(Reprint No. 1)

SOUTH AUSTRALIA

AUSTRALASIA RAILWAY (THIRD PARTY ACCESS) ACT 1999

*This Act is reprinted pursuant to the Acts Republication Act 1967 and incorporates all amendments in force as at **17 February 2000**.*

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AustralAsia Railway (Third Party Access) Code

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AUSTRALASIA RAILWAY (THIRD PARTY ACCESS) ACT 1999

being

AustralAsia Railway (Third Party Access) Act 1999 No. 46 of 1999
[Assented to 12 August 1999][1]

as amended by

Ministerial Notice [*Gaz.* 17 February 2000, p. 964][2]

[1] Came into operation 2 September 1999: *Gaz*. 2 September 1999, p. 1046.
[2] Came into operation 17 February 2000: see notice.

NOTE:
- *Asterisks indicate repeal or deletion of text.*
- *For the legislative history of the Act see Appendix.*

An Act to establish as a law of South Australia 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.

The Parliament of South Australia enacts as follows:

Short title

1. This Act may be cited as the *AustralAsia Railway (Third Party Access) Act 1999*.

Commencement

2. This Act will come into operation on a day to be fixed by proclamation.

Definition

3. In this Act—

"**Access Code**" means the AustralAsia Railway (Third Party Access) Code contained in the Schedule.

Application of Access Code

4. The Access Code applies as a law of the State.

Crown to be bound

5. (1) This Act and the Access Code bind the Crown, not only in the right of the State but also, so far as the legislative power of the State 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.

Non-application of Commercial Arbitration Act

6. The *Commercial Arbitration Act 1986* does not apply to an arbitration under the Access Code.

Subordinate Legislation Act to apply to certain instruments under Code

7. Sections 10 and 10A of the *Subordinate Legislation Act 1978*, with the necessary modifications, apply to a notice under clause 49 of the Access Code (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.

Minister to cause copies of regulator's reports to be tabled in Parliament

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

SCHEDULE

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 and includes the access provider if or when the access provider is providing a freight service or a passenger service by means of the railway;

"**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;

"**corresponding access regime**" means—

(a) —

(i) in respect of a service that is declared under Part IIIA of the *Trade Practices Act 1974* of the Commonwealth, Part IIIA of that Act;

(ii) an access regime in respect of which there is a decision in force by the Commonwealth Minister under section 44N of the *Trade Practices Act 1974* of the Commonwealth that the regime is an effective access regime;

(iii) an arrangement under an undertaking in operation under section 44ZZA of the *Trade Practices Act 1974* of the Commonwealth; or

(iv) a code accepted by the Australian Competition and Consumer Commission under section 44ZZAA of the *Trade Practices Act 1974* of the Commonwealth,

if and only to the extent that the regime allows for the resolution of interface issues arising under two or more railway access regimes; or

(b) a law, code, instrument or arrangement declared by the Northern Territory Minister and the South Australian Minister jointly, by notice in the *Gazette*, to be a corresponding access regime for the purposes of this definition;

"**freight service**" means the service of carrying goods on the railway;

"**interface issues**"—these are issues which directly affect two or more railways (including the railway to which this Code applies) and which relate to operating a freight service or a passenger service by means of such railways;

"**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) the signalling systems, train control systems and communications systems; and

(c) such other facilities as may be prescribed,

but not including rolling stock;

"**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**"—*see* clause 5;

"**related body corporate**" has the meaning given by the *Corporations Law*;

"**required railway infrastructure**", in relation to an access seeker or access holder, means that portion of the railway infrastructure facilities required from the access provider in order to provide the relevant railway infrastructure service to the access seeker or access holder (as the case may be);

"**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.

(3) A reference in this Code to a person seeking access to a railway infrastructure service includes a reference to a person seeking access on behalf of another person or other persons.

(4) For the purposes of the pricing principles, an effective constraint will be taken to exist when it is likely that a supplier (or the threat of entry by a potential supplier) of transportation services by a mode other than rail (supplier A) will prevent another supplier of the same or similar transportation services by rail (supplier B) from sustaining prices materially above supplier B's long term efficient costs of supply without offering materially more in return.

(5) The following provisions apply with respect to the prescription of any facilities under paragraph *(c)* of the definition of "**railway infrastructure facilities**" in subclause (1):

(a) the Ministers must not prescribe a facility without first consulting with the regulator; and

(b) the prescription of a facility must be consistent with the criteria set out in Clause 6(3)*(a)* of the Competition Principles Agreement referred to in the *Trade Practices Act 1974* of the Commonwealth.

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

The South Australian Independent Industry Regulator established under the *Independent Industry Regulator Act 1999* of South Australia is the regulator under this Code (and may exercise and perform the powers and functions of the regulator under this Code for the purposes of both the law of the Northern Territory and the law of South Australia).

6. Powers and functions of regulator

(1) The following functions are assigned to the regulator:

(a) to monitor and enforce compliance with this Code; and

(b) such other functions as are contemplated for the regulator under this Code.

(2) The regulator has such powers as are necessary to enable him or her to carry out the functions assigned to the regulator under this Code.

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. Public consultation

(1) The regulator must undertake a public consultation process whenever the regulator—

(a) is undertaking a review under clause 50; or

(b) is considering the adoption of a guideline, or the adoption of a variation to a guideline, under this Code.

(2) A public consultation process under subclause (1) must provide for—

(a) the publication in a newspaper circulating generally in Australia of a notice describing the matter under consideration and inviting interested persons to make submissions in relation to the matter within a period stated in the notice; and

(b) the consideration by the regulator of any submissions made in response to an invitation under paragraph *(a)*,

(and may include other consultation processes considered appropriate 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;

(c) time-path allocation and reallocation policies for the railway;

(d) service quality and train management standards; and

(e) relevant prices and costs associated with railway infrastructure services provided by the access provider, prepared by the access provider for reference purposes in accordance with guidelines developed and published by the regulator.

(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.

(3) The access provider must, for the purposes of subclause (1)*(c)* and *(d)*, develop and maintain time-path allocation and reallocation policies and service quality and train management standards in accordance with principles contained in guidelines developed and published by the regulator.

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) any other information relevant to formulating a response to the access proposal, including information relevant to determining the price to be charged for access or on account of the variation (as the case may be).

(2) If the implementation of an access proposal would require an expansion or extension of railway infrastructure facilities, the access proposal may include a proposal for the expansion or extension of the infrastructure facilities.

(2a) An access proposal may involve—

(a) a proposal relating to one or more freight services or passenger services and one or more time paths for such services; and

(b) a person other than the access seeker who will ultimately require the railway infrastructure services which are the subject of the access request.

(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;

(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; and

(c) provide to the access seeker an indication (even if only a preliminary indication) of the terms and conditions on which the access provider would be prepared to grant access or to make the variation.

(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.

(5a) A written notice under subclause (4)*(a)*(ii) will be limited to providing the name and contact details of the access seeker and technical details concerning the nature and extent of the required access or variation.

(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.

(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.

12A. Protection of confidential information

(1) Information obtained under this Division that—

(a) could affect the competitive position of an access seeker or a respondent; or

(b) is commercially valuable or sensitive for some other reason,

is to be regarded as confidential information.

(2) A person who obtains confidential information under this Division must not disclose that information unless—

(a) the disclosure is reasonably required for the purposes of this Code;

(b) the disclosure is made with the consent of the person who supplied the information;

(c) the disclosure is required or allowed by law;

(d) the disclosure is required by a court or tribunal constituted by law; or

(e) the disclosure is in prescribed circumstances.

Penalty: $10 000.

(3) A person who obtains confidential information under this Division must not (unless authorised by the person who supplied the information)—

(a) disclose the information to an unauthorised person; or

(b) use (or attempt to use) the information for a purpose which is not authorised or contemplated by this Code.

Penalty: $10 000.

(4) Subclauses (1), (2) and (3) do not prevent or restrict the disclosure of information to the regulator and the regulator may in any event disclose confidential information if the regulator is of the opinion that the public benefit in making the disclosure outweighs any detriment that might be suffered by a person in consequence of the disclosure.

(5) A person who obtains confidential information under this Division must not use the information for the purpose of securing an advantage for himself or herself or for some other person in competition to the person who provided the information.

Penalty: $100 000.

(6) The access provider must, in connection with the operation of this clause, develop and maintain policies to ensure that confidential information obtained by the access provider under this Division is not—

(a) used in any unauthorised way or for an unauthorised purpose; or

(b) provided to an unauthorised person.

(7) The access provider must provide a copy of a policy that applies under subclause (6) to the regulator, and to any other person who requests a copy from the access provider.

(8) In this clause—

"**unauthorised person**" means a person who is directly involved, on behalf of the access provider, in the promotion or marketing of freight services or passenger services but does not include a person whose involvement is limited to—

(a) strategic decision making;

(b) performing general supervisory or executive functions; or

(c) providing technical, administrative, accounting, service or other support functions.

12B. Referral of issues to regulator

(1) An access seeker, the access provider or any other respondent to an access proposal may request the regulator to consider and, if appropriate, to give advice or directions with respect to any matter that has arisen in connection with the operation of this Division in order to facilitate the conduct of negotiations under this Division.

(2) A person making a request under subclause (1) must comply with any requirement published by the regulator for the purposes of this clause.

(3) The regulator may decline to consider or act on a request under subclause (1) for any reasonable cause.

(4) The regulator may, if the regulator thinks fit, give a general direction to the access provider under subclause (1) in respect of a particular matter under this Division.

(5) A person must not, without reasonable excuse, contravene or fail to comply with a direction given by the regulator under this clause.

Penalty: $10 000.

(6) This clause does not limit or affect the ability of an access seeker at any time to request that an access dispute be referred to arbitration under Division 2.

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; 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.

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 has resorted to arbitration prematurely or unreasonably; 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.

(4) If it appears to the regulator—

(a) that a dispute includes, or may include, an interface issue; and

(b) that the access seeker is, or may be, involved in a dispute under a corresponding access regime,

then the regulator should, in making an appointment under this clause, endeavour to appoint a person who can also act under the corresponding access regime.

(5) If the regulator is unable to appoint a person under subclause (4) who is able to act under a corresponding access regime, the person appointed under this clause to act as an arbitrator must, in respect of any interface issues involved in a dispute, endeavour to consult with any person appointed to act as an arbitrator under the corresponding access regime.

Division 4—Arbitration of access disputes

17. Parties to arbitration

(1) 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.

(2) The regulator may participate in an arbitration under this Part.

(3) The participation of the regulator may include—

(a) providing or calling evidence;

(b) making representations on questions arising during the arbitration; and

(c) assisting the parties or the arbitrator with any matter (as may be appropriate).

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 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, require the access provider to expand or extend the railway infrastructure facilities;

(e) subject to clause 20, 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 the regulator 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.

(6) The arbitrator may, in providing a draft award or making an award, do either or both of the following:

(a) divide the award into parts and limit distribution of a part in order to protect confidential commercial information from unnecessary publication;

(b) impose conditions with respect to the disclosure of confidential commercial information in order to prevent unnecessary publication.

(7) Despite any other provision, the regulator may disclose confidential commercial information if the regulator is of the opinion that it is in the public interest to do so.

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 expansion or extension of 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 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.

(3) Despite subclause (1), the arbitrator may make an award that would have the effect of requiring the access provider to expand or extend the railway infrastructure facilities, or to permit an expansion or extension of the railway infrastructure facilities, if—

(a) the expansion or extension is technically and economically feasible and consistent with the safe and reliable operation of the railway infrastructure facilities;

(b) the access provider's legitimate business interests in the railway infrastructure facilities are protected; and

(c) the terms and conditions on which access is to be permitted are reasonable taking into account the costs to be borne by the parties and the economic benefits to the parties resulting from the expansion or extension.

(4) For the purposes of subclause (3)*(b)*, it will be considered not to be in the access provider's legitimate business interests to require the access provider to take action that would—

(a) result in a breach of—

(i) a reasonable financial or other covenant or commitment given by the access provider to a third party; or

(ii) a reasonable security obligation of the access provider to a third party; or

(b) result in the access provider having to assume an unreasonable financial, business or other risk, liability or detriment associated with the cost of the expansion or extension.

(5) However, subclause (4)*(a)* does not apply if it is found that the financial or other covenant or commitment was given, or the security obligation was undertaken, (as the case may be) by the access provider for the purpose of preventing or hindering access to a railway infrastructure service.

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 initial capital cost of the railway infrastructure facilities (including the cost of the rail corridor), the 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;

(ea) in relation to an interface issue involving a corresponding access regime—the interests of the access seeker in having efficient access to the railway;

(f) the pricing principles;

(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,

(and may take into account any other matters, not inconsistent with the matters referred to above, that the arbitrator thinks are relevant).

(2) Subclause (1)*(b)* must be read in a manner that is not inconsistent with the principles set out in clause 6(4)(i) of the Competition Principles Agreement referred to in the *Trade Practices Act 1974* of the Commonwealth.

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 is acting unreasonably; 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 on an arbitration

23. Arbritrated prices for access relating to passenger or 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.

(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.

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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 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.

(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.

(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

(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 arbitration (including each party's reasonable costs and expenses) are to be borne by the parties in proportions decided by the arbitrator.

(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, the award is rescinded.

(6) If—

(a) an award is rescinded under subclause (5); and

(b) the access seeker who elected not to be bound by the award makes a new access proposal under this Code,

the regulator may, on application by the access provider, determine that the new access proposal should not proceed if, in the opinion of the regulator—

(c) in a case where the new access proposal is the same as, or similar to, the access proposal in relation to which the award was made—the access seeker is acting unreasonably in view of the period of time between the rescission of the award and the making of the new access proposal;

(d) the access seeker has not acted, or is not acting, in good faith; or

(e) there is some other good reason why the new access proposal should not proceed.

(7) A determination of the regulator under subclause (6) will have effect according to its terms.

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;

(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.

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) if the regulator is of the opinion 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.

(2a) The regulator must, before taking action under subclause (2)*(a)*, give the person who supplied the relevant information a reasonable opportunity to make submissions to the regulator in relation to the potential disclosure of the information.

(3) Clause 33 extends to confidential information and documents supplied to an arbitrator under subclause (2)*(b)*.

41. Duty to report to Ministers

(1) 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.

(2) If the regulator provides a report to a Minister under subclause (1), the regulator must furnish a copy of the report to the other Minister.

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.

(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;

(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

45A. Power to vary guidelines

(1) The regulator may, from time to time as the regulator thinks fit, vary or revoke guidelines developed and published by the regulator under this Code, or develop and publish new or substitute guidelines.

(2) The regulator should, in developing (or varying) guidelines under this Code, take into account interface issues that may arise under a corresponding access regime (insofar as this may be relevant and insofar as this is consistent with, and not in derogation of the operation of, the other provisions of this Code).

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 comply with any guidelines developed and published by the regulator and 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;

(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; and

(c) sufficient information to enable the pricing principles to be applied in a reasonable manner.

(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 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 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—

(a) firstly, not later than 30 June in the 3rd year of operations of the railway; and

(b) secondly, 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.

(3) The Ministers must, in relation to a review under subclause (1)*(a)* or *(b)*—

(a) —

(i) by notice published in a newspaper circulating generally in Australia, invite interested persons to make submissions in relation to the review within a period stated in the notice; and

(ii) give consideration to any submissions made in response to an invitation under subparagraph (i); and

(b) —

(i) in the case of the Northern Territory Minister—cause a report on the outcome of the review to be laid before the Legislative Assembly of the Northern Territory within 12 sitting days after the completion of the review; and

(ii) in the case of the South Australian Minister—cause a report on the outcome of the review to be laid before both Houses of the South Australian Parliament within 12 sitting days after the completion of the review.

(4) The regulator must, at the intervals referred to in subclause (10), review the revenues paid or payable by access holders to the access provider for railway infrastructure services where no sustainable competitive prices exist ("relevant revenues"), being revenues derived under either:

(a) awards by arbitrators to the extent the awards involve the application of section 2 of the pricing principles; or

(b) access contracts to the extent that the regulator considers sustainable competitive prices did not or do not exist in relation to the transportation of the freight the subject of those access contracts,

and determine whether the relevant revenues paid or payable by such access holders (the "relevant access holders") for those railway infrastructure services are excessive having regard to the factors referred to in subclause (5).

(5) In determining whether the relevant revenues are excessive the regulator must have regard to the following:

(a) the relevant revenues are to be measured against the costs associated with the required railway infrastructure required by the relevant access holders including an appropriate commercial return on the required railway infrastructure used by the relevant access holders in the circumstances referred to in subclause (4) (the "relevant required railway infrastructure");

(b) the investment in all of the railway infrastructure facilities by the access provider or any other person and all of the revenues earned by the access provider from the provision of railway infrastructure services including, if the access provider, a related body corporate or an associate has conducted transportation services on the railway, revenues at market rates in relation to those services;

(c) an appropriate commercial return on the relevant required railway infrastructure, determined having regard to—

(i) the appropriate risk premium associated with the construction, development and operation of the railway infrastructure facilities, based on both of the following:

(A) the expected risks prevailing as at the date of commencement of construction of the railway by the access provider; and

(B) in respect of any expansion or extension of the railway after the date of commencement of construction of the railway by the access provider—the expected risks prevailing as at the date of the commencement of construction of that expansion or extension; and

(ii) the relevant financial market rates (including the risk free rate for return on investments and the rate of inflation) prevailing at the time of the regulator's review;

(d) when comparing the relevant revenues to the costs under paragraph *(a)*, the regulator must subtract from those costs an amount determined by the regulator to be the aggregate of—

(i) the avoidable costs attributable to the usage of the relevant required railway infrastructure by all other access holders (being avoidable costs of the kind referred to in section 3 of the pricing principles); and

(ii) a reasonable contribution to fixed costs of the relevant required railway infrastructure ("R") from all other access holders using that required railway infrastructure, where R has the same meaning as in section 2(2)*(c)* of the pricing principles.

(6) The costs to be applied under subclause (5) must be efficient.

(7) For the purposes of determining expected risks under subclause (5)*(c)*(i), the regulator must have regard to information provided by the access provider with respect to the contents of any financing plan of the access provider.

(8) If the regulator determines that revenues are excessive under subclause (4)—

(a) the regulator must promptly give the access provider written notice of the regulator's determination, including the reasons for his or her determination;

(b) within 2 months of receiving the regulator's determination under paragraph *(a)*, the access provider must prepare and submit to the regulator for approval a plan under which the access provider will reduce future relevant revenues so that such revenues are not excessive (having regard to the matters referred to in subclause (5)), when measured over the next regulatory review period (the "remedial plan");

(c) the regulator will consider the remedial plan submitted to it with a view to reaching agreement with the access provider on the terms which are acceptable to the regulator for the remedial plan;

(d) if the regulator and the access provider agree on the terms of a remedial plan, the access provider must implement that plan;

(e) if the regulator and the access provider are unable to reach agreement on a remedial plan that is acceptable to the regulator within 1 month of receiving the remedial plan, the regulator must make a determination under subclause (9) and the access provider must observe the terms of that determination.

(9) If subclause (8)*(e)* applies, the regulator will make a determination to regulate prices, and/or to establish conditions relating to prices or price fixing factors in relation to the future provision of railway infrastructure services in any manner the regulator considers appropriate, including—

(a) fixing a price or the rate of increase or decrease in a price;

(b) fixing a maximum price or rate of increase or decrease in a maximum price;

(c) fixing an average price for specified railway infrastructure services or an average rate of increase or decrease in an average price;

(d) specifying pricing policies or principles;

(e) fixing a maximum revenue in relation to railway infrastructure services,

provided the effect of the determination is limited to reducing revenues of the type referred to in paragraphs *(a)* and *(b)* of subclause (4) derived from railway infrastructure services so that the total of such revenues so derived do not result in excessive revenues (having regard to the matters referred to in subclause (5)), when measured over the next regulatory review period.

(10) The regulator's reviews under subclause (4) are to be conducted in relation to the following periods:

(a) the first review must be in respect of the period ending on 30 June in the 10th year of operations of the railway;

(b) the second review must be in respect of the 5 year period commencing immediately after the end of the period of the first review; and

(c) the third and subsequent reviews must be in respect of successive 5 year periods.

SCHEDULE

Access Pricing Principles

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 subsections (2) to (6)); or

(b) no sustainable competitive price (as to which see section 2).

(2) A sustainable competitive price will exist in relation to the transportation of a particular type of freight where it can be demonstrated that—

(a) there are no regulatory, technical or other practical impediments to transport of the freight by a mode of transport other than the railway or combination of such alternative modes; and

(b) the availability or potential availability of modes of transport other than the railway is an effective constraint on the price of transporting such freight on the railway having regard to the following factors:

(i) the number and size of participants in the market;

(ii) the type and volume of freight involved and any unequal backhaul loadings;

(iii) whether there are any regulatory, technical or other practical barriers to entry;

(iv) the extent of product differentiation in the market, including the differences in the ancillary services and convenience offered by different modes of transport;

(v) the dynamic characteristics of the market including any fluctuations in demand for transportation services;

(vi) the costs and service characteristics of transporting freight by different modes of transport (including the time for delivery of the freight, rail rolling stock or other vehicle axle loadings, length and speed of trains, and any infrastructure upgrade requirements);

(vii) contractual terms (such as duration and frequency of service, whether for a specific volume or at call);

(viii) congestion and bottleneck inefficiencies caused by constraining points on the road, railway or other relevant infrastructure;

(ix) the safety requirements the different modes of transport are required to meet;

(x) the direct and indirect costs of environmental impacts of the different modes of transport; and

(xi) any other relevant matters.

(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 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 (*see* subsection (4)); and

(b) not less than the floor price for the provision of the railway infrastructure service (*see* subsection (5)),

but subject to these qualifications the price so determined will be calculated in accordance with subsection (6).

(4) The ceiling price is to be an amount equal to the costs associated with the operation of the required railway infrastructure needed by the access seeker for the provision of the freight service involving the transportation of freight on the railway between one point (point A) and another point (point B), calculated assuming the access seeker is the sole user of that required railway infrastructure and calculated in a manner consistent with section 2(2)*(d)* and (7)*(a)*.

(5) The floor price is to be calculated in accordance with section 3.

(6) Subject to subsections (4) and (5), the access price payable where there is a sustainable competitive price is to be an amount calculated in accordance with the following formula:

$$AP = CRLP_{AB} — IC_{AR}$$

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);

$CRLP_{AB}$ 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 the nature of the railway infrastructure service being sought and—

(a) the prices charged (on the basis of long term efficient costs of supply) for transporting on the railway the same or similar freight where some other mode of transport (or a combination of modes) provide an effective constraint on prices, 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 volumes of freight or some other risk allocation arrangement);

(iv) the amount of freight and the prices charged in each direction; and

(v) the origin and the ultimate destination of the freight; and

(b) the prices charged (on the basis of long term efficient costs of supply) for the use of alternative modes of transport (for example, by road, sea, air or some other mode of transport or a combination of such means) for transporting the same or similar freight 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) contractual terms (such as the duration and frequency of the service relating to the delivery of freight and whether the contract for the delivery of freight involves a take-or-pay obligation for specific volumes of freight or some other risk allocation arrangement);

(iv) the amount of freight and the prices charged in each direction; and

(v) the origin and ultimate destination of the freight; and

IC_{AR} is the incremental cost (above-rail) of providing the relevant freight service (including, if the relevant freight service is not provided, an estimate of that cost) 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 any freight services, an operator of freight services operating in accordance with good railway industry practice,

(the relevant entity being referred to as the "designated service provider"), such costs to be calculated having regard to the total above-rail incremental costs, being the costs the designated service provider would avoid if it did not provide the freight service, including—

(d) 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;

(e) administrative costs; and

(f) an appropriate allowance for capital costs, which reflects the opportunity 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 both depreciation and return on assets, determined in accordance with guidelines developed and published by the regulator.

(7) The guidelines referred to in paragraph *(f)* above must—

(a) adopt an approach for valuing capital assets; and

(b) provide guidance on the timeframes within which the regulator considers costs could be avoided,

(and may include other provisions considered appropriate by the regulator).

2. No sustainable competitive prices

(1) Where there is not a sustainable competitive price, the access price 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 freight service will be a reasonable price determined by the arbitrator which is—

(a) not more than the ceiling price for the provision of the railway infrastructure service (*see* subsection (2)); and

(b) not less than the floor price for the provision of the railway infrastructure service (*see* subsection (4)),

and the price so determined must take into account the matters set out in clause 21 of this Code.

(2) The ceiling price is to be an amount equal to whichever is the lesser of:

(a) the costs associated with the operation of the required railway infrastructure needed by the access seeker for the provision of the freight service involving the transportation of freight on the railway between one point (point A) and another point (point B), calculated assuming the access seeker is the sole user of that required railway infrastructure; and

(b) the costs associated with the operation of the required railway infrastructure needed by the access seeker for the provision of the freight service involving the transportation of freight on the railway between one point (point A) and another point (point B), less an amount determined by the arbitrator to be the aggregate of—

(i) the avoidable costs attributable to the usage of that required railway infrastructure by all other access holders; and

(ii) a reasonable contribution to the fixed costs of that required railway infrastructure ("R") from all other access holders using that required railway infrastructure,

where—

(c) R is to be an amount which is not greater than the amount, if any, by which revenues of the access provider attributable to access holders' (other than the access seeker's) usage of the required railway infrastructure required by those access holders exceeds the avoidable costs attributable to those access holders' usage of that required railway infrastructure; and

(d) the costs are to be on-going costs that are causally related to the relevant required railway infrastructure, including—

(i) labour and material costs associated with the operation and maintenance of the required railway infrastructure (including major periodic maintenance);

(ii) an appropriate allocation of administrative costs;

(iii) an appropriate allocation of capital costs, including both depreciation and a return on assets, determined in accordance with guidelines developed and published by the regulator.

(3) The costs to be applied in subsection (2) must be forward-looking and efficient.

(4) The floor price is to be calculated in accordance with section 3.

(5) The arbitrator must, in determining a price under this section, have regard to economic efficiency taking into account the prices being charged by the access provider to access holders for the same or similar services (including, if the access provider, a related body corporate or an associate has conducted the same or similar services on the railway, the actual prices charged in relation to those services).

(6) The regulator must develop and publish guidelines in connection with the operation of this section (in addition to the guidelines specifically required under subsection (2)*(d)*(iii)).

(7) The guidelines must—

(a) subject to subsection (8), adopt an approach for valuing capital assets which reflects the *Depreciated Optimised Replacement Cost* for those assets;

(b) provide guidance on the timeframes within which the regulator considers costs could be avoided; and

(c) in relation to a return on assets, have regard to—

(i) the appropriate risk premium associated with the construction, development and operation of the railway infrastructure facilities, based on both of the following:

(A) the expected risks prevailing as at the date of commencement of construction of the railway by the access provider; and

(B) in respect of any expansion or extension of the railway after the date of commencement of construction of the railway by the access provider—the expected risks prevailing as at the date of the commencement of construction of that expansion or extension; and

(ii) the relevant financial market rates (including the risk free rate for return on investments and the rate of inflation),

(and may include other provisions considered appropriate by the regulator).

(8) The guidelines may, if the regulator thinks it appropriate to do so, allow an adjustment to the *Depreciated Optimised Replacement Cost* valuation of capital assets under subsection (7)*(a)* on account of government-contributed assets and other government financial assistance after taking into account any associated liabilities assumed by the access provider, subject to the qualifications that any such adjustment:

(a) must not, when used in calculating the ceiling prices specified in sections 1(4) and 2(2), prevent the access provider earning a reasonable risk-adjusted return on the capital invested in the railway (disregarding government-contributed assets and other government financial assistance); and

(b) must be made on a pro-rated basis over the entirety of the capital assets comprising the railway infrastructure facilities.

3. Access price not below economic cost

(1) The access price must not be less than the economic cost of providing the railway infrastructure service, and accordingly the access price calculated in accordance with section 1 or section 2 (as the case may be) must not be less (but may be greater) than an amount which is equal to the avoidable costs (below-rail) associated with the access provider providing access to the required railway infrastructure for the access seeker to deliver the relevant freight service involving the transport of freight between point A and point B on the railway, being:

(a) labour and material costs which vary directly with the usage of the access seeker (including major periodic maintenance);

(b) administrative costs which vary directly with the usage of the access seeker; and

(c) capital costs which vary directly with the usage of the access seeker, including the costs of replacing the required railway infrastructure assets being brought forward by the operation of the freight service (such as wear and tear of the track).

(2) The costs to be applied in subsection (1) must be forward-looking and efficient.

(3) The regulator must develop and publish guidelines in connection with the operation of this section.

(4) The guidelines must—

(a) subject to subsection (5), adopt an approach for valuing capital assets which reflects the *Depreciated Optimised Replacement Cost* of those assets;

(b) provide guidance on the timeframes within which the regulator considers costs could be avoided; and

(c) in relation to a return on assets, have regard to—

(i) the appropriate risk premium associated with the construction, development and operation of the railway infrastructure facilities, based on both of the following:

(A) the expected risks prevailing as at the date of commencement of construction of the railway by the access provider; and

(B) in respect of any expansion or extension of the railway after the date of commencement of construction of the railway by the access provider—the expected risks prevailing as at the date of the commencement of construction of that expansion or extension; and

(ii) the relevant financial market rates (including the risk free rate for return on investments and the rate of inflation),

(and may include other provisions considered appropriate by the regulator).

(5) The guidelines may, if the regulator thinks it appropriate to do so, allow an adjustment to the *Depreciated Optimised Replacement Cost* valuation of capital assets under subsection (4)*(a)* on account of government-contributed assets and other government financial assistance after taking into account any associated liabilities assumed by the access provider, subject to the qualifications that any such adjustment:

(a) must not, when used in calculating the floor prices specified in sections 1(5) and 2(4), prevent the access provider earning a reasonable risk-adjusted return on the capital invested in the railway (disregarding government-contributed assets and other government financial assistance); and

(b) must be made on a pro-rated basis over the entirety of the capital assets comprising the railway infrastructure facilities.

Division 2—Access pricing in connection with passenger services

4. Access pricing for passenger access

(1) The access price 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 (*see* subsection (2)); and

(b) not less than the floor price for the provision of the railway infrastructure service (*see* subsection (3)).

(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 ceiling price set out in section 2(2).

(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.

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 that are already hauled by the railway and the second and third examples are for new freight traffics, with and without a sustainable competitive price respectively.

(1) Example 1—Existing freight traffic

This example assumes that the access proposal 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).

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 provide an effective constraint on the pricing of the railway for these services, given the:
  - — highly competitive road market; and
  - — low switching costs between road and rail.
- For this example, it is assumed that this threshold test is met.

(b) What is the competitive imputation access price ($CRLP_{AB}$—IC_{AR})?

- 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
    - ... 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 rail linehaul price ($CRLP_{AB}$).
- The incremental above rail cost (IC_{AR}) represents the costs which the integrated freight operator would avoid if it did not provide the freight service.
- IC_{AR} 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 ($CRLP_{AB}$) of 3.50 c/ntk and the incremental above rail costs (IC_{AR}) of 1.33 c/ntk (1.03 + 0.3 being the sum of the incremental above rail operating cost and the rollingstock capital charge). Expressed in terms of cents per gross-tonne-kilometre[1], 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.

    — 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, IC_{AR} 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).

(c) What is the ceiling price?

- Stand-alone operating costs are taken to be $16.18 million, which is less than operating costs of the total railway of $24 million allowing for minimum requirements of the access seeker as a stand-alone operation (see Attachment C).

- It is assumed that track depreciates with use and a depreciation charge of 0.05c/gtk has been applied (i.e. the usage of the service of 3.6 billion gtk x 0.05c/gtk). Other infrastructure is depreciated on a time basis assuming a 50 year life. The total depreciation charge is $15.3 million.

- The replacement value of the railway from Tarcoola to Darwin might be $1500 million, which might correspond to a written-down value of $1000 million.

    — The interest charge after tax is $180 million (assuming an allowable rate of return of 18%) which grosses up to $281.25 million (assuming an effective tax rate of 36%) before tax. Guidelines on the method to be applied in calculating the stand-alone cost will be developed and published by the regulator.

    — Total stand-alone below rail costs of the relevant infrastructure, including operations and maintenance costs, are $312.73 million as shown in Attachment C.

- If the relevant traffic was to generate 2 billion ntk, the ceiling price would be 15.64 c/ntk or 8.69 c/gtk (@1.8 ntk:gtk).

(d) What is the floor price?

- The floor price is the incremental below rail cost, i.e. the below rail costs which could be avoided if it were not for the use of the network by the freight service seeking access.

    — Typically, this will include both maintenance costs and capital consumption costs attributable to the individual service. Some operations (signalling) costs may also be avoided depending on the nature of the train control operations and the nature of the service for which access is being sought. Guidelines on the method to be used to calculate the floor price will be developed and published by the regulator.

    — In Attachment B, the track variable cost, i.e. the component of infrastructure maintenance which varies directly with the usage of the access seeker, is 0.07 c/gtk ($6m/8800m gtk). In this example there are no directly variable operations (train control) and administration costs.

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[1] *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 by an independent track owner.*

— The capital costs which will vary directly as result of the access seeker's usage will relate to components of infrastructure where renewal is typically related to use (as opposed to time). For higher density lines, this will typically include 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 below rail cost of 0.17 c/gtk (0.07+0.05+0.05).

(e) What is the final access price?

- The final access price is determined as the CIPR price (0.99 c/gtk) but is to be not less than the floor price (0.17 c/gtk) or more than the ceiling price (8.69 c/gtk).

(2) Example 2—New freight traffic—sustainable competitive price

This example assumes that the access proposal 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 mineral traffic are hauled by road (several hundreds of thousands of tonnes over several hundred kilometres).

  — 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 which was considered to be an effective constraint on the pricing of the railway, having regard to the:

  — relative costs of transport by road and rail; and

  — low switching costs between road and rail.

(b) What is the competitive imputation access price ($CRLP_{AB}$—IC_{AR})?

- Because it is a new traffic, $CRLP_{AB}$ 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 $CRLP_{AB}$ was 4.0 c/ntk.

- The incremental above rail cost (IC_{AR}) represents the costs that the integrated freight operator would avoid if it did not provide the freight service:

  — In this case, IC_{AR} would still be based on the integrated access provider's actual costs, but adjusted for the avoidable resources assuming it did not undertake the freight service.

— The avoidable resources required (i.e. locomotives, wagons, train hours etc) are valued using a set of unit costs (developed from the railway's accounts). Attachment D provides example unit costs.

— The derivation of IC_{AR} for the new traffic example is shown in Attachment E. 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.

- The competitive imputation access price (2.23 c/ntk) is the difference between the competitive rail linehaul price ($CRLP_{AB}$) of 4.00 c/ntk and the incremental above rail costs (IC_{AR}) of 1.77 c/ntk. Expressed in terms of cents per gross-tonne-kilometre the equivalent competitive imputation access price is 1.24c/gtk (2.23/1.80).

(c) What is the ceiling price?

- The replacement value of the 300 kms 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 (assuming an allowable rate of return of 18%) which grosses up to $45 million (assuming an effective tax rate of 36%) before tax. Guidelines on the method to be applied in calculating the stand-alone cost will be developed and published by the regulator.

— Total stand-alone below rail costs of the relevant infrastructure, including operations and maintenance costs, are $47.7 million as shown in Attachment F.

- If the new traffic was to generate 1 billion ntk, the ceiling price would be 4.77 c/ntk or 2.65 c/gtk (@1.8 ntk:gtk).

(d) What is the floor price?

- Following the example in the previous section, the floor price is 0.17 c/gtk.

(e) What is the final access price?

- The final access price is determined as the CIPR price (1.24 c/gtk) but is to be not less than the floor price (0.17 c/gtk) or more than the ceiling price (2.65 c/gtk).

(3) Example 3—New freight traffic—no sustainable competitive price

This example similarly assumes that the access proposal 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 was considered not to be a substitutable service and did not provide an effective constraint on the pricing of the railway, i.e. no sustainable competitive price exists.

(b) What is the ceiling price?

- The replacement value of the 300 kms 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 (assuming an allowable rate of return of 18%) which grosses up to $45 million (assuming an effective tax rate of 36%) before tax. Guidelines on the method to be applied in calculating the stand-alone cost will be developed and published by the regulator.

— Total stand-alone below rail costs of the relevant infrastructure, including operations and maintenance costs, are $47.7 million as shown in Attachment G.

- If there are multiple users of the relevant railway infrastructure, the arbitrator may choose to determine an amount "R", being a reasonable contribution to shared costs from those other users.

  — The contribution to "R" from any single access holder would not exceed the amount by which their access revenue exceeds their avoidable costs and would not be less than the additional costs they impose from their use of the relevant railway infrastructure.

  — Assume for this example that the arbitrator determined that amount to be $23.85 million (50% of the stand-alone cost).

- If the new traffic was to generate 1 billion ntk, the ceiling price would be 2.39 c/ntk or 1.33 c/gtk (@1.8 ntk:gtk).

(c) What is the floor price?

- Following the calculations from the previous example, the incremental below rail cost is 0.17 c/gtk.

(d) What is the final access price?

- The arbitrator would then set an access price between the ceiling price (of 1.33 c/gtk) and the floor price (of 0.17 c/gtk).

- When determining the final access price, the arbitrator may take into account a range of factors considered relevant, such as

  — the potential impact on the access provider's legitimate business interests, having regard to the access provider's investment in above-rail rollingstock and infrastructure; and

  — the potential for the new entrant to create additional economic value (as opposed to merely transferring value from the access provider).

ATTACHMENT A. PROCESS FOR DETERMINING THE ARBITRATED ACCESS PRICE

ATTACHMENT B. RAILWAY OWNER'S COST STRUCTURE

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	**$80,000,000**
Net tonne kilometres	**4,000,000,000**
Gross tonne kilometres	8,800,000,000
Above rail operating costs (cents per ntk)	1.25
Incremental above rail operating cost (cents per ntk)[1]	**1.03**
Total operating cost (cents per ntk)	2.00
Average operating revenue per ntk ($CRLP_{AB}$)	**3.50**
Total operating revenue	$140,000,000
Surplus to common costs, rollingstock capital and track[2]	$99,000,000
Surplus to common costs, rollingstock capital and track (cents per ntk)	2.47
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
Remaining surplus to common costs and track	$87,000,000
Total rollingstock capital charge (cents per ntk)	**0.30**
Incremental Above Rail Cost (IC_{AR}) (cents per ntk)	**1.33**
Equivalent access charge (cents per ntk)	**2.17**
Approximate equivalent gtk charge (@2.2 ntk:gtk)	**0.99**

Notes:

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. CEILING PRICE (COMPETITIVE MARKET)

	Total Railway ($ pa)	**Stand-alone Cost ($ pa)**
Below rail operations and maintenance		
Train control (Darwin—Tarcoola)	1,000,000	1,000,000
Track variable (Darwin—Tarcoola)	6,000,000	680,000
Fixed infrastructure maintenance (Darwin—Tarcoola)	14,000,000	14,000,000
Administration, management	3,000,000	500,000
Total below rail services	24,000,000	16,180,000
Below rail capital charges		
Depreciation—track (0.05 c/gtk)		1,800,000
Depreciation—other infrastructure ($300,000/km@50 yrs)		13,500,000
Return on investment ($180m@18%/0.64)		281,250,000
Total below rail capital charges		296,550,000
Total stand-alone cost		**312,730,000**

Calculation of ceiling price:

Usage (ntk pa)	2,000,000,000
Ceiling price (c/ntk)	15.64
Ceiling price (c/gtk @1.8 ntk:gtk)	**8.69**

ATTACHMENT D. 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 E. NEW TRAFFIC EXAMPLE

Operating assumptions

Freight task (tonnes pa)	2,500,000
Average haul (kms)	300
Net tonne kms pa	750,000,000
Av. Gross trailing load (per train)[1]	6,000
Train load (net tonnes per train)	4,560
Number of trains pa	548
Locomotives per train	3
Wagons per train	60
Round-trip cycle time (hrs)	24
Cycles per week	7
Locomotive fleet requirement	7
Wagon fleet requirement	132
Train hours pa	13,158
Gross tonne kms pa (000)	1,351,974
Wagon kms pa (000)	19,737
Locomotive kms pa	986,842

Incremental above rail costs

	Cost driver	**Unit rate**	**Total cost pa**
Train crew	train hour	$150.00	$1,973,700
Fuel	000 gtk	$2.50	$3,379,935
Locomotive maintenance	locomotive kms	$1.50	$1,480,263
Wagon maintenance	000 wagon kms	$80.00	$1,578,960
Administration, management	% mark up	8.0%	0
Terminal operations	per tonne	$0.50	$1,249,440
Shunting	per tonne		0
Incremental operating costs			$9,662,298
Incremental capital charges	locomotives	$266,667	$1,866,669
	wagons	$13,333	$1,759,956
Total incremental above rail cost			**$13,288,923**
Incremental above rail cost (c/ntk) (IC_{AR})			1.77
Incremental above rail cost (c/gtk) (@1.80			**0.98**

Note: 1. Gross trailing load is the gross weight hauled behind the locomotive(s) and is the sum of the weight of the freight and the tare weight of the wagons (it excludes the weight of the locomotives).

ATTACHMENT F. CEILING PRICE (NEW TRAFFIC—COMPETITIVE MARKET)

	Total Railway ($ pa)	**Relevant Infrastructure ($ pa)**
Below rail operations and maintenance		
Train control (Darwin—Tarcoola)	1,000,000	133,333
Track variable (Darwin—Tarcoola)	6,000,000	800,000
Fixed infrastructure maintenance (Darwin—Tarcoola)	14,000,000	1,866,667
Administration, management	3,000,000	400,000
Total below rail services	24,000,000	3,200,000
Below rail capital charges		
Depreciation—track (0.05 c/gtk)		900,000
Depreciation—other infrastructure ($300,000/km@50 yrs)		1,800,000
Return on investment ($160m@18%/0.64)		45,000,000
Total stand-alone cost		**47,700,000**
Calculation of ceiling price:		
Usage (ntk pa)		1,000,000,000
Ceiling price (c/ntk)		4.77
Ceiling price (c/gtk @1.8 ntk:gtk)		**2.65**

ATTACHMENT G. CEILING PRICE (NEW TRAFFIC—NO COMPETITIVE MARKET)

	Total Railway ($ pa)	**Relevant Infrastructure ($ pa)**
Below rail operations and maintenance		
Train control (Darwin—Tarcoola)	1,000,000	133,333
Track variable (Darwin—Tarcoola)	6,000,000	800,000
Fixed infrastructure maintenance (Darwin—Tarcoola)	14,000,000	1,866,667
Administration, management	3,000,000	400,000
Total below rail services	24,000,000	3,200,000
Below rail capital charges		
Depreciation—track (0.05 c/gtk)		900,000
Depreciation—other infrastructure ($300,000/km@50 yrs)		1,800,000
Return on investment ($160m@18%/0.64)		45,000,000
Total stand-alone cost		**47,700,000**
Contribution from other users ("R")		23,850,000
Total Cost		**23,850,000**
Calculation of ceiling price:		
Usage (ntk pa)		1,000,000,000
Ceiling price (c/ntk)		2.39
Ceiling price (c/gtk @1.8 ntk:gtk)		**1.33**

APPENDIX

LEGISLATIVE HISTORY

Schedule	
Clause 1:	amended by notice, cl. 1
Clause 3(1):	definition of "access holder" amended by notice, cl. 2(1) definition of "corresponding access regime" inserted by notice, cl. 2(2) definition of "interface issues" inserted by notice, cl. 2(3) definition of "railway infrastructure facilities" substituted by notice, cl. 2(4) definition of "regulator" substituted by notice, cl. 2(5) definition of "required railway infrastructure" inserted by notice, cl. 2(6)
Clause 3(3) - (5):	inserted by notice, cl. 2(7)
Clause 5:	substituted by notice, cl. 3
Clause 6(1):	amended by notice, cl. 4(1), (2)
Clause 6(2):	amended by notice, cl. 4(3)
Clause 8:	substituted by notice, cl. 5
Clause 9(1):	amended by notice, cl. 6(1)
Clause 9(3):	inserted by notice, cl. 6(2)
Clause 10(1):	amended by notice, cl. 7(1)
Clause 10(2):	amended by notice, cl. 7(2), (3)
Clause 10(2a):	inserted by notice, cl. 7(4)
Clause 10(4):	amended by notice, cl. 7(5), (6)
Clause 10(5a):	inserted by notice, cl. 7(7)
Clauses 12A and 12B:	inserted by notice, cl. 8
Clause 13:	amended by notice, cl. 9
Clause 15(2):	amended by notice, cl. 10
Clause 16(4) and (5):	inserted by notice, cl. 11
Clause 17:	redesignated as cl. 17(1) by notice, cl. 12
Clause 17(2) and (3):	inserted by notice, cl. 12
Clause 19(2):	amended by notice, cl. 13(1)-(3)
Clause 19(4):	amended by notice, cl. 13(4)
Clause 19(6) and (7):	inserted by notice, cl. 13(5)
Clause 20(1):	amended by notice, cl. 14(1)
Clause 20(3) - (5):	inserted by notice, cl. 14(2)
Clause 21(1):	amended by notice, cl. 15(1)-(4)
Clause 21(2):	substituted by notice, cl. 15(5)
Clause 22(1):	amended by notice, cl. 16
Part 2 Division 5 heading:	amended by notice, cl. 17
Clause 23:	amended by notice, cl. 18
Clause 24:	repealed by notice, cl. 19
Clause 34(1):	substituted by notice, cl. 20
Clause 35(5) and (6):	substituted by notice, cl. 21
Clause 35(7):	inserted by notice, cl. 21
Clause 40(2):	amended by notice, cl. 22(1)
Clause 40(2a):	inserted by notice, cl. 22(2)
Clause 41:	redesignated as cl. 41(1) by notice, cl. 23
Clause 41(2):	inserted by notice, cl. 23
Clause 45A:	inserted by notice, cl. 24
Clause 46(2):	substituted by notice, cl. 25
Clause 50:	substituted by notice, cl. 26
Schedule:	substituted by notice, cl. 27