rights to negotiate access under the Regime 'lapse after a defined period unless reviewed and subsequently extended.' The South Australian Government submits that ESCOSA can assess coverage and recommend continuance or revocation where appropriate as part of its general monitoring and reporting obligations under the ROA Act.

5.28 In light of the Regime's 'coverage-by-proclamation' procedure, in which coverage does not lapse and is not subject to mandatory periodic review, the Council considers the Regime's compliance with clause 6(4)(d) is arguable. The case for satisfaction of clause 6(4)(d) would be stronger if the South Australian Government were to formalise a requirement for ESCOSA to periodically review the railway services covered by the Regime on a regular basis.[7] If such a change is not made the Council may need to consider shortening the period for which it recommends certification be granted. This issue is considered further in Chapter 7 which addresses the appropriate duration of any certification.

Treatment of interstate issues (clauses 6(2), 6(4)(p))

5.29 Clause 6(2) establishes principles for the treatment of a service(s) provided by a facility with an influence beyond a jurisdictional boundary or where there are difficulties because the facility providing the service that is subject to a regime is located in more than one jurisdiction. Clause 6(4)(p) is aimed at ensuring there is a single seamless process for obtaining access to a service, so promoting timely and efficient outcomes.

[7] The Council notes that the SA Port Access Regime provides that is subject to five-yearly reviews by ESCOSA and that the regime lapses unless it is endorsed by ESCOSA and a regulation is made extending the regime's operation.

The SA Rail Access Regime

5.30 The rail services currently covered by the SA Rail Access Regime do not include any provided by railways running interstate. All covered railways are located entirely within South Australia.

Application and submissions

5.31 The South Australian Government submits that, as the Regime applies only to railways which are entirely located in South Australia the question of whether substantial difficulties arise from facilities being situated in more than one jurisdiction does not arise. It further submits in relation to clause 6(4)(p) of the CPA that there are no railways in South Australia to which more than one access regime applies.

5.32 The South Australian Government considers therefore, that the principles in clauses 6(2) and 6(4)(p) of the CPA are satisfied.

The Council's assessment

5.33 The Council acknowledges that as the SA Rail Access Regime operates to intrastate railway services operating and located exclusively within the jurisdiction of South Australia, and as no other access regime applies to those services, there is no prospect for conflict to arise. The SA Rail Access Regime satisfies clauses 6(2) and 6(4)(p).

The negotiation framework (CPA clauses 6(4)(a)–(c), (e), (f), (g), (h), (i), (m), (n), (o))

Clauses 6(4)(a)–(c): negotiated access

5.34 Clauses 6(4)(a)-(c) seek to ensure that an access regime provides an appropriate balance between commercial negotiation and regulatory intervention to facilitate access negotiations. Clause 6(4)(a) requires that an effective access regime allows parties to try to reach mutually beneficial agreements through commercial negotiation. Clauses 6(4)(b) and (c) recognise that regulatory measures can provide an incentive to reach commercially agreed outcomes but also require that an effective regime provides a means for dealing with situations where access providers and access seekers are unable to reach agreement.

5.35 In some circumstances access seekers may have insufficient information and bargaining power to negotiate with large incumbent service providers. Therefore an effective access regime should appropriately address information asymmetries, so that access seekers can enter into meaningful access negotiations. This involves a balance between obliging the service provider to disclose sufficient information so that the access seeker can make informed decisions, while ensuring that the disclosure requirements are not overly onerous.

The SA Rail Access Regime

5.36 The SA Rail Access Regime is a negotiate/arbitrate model, including mechanisms to encourage and facilitate negotiated agreements between providers of covered railway services and access seekers, particularly relating to the exchange of information, as well as mechanisms to establish and regulate arbitration between the parties and enforce arbitration awards where negotiations do not lead to agreement.

Information provision

5.37 Operators of railway infrastructure must maintain 'information brochures' relating to their services and make them available on request to industry participants (ROA Act, s 28). The information brochures must specify the terms and conditions upon which the operator provides any passenger or freight services, terms and conditions upon which the operator is prepared to make its railway available for use by others (ie offer below rail services), and any other information required by ESCOSA. ESOCSA's Information Kit in relation to the SA Rail Access Regime details, amongst other things, the information that operators must include in their information brochures. Operators must provide an information brochure to a requesting industry participant within 30 days of a request for one (unless extended by ESCOSA) (ESCOSA 2010).

5.38 The ROA Act sets out in s 29 additional obligations on operators to provide 'information about access'. On the application of a person with a proper interest in making an access proposal, operator must provide information 'reasonably requested by the applicant' relating to:

- the extent to which the operator's railway infrastructure is currently being used
- whether it would be necessary and if so feasible to add to or extend the operator's railway infrastructure to meet the applicant's requirements, and
- whether the operator is prepared to offer a specified service and if so, on what terms, and if not, the reasons why.

5.39 ESCOSA recently conducted a review of the SA Rail Access Regime Information Kit (ESCOSA 2010b). The key purposes of the review were to ensure that the information provided by operators in their SA Rail Access Regime information brochures was provided in a transparent manner and that the information provided in the brochure and throughout the negotiation process is able to facilitate successful negotiation.

5.40 Section 33A of the ROA Act provides for the protection of confidential information that may be exchanged between operators and access seekers pursuant to a s 29 request, or otherwise during negotiations under the Act. Unauthorised use or disclosure of such information is an offence. Operators are required to develop and maintain a policy for the handling of confidential information obtained during access negotiations.

5.41 To facilitate each operator's information provision functions as well as the monitoring functions of ESCOSA (see paragraphs 5.143-5.149), the ROA Act includes in s 22 rules for the segregation by operators of accounts and records relating to their railway service business(es). Operators must keep accounts that give a true and fair view of their railway service business, as distinct from any other businesses carried on (s 22(1)). If the operator provides a below rail service, it must keep separate accounts for that business as distinct from its other railway service business (s 22(1a)). The accounts must give a comprehensive view of the operator's rights and liabilities related to railway infrastructure, and a true and fair view of income, expenditure, assets and liabilities related to railway infrastructure (s 22(2)).

Negotiation

5.42 Part 5 of the ROA Act makes provision for the negotiation of access agreements. Under s 31, an industry participant who wants to access a railway service or vary an existing access contract (the 'proponent'), may put an 'access proposal' to the relevant operator setting out the nature and extent of access sought, the proposed terms and conditions and, if any further railway infrastructure is required, a proposal in that regard. Notice of the access proposal must be given to ESCOSA and any other industry participants whose interests could be affected. The operator and other interested industry participants are referred to as 'respondents'.

5.43 Once an access proposal has been made, the operator and any other respondents must negotiate with the proponent in good faith to reach agreement (s 32). The operator must not enter into an access contract unless any respondents agree to it.

Access disputes / conciliation / arbitration

5.44 Pursuant to s 34 of the ROA Act, an 'access dispute' arises if:

- the operator or any other respondent fails to respond to an access proposal within 30 days
- the operator or any other respondent refuses or fails to negotiate in good faith with the proponent on an access proposal
- the proponent, the operator and any other respondent fail to reach agreement on an access proposal after making reasonable attempts to do so, or
- a respondent objects to a proposed access contract.

5.45 Pursuant to s 36 of the ROA Act, once an access dispute arises, the proponent may ask ESCOSA to refer it to arbitration. ESCOSA must then attempt to settle the dispute by conciliation or appoint an arbitrator and refer the dispute to him or her. If ESCOSA fails to resolve an access dispute after making a reasonable attempt to do so by conciliation, then it must appoint and refer the dispute to an arbitrator. ESCOSA need not refer the matter to arbitration if, in its opinion:

- the subject matter in dispute is trivial, misconceived or lacking in substance

- the person seeking arbitration has not negotiated in good faith, or
- it is satisfied by a party to the dispute that there are good reasons why the dispute should not be referred to arbitration.

5.46 The appointment of the arbitrator is governed by s 37 of the Act. The arbitrator must be properly qualified and disinterested. ESCOSA must attempt to appoint an arbitrator who is acceptable to all parties.

5.47 The parties to an arbitration are the proponent and respondents to the access proposal, any other person who, in ESCOSA's opinion, has a material interest in its outcome and any other person joined by the arbitrator (ROA Act, s 39). The Minister responsible for the ROA Act may participate (s 41). Parties may be represented by a lawyer (s 40).

5.48 The arbitrator must proceed with the arbitration as quickly as its proper investigation and fair consideration allows (ROA Act, s 42). The arbitrator must make an award within a standard period of six months of the dispute being referred to arbitration, however, the 'clock may be stopped' on the standard period to allow the arbitrator to exercise powers to obtain information and documents in relation to the dispute (s 50A).

5.49 Sections 44 and 45 of the ROA Act give the arbitrator wide powers to regulate the procedure of the arbitration. The arbitrator may give a wide array of procedural orders, refer matters to experts for report, engage a lawyer for advice and otherwise 'do anything necessary for the expeditious hearing and determination of the dispute'. An arbitrator is not bound by rules of evidence or legal procedure, and may obtain information in any way he or she considers appropriate.

5.50 The arbitrator has powers under s 47 of the ROA Act to obtain information and documents that may be relevant to the dispute from any person. Section 48 provides for the arbitrator to evaluate confidentiality claims over such information and limit access to them if appropriate.

5.51 Arbitration may be terminated early:

- by the arbitrator if the subject matter is trivial, misconceived or lacking in substance, or if the person who applied for arbitration has not first engaged in negotiations in good faith (ROA Act, s 49(1))
- by consent of the parties (ROA Act, s 49(2)), and
- by the proponent (or all proponents) of the access proposal at any time (ROA Act, s 50).

5.52 Under s 38(1) of the ROA Act, the arbitrator must take the following principles into account:

(a) the objects of the ROA Act (extracted in paragraph 6.4)

(b) the non-discrimination principles (see paragraph 5.166)

(c) the operator's legitimate business interests and investment in railway infrastructure

(d) the cost to the operator of providing access as sought by the proponent (excluding costs arising from increased market competition)

(e) if applicable—the economic value to the operator of additional investment the proponent proposes to undertake

(f) the economically efficient operation of the railway infrastructure

(g) the pricing principles—

(i) relating to the fixing of floor and ceiling prices specified in s 27;[8] and

(ii) relating to the price of access to a railway service specified in subsection (2) (see paragraph 5.53 below)

(h) the price of comparable services for other industry participants (including—if applicable—the operator itself)

(i) the interests of industry participants whose interests may be affected by the proposal

(j) the contractual obligations of the operator and existing industry participants

(k) the operational requirements for the safe and reliable operation of the railway infrastructure

(l) the public interest in market competition

(m) relevant technical and legal issues, and

(n) other matters the arbitrator considers appropriate.

5.53 The pricing principles referred to at paragraph 5.52(g) above are (per s 38(2)):

(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.

5.54 Following arbitration the arbitrator makes an award. Restrictions on the awards an arbitrator may make are set out in s 52 of the Act, which provides as follows.

(1) 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.

(2) An arbitrator cannot make an award that would prejudice the rights of an existing industry participant under an earlier contract or award unless—

(i) the industry participant's entitlement to access exceeds the entitlement that the participant actually needs and there is no reasonable likelihood that the participant will need to use the excess entitlement; and

[8] As discussed at paragraph 5.166, ESCOSA may fix pricing principles pursuant to section 27 of the Act, which include principles for fixing a floor price and a ceiling price for particular classes of railway services.

(ii) the proponent's requirements cannot be satisfactorily met except by transferring the excess entitlement (or some of it) to the proponent.

5.55 The ROA Act provides for consent awards (s 53). A proponent of an access proposal may elect not to be bound by an award, in which case it is prevented from making another access proposal for 12 months without ESCOSA's consent (s 54). The Act provides under s 55 for the variation or revocation of awards by ESCOSA if all parties agree. If one or more parties desire variation or revocation of an award but there is not unanimous agreement, the party(ies) desiring variation or revocation can apply to ESCOSA to refer the question to further arbitration. In deciding whether or not to do so, ESCOSA must consider whether circumstances have changed and other relevant matters.

5.56 Appeals from an arbitration award (or a decision not to make one) may be made to the Supreme Court of South Australia on a question of law (ROA Act, s 56). The Act empowers the Court to vary, revoke or re-make awards, remit matters back to the arbitrator, and make incidental orders. An appeal does not suspend the operation of the award unless the Court so orders. The ROA Act provides that an arbitration award under the Act cannot be challenged other than by appeal under s 56 (s 56(4)). The *Commercial Arbitration Act 1986* (SA) does not apply to arbitration under the ROA Act (s 59).

5.57 The ROA Act allows for awards regarding the costs of an arbitration are to be borne by the parties in proportions either as decided by the arbitrator or in equal proportions (s 57). If, however, a proponent terminates an arbitration or elects not to be bound by an award, it must bear the entire costs (s 57(2)).

5.58 The ROA Act provides for the Supreme Court of South Australia to enforce the Act by:

- giving injunctive relief requiring a person to comply with an award or with any provision of the Act (s 65)
- awarding compensation where loss or damage has been suffered as a result of non compliance with an arbitration award (s 66), and
- where the arbitrator certifies that a person has failed to comply with an award or other order of the arbitrator, make orders to enforce compliance (s 67).

Application and submissions

5.59 The South Australian Government submits that the SA Rail Access Regime encourages third party access through negotiation 'to the maximum extent possible, in accordance with clause 6(4)(a) of the CPA.' The South Australian Government notes that the Regime places no restrictions on the ability of parties to seek agreement on access or seek to resolve disputes in that regard via avenues agreed between them. It further notes that the ROA Act allows proponents to put access proposals to operators, and provides that the operator, the proponent and any interested third party are required under the ROA Act to then negotiate in good faith with a view to reaching agreement.

5.60 The application also discusses the ESCOSA CIRA Review (ESCOSA 2009), pursuant to which ESCOSA considered whether the SA Rail Access Regime was consistent with CIRA. The South Australian Government notes that ESOSA's conclusion was that 'the access regime is generally consistent with clause 2 of the CIRA, although [ESCOSA] recommended that certain amendments to the access regime could be made to achieve greater consistency' (SAG1, p 21).

5.61 Notably, clause 2.2 of the CIRA is in similar terms to clause 6(4)(a), being that:

> Clause 2.2, CIRA
>
> The parties agree in the first instance terms and conditions for third party access to services provided by means of significant infrastructure facilities should be on the basis of terms and conditions commercially agreed between the access seeker and the operator of the infrastructure.

5.62 In relation to clause 6(4)(b), the South Australian Government submits that this is satisfied, again pointing to the rights of proponents of access proposals to negotiate with the operator, and the fact that this right is backed by the good faith negotiation requirement, conciliation of disputes by ESCOSA and finally enforceable arbitration (SAG1, p 33).

5.63 The South Australian Government's submissions specifically regarding compliance with clause 6(4)(c) of the CPA focus on the mechanisms available to enforce the results of arbitration and the ROA Act through the Supreme Court.

The Council's assessment

5.64 The Council accepts that the SA Rail Access Regime encourages parties to enter into commercial negotiations to reach agreement on the terms and conditions of access, and provides an appropriate balance between commercial negotiation and regulatory intervention to facilitate access negotiations. The Council considers that the negotiation provisions under the ROA Act and the conciliate/arbitrate dispute resolution processes establish an appropriate balance between the interests of operators of covered rail infrastructure, access seekers and any interested third parties.

5.65 The Council considers that ESCOSA is sufficiently resourced and vested with appropriate powers under both the ROA Act and the ESC Act to undertake its duties in an independent and objective manner.

5.66 In respect of dispute resolution, the respective roles of ESCOSA in conciliation and the arbitrator in arbitrating access disputes means that commercial negotiations are supported by credible dispute resolution mechanisms. Arbitration awards are enforceable by the state's Supreme Court, while conciliation / arbitration of any disputes is subject to a six month time limit, and appeals from arbitrations may only be made on a point of law. This strikes an appropriate balance between encouraging parties to reach negotiated outcomes and providing for regulatory intervention where necessary.

5.67 The SA Rail Access Regime satisfies clauses 6(4)(a)-(c).

Clause 6(4)(e): reasonable endeavours

5.68 Clause 6(4)(e) requires that an effective access regime provides for a service provider to use all reasonable endeavours to facilitate the requirements of access seekers. The Council considers that an access regime may either incorporate clause 6(4)(e) expressly, or through general provisions that have the same effect.

The SA Rail Access Regime

5.69 As noted above, the ROA Act imposes a number of obligations on operators of regulated railway services for the benefit of access seekers. Operators must:

- negotiate in good faith with proponents of access proposals, and must negotiate 'with a view to reaching agreement on whether the proponent's requirements as set out in the access proposal (or some agreed modification of the requirements) could reasonably be met' (s 32(1)) (and, if they fail to respond to an access proposal within 30 days, an access dispute is triggered which may be referred to arbitration)
- notify ESOCOSA and potentially affected industry participants when they receive access proposals
- maintain information brochures for the benefit of potential users of above and below rail services describing the terms and conditions upon which the operator would make such services available, and
- respond to requests from persons with a proper interest in making an access proposal for specific information regarding available capacity of its railway infrastructure, potential expansion of the infrastructure for access, and the terms on which the operator would be prepared to offer a specific railway service.

5.70 Furthermore, s 24 of the ROA Act prohibits conduct preventing or hindering access to railway services. Section 24(1) provides as follows:

> 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*** includes negative conduct such as a failure or refusal to act or delay.
>
> The ***purpose*** of conduct is to prevent or hinder access to railway services if that is one of the purposes of the conduct.

5.71 These obligations are backed by the dispute resolution procedures and court enforcement provisions, which an access seeker may have recourse to if aggrieved by negotiations or if they consider an operator is not adhering to its obligations under the Act, a contract or an award.

Application and submissions

5.72 In its submissions regarding clause 6(4)(e), the South Australian Government refers to the obligations that the SA Rail Access Regime imposes on operators summarised in paragraph 5.69 above. It notes the obligation to negotiate in good faith, and characterises s 32(1) of the ROA Act as 'expressly require[ing] the regulated operator to endeavour to accommodate the proponent's reasonable requirements in relation to access' (SAG1, p 36). The South Australian Government refers to the obligations on operators to respond to requests from access seekers for access-related information. It notes that these obligations are supported by the fact that a failure to respond to an access proposal in 30 days triggers the availability of the access dispute resolution process under the Regime.

The Council's assessment

5.73 The Council considers that the SA Rail Access Regime is appropriately adapted to meet the requirements of clause 6(4)(e). Operators are specifically enjoined to negotiate in good faith with a view to reaching agreement with access seekers. They are prohibited from acting to prevent or hinder access. Operators' obligations to assist access seekers are strengthened by the need to maintain information brochures, to respond to specific requests for access-related information and to maintain separate accounts for above and below rail businesses. These obligations are supported by appropriate enforcement mechanisms.

5.74 The SA Rail Access Regime satisfies clause 6(4)(e).

Clause 6(4)(f): access need not be on exactly the same terms

5.75 Clause 6(4)(f) requires that an effective access regime should allow for access to be provided on different terms and conditions to different users. An access regime should not limit the scope for commercial negotiation, which is consistent with the principles of commercial negotiation enshrined in clause 6 of the CPA.

The SA Rail Access Regime

5.76 The Regime provides the flexibility for parties to negotiate their own arrangements for access, with recourse to conciliation and arbitration in the event of disputes. There are no constraints on the terms and conditions that may be arrived at (and no restriction on negotiation outside the framework of the Regime).

5.77 If arbitration of a dispute occurs, however, the arbitrator must take into account the arbitration principles in s 38 of the ROA Act as described in paragraphs 5.52-5.53 above, and awards are subject to the limitations in s 52 described in paragraph 5.54 above. These principles, read with the balance of the ROA Act, are generally consistent with the clause 6 principles, particularly the factors in clause 6(5).

5.78 Furthermore, the Regime provides for ESCOSA to set pricing principles for fixing a floor and ceiling price in relation to particular railway services. Operators and access seekers are not prevented from negotiating terms outside the floor and ceiling prices

calculated under the principles, however, arbitrators must not price railway services above any relevant ceiling or below any floor price calculated under the relevant principles.

Application and submissions

5.79 The South Australian Government submits that the SA Rail Access Regime complies with clause 6(4)(f) because it provides flexibility for parties to negotiate individual arrangements outside the Regime. It notes that arbitration awards may include different terms and conditions for different access seekers. While noting that arbitrators must take into account the arbitration principles, South Australian Government submits that 'these matters do not preclude the making of awards on different terms and conditions for different users' (SAG1, p 38).

The Council's assessment

5.80 The SA Rail Access Regime allows the commercial negotiation of different access arrangements by different users. While an arbitrator in the event of a dispute is required to have regard to certain factors, arbitration is not unduly constrained and could be expected to result in access on different terms and conditions for different sets of parties where that is appropriate. Arbitrators must set access prices within the range of any price floor and ceiling principles applicable to the relevant services, however: (a) ESCOSA is not obliged to set price floor and ceiling principles, and (b) it can reasonably be expected that price floors and ceilings set under such principles would allow ranges to provide for different outcomes appropriate for the circumstances of different access proposals.

5.81 The SA Rail Access Regime satisfies clause 6(4)(f).

Clauses 6(4)(g), (h), (i): dispute resolution

5.82 An important element of the negotiation framework in an effective access regime is the requirement that if commercial negotiations and/or agreements between service providers and access seekers break down, then there are appropriate dispute resolution procedures in place. The decisions of the dispute resolution body must bind the parties and be enforceable.

5.83 The SA Rail Access Regime's procedures for independent dispute resolution and enforcement mechanisms are detailed in paragraphs 5.44-5.58, and their effectiveness considered by the Council at paragraphs 5.64-5.67. For the reasons expressed there, the Council's view is that these procedures adequately support the negotiation framework.

5.84 The SA Rail Access Regime satisfies clauses 6(4)(g), (h) and (i).

Clause 6(4)(m): hindering access

5.85 Clause 6(4)(m) requires that an effective access regime prohibit conduct for the purpose of hindering access. This principle applies both to existing users (to address the risk of problems such as hoarding) and facility owners.

The SA Rail Access Regime

5.86 As noted above at paragraph 5.70, s 24 of the ROA Act sets out a prohibition on conduct preventing or hindering access to railway services. Contravention may be remedied by the court enforcement mechanisms discussed at paragraph 5.58 allowing injunctive and compensatory relief for breaches of the Act.

Application and submissions

5.87 The South Australian Government submits that the SA Rail Access Regime satisfies the requirements of clause 6(4)(m) by prohibiting conduct preventing or hindering access to railway services, and allowing for compensation for breaches of the Act.

The Council's assessment

5.88 The Council is satisfied that the SA Rail Access Regime provides adequately for a situation where access is prevented or hindered.

5.89 The SA Rail Access Regime satisfies clause 6(4)(m).

Clause 6(4)(n): separate accounting

5.90 Clause 6(4)(n) requires that an effective access regime should impose separate accounting arrangements on service providers for the elements of the business covered by the regime. That is, facility owners must maintain financial information that focuses exclusively on the elements of their business subject to the regime. The availability of relevant accounting information is necessary for access seekers and regulatory bodies (including dispute resolution bodies) to assess the terms and conditions of access.

5.91 To satisfy clause 6(4)(n), the Council considers that an effective access regime should include provisions that require a service provider to at least:

- maintain a separate set of accounts for each service that is the subject of an access regime
- maintain a separate consolidated set of accounts for all of the activities undertaken by the service provider, and
- allocate any costs that are shared across multiple services in an appropriate manner.

The SA Rail Access Regime

5.92 The ROA Act provides that operators must keep the accounts for its rail service business so as to give a true and fair view of that business as distinct from other

businesses carried on by the operator. Further, if the operator's rail service business includes providing a below rail service(s) as well as other railway services, it must keep accounts for the below rail service business distinct from the remainder of its rail service business. The detail of these requirements is set out in paragraph 5.41.

Application and submissions

5.93 The South Australian Government submits that the accounting requirements in the ROA Act described above mean that the SA Rail Access Regime satisfies the clause 6(4)(n) of the CPA.

The Council's assessment

5.94 The Council accepts that the SA Rail Access Regime imposes a requirement on operators to maintain separate accounting arrangements for the elements of its business covered by the Regime satisfactorily for the purposes of clause 6(4)(n).

5.95 The SA Rail Access Regime satisfies clause 6(4)(n).

Dispute resolution (clauses 6(4)(a)-(c), (g), (h), (i), (j), (k), (l), (o), 6(5)(c))

Clauses 6(4)(a)–(c): dispute resolution

5.96 Clause 6(4)(a) establishes commercial negotiation as a cornerstone in determining access outcomes, while clauses 6(4)(b) and (c) complement and underpin the principle in clause 6(4)(a). They recognise that regulatory measures can provide a means for dealing with situations where access providers and access seekers are unable to reach agreement through private commercial negotiations by providing legislative rights and obligations to negotiate (clause 6(4)(b)) and an independent and credible dispute resolution procedure (clause 6(4)(c)).

5.97 The negotiation framework established by clauses 6(4)(a)-(c) is supported by the requirements for a dispute resolution procedure set out in clauses 6(4)(g)-(l), 6(4)(o) and 6(5)(c) of the CPA.

The SA Rail Access Regime

5.98 The SA Rail Access Regime encourages negotiated commercial outcomes by:

- establishing mechanisms to ensure that access seekers can obtain information from operators that they would reasonably require to make informed decisions as to whether to seek access, and then conduct access negotiations in an informed manner (see the description of the relevant provisions of the ROA Act at paragraphs 5.37-5.41), and
- establishing a legislative procedure for access seekers to make an access proposal under the ROA Act, and obliging operators of covered railway services to negotiate in good faith with the

proponent with a view to reaching agreement on the proposal (see the description of the relevant provisions of the ROA Act at paragraphs 5.42-5.43, and also 5.69).

The Council's assessment

5.99 The SA Rail Access Regime establishes the right for parties to negotiate access for services, with conciliation by ESCOSA and subsequent independent arbitration available where agreement cannot be reached.

5.100 The SA Rail Access Regime satisfies clauses 6(4)(a)-(c).

Clause 6(4)(g): independent dispute resolution

5.101 The clause 6 principles recognise the need for an independent arbitration mechanism to complement and encourage genuine negotiations. Clause 6(4)(g) requires an effective access regime to contain a mechanism to ensure that parties to a dispute have recourse to an independent dispute resolution body. The arbitration framework should be designed to produce credible and consistent outcomes so promoting confidence among the parties.

5.102 Clause 6(4)(g) also provides that an effective access regime should require the parties to a dispute to fund some or all of the costs of having an independent body resolve the dispute. At the same time, the costs of arbitration should not deter parties from seeking access.

The SA Rail Access Regime

5.103 The ROA Act provides for dispute resolution under the Regime where the parties cannot reach agreement on an access proposal. However, while the ROA Act expressly provides for conciliation by ESCOSA and subsequent arbitration if negotiations are unsuccessful, parties are free to choose their own dispute resolution processes if they wish. Disputing parties would do so by not referring a dispute to ESCOSA but instead reaching agreement to employ some other means of dispute resolution.

5.104 The dispute resolution process under the Regime is described in detail at paragraphs 5.44-5.58 above. Relevantly for the purposes of clause 6(g) of the CPA:

- where negotiations between an access proponent(s) and the relevant operator(s) fail to achieve agreement, the proponent can ask ESCOSA to refer the access dispute to an arbitrator
- ESCOSA may then either attempt to settle the dispute by conciliation or appoint an arbitrator and refer the dispute to arbitration
- if ESCOSA chooses to attempt to conciliate the dispute but reasonable attempts at conciliation fail, it must (absent special circumstances, for example lack of good faith) appoint an arbitrator and transfer the matter to arbitration

- ESCOSA must attempt to appoint an arbitrator acceptable to all parties, and the arbitrator must have no direct or indirect interest in the outcome of the dispute, and
- the costs of an arbitration are borne by the parties in equal proportions unless: (i) the arbitrator decides that a different apportionment is appropriate, or (ii) the access proponent terminates the arbitration early or elects not to be bound by its outcome, in which case it must pay all costs.

Application and submissions

5.105 The South Australian Government submits that the SA Rail Access Regime in the ROA Act 'provides a process that encourages parties to negotiate and reach agreement,' and states that this 'includes the parties resorting to their own chosen dispute resolution parties resorting to their own chosen dispute resolution process if they wish' (SAG1, p 38).

5.106 The South Australian Government submission goes on to note the features of the Regime that accord with clause 6(4)(g) of the CPA as noted above.

The Council's assessment

5.107 Where the owner and the access seeker cannot reach agreement, the SA Rail Access Regime provides for dispute resolution in a manner envisioned by clause (6)(g). The Regime allows (but does not mandate) conciliation by ESCOSA. It is reasonable to give ESCOSA the ability to attempt to conciliate the parties in appropriate circumstances, for example where the matters in dispute are relatively insubstantial and conciliation may be more efficient or cost effective than arbitration.

5.108 Arbitrator appointment is done by ESCOSA rather than the parties. Under the Regime, however, the parties are involved in the appointment process. The arbitrator may be nominated by them, and will be a person accepted by the parties unless they cannot agree. In that case it is reasonable for the Regime to provide for appointment by ESCOSA to avoid a deadlock. The arbitrator must be independent. The standard position is that the costs of the arbitration are borne equally by the parties, and the Regime allows for deviations from this position in circumstances that the Council considers appropriate.

5.109 The Council considers that the arbitration provisions under the SA Rail Access Regime satisfy clause 6(4)(g).

Clause 6(4)(h): binding decisions

5.110 Clause 6(4)(h) provides that an effective access regime should have credible enforcement arrangements to ensure an arbitrator's decision is binding and effective. The regime should give effect to the enforcement process through legislative provisions, with appropriate sanctions and remedies for non-compliance.

5.111 State or territory access regimes may allow for appeal of the decision of a dispute resolution body. To satisfy clause 6(4)(h), the ultimate decision of the appeal body must also bind the parties.

5.112 To satisfy clause 6(4)(h), an effective regime should not diminish any existing rights for appeal of an arbitrator's decision. This does not require the insertion of new appeal provisions.

The SA Rail Access Regime

5.113 The SA Rail Access Regime provides for the enforcement of awards and other orders of the arbitrator of an access dispute by making available appropriate remedies from the Supreme Court of South Australia for non-compliance (as set out in detail at paragraph 5.58). Where disputes are resolved through conciliation by ESCOSA, there will be agreement between the parties.

5.114 The Regime provides that parties aggrieved by arbitration may appeal to the Supreme Court of South Australia on a question of law, and the Court may give various remedies on appeal as described at paragraph 5.56. Appeals from an arbitratral decision made pursuant to the ROA Act may only be made under the appeal provisions in the Act.

5.115 Other decisions made by ESCOSA in its capacity as the industry regulator—such as determining whether a dispute exists and whether it should be referred to arbitration—may be subject to judicial review in accordance with the *Supreme Court Act 1935* (SA).

Application and submissions

5.116 The South Australian Government states that resolution of disputes by conciliation mean that 'the parties effectively reach agreement on a commercial basis and may enforce the agreement contractually' (SAG1, p 39). It submits that decisions of the dispute resolution body under the SA Rail Access Regime bind the parties, noting the ability of the parties to apply to the Supreme Court under the ROA Act for appropriate orders if another party fails to comply with the outcome of arbitration.

5.117 Further, South Australian Government submits that while the ROA Act does not make specific provisions for persons aggrieved by decisions of ESCOSA to appeal from them, judicial review of its actions under '[c]ommon law administrative principles' may apply.

The Council's assessment

5.118 Under the SA Rail Access Regime, the decisions an arbitrator appointed under the ROA Act are enforceable in the same manner as a judgment or Court order. The Council considers that the Regime thereby complies with the clause 6(4)(h) requirement that 'decisions of the dispute resolution body must bind the parties.' The Regime also provides for dispute resolution through conciliation by ESCOSA. However, a successful conciliation is one in which the conciliator is able to induce the parties to

reach agreement. Therefore, conciliation does not involve a 'decision of [a] dispute resolution body' which is imposed on the parties. In any case, as the applicant notes, if conciliation results in an agreement as to access, this can be expected to be embodied in an access contract which the parties could enforce against each other under the usual principles of contract law.

5.119 The second limb of clause 6(4)(h) is that 'rights of appeal under existing legislative provisions should be preserved.' While appeals from decisions flowing from arbitration under the ROA Act are only appealable under the Act and not otherwise, this does not interfere with 'rights of appeal under existing legislative provisions' given that the right to arbitration under the ROA Act—and rights to appeal from such arbitrations—did not exist before the enactment of the SA Rail Access Regime.

5.120 In any case, appeals pursuant to the ROA Act from an arbitrator's award or decision may be made on any question of law arising out of that decision or award. These appeal rights are not materially different from the legal avenues of appeal that would ordinarily by available to a person under existing law. That is, if a person were appealing from a decision made by a trial judge in a court or seeking judicial review of regulatory or official action, they would only have some prospect of success if they could establish an error of law (or a finding of fact so unreasonable that it amounts to an error of law).

5.121 Having regard to the matters discussed above, the SA Rail Access Regime satisfies clause 6(4)(h).

Clause 6(4)(i): principles for dispute resolution

5.122 Clause 6(4)(i) sets out eight matters that a dispute resolution body in an access regime should take into account in deciding on the terms and conditions of access.

5.123 The Council considers that clause 6(4)(i) applies to any body responsible for determining the terms and conditions of access—that is, both arbitrators and regulators. Clause 6(4)(i) covers both price and non price terms and conditions of access. Where relevant, the dispute resolution body should also be obliged to take account of the clause 6(5)(b) principles in considering access prices.

The SA Rail Access Regime

5.124 Section 38(1) of the ROA Act sets out a number of the principles that an arbitrator should take into account in deciding on the terms of an award. These principles are quoted at paragraph 5.52.

Application and submissions

5.125 The South Australian Government submits that the SA Rail Access Regime provides for the taking account by the arbitrator of the each of the principles mandated by clause 6(4)(i) in s 32(1) of the ROA Act. The South Australian Government's states each subsection of s 32(1) that, in its submission, satisfies each subclause of clause 6(4)(i) of the CPA in a table in its submission (SAG1, p 41).

The Council's assessment

5.126 The Council considers that each of the principles in clause 6(4)(i) of the CPA has appropriate analogues in the ROA Act, generally as submitted by the South Australian Government. In most cases the principles in clause 6(4)(i) are substantially replicated in the s 32(1) of ROA Act.

5.127 The Council considers that the requirement in clause 6(4)(i)(v) that the dispute resolution body take into account 'firm and binding contractual obligations or the owner or other persons (or both) already using the facility' is satisfied by s 32(1)(j) ('the contractual obligations of the operator and existing industry participants'), which is cited by the South Australian Government, in conjunction with s 32(1)(i) ('the interests of industry participants whose interests may be affected by the [access] proposal').

5.128 The SA Rail Access Regime satisfies clause 6(4)(i).

Clause 6(4)(j): facility extension

5.129 In some situations, the needs of an access seeker can be met only by an extension of the facility's geographic range or an expansion of its capacity. These matters should be subject, in the first instance, to negotiation between the parties. When parties cannot reach an agreement, however, the arbitrator should be empowered to determine, subject to the clause 6(4)(j) criteria, whether the owner should be required to extend or permit extension of the facility.

The SA Rail Access Regime

5.130 Section 52 of the ROA Act (quoted at paragraph 5.54) sets certain limits on the awards that may be made by an arbitrator. These include that an operator cannot compelled to bear the capital cost of any addition or extension to railway infrastructure. The other limits required by clause 6(4)(j) on ordered extensions of facilities are reflected in the arbitration principles in s 38 of the Act, which require the arbitrator to consider:

- the operational requirements for the safe and reliable operation of the facility (as per CPA clause 6(4)(j)(i))
- the operator's legitimate business interests and investment in the facility (as per CPA clause 6(4)(j)(ii)), and
- the economic value to the operator of any additional investment the proponent proposes to undertake (as per CPA clause 6(4)(j)(iii)).

Application and submissions

5.131 The South Australian Government submits that the SA Rail Access Regime satisfies clause 6(4)(j) having regard to the limitations on an arbitrator's ability to make an award set out in s 52 of the ROA Act.

The Council's assessment

5.132 The SA Rail Access Regime permits the arbitrator to require extensions of rail infrastructure. Given the aspects of the Regime set out at paragraph 5.130, it satisfies clause 6(4)(j).

Clause 6(4)(k): a material change in circumstances

5.133 Clause 6(4)(k) provides for an access arrangement to be revoked or modified following a material change of circumstances.

The SA Rail Access Regime

5.134 The SA Rail Access Regime does not prevent parties from determining what may constitute a material change in their particular circumstances and incorporating provisions to this effect in their access contracts.

5.135 Section 55 of the ROA Act sets out the process for the revocation or variation of an arbitration award. Awards may be varied or revoked by ESCOSA with the agreement of the parties. If the parties cannot reach agreement, ESCOSA may refer the matter to arbitration, in which case the previously described ROA Act arbitration process occurs to settle the dispute. One of the factors ESCOSA must consider in deciding whether or not to refer a dispute concerning the revocation or variation of an award to arbitration is whether there has been a material change in circumstances since the award was last made or varied.

Application and submissions

5.136 The South Australian Government submits that the SA Rail Access Regime satisfies clause 6(4)(k), noting the ability of parties to negotiate arrangements providing for changes in circumstances, and the mechanisms in the ROA Act to deal with a material change in circumstances described above.

The Council's assessment

5.137 The SA Rail Access Regime satisfies clause 6(4)(k).

Clause 6(4)(l): compensation

5.138 Clause 6(4)(l) provides that a dispute resolution body should only impede a person's existing right to use a facility when it has considered the case for compensating that person. The Council does not interpret this to mean that an access regime need allow a dispute resolution body to impede existing rights. However, where a dispute resolution body can do this, it must also be empowered to consider and, if appropriate, determine compensation.

The SA Rail Access Regime

5.139 The restrictions on awards that an arbitrator may make under the ROA Act (set out in s 52, quoted at paragraph 5.54) include that awards may not prejudice the rights of

an industry participant under an earlier contract or award without its agreement unless:

- the relevant access rights exceed what the industry participant needs, and there is no reasonable likelihood that the participant will use the excess entitlement, and
- the access proponent's can only be reasonably met from the excess entitlement.

5.140 Further, the arbitrator must take into account the interests of industry participants affected by an award when making one.

Application and submissions

5.141 The South Australian Government submits that the SA Rail Access Regime satisfies clause 6(4)(l), noting the relevant restrictions on arbitral awards described above. The South Australian Government further notes that awards conferring a right of access must provide for the resolution of all related an incidental matters (s 51(3)(c)), and that the Act provides for compensation orders by the Supreme Court to remedy contraventions of the Act.

The Council's assessment

5.142 The SA Rail Access Regime prevents the impediment of existing rights to use railway infrastructure in all cases where such rights are reasonably needed by the existing rights holder, and allows for awards compensating existing rights holders in appropriate cases. The Council considers the Regime satisfies clause 6(4)(l).

Clause 6(4)(o): access to financial information

5.143 An effective access regime should provide the dispute resolution body and other relevant bodies (for example, regulators and appeal bodies) with the right to inspect all financial documents pertaining to the covered service. This principle seeks to ensure that the dispute resolution body and other relevant bodies have access to all information necessary to properly assess and settle any issues relating to third party access.

The SA Rail Access Regime

5.144 The ROA Act gives the arbitrator wide powers to require the provision, inspection and discovery of documents, statements, reports or information from any person where the arbitrator has reason to believe that the information in question may be relevant to the dispute (see paragraphs 5.37-5.41).

5.145 In addition, ESCOSA may require an operator to provide, within a period specified by ESCOSA, any 'specified information relevant to monitoring the costs of railway services provided by the operator' (ROA Act, s 60) or 'information or documents related to the provision of railway services' (s 62). Operators must also supply ESCOSA, on a confidential basis, with a copy of every access contract made by the

operator (s 61). Failure to comply with these obligations are offences carrying fines of up to $60 000.

5.146 The information gathering powers of ESCOSA and the arbitrator rights are supported by obligations under s 22 of the Act that require operators to keep accounts relating to its railway service business. Where an operator's railway service business includes providing a below rail service, it must keep separate accounts relating to that part of its business as distinct from accounts relating to other parts of its railway service business (by implication, that is, distinct from any above rail service(s) it provides).

5.147 Furthermore, ESCOSA has a general information gathering power under s 29 of the ESC Act. By written notice ESCOSA may require a person to give information that ESCOSA reasonably requires for the performance of its functions. Failure to comply may incur a maximum penalty of $20 000 or imprisonment for 2 years.

Application and submissions

5.148 The South Australian Government submits that the SA Rail Access Regime satisfies clause 6(4)(o) by providing for the information gathering powers of ESCOSA and the arbitrator described above.

The Council's assessment

5.149 The SA Rail Access Regime satisfies clause 6(4)(o).

Clause 6(5)(c): merits reviews of arbitration determinations

5.150 Clause 6(5)(c) provides that where merits review is provided, the review should be limited to information submitted to the original decision-maker.

The SA Rail Access Regime

5.151 The SA Rail Access Regime does not provide for merits review although an aggrieved party may seek judicial review of an arbitration award in the Supreme Court of South Australia.

Application and submissions

5.152 The South Australian Government submits that because the SA Rail Access Regime does not include merits review, the requirement in clause 6(5)(c) does not apply.

The Council's assessment

5.153 As the SA Rail Access Regime does not provide for merits review of an arbitration determination, the Council has not considered the Regime's mechanisms for dispute resolution against clause 6(5)(c) of the CPA.

5.154 Merits review of arbitration outcomes or regulatory decisions is not a mandatory requirement under the clause 6 principles. The Council does not consider that the absence of merits review of arbitration decisions is a basis on which to conclude that the SA Rail Access Regime should not be certified.

Efficiency promoting terms and conditions of access (clauses 6(4)(a)–(c), (e), (f), (i), (k), (n), 6(5)(a) and (b))

5.155 An effective access regime must encourage outcomes that enhance the objective of efficient use of and investment in significant bottleneck infrastructure, so promoting competition. An effective regime ought to:

(a) incorporate an objects clause that provides a clear statement that the purpose of regulating third party access is to promote economic efficiency in the operation, use and investment in infrastructure thereby promoting competition in upstream and downstream markets (clause 6(5)(a))

(b) provide a robust framework for negotiating agreements and resolving disputes: a right to negotiate access supported by binding dispute resolution (clauses 6(4)(a)-(c), (g) and (h)), an obligation on the service provider to negotiate in good faith (clause 6(4)(e)), and availability of required information (clauses 6(4)(n) and (o))

(c) provide an entitlement to revoke or modify an access agreement where there has been a material change in circumstances (clause 6(4)(k))

(d) enable efficient access terms and conditions while providing considerable discretion and flexibility in setting prices (clauses 6(4)(f) and 6(4)(i))

(e) specify the factors that a dispute resolution body should take into account when determining access terms and the pricing principles in clause 6(5)(b)), and

(f) set appropriate requirements for regulated access prices, such that they be set to cover costs, provide a return on investment that is commensurate with the risks involved and provide incentives to reduce costs or otherwise improve productivity.

The SA Rail Access Regime

Objects clause(s)

5.156 The SA Rail Access Regime includes an objects clause in s 3 of the ROA Act (which is extracted in paragraph 6.4).

5.157 The object in s 3(c) is expressed in similar terms to the object to be incorporated under clause 6(5)(a), seeking 'the promotion of the economically efficient use and operation of, and investment in, [railway] services.' The ROA Act does not expressly refer to the promotion of competition in *upstream and downstream* markets. However, this purpose is arguably implicit in the s 3(a) object to promote a rail system that is 'efficient and responsive to the needs of industry and the public.' Furthermore, the principles guiding the arbitration of disputes under the Act include 'the public interest in market competition'. The Council is confident that the existing objects in the ROA Act, considered in conjunction with the operation of the SA Rail Access Regime as a whole, satisfactorily addresses clause 6(5)(a).

Negotiate / arbitrate framework

5.158 The SA Rail Access Regime is characterised by a robust negotiate/arbitrate framework described in detail at paragraphs 5.36-5.58. Operators of covered railway services are obliged to negotiate in good faith and try to reach agreement with access proponents. The Regime contains provisions to address information asymmetries between access seekers and covered operators. Operators must maintain information brochures on access related issues and make them available to access seekers. The required content of these brochures has recently been reviewed by ESCOSA in a public process (ESCOSA 2009b). The Regime also includes a general obligation for operators to supply access related information to enable potential access seekers to assess their position.

5.159 Negotiation mechanisms are backed by robust dispute resolution and enforcement provisions, allowing for conciliation by ESCOSA and independent arbitration. The arbitrator is broadly empowered to make awards in relation to access, to require from any person the provision of documents, testimony or information relevant to a dispute, and to make procedural orders to facilitate an efficient process. The SA Rail Access Regime requires access disputes to be settled in a timely fashion, generally within six months. The ROA Act also gives broad powers to the Supreme Court of South Australia to enforce the Act and orders and awards made under it, and to give remedies for non-compliance.

5.160 The SA Rail Access Regime allows for the revocation or modification of access agreements following material changes in appropriate circumstances, as discussed at paragraphs 5.132-5.137.

Access pricing

5.161 The SA Rail Access Regime aims to encourage access seekers and railway service operators to set prices and other terms via commercial negotiation as a first preference for determining prices. The use of the dispute resolution procedures in the Regime to set prices for railway services are only intended as a fall back mechanism where negotiations fail.

5.162 The Regime allows ESCOSA to establish pricing principles for fixing floor and ceiling prices for railway services generally, or for railway services of a particular class. Section 27(2) of the ROA Act provides:

> 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.

5.163 The Regime allows the negotiation of access contracts that do not reflect the pricing principles. In settling an access dispute, however, the arbitrator must not set a price that is less than the floor price or higher than the ceiling price calculated according to any relevant pricing principles for the relevant railway service.

5.164 Currently, ESCOSA has established principles for setting floor and ceiling prices for the provision of below rail services. The principles are set out in ESCOSA's Information Kit for the SA Rail Access Regime (ESCOSA 2010). When prices for railway services are determined by an arbitrator settling an access dispute, the arbitrator must take account of the arbitration principles quoted at paragraphs 5.54 and 5.55 above. These include the pricing principles in ss 38(2)(a)-(c) of the ROA Act, which directly mirror the requirements for setting regulated access prices as set out in clause 6(5)(ii)-(iv) of the CPA. These include the principle that access prices should not allow a vertically integrated operator to set terms that would discriminate in favour of its downstream operations except where the costs of doing so are higher (s 38(2)(b)).

5.165 Arbitration principles in the Regime include several further principles that would assist in promoting efficiency in pricing and other access terms. Amongst other things, an arbitrator must consider the costs to the operator of providing access (excluding those from increased competition), economically efficient operation of railway infrastructure, the price of comparable services for others (including the operator itself), and the public interest in competition. An arbitrator must also consider the objects of the ROA Act (quoted at paragraph 5.156), which are goals consistent with the promotion of efficient terms of access that promote competition.

5.166 The ROA Act includes provisions designed to prohibit operators from engaging in unfair discrimination. Operators must not unfairly discriminate between access proponents in preferring one access proposal to another (s 23(1)). The Act gives as an example of prohibited conduct the preference of one access proponent over another on the basis that the first proponent and the operator are commonly owned. Operators are also prohibited from unfairly discriminating in the terms and conditions it offers access seekers (s 23(2)), by waiving rights under access arrangements or making kick-back arrangements on a non-uniform basis (s 23(3)).

Monitoring and information

5.167 ESCOSA is obliged to monitor the operation of the ROA Act, and must report annually to the Minister in that regard, and its annual report is laid before the Parliament of South Australia. The Minister also has the power to require ESCOSA to make specific reports to him or her on any aspect of the Act's operation, with a specific power to require reports on the costs of railway services. For this monitoring role, ESCOSA can require information from railway operators and other persons, including information relevant to the costs of railway services. Furthermore, operators must supply ESCOSA with a copy of each access contract.

5.168 Pursuant to its monitoring powers under the ROA Act, ESCOSA has published in its Information Booklet on the SA Rail Access Regime detailed reporting requirements that must be observed by railway operators (ESCOSA 2010, at pp 23-32). Operators must report to ESCOSA in relation to their railway service(s) business, and their compliance with the ROA Act. The reports are variously required annually,

immediately in the case of specified cases of non-compliance, or on request, depending on the nature of the information to be reported.

Application and submissions

5.169 The South Australian Government submits that the inclusion of the objects clause in s 3(c) of the ROA Act satisfies the requirement of clause 6(5)(a) of the CPA.

5.170 The South Australian Government submits that SA Rail Access Regime satisfies clause 6(5)(b) for the following reasons.

- The Regime does not set prices for railway services per se. Rather, it establishes a framework to encourage negotiated outcomes, backed by arbitration.
- The ROA Act includes pricing principles for arbitration that mirror those set out in s 6(5)(ii)-(iv) of the CPA.
- The pricing principles currently published by ESCOSA for fixing a ceiling price for below rail services include allowing the decision-maker to take account of regulatory risk, given that the prescribed model for calculating an appropriate rate of return[9] is a '(post-tax) real weighted average cost of capital ("WACC") after consideration of all regulatory and commercial risks involved' (ESCOSA 2010, at paragraph 3.2.4A).

5.171 The South Australian Government's submission further notes that ESCOSA had considered whether price regulation or price monitoring was appropriate in the covered railway services in the ESCOSA CIRA Inquiry (ESCOSA 2009), and had found that this was not required (SAG1, p 19).

The Council's assessment

5.172 The Council considers that the SA Rail Access Regime provides for efficiency promoting terms and conditions of access in a manner consistent with the relevant clauses of the CPA.

5.173 The Regime's objects clauses in subsections 3(c) and 3(a) of the ROA Act, particularly when considered in light of the arbitration principles and the Regime's overall operation, mean that it satisfies the requirement in clause 6(5)(a) of the CPA.

5.174 Where an access regime makes provision for regulated prices, it should do so with regard to the pricing principles in clause 6(5)(b) of the CPA. The ROA Act reproduces the principles required under subclauses 6(5)(b)(ii)-(iv) of the CPA as principles an arbitrator must take into account when setting access prices. Further, where prices are set under an arbitration, the arbitrator must take into account the arbitration principles, and these principles include any ceiling and floor price principles set by ESCOSA for the services in dispute. The Council considers that the efficient pricing

[9] For a ceiling price on a below rail service.

principle in clause 6(5)(b)(i) is satisfactorily addressed within the arbitration and pricing provisions in the ROA Act. Therefore, the SA Rail Access Regime satisfies clauses 6(5)(b) of the CPA.

5.175 The SA Rail Access Regime satisfactorily incorporates the principles in clauses 6(4)(a)-(c), (g) and (h) of the CPA by establishing a framework for parties to reach commercial agreement on access terms and conditions, with provision for conciliation by ESCOSA and arbitration to settle disputes where agreement cannot be reached by negotiation. The ROA Act provides a robust framework for such dispute resolution to occur which includes provision as to the timeliness of dispute resolution.

5.176 The SA Rail Access Regime incorporates the requirement in clause 6(4)(e) of the CPA by requiring the operator to negotiate with an access seeker in good faith with a view to reaching agreement.

5.177 The Regime provides the flexibility for parties to negotiate their own access arrangements. The principles guiding arbitration, and the constraints on arbitration awards, also provide considerable flexibility to an arbitrator to set different access terms and conditions appropriate for the range of possible access proposals and railway services. Accordingly, access to a rail service need not be on exactly the same terms and conditions for all users, satisfying the clause 6(4)(f) requirement. The principles guiding arbitration, furthermore, reflect the required principles in clause 6(4)(i) of the CPA.

5.178 The SA Rail Access Regime allows for a party to an arbitration award to propose termination or variation of the award if there is a material change in circumstances, satisfying clause 6(4)(k) of the CPA.

5.179 The SA Rail Access Regime implements arrangements requiring a regulated operator to keep separate books of account and other records for each rail service it provides. Operators must make reports to ESCOSA annually on their railway businesses, as well as report details of any non-compliance with the ROA Act. These reports must comply with detailed guidelines issued by ESCOSA. An arbitrator may require the production of operators' railway service(s) business records via its information gathering powers in the ROA Act. These provisions satisfy clauses 6(4)(n) and (o) of the CPA.

5.180 The Council considers that the SA Rail Access Regime satisfactorily incorporates efficiency promoting terms and conditions of access in accordance with clauses 6(4)(a)–(c), (e), (f), (i), (k), (n), 6(5)(a) and (b) of the CPA.

6 Assessment against the objects of Part IIIA of the TPA

6.1 The Council in recommending on the certification of an access regime, and the Minister in making a decision on certification, must have regard to the objects of Part IIIA (ss 44M(4)(aa) and 44N(2)(aa) of the TPA).

6.2 The objects of Part IIIA are set out in s 44AA, and provide that:

> The objects of this Part are to:
>
> (a) promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets; and
>
> (b) provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

6.3 In deciding whether to recommend certification having regard for the objects of Part IIIA the Council considers whether certifying the regime would promote those objects. This involves consideration of whether the intent and operation of a regime as a whole, guided by its stated object(s), accords with the objects of Part IIIA. The Council also takes account of the means of regulation (if any) of any other services in the industry to which a regime is relevant that are not covered by the regime. This consideration is in order to address the object that a regime provide a framework for consistent access regulation in each industry.

The SA Rail Access Regime

6.4 The objects of the SA Rail Access Regime are set out in s 3 of the ROA Act, which provides as follows.

> The objects of this Act are—
>
> (a) to promote a system of rail transport in South Australia that is efficient and responsive to the needs of industry and the public; and
>
> (b) to provide for the operation of railways; and
>
> (c) 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; and
>
> (d) to provide access to railway services on fair commercial terms and on a non-discriminatory basis.

Application and submissions

6.5 The South Australian Government submits that certification of the SA Rail Access Regime would promote the objects of Part IIIA of the TPA. It notes that the ROA Act's objects include the facilitation of competitive markets in the provision of railway services through efficient use of and investment in railway services.

6.6 The applicant refers to the negotiation/arbitration framework of the Regime. The Regime seeks to ensure that fair commercial terms are offered by setting out conduct

rules requiring negotiation, preventing unfair discrimination and the hindering of access. The South Australian Government submits that the conciliation/arbitration process for settling disputes, and the principles that must be taken into account in settling them, provide a safety net protecting against potential misuse of market power by service providers.

6.7 The South Australian Government submits that the emphasis the Regime places on commercially agreed outcomes may better reflect mutual requirements of the parties, promoting efficiency in the use of railway infrastructure. It submits the obligations on operators to supply access seekers with information relating to access terms, rail capacity and potential capital works facilitate meaningful negotiations. The applicant notes information from ESCOSA that, as at February 2009, ESCOSA had not been notified of any intrastate rail disputes (SAG1, p 24). It submits this indicates that the Regime has been successful. The South Australian Government further submits that were there any competition issues for covered services, ESCOSA's yearly reports to the Minister on the operation of the ROA Act would address these. In light of these matters, the South Australian Government submits that the Regime promotes s 44AA(a) of the TPA.

6.8 The South Australian Government submits there are benefits in using the ROA Act to regulate covered railway services instead of Part IIIA. It notes ESCOSA's comment following its 2009 Inquiry that access regimes 'should be sufficiently flexible as to recognise the particular circumstances in which the Regime operates, reflective of the state of intermodal competition within a jurisdiction' (SAG1, p 25). The South Australian Government submits:

> While the South Australian rail access regime is more light-handed compared to other regimes (e.g. ARTC-TPA) this in part reflects the different market conditions and industry structures. For the most part, the railway lines covered by the South Australian regime do not link with the railway lines covered by access regimes or not covered ... The [covered] South Australian regime railways are largely shorter haul, bulk transport lines with fewer users relative to the interstate network (SAG1, p 25).

6.9 Asciano submits that the objects of Part IIIA, read in conjunction with the clause 6 principles, impose a number of requirements that an access regime must address in order to be considered effective. Of those matters, Asciano identifies the following matters as not being satisfactorily addressed by the SA Rail Access Regime. Asciano submits that the Regime could be improved by addressing the alleged deficiencies summarised below, and the Council should consider them in considering whether to recommend the Regime's certification.

- The Regime does not prohibit vertical integration between providers of below and above rail services on the same railway (which is the case in relation to several railways owned by GWA). Above and below railway service providers should be effectively separated where prices are not directly regulated.

- Where above and below rail services are commonly owned, the Regime ought provide 'substantially more explicit requirements of functional separation,' such as independent directors, arms length negotiation, independent auditing of compliance reporting and accounting, and 'the prevention of cost shifting, cross subsidisation and margin squeezing' (ASC1, pages 8-9).
- There should be greater transparency in the level of cost information that is made available to access seekers. The accounts kept by service providers for above and below rail services, and reporting of non-compliance with the Regime, ought to be made public. In particular, Asciano submits access seekers ought to have access to information about operators' costs of providing rail services.
- The Regime should set out an indicative access agreement, settled by the regulator.
- There ought to be regulatory approval of access pricing and terms.
- Regarding many of these matters, Asciano suggests the Regime ought follow more closely other rail access regimes, particularly in Western Australia, Queensland, and the undertaking for the ARTC interstate network.

The Council's assessment

6.10 The Council considers that the SA Rail Access Regime promotes the effective operation of and investment in covered rail infrastructure, thereby promoting competition in dependent markets. The reasons for this conclusion are substantially the same as the pertinent submissions of the South Australian Government summarised above, with which the Council agrees, in conjunction with the Council's findings that the Regime is consistent with the clause 6 principles.

6.11 In relation to Asciano's submissions, the Council does not consider that certification requires satisfaction of a free-standing requirement of 'effectiveness' that mandates satisfaction of matters additional to the clause 6 principles read with the objects of Part IIIA.

6.12 In the Council's view alleged deficiencies of the kinds identified by Asciano and summarised in paragraph 6.9 are issues that can be taken up and considered within the Regime. In this regard the Council notes that a key matter considered by ESCOSA when reviewing the contents of its Information Kit was transparency of pricing information to access seekers.

6.13 To the extent that Asciano considers that the prices and other terms it is receiving for covered rail services are inefficient or non-competitive, including as a result of insufficient monitoring of or unfair discrimination by rail operators, the SA Rail Access Regime contains appropriate controls to address this. The appropriate remedy would be to dispute any alleged unfair terms and take advantage of the protections in the

ROA Act. As the South Australian Government notes, no access disputes have been notified to ESCOSA under the SA Rail Access Regime.

6.14 The Council considers certification of the SA Rail Access Regime would promote the object in s 44AA(a) of the TPA.

6.15 The Council also considers that certification of the Regime would be consistent with providing a framework and guiding principles to encourage a consistent approach to access regulation in the South Australian rail industry.

6.16 The Council notes that in its final recommendation in respect of the application for certification of the WA Rail Access Regime, it took the view that the consistency object in clause (b) of the objects clause militated against certification of a regime that did not support development of a consistent approach to regulation of access across a particular infrastructure type in a state or territory. In other situations the Council considers that consistency of regulation of a form of infrastructure at a national level may also be relevant in the context of having regard to the objects of Part IIIA in making a recommendation on an application for certification. In reaching his decision to certify the WA Rail Access Regime the Commonwealth Minister took a different view. The Commonwealth Minister considered that the second limb of the objects clause required him to consider how the WA Rail Access Regime sits within the framework and guiding principles to encourage a consistent approach to access regulation in each industry. The Commonwealth Minister was of the view that the words 'in each industry' refer to consistency across different industries rather than the approach adopted by the Council in relation to the WA Rail Access Regime which, in that case, was concerned with consistency within the WA rail industry. The Council considers that both interpretations are open.

6.17 The SA Rail Access Regime is consistent in its application to intrastate railways in the state, with minor exceptions. The Council accepts the South Australian Government's submission that it is reasonable to adopt a different approach to intrastate railways than interstate ones and that it is plausible that different circumstances and market conditions would apply to the different services justifying distinct policy responses to access regulation. The Council notes that the principles underlying the SA Rail Access Regime and the access undertaking relating to interstate railway services are similar and consistent with one another.

6.18 The Council considers certification of the SA Rail Access Regime would promote the object in s 44AA(b) of the TPA.

6.19 Consequently, the Council is satisfied that certification of the Regime would promote the objects of Part IIIA of the TPA.

7 The duration of certification

7.1 When recommending to the Commonwealth Minister on the certification of an access regime, the Council must also recommend on the period that any certification should remain in force (s 44(M)(5) of the TPA).

7.2 A certification remains in force for the duration specified in the Commonwealth Minister's decision unless the relevant state or territory ceases to be a party to the CPA. There is no mechanism in the TPA for revocation or early termination of a certification.

7.3 Where an access regime has been certified as an effective access regime, services to which the regime applies become immune from declaration, unless there have been substantial modifications to the access regime or the clause 6 principles since the regime was certified.

Application and submissions

7.4 The South Australian Government seeks certification for a period of at least 10 years, or for a longer period deemed appropriate by the Council. It submits that an important consideration for rail industries and those seeking access facilities is an appropriate under the SA Rail Access Regime is the duration for which it is certified.

The Council's assessment

7.5 In considering the duration of a certification, the Council considers the need for infrastructure owners/service providers and users to have stability and certainty in the regulatory environment, on the one hand, with the recognition that there may be changes in the market environment and the fact that there is no mechanism in the TPA for revocation of a certification,[10] on the other. Where relevant, the Council also considers other factors such as whether a regime is proposed as a transitional measure or is being introduced in the early stages of industry reform and whether there are other relevant regulatory proposals such as for the development of a national access regime for an industry.

7.6 A consideration for the Council in recommending on the duration of any certification for this Regime is the requirement for ESCOSA to monitor and review the continued operation of the Regime, and report to the Minister and the Parliament. However, as discussed at paragraphs 5.27 and 5.28, the absence of a specific requirement for periodic reviews of the services subject to the Regime may require the Council to recommend a shorter period of certification than would otherwise be the case. A shorter certification of up to five years would at least enable reassessment of the Regime, including the scope of its application, in the context of recommending whether certification should continue

[10] A service that is subject to a certified state or territory access regime may nevertheless be declared under Part IIIA where the Council believes there have been substantial modifications to the access regime or the relevant principles in the CPA since the regime was certified.

7.7 Noting that there is no mechanism to revoke a certification in the TPA, and having regard to the certification period sought by the applicant, if the concern regarding the absence of a requirement for periodic review of the services covered by the Regime is appropriately addressed, the Council considers that a 10 year certification period as sought by the South Australian Government would be appropriate.

7.8 If that concern cannot be addressed, as noted in paragraph 5.28, the Council will consider whether any recommended certification should be for a shorter period of up to five years.

Appendix A — The clause 6 principles

—extract from the Competition Principles Agreement

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.

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; 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) 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).

There may be a range of approaches available to a State or Territory Party to incorporate each principle. Provided the approach adopted in a State or Territory access regime represents a reasonable approach to the incorporation of a principle in subclause (4) or (5), the regime can be taken to have reasonably incorporated that principle for the purposes of paragraph (b).

6(3A) In assessing whether a State or Territory access regime is an effective access regime under the *Trade Practices Act 1974*, the assessing body:

(a) should, as required by the *Trade Practices Act 1974*, and subject to section 44DA, not consider any matters other than the relevant principles in this Agreement. Matters which should not be considered include the outcome of any arbitration, or any decision, made under that access regime;

(b) should recognise that, as provided by ss 44DA(2) of the *Trade Practices Act 1974*, an access regime may contain other matters that are not inconsistent with the relevant principles in this Agreement.

6(4) 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.

(d) 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.

(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.

(f) Access to a service for persons seeking access need not be on exactly the same terms and conditions.

(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.

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

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

  (i) the owner's legitimate business interests 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 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.

(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 costs borne by the parties for the extension and the economic benefits to the parties resulting from the extension.

(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.

(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.

(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.

(n) Separate accounting arrangements should be required for the elements of a business

which are covered by the access regime.

(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.

(p) Where more than one State or Territory 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 aspect of access and a single forum for enforcement of access arrangements.

6(5) A State, Territory or Commonwealth access regime (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) 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; and

(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; and

(iii) should have regard to the policies and guidelines of the original decision-maker (if any) that are relevant to the decision under review.

Appendix B Key defined terms from the ROA Act

—from s 4 of the ROA Act

Term	Definition
railway service	(a) a passenger service or a freight service; or (b) the service of providing (or providing and operating) railway infrastructure for another industry participant
freight service	the service of carrying goods on a railway
passenger service	the service of carrying passengers on a railway
railway infrastructure	(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 siding prescribed by the regulations to be railway infrastructure for the purposes of this Act
fixed railway infrastructure	(c) railway track; and (d) buildings, installations and equipment used 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
railway network	the railways to which this Act applies
operator	a person who provides, or is in a position to provide, railway services in relation to the railway network
industry participant	(a) an operator; or (b) a person who operates, or proposes to operate, railway rolling stock on the railway network

Appendix C — Information taken into account by the Council

Author	Date	Title	Confidentiality
Applications and submissions			
Government of South Australia	29 December 2010	Certification of the South Australian Rails Access Regime, Submission to the National Competition Council, 29 December 2010 (**SAG1**)	No
Asciano Limited	February 2011	Certification of South Australian Rail Access Regime, Response to the SA Government Submission to the NCC, February 2011 (**ASC1**)	No
Genesee & Wyoming Australia Pty Ltd	14 February 2011	Submission re Application for Certification of South Australian Ports Access Regime, 14 February 2011 (**GAW1**)	No
References			
COAG (Council of Australian Governments)	1995	*Competition Principles Agreement*, as amended 13 April 2007.	
ESCOSA	2009	*2009 SA Rail Access Regime Inquiry, Final Inquiry Report*, October 2009	
ESCOSA	2010a	*South Australian Rail Access Regime: Information Kit*, March 2010	
ESCOSA	2010b	*South Australian Rail Access Regime: Information Kit Review, Final Decision*, March 2010	
NCC	2009a	*Declaration of Services, A guide to Declaration under Part IIIA of the Trade Practices Act 1974 (Cth)*.	
NCC	2009b	*Certification of State and Territory Access Regimes, A guide to Certification under Part IIIA of the Trade Practices Act 1974 (Cth).*	
NCC	2009c	*NSW Water Industry Access Regime - Final Recommendation.*	
Acts and other instruments			
		Competition Policy Reform Bill 1995 (Cth), Explanatory Memorandum.	
		Essential Services Commission Act 2002 (SA).	
		Rail Safety Act 2007 (SA)	
		Railways (Operations and Access) Act 1997 (SA)	
		Supreme Court Act 1935 (SA).	
		Trade Practices Act 1974 (Cth).	
		Trade Practices Amendment (Infrastructure Access) Act 2010 (Cth).	
		Trade Practices Amendment (Australian Consumer Law)	

Author	Date	Title	Confidentiality
		Act (No. 2) 2010 (Cth).	
Case law			
		Re Duke Eastern Gas Pipeline Pty Ltd [2001] ACompT 2	

Appendix D – Chronology

Date	Event
29 December 2010	Application received by the Council
10 January 2011	Notice of the application published in *The Australian* and on the Council's website, inviting submissions in response to the application. Interested parties notified.
14 February 2011	Closing date for submissions on the application
16 March 2011	Draft recommendation released
18 April 2011	Closing date for submissions on the draft recommendation