

# NORTHERN TERRITORY OF AUSTRALIA

## AUSTRALASIA RAILWAY (THIRD PARTY ACCESS) ACT 1999

As in force at 2 September 1999

### Table of provisions

1	Short title and commencement .....	1
2	Definition.....	1
3	Application of Access Code .....	1
4	Crown to be bound .....	1
5	Non-application of <i>Commercial Arbitration Act</i> .....	1
6	<i>Interpretation Act</i> provisions to apply to certain instruments under Code.....	1
7	Minister to cause copies of regulator's reports to be tabled in Legislative Assembly .....	2

### **Schedule      AustralAsia Railway (Third Party Access) Act 1999**

#### **Part 1            Preliminary**

##### **Division 1      General**

1	Title.....	3
2	Application of Code .....	3
3	Interpretation .....	3
4	Joint ventures .....	5

##### **Division 2      The regulator**

5	The regulator .....	5
6	Powers and functions of regulator .....	6
7	Regulator to report to Ministers .....	6
8	Regulator may delegate .....	6

#### **Part 2            Access to railway infrastructure services**

##### **Division 1      Negotiation of access**

9	Obligation of access provider to provide information about access .....	7
10	Access proposal .....	7
11	Duty to negotiate in good faith .....	8
12	Limitation on access provider's right to contract to provide access .....	9

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<b>Division 2</b>	<b>Access disputes and requests for arbitration</b>	
13	Access disputes.....	9
14	Request for reference of dispute to arbitration.....	9
<b>Division 3</b>	<b>Conciliation and reference to arbitration</b>	
15	Conciliation and reference to arbitration .....	10
16	Arbitrator to be qualified .....	10
<b>Division 4</b>	<b>Arbitration of access disputes</b>	
17	Parties to arbitration .....	11
18	Manner in which decisions made.....	11
19	Award by arbitrator .....	11
20	Restrictions on access awards .....	12
21	Matters arbitrator must take into account .....	13
22	Arbitrator may terminate arbitration in certain cases .....	14
<b>Division 5</b>	<b>Pricing principles</b>	
23	For access relating to passenger and freight services.....	14
24	Access provider may agree different price .....	15
<b>Division 6</b>	<b>Procedure in arbitration</b>	
25	Hearing to be in private .....	15
26	Right to representation .....	15
27	Procedure of arbitrator.....	15
28	Particular powers of arbitrator.....	16
29	Power to take evidence on oath or affirmation.....	17
30	Failing to attend as witness .....	17
31	Failing to answer questions etc. ....	17
32	Intimidation etc. ....	18
33	Party may request arbitrator to treat material as confidential.....	18
34	Costs of arbitration .....	19
<b>Division 7</b>	<b>Effect of awards</b>	
35	Operation of award .....	19
<b>Division 8</b>	<b>Variation or revocation of awards</b>	
36	Variation or revocation of award .....	20
<b>Division 9</b>	<b>Appeals</b>	
37	Appeal to Supreme Court on question of law .....	20

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<b>Part 3</b>	<b>Hindering access to railway infrastructure services</b>	
38	Prohibition on hindering access to railway infrastructure service .....	21
<b>Part 4</b>	<b>Monitoring powers</b>	
39	Regulator's power to obtain information .....	21
40	Confidentiality .....	22
41	Duty to report to Ministers.....	22
<b>Part 5</b>	<b>Enforcement</b>	
42	Injunctive remedies.....	22
43	Compensation .....	23
44	Enforcement of arbitrator's requirements .....	24
45	Access contracts specifically enforceable .....	24
<b>Part 6</b>	<b>Miscellaneous</b>	
46	Segregation of access provider's accounts and records .....	24
47	Removal and replacement of arbitrator .....	25
48	Amendment of Code.....	25
49	Prescribing of matters for purpose of Code .....	25
50	Review of Code .....	26
<b>Schedule</b>	<b>Access Pricing Principles</b>	
1	Sustainable competitive prices .....	27
2	No sustainable competitive prices .....	28
3	Access price not below economic cost .....	29
4	Access pricing for passenger access .....	30
5	Introduction.....	30

## ENDNOTES



# NORTHERN TERRITORY OF AUSTRALIA

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As in force at 2 September 1999

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## AUSTRALASIA RAILWAY (THIRD PARTY ACCESS) ACT 1999

An Act to establish as a law of the Territory a Code making provision for the regulation of third party access to railway infrastructure services in relation to the AustralAsia Railway, and for other purposes

### 1 Short title and commencement

- (1) This Act may be cited as the *AustralAsia Railway (Third Party Access) Act*.
- (2) This Act comes into operation on the date fixed by the Administrator by notice in the *Gazette*.

### 2 Definition

In this Act **Access Code** means the AustralAsia Railway (Third Party Access) Code contained in the Schedule.

### 3 Application of Access Code

The Access Code applies as a law of the Territory.

### 4 Crown to be bound

- (1) This Act and the Access Code binds the Crown, not only in the right of the Territory but also, so far as the legislative power of the Legislative Assembly permits, the Crown in all its other capacities.
- (2) Nothing in this Act or the Access Code makes the Crown liable to be prosecuted for an offence.

### 5 Non-application of *Commercial Arbitration Act*

The *Commercial Arbitration Act* does not apply to an arbitration under the Access Code.

### 6 *Interpretation Act* provisions to apply to certain instruments under Code

Sections 63 and 64 of the *Interpretation Act*, with the necessary modifications, apply to a notice under clause 49 of the Access Code

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(other than a notice prescribing a date on which clause 48 of the Access Code is to expire) in the same way as they apply to regulations made under an Act.

**7 Minister to cause copies of regulator's reports to be tabled in Legislative Assembly**

The Minister must, within 12 sitting days of the Legislative Assembly after receiving a report under clause 7 of the Access Code, cause a copy of the report to be laid before the Legislative Assembly.

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**Schedule      AustralAsia Railway (Third Party Access)  
Act 1999**

section 3

**AUSTRALASIA RAILWAY (THIRD PARTY ACCESS) CODE****Part 1              Preliminary****Division 1        General****1                  Title**

This Code may be cited as the AustralAsia Railway (Third Party) Access Code.

**2                  Application of Code**

This Code applies to so much of the railway as has been constructed between Tarcoola and Darwin to the extent prescribed from time to time.

**3                  Interpretation**

(1) In this Code, unless the contrary intention appears:

**access contract** means a contract or agreement for the provision of railway infrastructure services.

**access dispute** means a dispute referred to in clause 13 or clause 36(2).

**access holder** means a person who has a right of access to railway infrastructure facilities.

**access provider**, in relation to a railway infrastructure service, means the person who provides or is in a position to provide the railway infrastructure service.

**access seeker** has the meaning given by clause 10.

**arbitrator** means an arbitrator appointed under this Code.

**associate** has the meaning given by the Corporations Law.

**award** means an award made by an arbitrator under this Code.

**freight service** means the service of carrying goods on the railway.

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**Northern Territory Minister** means the Minister of the Northern Territory having responsibilities for railways in the Northern Territory.

**party** means:

- (a) in relation to an arbitration of an access dispute – a party to the arbitration, as mentioned in clause 17;
- (b) in relation to an award – a party to the arbitration in which the arbitrator made the award.

**passenger service** means the service of carrying passengers on the railway.

**prescribed** means prescribed by the Northern Territory Minister and the South Australian Minister jointly by notice in the *Gazette*.

**pricing principles** means the pricing principles established by the Schedule.

**railway** means the railway to which this Code applies.

**railway infrastructure facilities** means facilities necessary for the operation or use of the railway, including:

- (a) the railway track;
- (b) stations and platforms;
- (c) the signalling systems, train control systems and communications systems; and
- (d) such other facilities as may be prescribed,

but not including:

- (e) rolling stock; and
- (f) such other facilities as may be prescribed.

**railway infrastructure service** means the service of providing, or providing and operating, railway infrastructure facilities for the purpose of providing a freight service or a passenger service by means of the railway.

**regulator** means the authority, officer or person to which or whom the functions of the regulator under this Code are assigned under clause 5.

**related body corporate** has the meaning given by the



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Corporations Law.

**response date** means the date on which the relevant 21 day period referred to in clause 10(4) expires.

**South Australian Minister** means the Minister of South Australia having responsibilities for railways in South Australia.

**Supreme Court** means the Supreme Court of the Northern Territory or the Supreme Court of South Australia.

- (2) A reference in this Code to an arbitrator includes, in a case where there are 2 or more arbitrators, a reference to the arbitrators.

#### **4 Joint ventures**

- (1) If the access provider or access seeker consists of the participants in a joint venture, the participants are jointly and severally liable to the obligations under this Code.
- (2) The participants in the joint venture may, from time to time, give the regulator written notice of an authorised representative (who may, but need not, be a participant in the joint venture).
- (3) A notice given by or to the authorised representative is taken to have been given by or to all participants in the joint venture.
- (4) If no representative is currently nominated under this clause, a notice given to any one of the participants in the joint venture is taken to have been given to all.
- (5) If this Code requires or permits something to be done by the participants, the thing may be done by one or more of the participants on behalf of them all.
- (6) If a provision of this Code refers to the participants doing something, the provision applies as if the provision referred to one or more of the participants doing that thing on behalf of the participants.
- (7) A joint venture includes a partnership.

### **Division 2 The regulator**

#### **5 The regulator**

- (1) The Northern Territory Minister and the South Australian Minister jointly may, by notice in the *Gazette*, assign the functions of the regulator under this Code to a nominated authority, officer or person.

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- (2) The regulator is subject to the control and direction of the Northern Territory Minister and the South Australian Minister jointly.
- (3) However, no ministerial direction can be given:
- (a) to suppress information or recommendations provided or made under this Code;
  - (b) to compel the regulator to conciliate or refrain from conciliating an access dispute;
  - (c) to compel the regulator to refer or refrain from referring an access dispute to arbitration;
  - (d) to compel the regulator to appoint or refrain from appointing a particular person as an arbitrator under this Code;
  - (e) to compel the regulator to authorise an access proposal, or to refrain from authorising an access proposal, under clause 35(5)(b); or
  - (f) to compel the regulator to vary or revoke an award, or to refrain from varying or revoking an award, under clause 36(1).

## **6 Powers and functions of regulator**

- (1) The functions of the regulator are:
- (a) to monitor and enforce compliance with this Code; and
  - (b) such other functions as are imposed on the regulator by this Code.
- (2) The regulator has such powers as are necessary to enable him or her to carry out the functions of the regulator.

## **7 Regulator to report to Ministers**

The regulator must, on or before 30 September in every year, forward to the Northern Territory Minister and the South Australian Minister a report of the work carried out by the regulator under this Code for the financial year ending on the preceding 30 June.

## **8 Regulator may delegate**

- (1) The regulator may, in writing, delegate to a person in a jurisdiction to which this Code applies or elsewhere, any of the regulator's powers and functions under this Code, other than this power of delegation or the power to act as a conciliator or to appoint an arbitrator under this Code.

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- (2) A power or function delegated under this clause, when exercised or performed by the delegate, is to be taken to have been exercised or performed by the regulator.
  - (3) A delegation under this clause does not prevent the exercise of a power or the performance of a function by the regulator.

## **Part 2                      Access to railway infrastructure services**

### **Division 1                Negotiation of access**

#### **9                      Obligation of access provider to provide information about access**

- (1) The access provider must, on application of any person, provide the person with information reasonably requested by the person about:
  - (a) the extent to which the access provider's railway infrastructure facilities are currently being used;
  - (b) technical details and requirements of the access provider, such as axle load data, clearance and running speeds; and
  - (c) whether the access provider would be prepared to provide a railway infrastructure service of a specified description.
- (2) The access provider may make a reasonable charge (to be determined on a basis decided or approved by the regulator) for providing information under this clause.

#### **10                    Access proposal**

- (1) A person (the **access seeker**) who wants access to a railway infrastructure service, or who wants to vary an access contract in a significant way or to a significant extent, may put a written proposal (the **access proposal**) to the access provider setting out:
  - (a) the nature and extent of the required access or variation; and
  - (b) terms and conditions for the provision of access, or for making the variation, that the access seeker considers reasonable and commercially realistic and to which the access seeker is prepared to agree.
- (2) If the implementation of an access proposal would require an addition or extension to railway infrastructure facilities, the access proposal may include a proposal for the addition or extension to the infrastructure facilities.

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*Note: Clause 20 prevents the making of an award requiring the access provider to bear any of the capital cost of an addition or extension to infrastructure, unless he or she agrees.*

- (3) The access provider may, within 21 days after receiving an access proposal, request further information from the access seeker as the access provider may reasonably require to enable the access provider to consider the access proposal.
- (4) The access provider must, within 21 days after receiving an access proposal or if, within that period, the access provider has requested further information under subclause (3), within 21 days after receiving the information:
  - (a) give written notice of the proposal to:
    - (i) the regulator; and
    - (ii) any access holder whose rights under an existing access contract or award would be affected by implementation of the proposal; and
  - (b) provide to the access seeker the name and contact details of any access holder whose rights under an existing access contract or award would be affected by implementation of the proposal.
- (5) It is sufficient compliance with subclause (4)(a)(ii) if a notice indicating that the access provider has received the access proposal, and the name of the access seeker, is published in a newspaper circulating in the Northern Territory and South Australia.
- (6) The respondents to the proposal are:
  - (a) the access provider; and
  - (b) any access holder whose rights under an existing access contract or award would be affected by implementation of the proposal.

## **11 Duty to negotiate in good faith**

- (1) The access provider and access seeker must, as soon as practicable after the response date, endeavour to accommodate each others' reasonable requirements and must negotiate in good faith with a view to reaching agreement on whether the access seeker's requirements as set out in the access proposal (or some agreed modification of the requirements) could reasonably be met, and, if so, the terms and conditions for the provision of access for the access seeker.

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- (2) The other respondents (if any) whose rights (or prospective rights) would be affected by implementation of the access proposal must also negotiate in good faith with the access seeker with a view to reaching agreement on the provision of access to the access seeker and any consequent variation of their rights (or prospective rights) of access.

**12      Limitation on access provider's right to contract to provide access**

- (1) The access provider must not enter into an access contract unless:
- (a) there is no other respondent to the access proposal;
  - (b) all the other respondents to the proposal agree; or
  - (c) any access dispute in relation to the access proposal is resolved by conciliation in accordance with Division 3 or by arbitration in accordance with Division 4.
- (2) A contract entered into in contravention of this clause is void.

**Division 2      Access disputes and requests for arbitration**

**13      Access disputes**

An access dispute exists if:

- (a) a respondent to an access proposal, within 30 days after the response date or such other time as may be prescribed, refuses or fails to enter into good faith negotiations with the access seeker;
- (b) the access seeker, after making reasonable attempts to reach agreement with the respondents, fails to obtain an agreement on the access proposal or an agreed modification of the proposal within 180 days after the response date; or
- (c) all parties agree that there is no reasonable prospect of reaching agreement.

**14      Request for reference of dispute to arbitration**

- (1) An access seeker may, by written notice given to the regulator, request the regulator to refer an access dispute to arbitration.
- (2) A copy of a notice under this clause must be given to all respondents to the access proposal.

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**Division 3            Conciliation and reference to arbitration****15            Conciliation and reference to arbitration**

- (1) On receipt of a request to refer an access dispute to arbitration, the regulator must (subject to this clause):
  - (a) if the parties to the dispute agree – attempt to settle the dispute by conciliation; or
  - (b) if the parties do not agree or they agree but after making a reasonable attempt to do so the regulator fails to settle the dispute by conciliation – appoint an arbitrator or arbitrators and refer the dispute to them.
- (2) The regulator is not obliged to attempt to settle the dispute by conciliation or refer the dispute to arbitration if, in the regulator's opinion:
  - (a) the subject matter of the dispute is trivial, misconceived or lacking in substance;
  - (b) the access seeker has not provided information reasonably requested by the access provider under clause 10(3);
  - (c) the access seeker has not negotiated in good faith; or
  - (d) the regulator is satisfied, on the application of a party to the dispute, that there are good reasons why the dispute should not be referred to arbitration.
- (3) A dispute cannot be referred to arbitration if:
  - (a) the dispute involves only one access seeker and, before the appointment of the arbitrator, the access seeker notifies the regulator that the access seeker does not want to proceed with the arbitration; or
  - (b) the dispute involves 2 or more access seekers and, before the appointment of the arbitrator, all access seekers notify the regulator that they do not want to proceed with the arbitration.

**16            Arbitrator to be qualified**

- (1) The regulator must keep a list of persons who are suitably qualified to be appointed as arbitrators but may appoint as an arbitrator a person who is not included in the list if the occasion requires.
- (2) An arbitrator must be a person who:

- (a) is independent of the parties to the dispute;
  - (b) is not subject to the control or direction of the Government of either the Northern Territory or South Australia in any capacity;
  - (c) is properly qualified to act in the resolution of the dispute; and
  - (d) has no direct or indirect interest in the outcome of the dispute.
- (3) Before appointing an arbitrator, the regulator must consult with each of the parties to the dispute and must attempt (but is not bound) to make an appointment that is acceptable to all parties.

#### **Division 4      Arbitration of access disputes**

##### **17      Parties to arbitration**

The parties to the arbitration of an access dispute are:

- (a) the access seeker;
- (b) the access provider;
- (c) any other respondent to the access proposal; and
- (d) any other person who applies in writing to be made a party and is accepted by the arbitrator as having a sufficient interest.

##### **18      Manner in which decisions made**

Where 2 or more arbitrators are appointed to arbitrate an access dispute:

- (a) the regulator must appoint one of the arbitrators to preside;
- (b) any decision to be made in the proceedings may be made by a majority; and
- (c) if the arbitrators are equally divided in opinion, the decision of the presiding arbitrator prevails.

##### **19      Award by arbitrator**

- (1) Unless the arbitrator terminates the arbitration under clause 22, the arbitrator must make a written award on access to the railway infrastructure service by the access seeker.
- (2) The award may deal with any matter relating to access to the

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service by the access seeker, including matters that were not the basis for notification of the dispute. By way of example, the award may:

- (a) require the access provider to provide access to the service by the access seeker;
  - (b) require the access seeker to accept, and pay for, access to the service;
  - (c) specify the terms and conditions of the access seeker's access to the service;
  - (d) subject to clause 20(1), require the access provider to extend the railway infrastructure facilities;
  - (e) subject to clause 20(2), specify the extent to which the award overrides an earlier award or access contract.
- (3) The award does not have to require the access provider to provide access to the service by the access seeker.
  - (4) Before making an award, the arbitrator must give a draft award to the parties to the arbitration and may take into account representations that any of them may make on the proposed award.
  - (5) When the arbitrator makes an award, the arbitrator must give the parties to the arbitration and the regulator the arbitrator's reasons for making the award.

## **20 Restrictions on access awards**

- (1) The arbitrator cannot:
  - (a) make an award that would:
    - (i) delay the construction of the railway or any part of the railway;
    - (ii) add to the cost of construction of the railway; or
    - (iii) have the effect of requiring the access provider to bear any of the capital cost of any addition or extension to the railway infrastructure facilities,unless the access provider agrees; or
  - (b) make an award granting access to railway infrastructure facilities where the right of access cannot be satisfied because of a right of access already granted to, and used by, an



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access holder.

- (2) The arbitrator cannot make an award that would prejudice the rights of an existing access holder under an earlier access contract or award unless:
- (a) the access holder agrees; or
  - (b) the arbitrator is satisfied that:
    - (i) the access holder's entitlement to access exceeds the entitlement that the access holder actually needs and there is no reasonable likelihood that the access holder will need to use the excess entitlement; and
    - (ii) the access seeker's requirements cannot be satisfactorily met except by transferring the excess entitlement (or some of it) to the access seeker and the access holder is or will be compensated for any loss suffered as a result of the transfer of the excess entitlement (or relevant part) to the access seeker.

## **21 Matters arbitrator must take into account**

- (1) The arbitrator must take the following matters into account in making an award:
- (a) the legitimate business interests of the access provider, and the access provider's investment in the railway generally;
  - (b) the high initial capital cost of the railway infrastructure facilities (including the cost of the rail corridor), the high degree of economic risk of the project, and the need for a fair return on the access provider's investment having regard to those costs and that risk;
  - (c) the cost to the access provider of providing access, including any costs of extending the railway infrastructure facilities, but not costs associated with losses arising from increased competition in upstream or downstream markets;
  - (d) the public interest, including the public interest in having competition in markets;
  - (e) the interests of all access holders and other persons who have rights to use the railway infrastructure facilities, including all firm and binding contractual obligations;
  - (f) the pricing principles;

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- (g) the economic value to the access provider of extensions to the railway infrastructure facilities, the cost of which is borne by someone else, and any additional investment that the access seeker or access provider has agreed to undertake;
  - (h) the operational and technical requirements necessary for the safe and reliable operation of the railway infrastructure facilities;
  - (i) the economically efficient operation of the railway infrastructure facilities.
- (2) The arbitrator may take into account any other matters, not inconsistent with the matters referred to in subclause (1), that the arbitrator thinks are relevant.

## **22 Arbitrator may terminate arbitration in certain cases**

- (1) The arbitrator may at any time terminate an arbitration (without making an award) if the arbitrator thinks that:
- (a) the subject matter of the dispute is trivial, misconceived or lacking in substance;
  - (b) the person seeking arbitration of the dispute has not negotiated in good faith; or
  - (c) the arbitrator is satisfied, on an application of a party to the dispute, that there are good reasons why the arbitration should be terminated.
- (2) The arbitrator may also, at any time, terminate an arbitration (without making an award), with the consent of the parties to the arbitration.
- (3) If the arbitrator terminates an arbitration under subclause (1) without making an award, the arbitrator must give the parties to the arbitration and the regulator the arbitrator's reasons for terminating the arbitration.

## **Division 5 Pricing principles**

### **23 For access relating to passenger and freight services**

- (1) On an arbitration under this Code, the price that may be charged by the access provider for access to railway infrastructure facilities to enable an access seeker to deliver to its customers a freight service is to be determined by applying the principles and methods of calculation set out in Division 1 in the Schedule to this Code.

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- (2) On an arbitration under this Code, the price that may be charged by the access provider for access to railway infrastructure facilities to enable an access seeker to deliver to its customers a passenger service is to be determined by applying the principles and methods of calculation set out in Division 2 in the Schedule to this Code.

**24 Access provider may agree different price**

The pricing principles do not prevent an access provider from entering into an access contract on terms that do not reflect the pricing principles.

**Division 6 Procedure in arbitration**

**25 Hearing to be in private**

- (1) Subject to subclause (2), an arbitration hearing for an access dispute is to be in private.
- (2) If the parties agree, an arbitration hearing or part of an arbitration hearing may be conducted in public.
- (3) The arbitrator in a hearing that is conducted in private may give written directions as to the persons who may be present.
- (4) In giving directions under subclause (3), the arbitrator must have regard to the wishes of the parties and the need for commercial confidentiality.

**26 Right to representation**

In an arbitration hearing, a party may appear in person or be represented by someone else.

**27 Procedure of arbitrator**

- (1) In an arbitration hearing about an access dispute, the arbitrator:
- (a) is not bound by technicalities, legal forms or rules of evidence;
  - (b) must act as speedily as a proper consideration of the dispute allows, having regard to the need to carefully and quickly inquire into and investigate the dispute and all matters affecting the merits, and fair settlement, of the dispute; and
  - (c) may inform himself or herself of any matter relevant to the dispute in any way the arbitrator thinks appropriate.
- (2) The arbitrator may determine the periods that are reasonably necessary for the fair and adequate presentation of the respective

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cases of the parties to an access dispute and may require that the cases be presented within those periods.

- (3) The arbitrator may require evidence or argument to be presented in writing and may decide the matters on which the arbitrator will hear oral evidence or argument.
- (4) The arbitrator may determine that an arbitration hearing is to be conducted by:
  - (a) telephone;
  - (b) closed circuit television; or
  - (c) any other means of communication.

## **28 Particular powers of arbitrator**

- (1) The arbitrator may do any of the following things for the purpose of arbitrating an access dispute:
  - (a) give a direction in the course of, or for the purposes of, an arbitration hearing;
  - (b) hear and determine the arbitration in the absence of a person who has been summoned or served with a notice to appear;
  - (c) sit at any place;
  - (d) adjourn to any time and place;
  - (e) refer any matter to an expert and accept the expert's report as evidence;
  - (f) generally give all such directions, and do all such things, as are necessary or expedient for the speedy hearing and determination of the access dispute.

- (2) A person must not do an act or thing in relation to the arbitration of an access dispute that would be a contempt of court if the arbitrator were a court of record.

Penalty: \$50,000.

- (3) Subclause (1) has effect subject to any other provision of this Code or as prescribed.
- (4) The arbitrator may give an oral or written order to a person not to divulge or communicate to anyone else specified information that was given to the person in the course of an arbitration, unless the person has the arbitrator's permission.

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- (5) A person who contravenes an order under subclause (4) is guilty of an offence.

Penalty: \$50,000.

**29 Power to take evidence on oath or affirmation**

- (1) The arbitrator may take evidence on oath or affirmation and for that purpose may administer an oath or affirmation.
- (2) The arbitrator may summon a person to appear before the arbitrator to give evidence and to produce such documents (if any) as are referred to in the summons.
- (3) The powers in this clause may be exercised only for the purposes of arbitrating an access dispute.

**30 Failing to attend as witness**

A person who is served, as prescribed, with a summons to appear as a witness before the arbitrator must not, without reasonable excuse, fail to:

- (a) attend as required by the summons; or
- (b) appear and report himself or herself from day to day unless excused or released from further attendance by the arbitrator.

Penalty: \$50,000.

**31 Failing to answer questions etc.**

- (1) A person appearing as a witness before the arbitrator must not, without reasonable excuse, refuse or fail:
- (a) to be sworn or to make an affirmation;
- (b) to answer a question that the person is required to answer by the arbitrator; or
- (c) to produce a document that the person was required to produce by a summons under this Code served on the person as prescribed.

Penalty: \$50,000.

- (2) It is a reasonable excuse for the purposes of subclause (1) for an individual to refuse or fail to answer a question or produce a document on the ground that the answer or the production of the document might tend to incriminate the individual or to expose the individual to a penalty.

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- (3) Subclause (2) does not limit what is a reasonable excuse for the purposes of subclause (1).

**32 Intimidation etc.**

A person must not:

- (a) threaten, intimidate or coerce another person; or
- (b) cause or procure damage, loss or disadvantage to another person,

because that other person:

- (c) proposes to produce, or has produced, documents to the arbitrator; or
- (d) proposes to appear or has appeared as a witness before the arbitrator.

Penalty: \$100,000.

**33 Party may request arbitrator to treat material as confidential**

- (1) A party to an arbitration hearing may:
  - (a) inform the arbitrator that, in the party's opinion, a specified part of a document contains confidential commercial information; and
  - (b) request the arbitrator not to give a copy of that part to another party.
- (2) On receiving a request, the arbitrator must:
  - (a) inform the other party or parties that the request has been made and of the general nature of the matters to which the relevant part of the document relates; and
  - (b) ask the other party or parties whether there is any objection to the arbitrator complying with the request.
- (3) If there is an objection to the arbitrator complying with a request, the party objecting may inform the arbitrator of its objection and of the reasons for it.
- (4) After considering:
  - (a) a request;
  - (b) any objection; and

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- (c) any further submissions that a party has made in relation to the request,

the arbitrator may decide not to give to the other party or parties a copy of so much of the document as contains confidential commercial information that the arbitrator thinks should not be so given.

### **34 Costs of arbitration**

- (1) The costs of an arbitrator are to be borne by the parties in proportions decided by the arbitrator, and in the absence of a decision by the arbitrator, in equal proportions.
- (2) However, if the access seeker terminates an arbitration or elects not to be bound by an award, the access seeker must bear the costs in their entirety.
- (3) The regulator may recover the costs of an arbitration as a debt.

## **Division 7 Effect of awards**

### **35 Operation of award**

- (1) Subject to this clause, an award is binding on the parties to the arbitration in which it is made.
- (2) An award has effect 21 days after it is made unless the access seeker, before that time, elects not to be bound by it.
- (3) An access seeker may, within 7 days after the making of an award, or such further time as the regulator may allow, elect not to be bound by the award by giving written notice of the election to the regulator.
- (4) The regulator must, within 7 days after receiving a notice of election under subclause (3), notify the access provider and the other parties to the arbitration.
- (5) If the access seeker elects not to be bound by an award:
  - (a) the award is rescinded; and
  - (b) the access seeker is precluded from making another access proposal for 2 years from the date the notice of election was given, unless the access provider agrees or the regulator authorises a further access proposal within that period.
- (6) An authorisation under subclause (5)(b) may be given on conditions the regulator considers appropriate.

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**Division 8            Variation or revocation of awards****36            Variation or revocation of award**

- (1) The regulator may vary or revoke an award if all parties to the award agree.
- (2) If the parties are unable to agree on a proposed variation of an award, the regulator may, on the application of one or more of the parties but subject to subclause (3), refer the dispute to arbitration.
- (3) The regulator must not refer the dispute to arbitration if of the opinion that there is no sufficient reason for varying the award.
- (4) In deciding whether to refer a dispute to arbitration under this clause, the regulator must have regard to:
  - (a) whether there has been a material change in circumstances since the award was made or last varied;
  - (b) the nature of the matters in dispute;
  - (c) the time that has elapsed since the award was made or last varied; and
  - (d) other matters the regulator considers relevant.
- (5) The provisions of this Part about the arbitration of a dispute arising from an access proposal apply, with the necessary modifications, to a dispute about the proposed variation of an award.

**Division 9            Appeals****37            Appeal to Supreme Court on question of law**

- (1) An appeal lies to the Supreme Court from an award, or a decision not to make an award, on a question of law.
- (2) On an appeal the Court may exercise one or more of the following powers:
  - (a) vary the award or decision;
  - (b) revoke the award or decision;
  - (c) make an award or decision that should have been made in the first instance;
  - (d) remit the matter to the arbitrator for further consideration or re-consideration;



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- (e) make incidental or ancillary orders, including orders for costs.
  - (3) An award or decision of an arbitrator cannot be challenged or called into question except by appeal under this clause.
  - (4) Unless the Court specifically decides to suspend the operation of an award until the determination of an appeal, an appeal does not suspend the operation of an award.

### **Part 3                   Hindering access to railway infrastructure services**

#### **38                   Prohibition on hindering access to railway infrastructure service**

A person must not engage in conduct for the purpose of preventing or hindering access to a railway infrastructure service by any person who has a right to use that service.

Penalty:       \$100,000 and \$10,000 for each day during which the offence continues.

### **Part 4                   Monitoring powers**

#### **39                   Regulator's power to obtain information**

- (1) The regulator may, by written notice to the access provider, require the access provider to provide to the regulator, within a period stated in the notice or at stated intervals, specified information or copies of specified documents related to:
  - (a) the provision of railway infrastructure services to which this Code applies; and
  - (b) any other activity in relation to the railway engaged in by the access provider or a related body corporate or an associate of the access provider.
- (2) Without limiting subclause (1), the information and documents that may be required extend to financial information and documents relating to the access provider's own use of railway infrastructure facilities.
- (3) A person must not, without reasonable excuse, contravene or fail to comply with a notice under this clause.

Penalty:       \$100,000 and \$10,000 for each day during which the offence continues.

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**40 Confidentiality**

- (1) The regulator must ensure that confidential information obtained under this Part is protected from use or disclosure except:
  - (a) in the performance of the regulator's functions;
  - (b) as required or allowed by law;
  - (c) with the written consent of the person who supplied the information; or
  - (d) in prescribed circumstances.
- (2) However, the regulator may disclose confidential information:
  - (a) to the Northern Territory Minister or the South Australian Minister if the Northern Territory Minister or South Australian Minister, as the case may be, directs that it is in the public interest for the regulator so to do; or
  - (b) to an arbitrator, at the arbitrator's request, in the course of an arbitration.
- (3) Clause 33 extends to confidential information and documents supplied to an arbitrator under subclause (2)(b).

**41 Duty to report to Ministers**

The regulator must, at the request of the Northern Territory Minister or the South Australian Minister, report to the Northern Territory Minister or the South Australian Minister, as the case may be, on:

- (a) the costs and other aspects of the provision of railway infrastructure services; or
- (b) any aspect of the operation of this Code.

**Part 5 Enforcement****42 Injunctive remedies**

- (1) The Supreme Court may grant an injunction:
  - (a) restraining a person from contravening a provision of this Code or a provision of an award; or
  - (b) requiring a person to comply with a provision of this Code or a provision of an award.

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- (2) The power of the Court to grant an injunction restraining a contravention of a provision of this Code or an award may be exercised:
- (a) whether or not the defendant has previously contravened the same provision; and
  - (b) whether or not there is imminent danger of substantial damage to any person.
- (3) The power of the Court to grant an injunction requiring compliance with a provision of this Code or an award may be exercised:
- (a) whether or not the defendant has previously failed to comply with the provision; and
  - (b) whether or not there is imminent danger of substantial damage to any person.
- (4) The Court may make an interim injunction under this clause.
- (5) An application for an injunction under this clause may be made by:
- (a) the regulator; or
  - (b) a person with a proper interest in whether the relevant provision is complied with.
- (6) The Court may grant an injunction by consent without inquiry into the merits of the application.
- (7) If the regulator makes an application for an injunction, the Court cannot require the regulator or any other person to give an undertaking as to damages as a condition of granting the injunction.
- (8) The Court may, on application by the regulator or an interested party, discharge or vary an injunction.

### **43 Compensation**

- (1) If a person contravenes a provision of this Code or an award, the Supreme Court may, on application by the regulator or an interested person, order compensation of persons who have suffered loss or damage as a result of the contravention.
- (2) An order may be made under this clause against the person who contravened the provision and others involved in the contravention.
- (3) A person is involved in the contravention if the person:
- (a) aided, abetted, counselled or procured the contravention;

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- (b) induced the contravention through threats or promises or in some other way;
  - (c) was knowingly concerned in, or a party to, the contravention; or
  - (d) conspired with others to contravene the provision.

#### **44 Enforcement of arbitrator's requirements**

- (1) If a person fails to comply with an order, direction or requirement of an arbitrator under this Code, the arbitrator may certify the failure to the Supreme Court.
- (2) The Court may inquire into the case and make such orders as may be appropriate in the circumstances.

#### **45 Access contracts specifically enforceable**

An access contract is specifically enforceable.

### **Part 6 Miscellaneous**

#### **46 Segregation of access provider's accounts and records**

- (1) The access provider must keep accounts and records of its business consisting of the provision of railway infrastructure services in relation to the railway so as to give a true and fair view of that business as distinct from other businesses carried on by the access provider or any related body corporate or associate of the access provider.
- (2) The accounts and records must be kept in a way that gives:
  - (a) a comprehensive view of the access provider's legal and equitable rights and liabilities in relation to railway infrastructure services; and
  - (b) a true and fair view of:
    - (i) income and expenditure derived from, or relating to, railway infrastructure services; and
    - (ii) assets and liabilities of the access provider's business so far as they relate to railway infrastructure services.
- (3) The access provider must cause to be kept in a similar way similar accounts and records in relation to the business of any related body corporate or associate of the access provider to whom a railway

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infrastructure service is provided by the access provider.

#### **47 Removal and replacement of arbitrator**

- (1) The regulator may remove an arbitrator from office if the arbitrator:
  - (a) becomes mentally or physically incapable of carrying out the arbitrator's duties satisfactorily;
  - (b) is convicted of a crime;
  - (c) becomes bankrupt or applies to take the benefit of a law for the benefit of bankrupt or insolvent debtors; or
  - (d) has a direct or indirect interest in the outcome of the dispute or matter under arbitration.
- (2) If an arbitrator resigns, is removed from office or dies, the regulator may appoint another person to take the place of the arbitrator.

#### **48 Amendment of Code**

- (1) This Code may be amended, before the date on which this clause expires, by the Northern Territory Minister and the South Australian Minister jointly as prescribed.
- (2) This clause expires on the date 12 months after the date on which this Code commences or, if an earlier date is prescribed, on that earlier date.

#### **49 Prescribing of matters for purpose of Code**

- (1) The Northern Territory Minister and the South Australian Minister jointly, by notice in the *Gazette*, may prescribe matters:
  - (a) required or permitted by this Code to be prescribed; or
  - (b) necessary or convenient to be prescribed for carrying out or giving effect to this Code.
- (2) Without limiting the generality of subclause (1), the Ministers may prescribe:
  - (a) amendments to this Code;
  - (b) a date on which clause 48 is to expire;
  - (c) the parts of the railway to which this Code from time to time applies; and
  - (d) provisions about the inspection of registers maintained under

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this Code (including about fees for such inspections).

## **50            Review of Code**

- (1) The Northern Territory Minister and South Australian Minister jointly may, at any time, review the operation of this Code but, in any case, must do so not later than 12 months before the expiration of the period for which the Commonwealth Minister has specified under section 44N of the *Trade Practices Act 1974* of the Commonwealth that the access regime, of which this Code is a part, is to remain in force.
- (2) To enable the Ministers to perform their function under subclause (1), the regulator must prepare such reports to the Ministers as the Ministers may require.

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## Schedule Access Pricing Principles

clause 23

### *Division 1 Access pricing in connection with freight services*

#### **1 Sustainable competitive prices**

- (1) The access price payable to the access provider by an access seeker for a railway infrastructure service provided to enable the access seeker to deliver a freight service will be determined by the arbitrator and will depend on whether there is:
  - (a) a sustainable competitive price (as to which see sections 1(2) and 1(3) below); or
  - (b) no sustainable competitive price (as to which see section 2 below).
- (2) A sustainable competitive price will exist where it can be demonstrated that:
  - (a) there are no regulatory, technical or other practical impediments to transport of the freight by an alternative mode or combination of modes; and
  - (b) the lowest cost of transporting the freight by an alternative mode is less than the stand alone cost of transporting the freight over the relevant part of the railway, which costs are to be calculated on the following basis:
    - (i) the costs associated with the operation of the railway infrastructure are to be limited to that portion of the railway infrastructure as is needed to satisfy the requirements of the access seeker (the **relevant infrastructure**) and are to be calculated assuming the access seeker is the sole user of the infrastructure; and
    - (ii) the stand alone costs are to include operating costs, being the on-going operational costs of the relevant infrastructure, including the labour and material costs that are causally related to the operation and maintenance of the relevant infrastructure and capital costs which include depreciation and a rate of return, based on the written down replacement cost of the relevant infrastructure and a nominal (after tax) rate of return on assets of 18%, where the tax rate to be applied is the corporate tax rate prevailing at the time or arbitration.

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- (3) Where there is a sustainable competitive price, the access price (AP) payable to the access provider by an access seeker for the railway infrastructure service is to be calculated in accordance with the following formula:

## 2 No sustainable competitive prices

Where there is not a sustainable competitive price, the access price (AP) payable to the access provider by an access seeker for the railway infrastructure service is to be calculated in accordance with the following formula:

$$AP = RPCAB$$

Where:

**AP** is the access price payable by the access seeker to the access provider for the railway infrastructure service used by the access seeker to provide a freight service involving the transportation of freight on the railway between one point (point A) to another point (point B); and

**RPCAB** is the rail price cap, being an amount equal to 2 times the average (below-rail) costs of the railway infrastructure facilities used in the provision of the freight service involving the transportation of freight on the railway between one point (point A) and another point (point B), which costs are to be calculated on the following basis:

- (a) the costs associated with the operation of the railway infrastructure are to be limited to that portion of the railway infrastructure as is needed to satisfy the requirements of the access seeker (the **relevant infrastructure**);
- (b) the average (below-rail) costs, being the on-going costs of the relevant infrastructure, including the labour and material costs that are causally related to the relevant infrastructure, including:
  - (i) labour and material costs associated with the operation and maintenance of the relevant infrastructure;
  - (ii) an appropriate allocation of administrative costs,
  - (iii) an appropriate allocation of capital charges including depreciation and a return on assets, based on the written down replacement cost of the relevant infrastructure and a nominal (after tax) rate of return on assets of 18%, where the tax rate to be applied is the corporate tax rate prevailing at the time of arbitration,



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which costs are to be apportioned across all users of the railway infrastructure facilities based on relative usage of those facilities.

### 3 Access price not below economic cost

The access price (AP) must not be less than the economic cost of providing the service, and accordingly the access price calculated in accordance with section 1 or section 2 (as the case may be) must not be less than a floor price calculated in accordance with the following formula:

$$AP = ICBR + R$$

where:

**AP** is the access price payable by the access seeker to the access provider for the railway infrastructure service used by the access seeker to provide a freight service involving the transportation of freight on the railway between one point (point A) and another point (point B).

**ICBR** is the incremental costs (below-rail) of the access provider, being the additional costs incurred by the access provider of providing access to the railway for the access seeker to deliver the relevant freight service involving the transport of freight between point A and point B on the railway having regard to:

- (a) the total below-rail service long-run incremental cost, being the costs the access provider will avoid in the long-term if it did not provide the freight service;
- (b) the period of time over which the long-run costs are to be measured is to be sufficient so as to enable all necessary investments in the railway infrastructure to be replaced;
- (c) the incremental costs are to include operating costs, being the on-going operational costs of providing the railway infrastructure service, including the labour and material costs that are causally related to the operation and maintenance of the railway infrastructure service;
- (d) the incremental costs are also to include capital costs, calculated on a long-term basis to account for the replacement of assets being brought forward by the operation of the freight service (such as wear and tear of the track); and

**R** is a reasonable contribution to below-rail common costs and capital charges having regard to the access provider's original investment in the railway (including outstanding debt obligations).

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*Division 2 Access pricing in connection with passenger services***4 Access pricing for passenger access**

- (1) The access price (AP) payable to the access provider by an access seeker for a railway infrastructure service that is provided to enable the access seeker to deliver a passenger service will be a price determined by the arbitrator which is:
  - (a) not more than the ceiling price for the provision of the railway infrastructure service; and
  - (b) not less than the floor price for the provision of the railway infrastructure service.
- (2) The ceiling price is to be determined by the arbitrator reflecting the highest price that could fairly be asked by the access provider for the provision of the railway infrastructure service having regard to the principles used to calculate the access price set out in section 2 above.
- (3) The floor price for the provision of railway infrastructure services is to be determined by the arbitrator reflecting the lowest price at which the access provider could provide the railway infrastructure service without incurring a loss, having regard to the principles set out in section 3 above, save that "R" (as defined in section 3 above) should not be used to determine the floor price.

*Division 3 Worked examples***5 Introduction**

The process an arbitrator should follow is illustrated in Attachment A. Three worked examples are provided in this section to illustrate application of the pricing principles. One example is for a service covering freight traffics which are already hauled by the Railway and the second and third examples are for new freight traffics, with and without a competitive sustainable price respectively.

**(1) Example 1 – Existing freight traffic**

This example assumes that the access application relates to the operation of general freight services over the length of the Railway (Tarcoola to Darwin), i.e. it will attract existing freight from the incumbent general rail freight operator but also potentially new freight of the same type (either transferred from road or generated).

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Following the process illustrated in Attachment A, a number of discrete steps are required:

- (a) is there a sustainable competitive price for such a freight service in the corridor?
  - For general freight services, the road linehaul rate is likely to be the appropriate competitive alternative price for the Railway.
    - Assume for the purposes of this example, that observed road rates in the corridor are 2.0 to 6.0 c/ntk depending on the characteristics of the movement, direction etc.
  - The stand-alone cost of the railway can be determined by reference to the ultimate construction cost, but assume the total construction cost of the New Railway was \$1 billion and the replacement cost of the Existing Railway was \$500 million.
    - Assuming the written-down replacement cost was \$1.1 billion, the interest charge after tax is \$198 million (@18%), which grosses up to say \$309 million (assuming an effective tax rate of 36%) before tax.
    - If the freight service of the access seeker was to generate up to 1 billion ntk per annum, then the capital charge is roughly equivalent to 31 c/ntk, clearly more than the competitive road rate, even before allowing for other stand-alone cost items.
  - In practice, it is highly likely that the test for a sustainable competitive price can be satisfied very quickly in most cases, by focusing on the relative orders of magnitude.
- (b) What is the competitive imputation access price (CRLPAB – ICAR)?
  - If the railway hauls the same or similar freight in the corridor, the railway's current freight rates will be a strong guide to the competitive rail linehaul price for the service for which access is being sought
    - Other value-added services provided by the Railway may have to be disaggregated from the rail price delivered to the customer (e.g. road pickup and delivery charges).
    - Other adjustments might be required to account for differences in the type of service being operated, for instance:
      - Time of day/peak issues; or

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- Conditions of contract (e.g. long-term freight haulage contract vs. spot rates).
  - Assume for this example, that existing freight of the same or similar type was carried for an average rate of 3.5 cents per net tonne kilometre and that this was considered to be the sustainable competitive linehaul price (CRLPAB).
  - The incremental above rail cost (ICAR) represents the additional costs which the integrated freight operator would incur if they provided the freight service, or alternatively in the case of existing freight hauled by the railway, the costs they would avoid (in the long-term allowing for replacement of capital) if they ceased to provide the freight service.
  - ICAR would be determined with regard to the actual above rail costs of the integrated access provider (where they exist). Attachment B illustrates an example railway owner's cost structure.
  - The competitive imputation access price (2.17 c/ntk) is the difference between the competitive rail linehaul price (CRLPAB) of 3.50 c/ntk and the incremental above rail costs (ICAR) of 1.33 c/ntk (1.03+0.3). Expressed in terms of cents per gross-tonne-kilometres *Gross tonne kilometres (i.e. net tonne kilometres plus the tare weight of the rollingstock) is a more common measure of usage for access pricing purposes as it more accurately reflects cost causality for an infrastructure owner than ntk and is generally more easily measured.*, the equivalent competitive imputation access price is 0.99 c/gtk.
    - It was assumed that all costs, except administration/management costs and 50% of the terminal costs would be avoidable with the loss of freight business in the long-run.
    - If the freight service for which access was being sought would replace the entire above rail business of the access provider, then all above rail costs are likely to be avoidable in which case, ICAR increases to 1.55 (1.25+0.30) and the access price falls from 2.17 c/ntk to 2.00 c/ntk (0.89 c/gtk).

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(c) Is it higher than the floor price?

- The starting point for the floor price is the incremental below rail cost, i.e. the additional below rail costs which are likely to be incurred as a result of the use of the network by the freight service seeking access.
  - Typically, this will include both maintenance costs and capital renewal costs. Additional operations (signalling) costs may also be incurred depending on the nature of the train control operations and the nature of the service for which access is being sought.
  - In Attachment B, the Track variable cost, i.e. the variable component of infrastructure maintenance, is 0.07 c/gtk (\$6m/8800m gtk)
  - The components of infrastructure where renewal is typically related to use (as opposed to time) are the rails, sleepers and ballast. Assuming a track replacement cost of \$500,000 per kilometre (including rails, sleepers and ballast but excluding initial formation works and structures), and an economic life of 1 billion gross tonnes, gives a depreciation charge of 0.05 c/gtk. Assuming an equivalent interest charge, gives a total incremental cost of about 0.17 c/gtk (0.07+0.05+0.05).
- The competitive imputation access price (0.99 c/gtk) is well above the incremental cost (0.17 c/gtk) and therefore the contribution to common costs and capital charges would be sufficient to ensure the competitive imputation access price passes the floor price test.

## **(2) Example 2 – New freight traffic – competitive sustainable price**

This example assumes that the access application relates to the operation of a new mineral freight service over 300 kms of the Railway. Again, following the process illustrated in Attachment A, a number of discrete steps are required:

- (a) is there a sustainable competitive price for such a freight service in the corridor?
- Developments in road transport technologies have meant that road transport is now a viable competitor for the transport of bulk mineral flows in non-urban areas.
  - Various examples now exist in the Northern Territory and Queensland where large volumes of minerals traffic are hauled by road (several hundreds of thousands of tonnes over several hundred kilometres). These examples could provide

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anecdotal evidence of the observed alternative competitive prices.

- Where sufficient differences in the characteristics of the haul exist, cost modelling could be undertaken to develop alternative road costs for the freight service for which access has been sought.
  - The cost of any road upgrades required would need to be factored into the analysis.
  - The costs would include capital charges for the vehicles over their economic life (which may be the economic life of the mine rather than the engineering life of the vehicles).
- Assume for this example, that the competitive alternative price was determined to be 4.0 cents per net tonne kilometre.
- The replacement value of the 300kms of the railway being used by the new traffic might be \$200 million, which might correspond to a written-down value of \$160 million :
  - The interest charge after tax is \$29 million (@18%), which grosses up to say \$45 million (assuming an effective tax rate of 36%) before tax.
  - If the freight service of the access seeker was to generate up to 1 billion ntk per annum, then the capital charge is roughly equivalent to 4.5c/ntk, again more than the competitive road rate, even before allowing for other stand-alone cost items.
- (b) What is the competitive imputation access price (CRLPAB – ICAR)?
- Because it is a new traffic, CRLPAB will be determined with regard to the competitive alternative mode
  - Rail rates charged to existing customers might however assist the arbitrator in making judgements about adjustments for contract conditions, service quality factors etc.
- Assume for this example that the CRLPAB was 4.0 c/ntk

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- The incremental above rail cost (ICAR) represents the additional costs which the integrated freight operator would incur if they provided the freight service
    - In this case, ICAR would still be determined based on the integrated service provider's actual costs, but adjusted for the additional resources required to undertake the freight service.
    - The additional resources required (i.e. additional locomotives, wagons, train hours etc) are valued using a set of unit costs (developed from the railway's accounts). Attachment C provides example unit costs.
    - The derivation of ICAR for the new traffic example is shown in Attachment D.
  - The competitive imputation access price (2.23 c/ntk) is the difference between the competitive rail linehaul price (CRLPAB) of 4.00 c/ntk and the incremental above rail costs (ICAR) of 1.77 c/ntk. Expressed in terms of cents per gross-tonne-kilometres the equivalent competitive imputation access price is 1.24c/gtk (2.23/1.80).
    - It was assumed that some additional terminal costs would be required (@\$0.50 per tonne) but no additional shunting or administration/overhead costs would be incurred.

(c) Is it higher than the floor price?

- Following the calculations from the previous example, an incremental below rail cost in the order of 0.17 c/gtk means that the contribution to common costs and capital charges would be sufficient to ensure the competitive imputation access price passes the floor price test.

### **(3) Example 3 – New freight traffic – no competitive sustainable price**

This example similarly assumes that the access application relates to the operation of a new mineral freight service over 300 kms of the Railway. Again, following the process illustrated in Attachment A, a number of discrete steps are required:

- (a) Is there a sustainable competitive price for such a freight service in the corridor?
- Assume for this example, that the competitive alternative price was determined to be 10.0 cents per net tonne kilometre which was considered to be above the stand-alone cost of the infrastructure which was required.

(b) What is the rail price cap?

- The below-rail costs of the relevant infrastructure are to include operations, maintenance and capital costs. Attachment E outlines the calculations to derive the average below rail cost
  - Total cost of the relevant infrastructure increases from \$54.4 million pa to \$55.7 million pa after introduction of the new traffic. The average cost reduces from 0.62 c/gtk to 0.55 c/gtk
- The rail price cap, and hence the access price, is set at twice the average cost (i.e.  $0.55 \times 2 = 1.10$  c/gtk)
  - Adopting the incremental above rail cost assumptions from the previous example, this access price would be equivalent to 1.98 c/ntk (@1.80 ntk:gtk). With an above rail cost of 1.77 c/ntk, the rail price cap corresponds to a maximum freight rate of approximately 3.75 c/ntk.

(c) Is it higher than the floor price?

- Following the calculations from the previous example, an incremental below rail cost in the order of 0.17 c/gtk means that the contribution to common costs and capital charges would be sufficient to ensure the competitive imputation access price passes the floor price test.

$$AP = CRLPAB - ICAR$$

Where:

**AP** is the access price payable by the access seeker to the access provider for the railway infrastructure service used by the access seeker to provide a freight service to its customers involving the transportation of freight on the railway between one point (point A) and another point (point B).

**CRLPAB** is the competitive rail-linehaul price, being the maximum competitive price that the access provider could charge for the transport of freight between one point (point A) and another point (point B) on the railway having regard to:

- (a) the prices charged for transporting the same or similar freight on the railway, taking into account, and where appropriate removing the effect of, any differences in:
  - (i) the type and volume of freight product involved;



- (ii) cost or service characteristics (such as the time for delivery of the freight , rolling stock axle loadings, train length and train speed);
  - (iii) contractual terms (such as the duration and frequency of the access contract and whether the contract involves a take-or-pay obligation for specific volume of freight or some other risk allocation arrangement);
  - (iv) the time during which access to the railway is required and the available capacity of the railway to accommodate the proposed freight service and all other freight and passenger services of other users of the railway at that time; and
  - (v) the amount of freight and the prices charged in each direction; and
- (b) the price charged for alternative modes of transporting the same or similar freight (for example, by road, sea, air or some other mode of transport or a combination of such means), which price must be sustainable in the long-run and allow for a replacement of capital and a normal commercial return (being a return that is consistent with the return in the market for investments of similar risk) and taking into account, and where appropriate removing the effect of, any differences in:
  - (i) any additional handling or transportation costs required in order to compare the total price of delivering the relevant freight product from the linehaul point of pick-up (of the alternative mode of transport) to the final linehaul point of delivery of the freight product, when compared to transporting the freight product from the linehaul point of pick-up to the final linehaul point of delivery via the relevant section of the railway between point A and point B;
  - (ii) the type of freight product involved, including its handling characteristics and the volumes of the freight product to be hauled and the contributions, if any, required to upgrade necessary infrastructure;
  - (iii) the amount of freight and the prices charged in each direction; and

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**ICAR** is the incremental cost (above-rail) of providing the relevant freight service involving the transport of freight between point A and point B on the railway of whichever of the following entities that conducts freight services:

- (a) the access provider;
- (b) if the access provider does not conduct freight services, a related body corporate or an associate of the access provider;
- (c) if neither the access provider nor a related body corporate or an associate of the access provider conduct freight services, an efficient operator of freight services,

(the relevant entity being referred to as the **designated service provider**), such costs to be calculated having regard to:

- (d) the total above-rail incremental costs, being the costs the designated service provider will avoid if it did not provide the freight service;
- (e) where the period of the access contract requested by the access seeker to enable it to deliver freight services is of less than 5 years duration (a **short-term access contract**) then the incremental costs (above-rail) will include:
  - (i) the operating costs, being the on-going operational costs of providing the freight service, including the labour and material costs that are causally related to the provision of the freight service, including:
    - train crew labour costs;
    - rolling stock maintenance costs;
    - fuel costs; and
    - terminal handling costs; and
  - (ii) no allowance for capital costs; and

- (f) where the period of the access contract requested by the access seeker to enable it to deliver freight services is of 5 or more years duration (a **long-term access contract**) then the incremental costs (above-rail) will include:
- (i) the operating costs, being the on-going operational costs of providing the freight service, including the labour and material costs that are causally related to the provision of the freight service, including
    - train crew labour costs;
    - rollingstock maintenance costs;
    - fuel costs; and
    - terminal handling costs; and
  - (ii) an allowance for capital costs, which are to be calculated on the basis of the historical costs of the relevant above-rail assets of the designated service provider where they exist or otherwise the acquisition cost of the relevant above-rail assets (which may not be new assets), comprising:
    - depreciation on a straight line basis calculated over the useful economic life of the assets; and
    - a return on the assets calculated at a rate equal to the 10 year Commonwealth bond rate plus 2%.

## ATTACHMENT A. PROCESS FOR DETERMINING THE ARBITRATED ACCESS PRICE



## ATTACHMENT B. RAILWAY OWNER'S COST STRUCTURE (TARCOOLA TO DARWIN)

### Existing fleet

Locomotives	15
Wagons	600
Trains per week	10

### Above rail services

(\$ pa)

Train crew	\$6,000,000
Fuel	\$16,000,000
Locomotive maintenance	\$8,000,000
Wagon maintenance	\$7,000,000
Terminal and shunting operations	\$8,000,000
Administration/management	\$5,000,000
Total above rail services	\$50,000,000

### Below rail services

Track access charges (Tarcoola – Adelaide)	\$6,000,000
Train control (Darwin – Tarcoola)	\$1,000,000
Variable infrastructure maintenance (Darwin – Tarcoola)	\$6,000,000
Fixed infrastructure maintenance (Darwin – Tarcoola)	\$14,000,000
Administration, management	\$3,000,000
Total below rail services	\$30,000,000

### Total

**\$80,000,000**

### Net tonne kilometres

**4,000,000,000**

Gross tonne kilometres 8,800,000,000

Above rail operating costs (cents per ntk)	1.25
Incremental above rail operating cost (cents per ntk) <sup>1</sup>	1.03
Total operating cost (cents per ntk)	2.00
Average operating revenue per ntk (CRLP <sub>AB</sub> )	3.50

Total operating revenue	\$140,000,000
Surplus to common costs, rollingstock capital and track <sup>2</sup>	\$99,000,000
Surplus to common costs, rollingstock capital and track (cents per ntk)	2.47

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Annual capital charge (per locomotive)	\$266,667
Annual capital charge (per wagon)	\$13,333
Annual capital charges for locomotives	\$4,000,000
Annual capital charges for wagons	\$8,000,000
Total rollingstock capital charge	\$12,000,000
<b>Remaining surplus to common costs and track</b>	<b>\$87,000,000</b>

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Total rollingstock capital charge (cents per ntk)	0.30
<b>Incremental Above Rail Cost (IC<sub>AR</sub>) (cents per ntk)</b>	<b>1.33</b>

Equivalent access charge (cents per ntk)	2.17
<b>Approximate equivalent gtk charge (@2.2 ntk:gtk)</b>	<b>0.99</b>

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1. Total above rail cost (\$50m) less admin/management (\$5m) and 50% terminal costs (\$4m) divided by ntk (4b)
2. Revenue (\$140m) less incremental above rail costs (\$41m)

### ATTACHMENT C. RAILWAY OWNER'S UNIT RATES

Cost Area	Cost Driver	Unit rate
Train crew	train hour	\$150.00
Fuel	000 gtk	\$2.50
Locomotive maintenance	loco kms	\$1.50
Wagon maintenance	000 wagon kms	\$80.00
Train control (Darwin – Tarcoola)	route kms	\$300.00
Track variable	000 gtk	\$0.50
Fixed infrastructure maintenance	track kms	\$5,000.00
Administration, management	% mark up on other operating costs	8%
Terminal operations	per tonne	\$4.00
Shunting	per tonne	\$4.00

### ATTACHMENT D. NEW TRAFFIC EXAMPLE

#### Operating assumptions

Tonnes p.a.	2,500,000
Average haul (kms)	300
Ntk	750,000,000
Av. Gross trailing load (per train)	6,000
Train load (net tonnes)	4,560
Number of trains p.a.	548

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Locomotives/train	3
Wagons per train	60
Round-trip cycle time (hrs)	24
Cycles per week	7
Loco fleet requirement	7
Wagon fleet requirement	132
Train hours pa	13,158
GTK (000)	1,351,974
Wagon kms (000)	19,737
Loco kms	986,842

**Incremental above rail costs**

	Cost driver	Unit rate	Total cost
Train crew	train hour	\$150.00	\$1,973,684
Fuel	000 gtk	\$2.50	\$3,379,934
Locomotive maintenance	locomotive kms	\$1.50	\$1,480,263
Wagon maintenance	000 wagon kms	\$80.00	\$1,578,947
Administration, management	% mark up	8.0%	0
Terminal Ops	per tonne Est	0.50 \$/tonne	\$1,250,000
Shunting	per tonne		0
Incremental operating costs			<u>\$9,662,829</u>
Incremental annual capital charges	locos	\$266,667	\$1,866,667
	wagons	\$13,333	\$1,760,000

**Total incremental cost**13,289,496

Incremental above rail cost (c/ntk) (IC <sub>AR</sub> )	1.77
Incremental above rail cost (c/gtk) (@ 1.80 ntk:gtk)	0.98

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**ATTACHMENT E. PRICE CAP**

	Total Railway	Relevant Infrastructure (Before)	Relevant Infrastructure (After)
<b>Below rail operations and maintenance</b>			
Train control (Darwin – Tarcoola)	\$1,000,000	133,333	
Track variable (Darwin – Tarcoola)	\$6,000,000	800,000	1,475,987
Fixed infrastructure maintenance (Darwin – Tarcoola)	\$14,000,000	1,866,667	1,866,667
Administration, management	\$3,000,000	400,000	400,000
Total below rail services	\$24,000,000	3,200,000	3,875,987
<b>Below rail capital charges</b>			
Depreciation – track (0.05 c/gtk)		4,400,000	5,075,987
Depreciation – other infrastructure (\$300,000/km@50 yrs)		800,000	1,800,000
Return on investment (\$160m@18%/0.64)		45,000,000	45,000,000
<b>Total cost</b>		<b>54,400,000</b>	<b>55,751,974</b>
Usage (gtk)		8,800,000,000	10,151,973,684
<b>Average cost c/gtk</b>		<b>0.62</b>	<b>0.55</b>



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## ENDNOTES

### 1

### KEY

Key to abbreviations

amd = amended  
 app = appendix  
 bl = by-law  
 ch = Chapter  
 cl = clause  
 div = Division  
 exp = expires/expired  
 f = forms  
 Gaz = Gazette  
 hdg = heading  
 ins = inserted  
 lt = long title  
 nc = not commenced

od = order  
 om = omitted  
 pt = Part  
 r = regulation/rule  
 rem = remainder  
 renum = renumbered  
 rep = repealed  
 s = section  
 sch = Schedule  
 sdiv = Subdivision  
 SL = Subordinate Legislation  
 sub = substituted

### 2

### LIST OF LEGISLATION

***AustralAsia Railway (Third Party Access) Act 1999 (Act No. 25, 1999)***

Assent date	21 May 1999
Commenced	2 September 1999 (Gaz S37, 1 September 1999)