Western Australia

Railways (Access) Act 1998

Railways (Access) Code 2000

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Western Australia

Railways (Access) Act 1998

Railways (Access) Code 2000

Part 1 — Preliminary

1. Citation

This Code may be cited as the *Railways (Access) Code 2000* [1].

2. Commencement

This Code comes into operation on the day on which Part 3 of the Act comes into operation [1].

3. [1M] Terms used

In this Code, unless the contrary intention appears —

access means —

(a) the use of railway infrastructure; and

(b) where applicable, includes the exercise of other rights of the kind described in section 3A(1) of the Act;

access agreement means an agreement in writing under this Code between the railway owner and an entity for access by that entity;

access holder means an entity to which access is provided under an access agreement;

access-related functions means the functions involved in arranging the provision of access to railway infrastructure under this Code;

access seeker means an entity that has made a proposal;

Act means the *Railways (Access) Act 1998*;

amendment day means the day on which the *Railways (Access) Amendment Code 2023* Part 2 comes into operation;

applicable railway infrastructure has the meaning given in section 47C(b);

applicable route section has the meaning given in section 47N(2);

associate, in relation to a railway owner, means —

(a) a related body corporate; and

(b) a unit trust, joint venture or partnership where the interest of the railway owner or of a related body corporate in the unit trust, joint venture or partnership entitles the railway owner or the related body corporate to —

(i) control the composition of the governing body of the unit trust, joint venture or partnership; or

(ii) cast, or control the casting of, more than one half of the maximum number of votes that might be cast at a general meeting of the unit trust, joint venture or partnership; or

(iii) control the business affairs of the unit trust, joint venture or partnership;

available capacity, in relation to a route, means the infrastructure capacity of the route that is not committed to existing rail operations;

business day means a day other than a Saturday, a Sunday or a public holiday throughout Western Australia;

Commission has the same meaning as in the *Government Railways Act 1904*;

confidential information has the meaning given in section 31(2) of the Act;

current regulatory asset base has the meaning given in section 3B;

depreciated optimised replacement cost, in relation to railway infrastructure, means —

(a) the lowest current cost to replace the railway infrastructure with assets that —

(i) have the capacity to provide the level of service that meets the actual and reasonably projected demand; and

(ii) are modern equivalent assets;

less

(b) accumulated depreciation in accordance with the costing principles for the time being approved or determined by the Regulator under section 47H;

determination means a determination by an arbitrator under Division 3 of Part 3;

economic life, in relation to an asset that is railway infrastructure, means the period over which the asset is reasonably expected to remain economically usable by 1 or more entities;

efficient costs means the costs that would be incurred by a prudent railway owner acting efficiently in accordance with good industry practice to achieve the lowest sustainable cost of providing access;

entity means a corporation, partnership, trustee or other person;

existing access agreement has the meaning given in section 8A(3)(a);

expansion, in relation to a route, means an increase in the infrastructure capacity of the route by an enhancement or improvement of the railway infrastructure associated with the route;

extension, in relation to a route, means the addition of railway infrastructure not forming part of the route at the time when the addition is proposed as mentioned in section 8(4) or (5);

Government railway means a railway, as defined in section 2 of the *Government Railways Act 1904*, that is under the management and control of the Commission as provided by section 13 of that Act;

infrastructure capacity, in relation to a route, means the total number of rail operations that can be accommodated on the route during a particular time having regard to —

(a) the characteristics of the route; and

(b) the length of the rolling stock comprising a train that can be operated on the route, and the speed at which it can be operated; and

(c) the requirements of any written law; and

(d) the technical requirements for the relevant rolling stock;

initial regulatory asset base has the meaning given in section 47J(7);

interim access agreement has the meaning given in section 8A(1);

interim access proposal has the meaning given in section 8A(3);

operating costs, in relation to railway infrastructure —

(a) includes —

(i) train control costs, signalling and communications costs, train scheduling costs, emergency management costs, and the cost of information reporting; and

(ii) the cost of maintenance of railway infrastructure calculated on the basis of cyclical maintenance costs being evenly spread over the maintenance cycle; and

(iii) payments made in respect of any lease or licence that the railway owner or an associate of the railway owner holds over any land, but only to the extent that the Regulator determines that those payments relate to land used for constructing, maintaining or operating the relevant railway and are not capital costs under Schedule 4 clause 2(5);

but

(b) does not include costs that the Regulator has determined under section 47W(3) to be inefficient;

operating expenditure, in relation to railway infrastructure, means any of the following —

(a) operating costs;

(b) overheads attributable to the performance of the railway owner's access-related functions, whether by the railway owner or an associate;

operating expenditure statement has the meaning given in section 47R;

proposal means a proposal under section 8;

rail operations means the operation of rolling stock on a part of the railways network;

rail operations of the railway owner includes the rail operations of an associate of the railway owner;

railway infrastructure means the facilities necessary for the operation of a railway, including —

(a) railway track, associated track structures, over or under track structures, supports (including supports for equipment or items associated with the use of a railway); and

(b) tunnels and bridges; and

(c) stations and platforms; and

(d) train control systems, signalling systems and communication systems; and

(e) electric traction infrastructure; and

(f) buildings and workshops; and

(g) associated plant machinery and equipment,

but not including —

(h) sidings or spur lines that are excluded by section 3(3) or (4) of the Act from being railway infrastructure; and

(i) rolling stock, rolling stock maintenance facilities, office buildings, housing, freight centres, and terminal yards and depots;

railway owner means the person having the management and control of the use of the railway infrastructure concerned;

railways network means —

(a) all the railways that were Government railways when the Act received the Royal Assent; and

(b) all the railways that are on land that is corridor land as defined in the *Rail Freight System Act 2000*; and

(ba) the railway constructed pursuant to the TPI Railway and Port Agreement; and

(c) any railway declared under section 3(2) of the Act to be part of the railways network;

Regulator means the person who holds, or is acting in, the office provided for by Part 3 of the Act;

Regulator's website means a website maintained by or on behalf of the Regulator;

regulatory asset base review statement has the meaning given in section 47P;

related body corporate has the meaning given in the *Corporations Act 2001* (Commonwealth) section 9;

relevant day has the meaning given in section 3A;

rolling stock means any vehicle, whether self-propelled or not, that operates on or uses a railway track;

route means those parts of the railways network and associated infrastructure to which this Code applies, and includes part of a route;

route section means the sections of the railways network into which the network is divided for management and costing purposes;

TPI Railway and Port Agreement has the meaning given to the term ***the Agreement*** in the *Railway and Port (The Pilbara Infrastructure Pty Ltd) Agreement Act 2004* section 3.

[Section 3 amended: Gazette 23 Jul 2004 p. 2989; 23 Jun 2009 p. 2409; Act No. 77 of 2004 s. 11; SL 2023/207 s. 4; SL 2026/148 s. 4.]

[Section 3, modifications have effect under the Railway (Roy Hill Infrastructure Pty Ltd) Agreement Act 2010 s. 11. See note 1M.]

3A. Relevant day in relation to proposal

(1) In this section —

section 9B application means an application under section 9B(1);

section 9C notice means a notice under section 9C(1).

(2) If a proposal is made to a railway owner, and the Regulator has approved or determined under section 47J(3) the depreciated optimised replacement cost of the railway infrastructure associated with every route section of the route to which access is sought under the proposal, the ***relevant day*** in relation to the proposal is —

(a) unless paragraph (b), (c) or (d) applies — the day on which the proposal is received; or

(b) if the railway owner makes a section 9B application, but does not give a section 9C notice to the access seeker, in

relation to the proposal — the day on which the section 9B application is resolved in the access seeker's favour; or

(c) if the railway owner gives a section 9C notice to the access seeker, but does not make a section 9B application, in relation to the proposal — the day on which the section 9C notice is resolved in the access seeker's favour; or

(d) if the railway owner makes a section 9B application, and gives a section 9C notice to the access seeker, in relation to the proposal, the day on which both of the following conditions are met —

(i) the section 9B application is resolved in the access seeker's favour;

(ii) the section 9C notice is resolved in the access seeker's favour.

(2A) If an interim access proposal is made to a railway owner, and subsection (2) does not apply, the ***relevant day*** in relation to the interim access proposal is the day on which the interim access proposal is received.

(3) If a proposal (other than an interim access proposal) is made to a railway owner, and subsection (2) does not apply, the ***relevant day*** in relation to the proposal is —

(a) unless paragraph (b), (c) or (d) applies — the first day on which the Regulator has approved or determined under section 47J(3) the depreciated optimised replacement cost of the railway infrastructure associated with every route section of the route to which access is sought under the proposal; or

(b) if the railway owner makes a section 9B application, but does not give a section 9C notice to the access seeker, in

relation to the proposal, the first day on which both of the following conditions are met —

(i) the Regulator has approved or determined under section 47J(3) the depreciated optimised replacement cost of the railway infrastructure associated with every route section of the route to which access is sought under the proposal;

(ii) the section 9B application is resolved in the access seeker's favour;

or

(c) if the railway owner gives a section 9C notice to the access seeker, but does not make a section 9B application, in relation to the proposal, the first day on which both of the following conditions are met —

(i) the Regulator has approved or determined under section 47J(3) the depreciated optimised replacement cost of the railway infrastructure associated with every route section of the route to which access is sought under the proposal;

(ii) the section 9C notice is resolved in the access seeker's favour;

or

(d) if the railway owner makes a section 9B application, and gives a section 9C notice to the access seeker, in relation to the proposal, the first day on which all of the following conditions are met —

(i) the Regulator has approved or determined under section 47J(3) the depreciated optimised replacement cost of the railway infrastructure associated with every route section of the route to which access is sought under the proposal;

(ii) the section 9B application is resolved in the access seeker's favour;

(iii) the section 9C notice is resolved in the access seeker's favour.

(4) For the purposes of subsections (2) and (3), a section 9B application is ***resolved in the access seeker's favour*** if —

(a) the Regulator notifies the railway owner and the access seeker under section 9B(5)(b) that the Regulator has refused the application; or

(b) an arbitrator makes a determination that the proposal is not frivolous or vexatious.

(5) For the purposes of subsections (2) and (3), a section 9C notice is ***resolved in the access seeker's favour*** if —

(a) the access seeker provides further information under section 9D(1)(a) in response to the notice and the railway owner does not give a further notice referred to in section 9C(3) within the period specified in section 9C(4)(b); or

(b) the access seeker notifies the railway owner under section 9D(1)(b) that there is a dispute between them, and an arbitrator makes a determination that each of the requirements of section 8(3) that are the subject of the dispute have been met.

[Section 3A inserted: SL 2023/207 s. 5; amended: SL 2026/148 s. 5.]

3B. Current regulatory asset base

The ***current regulatory asset base*** of a route section is —

(a) if the updated regulatory asset base of applicable railway infrastructure associated with the route section has never been determined under section 47N(1) — the initial regulatory asset base of the route section; or

(b) otherwise — the updated regulatory asset base of applicable railway infrastructure associated with the route section last determined under section 47N(1)

(including as amended in accordance with any direction given by the Regulator under section 47M(2) or 47U(2)(b)).

[Section 3B inserted: SL 2023/207 s. 5.]

3C. Notes not part of this Code

Notes in this Code are provided to assist understanding and do not form part of this Code.

[Section 3C inserted: SL 2023/207 s. 5.]

4A. Parties have option to negotiate agreements outside this Code

(1) To avoid doubt it is declared to be the case that —

(a) the parties concerned may choose whether negotiations for an agreement for access are carried on under this Code or otherwise; and

(b) if the parties choose to negotiate an agreement for access otherwise than under this Code, nothing in this Code applies to or in relation to the negotiations or any resulting agreement; and

(c) in particular, without limiting paragraph (b), a Part 5 instrument, as defined in section 40(3), is not to be taken into account in determining the rights, powers, duties and remedies of parties to negotiations carried on or an agreement made otherwise than under this Code, except to the extent that the parties concerned agree otherwise.

(2) The enactment of subsection (1) by the *Railways (Access) Amendment Code 2009* section 5 is not to be taken as showing that this Code did not have the same effect before the commencement of that section as it has by operation of that subsection.

[Section 4A inserted: Gazette 23 Jun 2009 p. 2410.]

4. Other laws not affected

Nothing in this Code is to be read as affecting the operation of any other written law.

5. Routes to which this Code applies

(1) This Code applies only to —

(a) those parts of the railways network; and

(b) the associated railway infrastructure,

that come within the routes specified in Schedule 1.

(1a) Subsection (1) does not prevent —

(a) the making of a proposal that involves any extension or expansion, or both, of a route or the associated railway infrastructure, as mentioned in section 8(4); or

(b) the proposal of such an extension or expansion being made in the course of negotiations under Part 3, as mentioned in section 8(5).

(1b) If a route or the associated railway infrastructure is extended or expanded pursuant to an access agreement or a determination, this Code also applies to the route and infrastructure as so extended or expanded.

(2) This Code ceases to apply to a Government railway that is part of the railways network, and the associated railway infrastructure, referred to in subsection (1) if it ceases by or under a written law to be a railway as defined in section 2 of the *Government Railways Act 1904*.

[Section 5 amended: Gazette 23 Jul 2004 p. 2989.]

Part 2A — Publication of information

[Heading inserted: Gazette 23 Jun 2009 p. 2411.]

6. Terms used

In this Part —

alternative information has the meaning given in section 7BA(1)(b)(i);

calendar year means a period of 12 months beginning on 1 January;

required information means —

(a) the standard access provisions for the time being approved or determined under section 47A in respect of the railway owner; and

(b) the information described in Schedule 2 in respect of the relevant part of the railways network; and

(c) if the Regulator has granted the railway owner an exemption under section 7BA(1)(b) — the alternative information specified in the railway owner's application under section 7BA(1); and

(d) any standing offer that the railway owner has prepared in compliance with a notice given under section 7G(1), but that is not the subject of a notice under section 7G(8).

[Section 6 inserted: Gazette 23 Jun 2009 p. 2411; amended: SL 2023/207 s. 57.]

7A. Information must be published

(1) The railway owner in relation to a part of the railways network to which this Code applies must —

(a) ensure that the required information is published on a website maintained by or on behalf of the railway owner; and

(b) make a publication containing the required information available for purchase in hard copy format.

(1A) Despite subsection (1), the publication made available under subsection (1)(b) need not contain the following —

(a) the information described in Schedule 2 item 7;

(b) if the Regulator has granted the railway owner an exemption under section 7BA(1)(b) — the alternative information specified in the railway owner's application under section 7BA(1);

(c) a standing offer described in paragraph (d) of the definition of ***required information*** in section 6.

(2) The publication made available under subsection (1)(b) may be in loose-leaf form or may be constituted by a number of separate documents.

(3) The railway owner may make a reasonable charge for supplying to a person a hard copy of the publication made available under subsection (1)(b)or an amendment to it.

[(4) deleted]

[Section 7A inserted: Gazette 23 Jun 2009 p. 2411; amended: SL 2023/207 s. 58.]

7B. Regulator may grant exemption for information about gross tonne kilometres

(1) The Regulator may, on application by a railway owner, exempt the owner from the obligation to publish some or all of the information described in Schedule 2 item 4(l) if the Regulator is satisfied that the publication of the information might reasonably be expected to adversely affect the business of the owner.

(2) The Regulator may revoke an exemption granted under subsection (1).

(3) The Regulator must give the railway owner written notice if the Regulator —

(a) grants an exemption under subsection (1) to the railway owner; or

(b) revokes under subsection (2) an exemption granted to the railway owner.

[Section 7B inserted: Gazette 23 Jun 2009 p. 2412; amended: SL 2023/207 s. 59.]

7BA. Regulator may grant exemption for other information

(1) The Regulator may, on application by a railway owner, exempt the owner from the obligation to publish some or all of the information (the ***exempt information***) described in Schedule 2 item 7 if —

(a) the Regulator is satisfied that the railway owner is not able to collect the exempt information; or

(b) both of the following apply —

(i) the application specifies other information (the ***alternative information***) that the railway owner will publish as an alternative to publishing the exempt information;

(ii) the Regulator is satisfied that the alternative information would be of similar utility to an entity that is interested in making a proposal in respect of a route to which the exempt information relates.

(2) The Regulator may revoke an exemption granted under subsection (1).

(3) The Regulator must give the railway owner written notice if the Regulator —

(a) grants an exemption under subsection (1) to the railway owner; or

(b) revokes under subsection (2) an exemption granted to the railway owner.

[Section 7BA inserted: SL 2023/207 s. 60.]

7C. Information to be kept up-to-date

(1) The railway owner must review, and amend or replace, the information published under section 7A.

(2) A review, and any necessary amendment or replacement, under subsection (1) must be carried out —

(a) as often as is necessary to ensure that the information remains reasonably up-to-date at all times; and

(b) in any case, at not less than yearly intervals starting with the end of the second calendar year following the commencement of the *Railways (Access) Amendment Code 2009* section 7 [1].

(3) This section does not apply to the information referred to in sections 7D, 7E or 7F.

[Section 7C inserted: Gazette 23 Jun 2009 p. 2412; amended: SL 2023/207 s. 61.]

7D. Particular provision for information as to gross tonne kilometres

(1) The first information published under Schedule 2 item 4(l) as amended by the *Railways (Access) Amendment Code 2026* section 10(2) must be for the 3 calendar years immediately before the day on which the *Railways (Access) Amendment Code 2026* section 10 comes into operation.

(2) The railway owner must update the information published under Schedule 2 item 4(l) as soon as is practicable after the last day of December in each year so as to show the information

mentioned in that paragraph for the 3 calendar years ending on that day.

[Section 7D inserted: Gazette 23 Jun 2009 p. 2412-13; amended: SL 2023/207 s. 62; SL 2026/148 s. 6.]

7DA. Particular provision for information as to running times

(1) The information published under Schedule 2 item 4(g) must be in a form that does not identify, or permit the identification of, an access holder or any particular train.

(2) The Regulator may, on application by a railway owner, exempt the owner from the obligation to publish the information described in Schedule 2 item 4(g) if the Regulator is satisfied that it is not possible to publish the information in a form that complies with subsection (1).

(3) The Regulator may revoke an exemption granted under subsection (2).

(4) The Regulator must give the railway owner written notice if the Regulator —

(a) grants an exemption under subsection (2) to the railway owner; or

(b) revokes under subsection (3) an exemption granted to the railway owner.

[Section 7DA inserted: SL 2023/207 s. 63.]

7E. Particular provision for information as to proposed improvements and capital works

(1) The first information published under Schedule 2 item 6 is to be for the 5 calendar years following the commencement of the *Railways (Access) Amendment Code 2009* section 7 [1].

(2) The railway owner must update the information published under Schedule 2 item 6 as soon as is practicable after the last day of December in each year so as to show the improvements and

capital works proposed to be carried out during the 5 calendar years following that day.

[Section 7E inserted: Gazette 23 Jun 2009 p. 2413.]

7F. Particular provision for monthly route section information

(1) The first information published under Schedule 2 item 7 must be for the 12 months immediately before the day on which the *Railways (Access) Amendment Code 2023* Part 3 comes into operation.

(2) The railway owner must update the information published under Schedule 2 item 7 as soon as is practicable after the last day of March, June, September and December in each year.

[Section 7F inserted: SL 2023/207 s. 64.]

7G. Standing offers

(1) The Regulator may, by written notice, require the railway owner to prepare a standing offer for access to a route (the ***specified route***) and associated railway infrastructure specified in the notice for the purpose of carrying on rail operations (the ***specified rail operations***) specified in the notice if the Regulator is satisfied that —

(a) 2 or more entities are carrying on, or are likely to carry on, similar rail operations on the specified route; and

(b) 1 or more of the entities is not the railway owner or an associate of the railway owner.

(2) For the purposes of subsection (1)(a), ***similar rail operations*** are rail operations that are similar having regard to the train length, axle load and freight type of the rolling stock being operated.

(3) The Regulator must not give the railway owner a notice under subsection (1) before the day that is 20 business days after the day on which the Regulator has approved or determined under section 47J(3) the depreciated optimised replacement cost of

railway infrastructure associated with every route section within the specified route.

(4) The railway owner must, as soon as practicable after being given a notice under subsection (1), comply with the notice.

(5) A standing offer prepared in compliance with a notice given under subsection (1) must set out —

(a) the specified route and specified rail operations; and

(b) the terms and conditions that the railway owner would want to be included in an access agreement for access to the specified route for the purpose of carrying on the specified rail operations, including the price that an entity might pay for access to the specified route for the purpose of carrying on the specified rail operations.

(6) The terms and conditions under subsection (5)(b) must —

(a) be reasonable; and

(b) be sufficiently detailed and complete to —

(i) form the basis of a commercially workable access agreement; and

(ii) enable an access seeker to determine the value represented by the provision of access to the specified route for the purpose of carrying on the specified rail operations;

and

(c) not seek to restrict an access holder from disclosing the terms and conditions of an access agreement or proposed access agreement to —

(i) the Regulator; or

(ii) an arbitrator in relation to an arbitration under Part 3 Division 3.

(7) The price set out under subsection (5)(b) must not be —

(a) less than the costs referred to in Schedule 4 clause 7(1) that would apply if an entity were provided with access to the specified route for the purpose of carrying on the specified rail operations; or

(b) more than the costs referred to in Schedule 4 clause 8(1) that would apply if an entity were provided with access to the specified route for the purpose of carrying on the specified rail operations.

(8) The Regulator may give written notice to a railway owner that a standing offer prepared by the railway owner in compliance with a notice under subsection (1) is no longer required.

[Section 7G inserted: SL 2023/207 s. 64.]

Part 2 — Proposals for access

7. Preliminary information

(1) An entity that is interested in making a proposal in respect of a particular route may request the railway owner in writing to provide it with —

(a) an initial indication of —

(i) the current infrastructure capacity and available capacity of that route; and

(ii) the price that the entity might pay for access; and

(iii) the terms, conditions and obligations that the railway owner would want to be included in any access agreement;

and

(b) any update of the required information, as defined in section 6, that is reasonably available to the railway owner; and

[(c) deleted]

(d) the origin and destination of any train paths proposed by the railway owner for the route.

(2) If the railway owner receives a request from an entity under subsection (1), the railway owner must, not later than 10 business days after the day on which the request is received —

(a) provide the information sought by the entity; and

(b) if the railway owner has prepared a standing offer for the route in compliance with a notice given under section 7G(1) —

(i) confirm that the information referred to in section 7G(5)(b) and set out in the standing offer is an initial indication of the information referred

to in subsection (1)(a)(ii) and (iii) that is sought by the entity; or

(ii) provide an explanation as to why that is not the case.

(3) In providing the information, the railway owner must give to the entity technical information about any aspect of the railway owner's railway infrastructure that affects the design of rolling stock.

(4) In preparing the information referred to in subsection (1)(a)(i), the railway owner must not unfairly discriminate between the proposed rail operations of the entity and the rail operations of the railway owner.

[Section 7 amended: Gazette 23 Jun 2009 p. 2413-14; SL 2023/207 s. 6 and 65.]

8. Proposals for access

(1) An entity may make to the railway owner a proposal in writing for access by the entity.

(2) A proposal can be made —

(a) only in respect of a route to which this Code applies; and

(b) for the purpose of carrying on rail operations, and for no other purpose.

(3) A proposal must —

(a) set out each of the matters described in Schedule 2A; and

(b) demonstrate each of the matters described in Schedule 2B; and

(c) be accompanied by a notice in writing of the access seeker's intention to enter into negotiations for an access agreement under this Code.

[(d) deleted.]

(4A) The access seeker must, as soon as is practicable after a proposal is made, give to the Regulator a copy of the notice referred to in subsection (3)(c).

(4) A proposal may specify any extension or expansion, or both, of the route or the associated railway infrastructure that would be necessary to accommodate the proposed rail operations.

(5) The fact that an extension or expansion is not specified in a proposal as mentioned in subsection (4) does not prevent the proposal of such an extension or expansion being made in the course of negotiations under Part 3 on the ground that such an extension or expansion would be necessary to accommodate the proposed rail operations.

[Section 8 amended: Gazette 23 Jul 2004 p. 2990; 23 Jun 2009 p. 2414; SL 2023/207 s. 7 and 55.]

8A. Proposals for interim access

(1) In this section —

interim access agreement means an access agreement that relates to —

(a) an interim access proposal; or

(b) some modification of that interim access proposal agreed to by the railway owner and the entity that made the interim access proposal.

(2) Sections 8(3)(a) and (b) and (4), 9B to 9D, 9(1)(b) and 10 to 11 do not apply in relation to a proposal that is an interim access proposal.

(3) A proposal is an ***interim access proposal*** if —

(a) on the day on which the entity makes the proposal (***proposal day***), the entity and the railway owner are

parties to an agreement (the ***existing access agreement***) that is —

(i) an access agreement (including an interim access agreement); or

(ii) an agreement for access made otherwise than under this Code;

and

(b) the existing access agreement is due to expire within the period of 6 months after proposal day; and

(c) the proposal is made —

(i) in respect of the same route to which access is provided to the entity under the existing access agreement; and

(ii) for the purpose of carrying on the same rail operations that the entity is carrying on under the existing access agreement; and

(iii) for access for a period of not more than 12 months.

(4) Subsection (3)(c)(iii) does not prevent an entity that is party to an interim access agreement from making further interim access proposals for access for further periods each of not more than 12 months.

[Section 8A inserted: SL 2023/207 s. 8; amended: SL 2026/148 s. 7.]

9A. Withdrawal of proposal

(1) An access seeker may at any time before an access agreement is made withdraw a proposal for access made to a railway owner, but only if there has not been a referral to arbitration under section 26(1).

(2) Subsection (1) does not affect —

(a) any right that an access seeker has in law not to continue with a referral to arbitration; or

(b) the operation of section 34(2).

(3) A proposal is withdrawn by the access seeker giving notice in writing of the withdrawal to —

(a) the railway owner; and

(b) the Regulator.

(4) If a proposal is withdrawn —

(a) the railway owner is under no further obligation under this Code in respect of the proposal; and

(b) any matter in progress under this Code in respect of the proposal lapses.

(5) Subject to subsection (5B), nothing in this section prevents an access seeker that has withdrawn a proposal from, under section 8 —

(a) re-making the same proposal; or

(b) making a further proposal.

(5A) If an access seeker re-makes the same proposal under section 8, the access seeker and the railway owner must again take all steps and observe all requirements under this Code in respect of the re-made proposal.

(5B) If a determination declares under section 31B(1) that a proposal is frivolous or vexatious, the access seeker cannot re-make the same proposal under section 8 unless the re-made proposal addresses any reasons stated in the determination as to why the proposal is frivolous or vexatious.

(6) The application of this section extends to a proposal —

(a) that has been made under section 8 before the commencement of the *Railways (Access) Amendment Code 2009* section 10 [1]; and

(b) in respect of which an access agreement has not been made.

[Section 9A inserted: Gazette 23 Jun 2009 p. 2415-16; amended: SL 2023/207 s. 9 and 55.]

9B. Frivolous or vexatious proposals

(1) If the railway owner to whom a proposal is made considers that the proposal is frivolous or vexatious the railway owner may apply in writing to the Regulator for notices to be issued under subsection (5)(a).

(2) An application under subsection (1) must be made within 5 business days after the day on which the railway owner receives the proposal.

(3) An application under subsection (1) must set out the reasons why the railway owner considers the proposal to be frivolous or vexatious.

(4) The railway owner must, as soon as practicable after making an application under subsection (1), give the access seeker —

(a) written notice that the railway owner considers the proposal to be frivolous or vexatious; and

(b) a copy of the application.

(5) On an application under subsection (1), the Regulator must —

(a) if the Regulator is satisfied that there are reasonable grounds for the railway owner to consider that the proposal is frivolous or vexatious — notify the railway owner and the access seeker in writing that there is a dispute between the railway owner and the access seeker as to whether the proposal is frivolous or vexatious; or

(b) otherwise — refuse the application and notify the railway owner and the access seeker in writing.

[Section 9B inserted: SL 2023/207 s. 10.]

9C. Railway owner may request further information

(1) A railway owner may give written notice to an access seeker under this subsection if —

(a) the access seeker has made a proposal to the railway owner; and

(b) the railway owner is not satisfied that the proposal meets the requirements of section 8(3).

(2) A notice under subsection (1) must specify —

(a) each requirement of section 8(3) that the railway owner considers that the proposal does not meet; and

(b) the further information that the railway owner requires the access seeker to provide to meet those requirements.

(3) If the access seeker provides further information to the railway owner under section 9D(1)(a) in response to a notice given under subsection (1) and the railway owner is not satisfied that the further information meets the requirements of section 8(3) specified in the notice, the railway owner may give a further notice under subsection (1) to the access seeker.

(4) A notice under subsection (1) must be given —

(a) if it is the first notice given under that subsection in relation to the proposal — within 5 business days after the day on which the railway owner receives the proposal; or

(b) if it is a further notice referred to in subsection (3) — within 5 business days after the day on which the railway owner receives the further information referred to in subsection (3).

[Section 9C inserted: SL 2023/207 s. 10.]

9D. Access seeker may provide further information or notify dispute

(1) An access seeker must within 10 business days after the day on which it receives a notice under section 9C(1) or within a further period agreed in writing by the parties —

(a) provide the further information specified in the notice; or

(b) if the access seeker considers that the notice is not justified — notify the railway owner in writing that there is a dispute between them as to whether the requirements of section 8(3) have, or any particular requirement of section 8(3) has, been met.

(2) If an access seeker fails to comply with subsection (1), the proposal to which the notice under section 9C(1) relates is taken to be withdrawn for the purposes of section 9A(4).

[Section 9D inserted: SL 2023/207 s. 10.]

9. Railway owner's obligations on receipt of proposal

(1) The railway owner to whom a proposal is made must —

(a) within 5 business days after the day on which the proposal is received — acknowledge receipt of the proposal; and

(b) within 5 business days after the relevant day in relation to the proposal — provide the access seeker with —

(i) the floor price and the ceiling price for the proposed access (including the floor price and the ceiling price for each year of the proposed access); and

(ii) the costs for each route section on which those prices have been calculated; and

(iii) a copy of the costing principles for the time being approved or determined by the Regulator under section 47H; and

(iv) the current regulatory asset base of each route section to which the proposal relates.

(1A) If the proposal is an interim access proposal, the railway owner must give the access seeker a draft access agreement not later than 5 business days after the relevant day in relation to the proposal.

(2) If the proposal is not an interim access proposal, the railway owner must give the access seeker a draft access agreement not later than —

(a) if Schedule 4 clause 10 does not apply and the proposal does not specify an extension or expansion under section 8(4) and section 10(1) does not apply — 20 business days after the relevant day in relation to the proposal; or

(b) if Schedule 4 clause 10 does not apply and the proposal specifies an extension or expansion under section 8(4) or section 10(1) applies — 30 business days after the relevant day in relation to the proposal; or

(c) if Schedule 4 clause 10 applies —

(i) if section 10(1) applies and, on the day on which the railway owner receives from the Regulator an approval under Schedule 4 clause 10(4)(a) or a determination under Schedule 4 clause 10(4)(b), the railway owner has not yet provided to the access seeker the things referred to in section 10(1)(b) — the day on which the railway owner provides to the access seeker the things referred to in section 10(1)(b); or

(ii) if the proposal specifies an extension or expansion under section 8(4) and section 11(1) applies and, on the day on which the railway owner receives from the Regulator an approval under Schedule 4 clause 10(4)(a) or a determination under Schedule 4 clause 10(4)(b),

the railway owner has not yet given the access seeker written notice under section 11(1) — the day on which the railway owner gives the access seeker written notice under section 11(1); or

(iii) otherwise — 5 business days after the day on which the railway owner receives from the Regulator an approval under Schedule 4 clause 10(4)(a) or a determination under Schedule 4 clause 10(4)(b).

(3) Despite subsection (2), if the access seeker gives written notice to the railway owner under section 10A(1) to prepare a cost assessment under section 10A(3) —

(a) the railway owner is taken to have complied with subsection (2); and

(b) the railway owner must give the access seeker a draft access agreement not later than 40 business days after the day on which the railway owner received the notice.

(4) In subsection (1)(b)(i) —

floor price and ***ceiling price*** are the sums equal to the costs referred to in Schedule 4 clauses 7(1) and 8(1) respectively —

(a) as determined by the Regulator under Schedule 4 clause 9; or

(b) if Schedule 4 clause 9 does not apply, as determined by the railway owner for the purposes of Schedule 4 clause 10(1).

[Section 9 inserted: SL 2023/207 s. 10; amended: SL 2026/148 s. 8.]

10. Obligations if railway owner considers extension or expansion necessary

(1) If a proposal is made to a railway owner and the railway owner considers that an extension or expansion, or both, of the route or

the associated railway infrastructure would be necessary to accommodate the proposed rail operations —

(a) the sums provided to the access seeker under section 9(1)(b)(i) and (ii) are to be assessed for access to the route and infrastructure as it exists and not for access to any proposed extension or expansion of the route and infrastructure; and

(b) the railway owner must, within 20 business days after the relevant day in relation to the proposal, provide the access seeker with —

(i) a reasonable preliminary estimate of the efficient costs relating to any extension or expansion specified in the proposal and any other extension or expansion considered necessary by the railway owner; and

(ii) the railway owner's opinion as to the share of those costs that is likely to be borne by the access seeker, having regard to the requirements of Schedule 4 clause 7A; and

(iii) a preliminary assessment, based on information reasonably available to the railway owner, of whether each extension or expansion referred to in subparagraph (i) is technically feasible and would be consistent with safe and reliable rail operations on the route.

(2) In any negotiations or arbitration under Part 3 the railway owner is not bound by an estimate, opinion or assessment provided to an access seeker under subsection (1)(b).

[Section 10 inserted: SL 2023/207 s. 10.]

10A. Cost assessment of extension or expansion

(1) On receipt of a preliminary estimate referred to in section 10(1)(b)(i), the access seeker may give written notice to the railway owner to prepare a cost assessment under

subsection (3) for 1 or more of the extensions or expansions to which the preliminary estimate relates.

(2) The access seeker's notice under subsection (1) must —

(a) specify each extension and expansion for which the access seeker requires a cost assessment; and

(b) include the access seeker's written consent to pay the railway owner's reasonable costs of preparing the cost assessment in accordance with subsection (3).

(3) The railway owner must, within 40 business days after the day on which it receives a notice under subsection (1), provide to the access seeker a cost assessment that includes —

(a) a reasonable detailed estimate of the efficient costs of implementing each extension and expansion specified in the notice; and

(b) supporting material demonstrating how those costs have been calculated; and

(c) the railway owner's opinion as to the share of those costs that is likely to be borne by the access seeker, having regard to the requirements of Schedule 4 clause 7A.

(4) The railway owner must comply with subsection (3) in relation to an extension or expansion regardless of whether the preliminary assessment under section 10(1)(b)(iii) is that the extension or expansion is not technically feasible or would not be consistent with safe and reliable rail operations on the route.

(5) If the access seeker gives a notice to the railway owner under subsection (1), the access seeker must pay the railway owner's reasonable costs of preparing any detailed estimate and supporting material provided to the access seeker under subsection (3).

[Section 10A inserted: SL 2023/207 s. 10.]

11. Obligations if railway owner does not consider extension or expansion necessary

(1) The railway owner to whom a proposal is made must, within 10 business days after the relevant day in relation to the proposal, give written notice to the access seeker under this section if —

(a) the proposal specifies an extension or expansion under section 8(4); and

(b) the railway owner does not consider that any extension or expansion of the route or the associated railway infrastructure would be necessary to accommodate the proposed rail operations.

(2) A notice under subsection (1) must include a written explanation as to why an extension or expansion, or both, of the route or the associated railway infrastructure would not be necessary to accommodate the proposed rail operations.

[Section 11 inserted: SL 2023/207 s. 10.]

12. Record of proposals to be kept

(1) The railway owner must keep a register relating to all proposals made to it under section 8.

(2) The register must show —

(a) a general description of the proposal;

(b) the name and address of the access seeker;

(c) the day on which it was received by the railway owner;

(d) the day on which each step required by this Code was taken; and

(e) the final outcome of the proposal.

(3) The register may be kept in electronic form, but must be capable of being reproduced in written form.

[Section 12 amended: SL 2023/207 s. 55.]

Part 3 — Negotiations

Division 1 — When duty to negotiate arises

13. Duty of railway owner to negotiate

(1) Where a proposal is made by an entity the railway owner must negotiate in good faith with the entity with a view to the railway owner and the entity making an access agreement in respect of the route.

(2) The duty imposed on the railway owner by subsection (1) does not arise until the access seeker has given notice to the railway owner under section 19(1).

[Section 13 amended: SL 2023/207 s. 11.]

*[**14, 15.** Deleted: SL 2023/207 s. 12.]*

Division 2 — Negotiations

16. General duties of railway owner in negotiations

(1) In the negotiation of access agreements the railway owner —

(a) must use all reasonable endeavours —

(i) to avoid unnecessary delays on its part; and

(ii) to meet the requirements of an access seeker that has complied, and whose proposal complies, with this Code;

and

(b) must not unfairly discriminate between —

(i) 1 access seeker and another access seeker; or

(ii) an access seeker and an access holder; or

(iii) an access seeker and an entity that is seeking access, or to which access is provided, otherwise than under this Code;

and

(c) must have regard to benefits provided to the railway owner in relation to a route or associated infrastructure by any foundation user of the route.

(1A) For the purposes of subsection (1)(b), discrimination is not unfair discrimination if it reasonably reflects —

(a) the railway owner's different costs or risks associated with providing different entities with access to a route; or

(b) all benefits provided to the railway owner by all foundation users of a route in relation to the route or associated infrastructure.

(1B) For the purposes of this section, an entity is a ***foundation user*** of a route if the entity contributed significant funding towards, or otherwise bore significant risk as part of —

(a) the establishment of the route; or

(b) an extension or expansion of the route; or

(c) a significant enhancement or improvement of the railway infrastructure associated with the route that does not increase the infrastructure capacity of the route.

(2) In the negotiation of access agreements the railway owner must not unfairly discriminate between the proposed rail operations of an access seeker and the rail operations of the railway owner including, without limitation, in relation to —

(a) the allocation of train paths; and

(b) the management of train control; and

(c) operating standards.

[Section 16 amended: SL 2023/207 s. 13.]

17. Matters that must be covered

(1) In negotiating an access agreement the railway owner and the access seeker must —

(a) ensure that provision is made in detail for the matters specified in Schedule 3; and

(b) give effect to the provisions of Schedule 4; and

(c) include in the agreement all matters agreed between them in relation to the proposal apart from provisions —

(i) implied by law; or

(ii) incorporated in the agreement by reference.

(2) Subsection (1) does not prevent other matters from being included in an access agreement.

[Section 17 amended: SL 2023/207 s. 14 and 55.]

*[**18.** Deleted: SL 2023/207 s. 15.]*

19. Notice of readiness to commence negotiations

(1) An access seeker who has made a proposal to a railway owner must, within 10 business days after the relevant day in relation to the proposal —

(a) notify the railway owner in writing of the access seeker's readiness to begin negotiations; and

(b) nominate a day on which the negotiations will begin, which cannot be earlier than 5 business days after the day on which the access seeker gives the railway owner notice under this section.

(2) If the access seeker fails to comply with subsection (1), the proposal is taken to be withdrawn for the purposes of section 9A(4) unless the railway owner and the access seeker otherwise agree in writing.

[Section 19 inserted: SL 2023/207 s. 15.]

20. Negotiation period

(1) The railway owner and the access seeker must begin negotiations on the day nominated under section 19(1)(b).

(2) Immediately before the negotiations are begun the railway owner and the access seeker must jointly fix a day (***the termination day***) after which the negotiations —

(a) will cease if, by the end of that day, they have not entered into an access agreement; or

(b) will continue only if a later termination day is fixed jointly by the railway owner and the access seeker.

(3) The initial termination day fixed under subsection (2) must be not later than —

(a) if the proposal is an interim access proposal — 5 business days after the day nominated under section 19(1)(b) (the ***nominated day***); or

(b) otherwise — 10 business days after the nominated day.

(4) The railway owner and the access seeker may extend the negotiations more than once by fixing later termination days under subsection (2)(b).

[Section 20 amended: SL 2023/207 s. 16 and 55.]

21. Regulator may give opinion on price sought for access

(1) An access seeker may apply to the Regulator for an opinion whether or not the price sought by the railway owner in negotiations for an access agreement meets the requirements of Schedule 4 clause 13(a).

(2) On application being so made, the Regulator is to form an opinion in terms of the application and notify that opinion to the access seeker and the railway owner.

(3) For the purpose of forming an opinion the Regulator —

(a) must give the access seeker and the railway owner an opportunity to make submissions and present material; and

(b) may otherwise be informed in such manner as the Regulator thinks fit; and

(c) may exercise any power conferred on the Regulator by Part 3 of the Act; and

(d) may otherwise proceed as the Regulator thinks fit.

(4) An opinion given under this section is for the information of the access seeker and does not have any effect for the purposes of the Act or this Code.

[Section 21 amended: SL 2023/207 s. 17.]

Division 3 — Arbitration of disputes

22. Terms used

In this Division —

arbitrator includes, where there are 2 or more arbitrators, both or all of the arbitrators;

other party has the meaning given by section 26(1).

*[**23.** Deleted: Gazette 19 Jul 2013 p. 3270.]*

24. Panels of persons who may be appointed as arbitrators

(1) The Regulator —

(a) is to establish panels of the names of persons from which persons are to be appointed under section 26(2A) or (2C) to act as arbitrators; and

(b) may at any time —

(i) include the names of additional persons on; or

(ii) remove the names of persons from,

a panel that has been established.

(2) The Regulator may —

(a) include the name of a person on; or

(b) remove the name of a person from,

a panel under this section only on the recommendation of the Chairman for the time being of the Western Australian Chapter of the Institute of Arbitrators and Mediators Australia or the recommendation of the Perth Centre for Energy & Resources Arbitration Ltd.

(3) As often as is necessary, the Regulator is to request both the Chairman referred to in subsection (2) and the Perth Centre for Energy & Resources Arbitration Ltd to make a recommendation.

(4A) The request must specify a day (the ***specified day***) before which the recommendation is to be made.

(4B) The Regulator may effect any necessary inclusion or removal of a name without complying with subsection (2) if —

(a) the Regulator makes a request to both the Chairman referred to in subsection (2) and the Perth Centre for Energy & Resources Arbitration Ltd; and

(b) neither the Chairman referred to in subsection (2) nor the Perth Centre for Energy & Resources Arbitration Ltd make a recommendation before the specified day.

(4) The name of the Regulator cannot be included on a panel under this section.

[Section 24 amended: Gazette 4 Dec 2015 p. 4846-7; SL 2023/207 s. 18.]

25. When entity taken to be in dispute with railway owner

(1) For the purposes of this Division an entity is in dispute with the railway owner if —

(a) the entity has made a proposal for access by it;

(b) the proposal complies, and the entity has complied, with this Code; and

(c) any of the situations in subsection (2) exist.

(1A) For the purposes of subsection (1)(b), a proposal or entity does not fail to comply with this Code solely because the railway owner is not satisfied that the proposal meets the requirements of section 8(3).

(2) The situations referred to are —

(aa) the Regulator has notified the railway owner and the access seeker under section 9B(5)(a) that there is a dispute between the railway owner and the access seeker; or

(a) the railway owner has refused or failed to negotiate on the proposal as required by section 13; or

(b) the access seeker has notified the railway owner under section 9D(1)(b) that there is a dispute between them; or

(c) the access seeker and the railway owner have entered into negotiations on the proposal but —

(i) have not before the termination day fixed under section 20(2) reached agreement on the provisions to be contained in an access agreement; or

(ii) have before that day jointly made a determination in writing that the negotiations have broken down.

[Section 25 amended: SL 2023/207 s. 19.]

26. Arbitration of disputes under *Commercial Arbitration Act 2012*

(1) An entity (***the other party***) that is in dispute with the railway owner may, by notice in writing to the Regulator, refer the dispute (if it is not a dispute referred to in section 25(2)(aa)) to arbitration.

(1A) A dispute referred to in section 25(2)(aa) is by the operation of this subsection referred to arbitration when the Regulator notifies the railway owner and the access seeker under section 9B(5)(a) that there is a dispute between them.

(2) Subsection (2A) applies if the parties to a dispute (other than a dispute referred to in section 25(2)(aa)) have not, within 10 business days after the day on which the Regulator receives the notice under subsection (1) (or within a further period agreed in writing by the parties and notified to the Regulator), given written notice to the Regulator that they have agreed on the arbitrator who will hear and determine the dispute.

(2A) The Regulator must, within 20 business days after the day on which the Regulator receives the notice under subsection (1), appoint 1 or more persons whose names are on a panel established under section 24 to act as arbitrators to hear and determine the dispute.

(2B) Subsection (2C) applies if the parties to a dispute referred to in section 25(2)(aa) have not, within 10 business days after the day (***notification day***) on which they are notified by the Regulator under section 9B(5)(a), given written notice to the Regulator that they have agreed on the arbitrator who will hear and determine the dispute.

(2C) The Regulator must, within 20 business days after notification day, appoint 1 or more persons whose names are on a panel established under section 24 to act as arbitrators to hear and determine the dispute.

(2D) The Regulator may extend the 20 business day period referred to in subsection (2A) or (2C), either before or after the period has ended, by written notice to the parties in accordance with section 52.

(3) Subject to this Division, the *Commercial Arbitration Act 2012* applies to an arbitration under this Division.

(4) A dispute to which this Division applies cannot be referred to arbitration, or otherwise dealt with, under the *Commercial Arbitration Act 2012* except in accordance with this Division.

[Section 26 amended: Gazette 19 Jul 2013 p. 3270; SL 2023/207 s. 20.]

27. Appointment where issues are also relevant to arbitration under another access regime

(1) Subsection (2) applies if —

(a) an appointment is required to be made under section 26 in respect of a dispute;

(b) the proposed rail operations concerned are part of operations that come within some other access regime recognised under the *Trade Practices Act 1974* of the Commonwealth; and

(c) the issues in dispute are —

(i) likely to be the same as or similar to issues requiring to be arbitrated under the other access regime; or

(ii) issues directly affecting both access regimes.

(2) Where this subsection applies, the Regulator must, so far as is practicable, appoint under section 26 a person or persons who in the Regulator's opinion is or are qualified and acceptable for appointment to conduct an arbitration both under this Code and the other access regime.

[Section 27 amended: SL 2023/207 s. 21.]

28. Preliminary conference to be held

(1) Where a dispute (other than a dispute referred to in section 25(2)(aa)) has been referred to arbitration, the arbitrator must arrange a preliminary conference between the parties to the dispute, to be presided over by the arbitrator.

(2) The purpose of the conference is for the arbitrator and the parties to reach an agreement on a timetable for —

(a) the taking of particular steps in the conduct of the arbitration; and

(b) the making of a determination.

(3) The conference is to take place not later than 10 business days after the day on which the arbitrator is appointed.

(4) If the arbitrator considers that it is not likely that an agreement will be reached as mentioned in subsection (2) within a reasonable time, the arbitrator is to give such directions to the parties as the arbitrator thinks fit as to the matters referred to in that subsection.

(5) Nothing in this section limits section 24B or 25 of the *Commercial Arbitration Act 2012*.

[Section 28 amended: Gazette 19 Jul 2013 p. 3270; SL 2023/207 s. 22.]

29. Matters to be taken into account by arbitrator

(1) In hearing and determining a dispute the arbitrator —

(a) must give effect to —

(i) the Act and this Code; and

(ii) matters determined by the Regulator;

and

(b) where paragraph (a) or (c) of section 25(2) applies, must take into account the matters set out in clause 6(4)(i), (j) and (l) of the Competition Principles Agreement; and

(c) may take into account any other matter that the arbitrator considers relevant.

(2) The Competition Principles Agreement is defined in section 3 of the Act and, for information, the clauses referred to in subsection (1)(b) are set out in Schedule 5.

(3) In subsection (1)(a)(ii) —

matters determined by the Regulator means —

(a) the train management guidelines under section 43; and

(b) the statements of policy under section 44; and

(c) the over-payment rules under section 47; and

(d) the costing principles under section 47H; and

(e) approvals and determinations under section 47J; and

(f) the applicable depreciation schedule under section 47K; and

(g) approvals and directions under section 47U; and

(h) determinations under sections 47V and 47W; and

(i) determinations under section 47X(1)(b); and

(j) determinations under Schedule 4 clauses 3 and 9; and

(k) approvals and determinations under Schedule 4 clause 10(4).

[Section 29 amended: SL 2023/207 s. 23.]

30. Question may be referred to Regulator

(1) Without limiting the powers of the arbitrator under the *Commercial Arbitration Act 2012*, the arbitrator may refer a question that arises in the course of the hearing of a dispute to the Regulator and request the Regulator's opinion, advice or comments on the question.

(2) In determining the dispute the arbitrator may give such weight as the arbitrator thinks fit to any opinion, advice or comments given by the Regulator in response to such a request.

[Section 30 amended: Gazette 19 Jul 2013 p. 3270; SL 2023/207 s. 24.]

31. Determination of dispute

(1) The arbitrator is to determine the dispute by making a written determination, which is to be taken to be an award within the meaning of the *Commercial Arbitration Act 2012*.

(2) A determination cannot require or allow the doing or omission of anything that is contrary to or inconsistent with the *Rail Safety National Law (WA) Act 2015*.

(3) Nothing in this Code is to be read as providing that a determination must require the railway owner to allow the other party to use railway infrastructure.

[Section 31 amended: Gazette 19 Jul 2013 p. 3270; SL 2023/207 s. 25.]

31A. Time limit for determination

(1) The arbitrator must determine a dispute as soon as practicable, and in any event within the following period (the ***determination period***) after the day on which the arbitrator is appointed —

(a) if the dispute is a dispute referred to in section 25(2)(aa) or (b) — 20 business days;

(b) if the dispute is a dispute referred to in section 25(2)(a) or (c) and the proposal to which the dispute relates is an interim access proposal — 20 business days;

(c) otherwise — 120 business days.

(2) The arbitrator may extend the determination period for a dispute —

(a) for a period agreed in writing by the parties; or

(b) if the arbitrator directs a party to provide further information within a specified period of time — for that period.

[Section 31A inserted: SL 2023/207 s. 26.]

31B. Determinations where section 25(2)(aa) applies

(1) Where the determination is made for the purposes of a dispute referred to in section 25(2)(aa), the determination must declare that the proposal to which the dispute relates is frivolous or vexatious, or not frivolous or vexatious, as the case may require.

(2) If the determination declares that the proposal is frivolous or vexatious, the proposal is taken to be withdrawn for the purposes of section 9A(4).

[Section 31B inserted: SL 2023/207 s. 26.]

32. Determinations where section 25(2)(b) applies

Where the determination is made for the purposes of a dispute referred to in section 25(2)(b), the determination may declare that the requirements of section 8(3) have been met, or any particular requirement has been met, as the case may require.

[Section 32 amended: SL 2023/207 s. 27.]

33. Determinations where section 25(2)(a) or (c) applies

(1) This section applies where the determination is made for the purposes of a dispute referred to in section 25(2)(a) or (c).

(2) The determination —

(a) may deal with any matter relating to use by the other party of railway infrastructure, including matters that were not the basis for the party's request for arbitration; and

(b) may contain any direction to the railway owner or the other party that is necessary for the purposes of paragraph (a).

(3) Without limiting subsection (2), the determination may do one or more of the following —

(a) require the railway owner to allow the other party to use railway infrastructure;

(b) require the other party to use, and pay for, railway infrastructure;

(c) specify the terms and conditions on which the other party may use railway infrastructure;

(d) subject to subsection (4), require the railway owner to extend or expand a route or the associated railway infrastructure, or to do both.

(4) The determination must not require the railway owner to extend or expand a route or the associated railway infrastructure unless the arbitrator determines that the access seeker —

(a) has the necessary financial resources to pay any costs relating to the extension or expansion for which the access seeker is liable; and

(b) is able to secure such payment in a way that the arbitrator considers satisfactory.

(5) Despite subsection (2), if the proposal to which the dispute relates is an interim access proposal —

(a) the determination must not require the railway owner to allow the other party to use railway infrastructure unless the arbitrator is satisfied that the other party genuinely intends to enter into, as soon as practicable, a long-term access agreement —

(i) in respect of a route that is the same as, or includes, some or all of the route to which access is sought under the interim access proposal; and

(ii) for access for the purpose of carrying on rail operations that are the same as, or include, some or all of the proposed rail operations set out in the interim access proposal;

and

(b) except as required or permitted under Schedule 4 clause 12A, the terms and conditions (if any) specified in the determination under subsection (3)(c) must be materially the same as the terms and conditions on which the other party may use the railway infrastructure under the existing access agreement referred to in section 8A(3)(a) in relation to the interim access proposal; and

(c) the determination must not require the railway owner to allow the other party to use railway infrastructure for a period of more than 12 months.

(6) In subsection (5)(a) —

long-term access agreement means an access agreement that relates to a proposal that is not an interim access proposal.

[Section 33 amended: Gazette 23 Jul 2004 p. 2992; SL 2023/207 s. 28 and 55; SL 2026/148 s. 9.]

34. Determination, effect in relation to railway owner and other party

(1) The railway owner must, subject to the *Commercial Arbitration Act 2012* Part 7, give effect to a determination unless the other party to the arbitration has made an election under subsection (2).

(2) Except as provided by subsection (5), the other party to an arbitration is not required to give effect to a determination if, within 10 business days after the day on which it is notified of the determination, it elects not to do so.

(3) Such an election is to be made by notice in writing given to the arbitrator and the railway owner.

(4) Unless it makes such an election, the other party must, subject to the *Commercial Arbitration Act 2012* Part 7, give effect to a determination after —

(a) the expiration of the period of 10 business days referred to in subsection (2); or

(b) an earlier day on which it gives notice in writing to the railway owner and the arbitrator that it waives its right to make an election under subsection (2).

(5) Subsection (2) does not apply to —

(a) any provision of a determination that consists of a direction as to, or an award of, costs under section 33B(1) or (7) of the *Commercial Arbitration Act 2012*, and any such provision binds the other party in the same way as it binds the railway owner; or

(b) a determination under section 31B.

[Section 34 amended: Gazette 23 Jul 2004 p. 2992-3; 19 Jul 2013 p. 3270-1; SL 2023/207 s. 29.]

35. Termination of arbitration

An arbitrator may, without making a determination, terminate an arbitration at any time if the arbitrator thinks that any of the following grounds exist —

(a) the other party's referral under section 26(1) was vexatious;

(b) the subject-matter of the dispute is trivial, misconceived or lacking in substance;

(c) the other party has not engaged in negotiations in good faith.

36A. Transitional provision relating to the *Railways (Access) Amendment Code 2012*

(1) In this section —

commencement day means the day on which the *Commercial Arbitration Act 2012* section 44 comes into operation.

(2) This section applies to a dispute to which this Division applies if, before the commencement day —

(a) the dispute has been referred to arbitration; and

(b) the Regulator has appointed under section 26 one or more persons to act as arbitrators to hear and determine the dispute.

(3) If this section applies to a dispute —

(a) the dispute cannot be referred to arbitration, or otherwise dealt with, under the *Commercial Arbitration Act 2012*; and

(b) this Division continues to apply to and in relation to that dispute as if the amendments made by the *Railways (Access) Amendment Code 2012* sections 4 to 9 had not been made.

[Section 36A inserted: Gazette 19 Jul 2013 p. 3271.]

36B. Transitional provision relating to the *Railways (Access) Amendment Code 2023*

(1) This section applies to a dispute to which this Division applies if, before amendment day, the dispute has been referred to arbitration.

(2) If this section applies to a dispute, this Division continues to apply to and in relation to that dispute as if the amendments made by the *Railways (Access) Amendment Code 2023* sections 18 to 29 had not been made.

[Section 36B inserted: SL 2023/207 s. 30.]

Part 4 — Access agreements

Division 1 — General

36. General matters relating to access agreements

(1) An access agreement must relate to —

(a) the proposal made by the access seeker; or

(b) some modification of that proposal agreed to by the railway owner and the access seeker.

(2) An access agreement cannot be made —

(a) in respect of a route and the associated railway infrastructure unless this Code applies to that route and infrastructure; or

(b) for access other than for the purpose of carrying on rail operations; or

(c) so as to confer on an entity exclusive rights to use or occupy any route, whether temporarily or otherwise, including by way of sale, lease or assignment.

(3) Subsection (2)(a) does not prevent the making of an access agreement that involves the extension or expansion, or both, of a route or the associated infrastructure if —

(a) the proposal specifies an extension or expansion under section 8(4); or

(b) section 10(1) applies; or

(c) an extension or expansion is proposed in the course of negotiations under Part 3, as mentioned in section 8(5).

[Section 36 amended: Gazette 23 Jul 2004 p. 2993; SL 2023/207 s. 31 and 55.]

37. Access agreements may differ

An access agreement, so long as it complies with this Code, need not contain the same provisions as another access agreement.

38. Agreement not affected by later amendments to Code

An access agreement is not affected by an amendment made to this Code after the agreement is made, unless this Code, or an instrument by which this Code is amended, provides otherwise.

Division 2 — Notice and registration of access agreements and determinations

39. Registration of agreements and determinations

(1) The railway owner must give a copy of an access agreement to the Regulator as soon as is practicable after the agreement is entered into.

(2) Where a determination is made by an arbitrator, the railway owner must give a copy of the determination to the Regulator as soon as is practicable after the determination is received by it.

(3) The Regulator is to register the following received by the Regulator under this section —

(a) access agreements;

(b) determinations to which section 33 applies.

(4) Registration is effected by recording the following particulars in a register —

(a) the nature of the instrument, that is whether it is an agreement or a determination;

(b) the names of the parties involved;

(c) the part of the railways network and the associated railway infrastructure to which it relates;

(d) the day on which it was entered into or made;

(e) the period for which it will be in force.

(5) The Regulator is to make the register available for inspection by any person during office hours.

(6) A failure of the railway owner to comply with subsection (1) or (2) does not affect the validity of the agreement or determination concerned.

[Section 39 amended: SL 2023/207 s. 32.]

39A. Publication of determinations

(1) The Regulator may publish on the Regulator's website all or part of a determination received by the Regulator under section 39(2).

(2) The Regulator must not publish any part of a determination under this section unless the Regulator is satisfied that it is in the public interest to do so.

(3) Before publishing a determination or part of a determination the Regulator must —

(a) give the parties to the determination —

(i) written notice of the Regulator's intention to publish the determination or part of the determination (as the case may be); and

(ii) a copy of the determination or the part of the determination that the Regulator intends to publish;

and

(b) invite the parties to make written submissions within a period specified in the notice as to whether the determination or the part of the determination should be published.

(4) For the purpose of making a decision under subsection (2) the Regulator —

(a) may be informed in such manner as the Regulator thinks fit; but

(b) must have regard to any submission relevant to the decision made in accordance with a notice under subsection (3).

[Section 39A inserted: SL 2023/207 s. 33.]

Part 5 — Certain Regulator functions

[Heading amended: SL 2023/207 s. 34.]

Division 1 — General

[Heading amended: SL 2023/207 s. 35.]

40. Interpretation

(1) Nothing in this Part limits the function of the Regulator under Part 3 of the Act to monitor compliance by the railway owner with the provisions of this Code.

(2) For the avoidance of doubt it is declared that a Part 5 instrument relating to a part of the railways network and the associated infrastructure is binding on the person who is for the time being the railway owner in respect of that part.

(3) In subsection (2) —

Part 5 instrument means the following —

(a) the train management guidelines for the time being approved or determined by the Regulator under section 43;

(b) the statements of policy for the time being approved or determined by the Regulator under section 44;

(c) the over-payment rules for the time being approved or determined by the Regulator under section 47;

(d) the costing principles for the time being approved or determined by the Regulator under section 47H;

(e) the applicable depreciation schedule for the time being approved or determined by the Regulator under section 47K(3).

[Section 40 amended: SL 2023/207 s. 36.]

41. Matters to be considered by Regulator

(1) For the purposes of performing the Regulator's functions under section 29(1) of the Act or section 43, 44, 47, 47A, 47H, 47J, 47K, 47M, 47Q, 47S, 47T, 47U, 47V, 47W or 47X of this Code, the Regulator —

(a) may be informed in such manner as the Regulator thinks fit; but

(b) must have regard to —

(i) submissions relevant to the function made in accordance with a notice under section 41A(1) or 42(1), as the case may be; and

(ii) what the Regulator determines to be the requirements of the public interest; and

(iii) any other matter that the Regulator considers to be relevant.

(2) Subsection (1)(b)(i) does not apply in relation to the performance of the Regulator's functions under section 47M.

[Section 41 amended: SL 2023/207 s. 37.]

41A. Public comment on matters under this Part

(1) Before the Regulator performs a function set out in column 1 of an item of the Table, the Regulator must publish on the Regulator's website a notice that —

(a) sets out the matter specified in column 2 of that item that relates to the function; and

(b) includes the following information —

(i) that written submissions relating to the matters set out in the notice may be made to the Regulator by any person within a specified period;

(ii) the address (including an email address) to which the submissions may be delivered or sent.

Table

Item	Column 1 Function	Column 2 Matter to be set out in notice
1.	Approving a statement prepared by a railway owner under section 43(3), 44(2), 47(1), 47A(1), 47H(1) or 47K(1)	A copy of the statement prepared by the railway owner under section 43(3), 44(2), 47(1), 47A(1), 47H(1) or 47K(1)
2.	Approving a determination set out in a statement submitted by a railway owner under section 47J(1)(b)	A copy of the statement submitted by the railway owner under section 47J(1)(b)
3.	Approving a railway owner to amend or replace standard access provisions under section 47A(6) or costing principles under section 47H(6)	A copy of the amended or replacement standard access provisions or costing principles proposed by the railway owner
4.	Directing a railway owner to amend or replace standard access provisions under section 47A(7) or costing principles under section 47H(7)	A copy of the direction proposed to be given to the railway owner under section 47A(7) or 47H(7)
5.	Approving an application made by a railway owner under section 47Q(2)	A copy of the application made by the railway owner under section 47Q(2)

Item	Column 1 Function	Column 2 Matter to be set out in notice
6.	Approving capital expenditure or operating expenditure proposed by a railway owner in an application under section 47S(1) or 47T(1)	A copy of the application made by the railway owner under section 47S(1) or 47T(1)
7.	Making a determination under section 47V(2), (3) or (4) in relation to a regulatory asset base review statement submitted by a railway owner under section 47P	A copy of the regulatory asset base review statement submitted by the railway owner under section 47P and details of the proposed determination under section 47V(2), (3) or (4)
8.	Making a determination under section 47W(2) or (3) in relation to an operating expenditure statement submitted by the railway owner under section 47R	A copy of the operating expenditure statement submitted by the railway owner under section 47R and details of the proposed determination under section 47W(2) or (3)
9.	Reviewing costs under section 47X(1)(a) for the purposes of making a determination under section 47X(1)(b)	Details of the proposed review of costs to be carried out under section 47X(1)(a)

(2) The period specified under subsection (1)(b)(i) must be not less than the period of 20 business days after the day on which the notice is published under subsection (1).

[Section 41A inserted: SL 2023/207 s. 38.]

42. Public comment before approval given to segregation arrangements

(1) Before the Regulator approves any arrangement or variation as mentioned in section 29(1) of the Act the Regulator must —

(a) publish a notice describing the requirements of sections 28 and 29(1) of the Act, and containing a general description of the proposed arrangement or variation, on the Regulator's website; and

(b) include in the notice the following information —

(i) the places at which a detailed description of the proposed arrangement or variation may be obtained;

(ii) a statement that written submissions relating to the proposed arrangement or variation may be made to the Regulator by any person within a specified period;

(iii) the address (including an email address) to which the submissions may be delivered or sent.

(2) The period specified under subsection (1)(b)(ii) must be not less than the period of 20 business days after the day on which the notice is published under subsection (1)(a).

(3) Subsection (1) does not apply in respect of a variation mentioned in section 29(1) of the Act if the Regulator is satisfied that the variation will not effect a material change to any arrangement made under section 28 of the Act.

[Section 42 amended: SL 2023/207 s. 39.]

Division 2 — Certain approval functions

[Heading inserted: SL 2023/207 s. 40.]

43. Railway owner to comply with approved train management guidelines

(1) Subsection (2) applies to the railway owner in relation to a part of the railways network and associated infrastructure to which this Code applies when that owner is performing its functions in relation to that part.

(2) The railway owner is to comply with the train management guidelines for the time being approved or determined by the Regulator under this section.

(3) As soon as is practicable after the commencement of this Code the railway owner is to prepare and submit to the Regulator a statement of the principles, rules and practices (***the train management guidelines***) that are to be applied and followed by the railway owner —

(a) in the performance of the functions referred to in subsection (1); but

(b) only so far as that performance relates to requirements imposed on the railway owner by or under the Act or this Code.

(4) The Regulator may —

(a) approve the statement submitted by the railway owner either with or without amendments; or

(b) if the Regulator is not willing to do so, determine what are to constitute the train management guidelines.

(4A) If the Regulator approves the statement submitted by the railway owner, the Regulator must publish the statement (including any amendments made under subsection (4)(a)) and notice of the approval on the Regulator's website.

(5) The train management guidelines may be amended or replaced by the railway owner with the approval of the Regulator.

(6) The Regulator may, by written notice, direct the railway owner —

(a) to amend the train management guidelines; or

(b) to replace them with other train management guidelines determined by the Regulator,

and the railway owner must comply with such a notice.

[Section 43 amended: SL 2023/207 s. 41.]

44. Certain approved statements of policy to be observed

(1) A statement of policy for the time being approved or determined by the Regulator under this section in respect of the railway owner must be observed by the railway owner and an access seeker in the negotiation and making of an access agreement.

(2) As soon as is practicable after the commencement of this Code each railway owner is to prepare and submit to the Regulator a statement of the policy that it will apply (***a statement of policy***) in —

(a) the allocation of train paths; and

(b) the provision of access to train paths that have ceased to be used.

(3) The Regulator may —

(a) approve a statement of policy submitted by the railway owner either with or without amendments; or

(b) if the Regulator is not willing to do so, determine what is to constitute the statement of policy.

(3A) If the Regulator approves a statement of policy submitted by the railway owner, the Regulator must publish the statement (including any amendments made under subsection (3)(a)) and notice of the approval on the Regulator's website.

(4) A statement of policy may be amended or replaced by the railway owner with the approval of the Regulator.

(5) The Regulator may, by written notice, direct the railway owner —

(a) to amend a statement of policy; or

(b) to replace a statement of policy with another statement of policy determined by the Regulator,

and the railway owner must comply with such a notice.

[Section 44 amended: SL 2023/207 s. 42.]

*[**45**, **46.** Deleted: SL 2023/207 s. 43.]*

47. Over-payment rules

(1) As soon as is practicable after amendment day each railway owner is to prepare and submit to the Regulator a statement of the rules (***the over-payment rules***) that are to apply where breaches of Schedule 4 clause 8 occur on the part of that owner that could not reasonably be avoided.

(2) The rules referred to in subsection (1) must give effect to the following basic requirements —

(a) the excess referred to in Schedule 4 clause 8(4) (the ***clause 8(4) excess***) in respect of an access holder or group of access holders must at all times be within a limit, being a percentage of the relevant costs, from time to time notified in writing to the railway owner by the Regulator;

(b) at the expiry of each successive period of 3 years from the commencement of access by an access holder or group of access holders there must be no such excess in respect of that access holder or group of access holders;

(c) if a clause 8(4) excess in respect of an access holder or group of access holders arises as a result of a determination by the Regulator under section 47X(1)(b),

there must be no clause 8(4) excess in respect of that access holder or group of access holders after the period of 60 business days beginning on the day on which the Regulator makes the determination.

(2a) The over-payment rules may make provision for a scheme under which amounts are to be determined that the railway owner is to pay to any relevant access holder for the purpose of giving effect to subsection (2)(b) or (c).

(3) The Regulator may —

(a) approve the statement submitted by the railway owner either with or without amendments; or

(b) if the Regulator is not willing to do so, determine what are to constitute the over-payment rules.

(3A) If the Regulator approves the statement submitted by the railway owner, the Regulator must publish the statement (including any amendments made under subsection (3)(a)) and notice of the approval on the Regulator's website.

(4) The over-payment rules may be amended or replaced by the railway owner with the approval of the Regulator.

(5) The Regulator may, by written notice, direct the railway owner —

(a) to amend the over-payment rules; or

(b) to replace them with other over-payment rules determined by the Regulator,

and the railway owner must comply with such a notice.

(6) The Regulator may in writing direct the railway owner to pay to an access holder any amount determined under a scheme referred to in subsection (2a).

(7) The railway owner must comply with —

(a) the provisions of the over-payment rules; and

(b) a direction given to the owner by the Regulator under subsection (6).

[Section 47 amended: Gazette 23 Jul 2004 p. 2993; SL 2023/207 s. 44.]

47A. Standard access provisions

(1) As soon as practicable after amendment day, each railway owner must prepare and submit to the Regulator a statement of the standard terms and conditions (***standard access provisions***) that the railway owner would want to be included in an access agreement entered into by the railway owner.

(2) The terms and conditions in a statement submitted by the railway owner under subsection (1) must —

(a) be reasonable; and

(b) be sufficiently detailed and complete to form the basis of a commercially workable access agreement; and

(c) not seek to restrict an access holder from disclosing the terms and conditions of an access agreement or proposed access agreement to —

(i) the Regulator; or

(ii) an arbitrator in relation to an arbitration under Part 3 Division 3.

(3) The railway owner may prepare and submit more than 1 statement under subsection (1).

(4) The Regulator may, in respect of each statement submitted by the railway owner —

(a) approve the statement either with or without amendments; or

(b) if the Regulator is not willing to do so, determine what is to constitute the standard access provisions.

(5) The Regulator must —

(a) if the Regulator approves a statement under subsection (4)(a) — publish the statement (including any amendments made under subsection (4)(a)) and notice of the approval on the Regulator's website; or

(b) if the Regulator determines what is to constitute the standard access provisions under subsection (4)(b) — give the railway owner written reasons why the Regulator is not willing to approve the statement submitted by the railway owner.

(6) Standard access provisions may be amended or replaced by the railway owner with the approval of the Regulator.

(7) The Regulator may, by written notice, direct the railway owner to —

(a) amend standard access provisions; or

(b) replace standard access provisions with other standard access provisions determined by the Regulator.

(8) The railway owner must comply with a direction under subsection (7).

(9) The Regulator must publish notice of the following on the Regulator's website —

(a) an approval given under subsection (6);

(b) a direction given under subsection (7).

[Section 47A inserted: SL 2023/207 s. 45.]

Division 3 — Regulatory asset base functions

[Heading inserted: SL 2023/207 s. 46.]

Subdivision 1 — General

[Heading inserted: SL 2023/207 s. 46.]

47B. Terms used

In this Division —

applicable part of the railways network has the meaning given in section 47C(a);

contributed capital means railway infrastructure that has been funded wholly or in part by an entity other than the railway owner or an associate of the railway owner, including by the entity doing any of the following —

(a) providing cash or in-kind contributions to the railway owner or an associate of the railway owner;

(b) undertaking work, or paying for work to be undertaken, for the railway owner or an associate of the railway owner;

(c) making payments to the railway owner or an associate of the railway owner that —

(i) fund the recovery of capital in relation to the railway infrastructure; and

(ii) are not payments of prices and charges for access;

double counting of assets has the meaning given in section 47F(2);

existing railway owner means a person who —

(a) is a railway owner; and

(b) was a railway owner immediately before amendment day;

first included in a regulatory asset base has the meaning given in section 47F(3);

relevant existing railway owner has the meaning given in section 47D.

[Section 47B inserted: SL 2023/207 s. 46.]

47C. Applicable part of the railways network and applicable railway infrastructure

If a railway owner is for the time being the railway owner in relation to a part of the railways network to which this Code applies —

(a) that part is an ***applicable part of the railways network*** in relation to the railway owner; and

(b) railway infrastructure associated with that part is ***applicable railway infrastructure*** in relation to the railway owner.

[Section 47C inserted: SL 2023/207 s. 46.]

47D. Relevant existing railway owners

An existing railway owner is a ***relevant existing railway owner*** if, during the period of 2 years immediately before amendment day —

(a) no entity other than the following carried on rail operations on an applicable part of the railways network —

(i) the existing railway owner;

(ii) an associate of the existing railway owner;

(iii) a contractor engaged by the existing railway owner or an associate of the existing railway owner to carry on railway operations for the benefit of the existing railway owner or an associate of the existing railway owner;

and

(b) no entity other than an entity referred to in paragraph (a)(ii) or (iii) was in negotiations, whether under this Code or otherwise, with the existing railway owner for access to applicable railway infrastructure by the entity; and

(c) the existing railway owner did not receive, or take a step under this Code in relation to, a proposal.

[Section 47D inserted: SL 2023/207 s. 46.]

47E. Notices to relevant existing railway owners

(1) For the purposes of section 47I(b) and 47L(2)(b), the Regulator must give a relevant existing railway owner written notice under this subsection if on or after amendment day —

(a) the Regulator is satisfied that —

(i) an entity other than an entity referred to in section 47D(a)(i) to (iii) is carrying on rail operations on an applicable part of the railways network; or

(ii) an entity other than an entity referred to in section 47D(a)(i) to (iii) is in negotiations with the relevant existing railway owner for access to applicable railway infrastructure by the entity, either under this Code or otherwise; or

(iii) an entity has made a proposal to the relevant existing railway owner;

or

(b) both of the following apply —

(i) an entity has notified the Regulator in writing that the entity is likely to seek access to applicable railway infrastructure, either under this Code or otherwise;

(ii) the Regulator is satisfied that, before notifying the Regulator under subparagraph (i), the entity

has made a genuine attempt to engage with the relevant existing railway owner regarding the access.

(2) A notice under subsection (1) must —

(a) specify the date on which the notice is given; and

(b) set out the reasons why the notice is given; and

(c) state the effect of sections 47I(b) and 47L(2)(b).

[Section 47E inserted: SL 2023/207 s. 46.]

47F. Double counting of assets prohibited

(1) A railway owner must not, when valuing railway infrastructure under or for the purposes of this Code, engage in double counting of assets.

(2) A railway owner engages in ***double counting of assets*** if the sum of the return of capital that is attributable to an asset over its economic life, via depreciation or otherwise, exceeds the value of the asset at the time at which it is first included in a regulatory asset base.

(3) The value of an asset is ***first included in a regulatory asset base*** when the first of the following occurs —

(a) the Regulator approves or determines under section 47J(3) the depreciated optimised replacement cost of the railway infrastructure that includes the asset;

(b) the railway owner determines under section 47N(1) the updated regulatory asset base of railway infrastructure that includes the asset.

[Section 47F inserted: SL 2023/207 s. 46.]

47G. Contributed capital prohibited

A railway owner must not, when valuing railway infrastructure under or for the purposes of this Code, include the following —

(a) if particular contributed capital is funded wholly by an entity other than the railway owner or an associate of the railway owner — the value of that contributed capital;

(b) if particular contributed capital is funded in part by an entity other than the railway owner or an associate of the railway owner — the value of the portion of the contributed capital that is not funded by the railway owner or an associate of the railway owner.

[Section 47G inserted: SL 2023/207 s. 46.]

Subdivision 2 — Matters to be approved or determined by Regulator

[Heading inserted: SL 2023/207 s. 46.]

47H. Costing principles

(1) Each railway owner must, within the period that applies under section 47I, prepare and submit to the Regulator a statement of the principles, rules and practices (the ***costing principles***) that are to be applied and followed by the railway owner —

(a) when determining the depreciated optimised replacement cost of applicable railway infrastructure under section 47J(1)(a); and

(b) when determining the updated regulatory asset base of applicable railway infrastructure under section 47N(1); and

(c) when determining the costs referred to in Schedule 4 clauses 7 and 8; and

(d) in the keeping and presentation of the railway owner's accounts and financial records so far as they relate to the determination of those costs.

(2) The statement must —

(a) specify the route sections into which each applicable part of the railways network is divided; and

(b) describe the intended method for calculating —

(i) accumulated depreciation for the purpose of determining the depreciated optimised replacement cost of applicable railway infrastructure under section 47J(1)(a); and

(ii) depreciation for the purposes of determining the updated regulatory asset base of applicable railway infrastructure under section 47N(1) and determining the costs referred to in Schedule 4 clauses 7 and 8;

and

(c) specify if assets will be grouped for the purposes of determining the matters referred to in subsection (1)(a) to (c) and, if so, how assets will be grouped; and

(d) prohibit any double counting of assets by providing that the sum of the return of capital that is attributable to an asset over its economic life, via depreciation or otherwise, must not exceed the value of the asset at the time at which it is first included in a regulatory asset base; and

(e) prohibit the inclusion of the following in relation to contributed capital —

(i) if the contributed capital is funded wholly by an entity other than the railway owner or an associate of the railway owner — the value of the contributed capital;

(ii) if the contributed capital is funded in part by an entity other than the railway owner or an associate of the railway owner — the value of the portion of the contributed capital that is not

funded by the railway owner or an associate of the railway owner.

(3) The Regulator must, within 40 business days after the day on which the Regulator receives the statement submitted by the railway owner —

(a) approve the statement submitted by the railway owner either with or without amendments; or

(b) if the Regulator is not willing to do so, determine what are to constitute the costing principles.

(4) If the statement specifies that assets will be grouped for the purpose of determining the depreciated optimised replacement cost of applicable railway infrastructure, the Regulator must not approve the statement under subsection (3)(a) unless the Regulator is satisfied that —

(a) assets will only be grouped with other assets that are —

(i) in the same route section; and

(ii) the same, or a similar, category of railway infrastructure; and

(iii) of a similar age and condition;

and

(b) assets will not be grouped in a way that will result in access holders paying for assets they do not use; and

(c) assets will not be grouped in a way that will interfere with the Regulator's ability to monitor compliance by the railway owner with the provisions of this Code.

(5) The Regulator must —

(a) if the Regulator approves the statement under subsection (3)(a) — publish the statement (including any amendments made under subsection (3)(a)) and notice of the approval on the Regulator's website; or

(b) if the Regulator determines what is to constitute the costing principles under subsection (3)(b) — give the

railway owner written reasons why the Regulator is not willing to approve the statement submitted by the railway owner.

(6) The costing principles may be amended or replaced by the railway owner with the approval of the Regulator.

(7) The Regulator may, by written notice, direct the railway owner to —

(a) amend the costing principles; or

(b) replace the costing principles with other costing principles determined by the Regulator.

(8) The railway owner must comply with a direction under subsection (7).

(9) The Regulator must publish the following on the Regulator's website —

(a) notice of an approval given under subsection (6);

(b) a copy of a direction given under subsection (7).

(10) The costing principles must be consistent with the requirements of the *Corporations Act 2001* (Commonwealth) relating to financial administration, and are of no effect to the extent of any inconsistency.

[Section 47H inserted: SL 2023/207 s. 46.]

47I. Period that applies for s. 47H(1)

For the purposes of section 47H(1), the period is —

(a) in the case of an existing railway owner (other than a relevant existing railway owner) — 60 business days after amendment day; or

(b) in the case of a relevant existing railway owner — 60 business days after the day on which the Regulator gives the relevant existing railway owner a notice under section 47E(1); or

(c) in any other case — 60 business days after the day on which the railway owner becomes a railway owner.

[Section 47I inserted: SL 2023/207 s. 46.]

47J. Initial regulatory asset base

(1) Each railway owner must, within the period that applies under section 47L —

(a) determine, for each route section of an applicable part of the railways network, the depreciated optimised replacement cost of applicable railway infrastructure associated with the route section; and

(b) submit to the Regulator a statement setting out —

(i) each of the railway owner's determinations made under paragraph (a); and

(ii) supporting material demonstrating the basis of each determination.

(2) A determination by the railway owner under subsection (1)(a) must be made in accordance with the costing principles for the time being approved or determined by the Regulator under section 47H.

(3) The Regulator must, within 120 business days after the day on which the Regulator receives a statement submitted by the railway owner under subsection (1), for each route section —

(a) approve the railway owner's determination made under subsection (1)(a); or

(b) if the Regulator is not willing to do so, determine the depreciated optimised replacement cost of applicable railway infrastructure associated with the route section.

(4) The Regulator may extend the period referred to in subsection (3), either before or after the period has ended, by written notice to the railway owner in accordance with section 52.

(5) The Regulator must not give an approval or make a determination under subsection (3) in relation to applicable railway infrastructure unless the Regulator has approved or determined the applicable depreciation schedule under section 47K(3) in relation to that railway infrastructure.

(6) The Regulator must, for each route section —

(a) if the Regulator approves the railway owner's determination under subsection (3)(a) — publish the determination and notice of the approval on the Regulator's website; or

(b) if the Regulator determines the depreciated optimised replacement cost of applicable railway infrastructure associated with the route section under subsection (3)(b) — give the railway owner written reasons why the Regulator is not willing to approve the railway owner's determination made under subsection (1)(a).

(7) The depreciated optimised replacement cost of applicable railway infrastructure associated with a route section approved or determined by the Regulator under subsection (3) (including as amended in accordance with a direction given under section 47M(2)) is the ***initial regulatory asset base*** of that route section.

[Section 47J inserted: SL 2023/207 s. 46.]

47K. Applicable depreciation schedule

(1) Each railway owner must prepare and submit to the Regulator a statement of the depreciation schedule (the ***applicable depreciation schedule***) to be applied by the railway owner when determining —

(a) the updated regulatory asset base of applicable railway infrastructure under section 47N(1); and

(b) the costs referred to in Schedule 4 clauses 7 and 8.

(2) The railway owner must submit the statement to the Regulator on the same day that the railway owner submits the statement containing the railway owner's determination of the depreciated optimised replacement cost of the relevant applicable railway infrastructure to the Regulator under section 47J(1).

(3) The Regulator must, within 120 business days after the day on which the Regulator receives the statement submitted by the railway owner under subsection (1) —

(a) approve the statement submitted by the railway owner either with or without amendments; or

(b) if the Regulator is not willing to do so, determine what is to constitute the applicable depreciation schedule.

(4) The Regulator may extend the period referred to in subsection (3), either before or after the period has ended, by written notice to the railway owner in accordance with section 52.

(5) The Regulator must not approve the statement submitted by the railway owner unless the Regulator is satisfied that the statement —

(a) sets out an annual depreciation profile for each asset or group of assets that is applicable railway infrastructure; and

(b) provides for each asset or group of assets to be depreciated over its economic life (whether the depreciation is distributed uniformly or otherwise); and

(c) provides for each asset to be depreciated only once, that is, so that the sum of the return of capital that is attributable to an asset over its economic life, via depreciation or otherwise, does not exceed the value of the asset at the time at which it is first included in a regulatory asset base; and

(d) is designed so that access prices will vary over time in a way that promotes efficient growth in the market for rail access; and

(e) allows, as far as reasonably practicable, for adjustments that reflect changes in the expected economic life of a particular asset or group of assets; and

(f) allows for the legitimate business interests of the railway owner, access seekers and access holders.

Note for this subsection:

Section 60 provides for certain transitional arrangements that apply despite paragraphs (d) and (f) of this subsection.

(6) If the statement submitted by the railway owner provides for depreciation of an asset or group of assets not to be distributed uniformly across each year of the economic life of the asset or group of assets, the Regulator must have regard to the following when performing its functions under subsection (3) —

(a) if the statement provides for depreciation of the asset or group of assets to be accelerated — whether it is appropriate for depreciation of the asset or group of assets to be accelerated in the manner provided in the statement to avoid asset stranding;

(b) if the statement provides for depreciation of the asset or group of assets to be deferred — whether it is appropriate for depreciation of the asset or group of assets to be deferred in the manner provided in the statement on the basis that the market for access to the asset or group of assets is relatively immature.

Note for this subsection:

Section 60 provides for certain transitional arrangements that apply despite this subsection.

(7) The Regulator must —

(a) if the Regulator approves the statement under subsection (3)(a) — publish the statement (including any amendments made under subsection (3)(a)) and notice of the approval on the Regulator's website; or

(b) if the Regulator determines what is to constitute the applicable depreciation schedule under subsection (3)(b) — give the railway owner written reasons why the Regulator is not willing to approve the statement submitted by the railway owner.

(8) For the purposes of this Code, a reference to the applicable depreciation schedule for the time being approved or determined by the Regulator under subsection (3) is a reference to that applicable depreciation schedule —

(a) as amended in accordance with any direction under section 47M(2); and

(b) as amended or replaced under section 47Q.

[Section 47K inserted: SL 2023/207 s. 46.]

47L. Period that applies for s. 47J(1)

(1) For the purposes of section 47J(1), the period that applies is —

(a) if the applicable part of the railways network referred to in section 47J(1)(a) is part of the railways network on amendment day — the period that applies under subsection (2); or

(b) if the applicable part of the railways network referred to in section 47J(1)(a) becomes part of the railways network after amendment day — the period that applies under subsection (3).

(2) For the purposes of subsection (1)(a), the period is the following period after the day on which the Regulator approves or

determines costing principles under section 47H(3) in relation to the railway owner —

(a) in the case of an existing railway owner (other than a relevant existing railway owner) —

(i) if on amendment day the railway owner has the management and control of the use of 600 km or less of railway track to which this Code applies — 6 months; or

(ii) if on amendment day the railway owner has the management and control of the use of more than 600 km but less than 2 000 km of railway track to which this Code applies — 9 months; or

(iii) if on amendment day the railway owner has the management and control of the use of 2 000 km or more of railway track to which this Code applies — 12 months;

(b) in the case of a relevant existing railway owner to whom the Regulator gives a notice under section 47E(1) —

(i) if on the day (***notification day***) on which the Regulator gives the notice under section 47E(1) the railway owner has the management and control of the use of 600 km or less of railway track to which this Code applies — 6 months; or

(ii) if on notification day the railway owner has the management and control of the use of more than 600 km but less than 2 000 km of railway track to which this Code applies — 9 months; or

(iii) if on notification day the railway owner has the management and control of the use of 2 000 km or more of railway track to which this Code applies — 12 months.

(3) For the purposes of subsection (1)(b), the period is the following —

(a) in the case where the railway owner was, immediately before the day (***application day***) on which the applicable part of the railways network referred to in section 47J(1)(a) becomes part of the railways network, the railway owner in relation to another part of the railways network to which this Code applies —

(i) if on application day the railway owner has the management and control of the use of 600 km or less of railway track to which this Code applies — the period of 6 months after application day; or

(ii) if on application day the railway owner has the management and control of the use of more than 600 km but less than 2 000 km of railway track to which this Code applies — the period of 9 months after application day; or

(iii) if on application day the railway owner has the management and control of the use of 2 000 km or more of railway track to which this Code applies — the period of 12 months after application day;

(b) in the case where paragraph (a) does not apply —

(i) if on application day the railway owner has the management and control of the use of 600 km or less of railway track to which this Code applies — the period of 6 months after the day on which the Regulator approves or determines costing principles under section 47H(3) in relation to the railway owner; or

(ii) if on application day the railway owner has the management and control of the use of more than 600 km but less than 2 000 km of railway track to which this Code applies — the period of

9 months after the day on which the Regulator approves or determines costing principles under section 47H(3) in relation to the railway owner; or

(iii) if on application day the railway owner has the management and control of the use of 2 000 km or more of railway track to which this Code applies — the period of 12 months after the day on which the Regulator approves or determines costing principles under section 47H(3) in relation to the railway owner.

[Section 47L inserted: SL 2023/207 s. 46.]

47M. Regulator may direct correction of material error or deficiency

(1) In this section —

error or deficiency means —

(a) a clerical mistake or an accidental slip or omission; or

(b) a miscalculation or misdescription; or

(c) an error or deficiency resulting from the provision of false or misleading information to the Regulator.

(2) The Regulator may, by written notice, direct a railway owner to amend any of the following matters that relate to the railway owner if the Regulator considers that the amendment is required to correct a material error or deficiency —

(a) the depreciated optimised replacement cost of applicable railway infrastructure associated with a route section approved or determined by the Regulator under section 47J(3);

(b) the applicable depreciation schedule for the time being approved or determined by the Regulator under section 47K(3);

(c) the updated regulatory asset base of a route section determined by the railway owner under section 47N(1).

(3) A direction under subsection (2) may direct the railway owner to amend the matter generally, or in relation to particular railway infrastructure specified in the direction.

(4) The railway owner must comply with a direction given under subsection (2).

(5) The Regulator must publish a copy of a direction given under subsection (2) on the Regulator's website.

(6) The Regulator's power to give a direction under subsection (2) is in addition to, and does not limit, the Regulator's power to give a direction under section 47U(2)(b).

[Section 47M inserted: SL 2023/207 s. 46.]

Subdivision 3 — Updated regulatory asset base

[Heading inserted: SL 2023/207 s. 46.]

47N. Railway owner to update regulatory asset base

(1) A railway owner must, within 60 business days after 30 June of each year, determine the updated regulatory asset base of applicable railway infrastructure associated with each applicable route section.

(2) For the purposes of subsection (1), a route section is an ***applicable route section*** if the Regulator has approved or determined the depreciated optimised replacement cost of railway infrastructure associated with the route section under section 47J(3).

(3) A determination under subsection (1) must be made by —

(a) taking the current regulatory asset base of the route section; and

(b) adding asset indexation over the relevant period of applicable railway infrastructure associated with the route section; and

(c) adding the value of capital expenditure incurred by the railway owner during the relevant period in relation to applicable railway infrastructure associated with the route section; and

(d) deducting depreciation over the relevant period of applicable railway infrastructure associated with the route section, in accordance with the applicable depreciation schedule for the time being approved or determined by the Regulator under section 47K(3); and

(e) deducting the value of railway infrastructure that —

(i) was disposed of by the railway owner or became redundant or stranded during the relevant period; and

(ii) was applicable railway infrastructure associated with the route section immediately prior to being disposed of or becoming redundant or stranded.

Notes for this subsection:

For the purposes of paragraph (c):

(a) Under section 47P, the railway owner must submit updated regulatory asset base determinations made under section 47N(1) to the Regulator for review.

(b) The Regulator must assess each updated regulatory asset base determination and determine in accordance with section 47V whether capital expenditure added under paragraph (c) for the purposes of making the updated regulatory asset base determination is efficient or inefficient.

(c) If the Regulator determines under section 47V(4) that the capital expenditure is inefficient, the Regulator may direct the railway owner under section 47U(2)(b) to amend the updated regulatory asset base determination.

(4) For the purposes of subsection (3), the ***relevant period*** in relation to a route section is —

(a) if the updated regulatory asset base of applicable railway infrastructure associated with the route section has never been determined under section 47N(1) — the period beginning on the day on which a statement setting out a determination under section 47J(1)(a) for the route section was submitted to the Regulator and ending on 30 June of the last completed financial year; or

(b) otherwise — the last completed financial year.

(5) In subsection (3)(c) and (e), a reference to the railway owner includes a reference to any person who, during the relevant period, was the railway owner in respect of the applicable railway infrastructure mentioned in subsection (3)(c) or (e).

(6) A determination under subsection (1) must be made in accordance with the costing principles for the time being approved or determined by the Regulator under section 47H.

[Section 47N inserted: SL 2023/207 s. 46.]

Division 4 — Regulator review

[Heading inserted: SL 2023/207 s. 46.]

47O. Terms used

In this Division —

necessary capital expenditure means capital expenditure that, at the time it was incurred, was necessary to —

(a) maintain or improve the safety of rail operations; or

(b) maintain the integrity of rail operations; or

(c) comply with a regulatory obligation or requirement; or

(d) maintain capacity to meet the existing level of demand for access;

proposed capital expenditure has the meaning given in section 47S(1);

proposed operating expenditure has the meaning given in section 47T(1);

relevant determination has the meaning given in section 47U(1)(a);

review period means the following —

(a) the period beginning on amendment day and ending on the last day of the 6th full review year after amendment day;

(b) each period of 5 years after that period;

review year means a period of 12 months beginning on 1 October.

[Section 47O inserted: SL 2023/207 s. 46.]

47P. Railway owner to submit updated regulatory asset base

A railway owner must, within 5 business days after the end of each review period, prepare and submit to the Regulator a statement (a ***regulatory asset base review statement***) setting out, for each applicable route section —

(a) each updated regulatory asset base of applicable railway infrastructure associated with the route section determined under section 47N(1) (whether by the railway owner or another person) during the review period; and

(b) supporting material demonstrating the basis of each determination.

[Section 47P inserted: SL 2023/207 s. 46.]

47Q. Railway owner to submit applicable depreciation schedule

(1) The railway owner must, on the day on which it submits a regulatory asset base review statement to the Regulator under section 47P, submit to the Regulator the applicable depreciation

schedule for the time being approved or determined by the Regulator under section 47K(3).

(2) The railway owner may, on the day on which it submits the applicable depreciation schedule to the Regulator under subsection (1), apply to the Regulator for approval to amend or replace the applicable depreciation schedule.

(3) The Regulator must not approve an application under subsection (2) unless —

(a) the Regulator is satisfied that the applicable depreciation schedule, as amended or replaced in accordance with the application, will meet the requirements of section 47K(5)(a) to (f); and

(b) if the application proposes that depreciation of an asset or group of assets be accelerated — the Regulator has had regard to whether it is appropriate for depreciation of the asset or group of assets to be accelerated in the manner proposed in the application to avoid asset stranding; and

(c) if the application proposes that depreciation of an asset or group of assets be deferred — the Regulator has had regard to whether it is appropriate for depreciation of the asset or group of assets to be deferred in the manner proposed in the application on the basis that the market for access to the asset or group of assets is relatively immature.

(4) If the Regulator approves an application under subsection (2), the Regulator must publish notice of the approval on the Regulator's website.

[Section 47Q inserted: SL 2023/207 s. 46.]

47R. Railway owner to submit operating expenditure

A railway owner must, on the day on which it submits a regulatory asset base review statement to the Regulator under

section 47P, submit to the Regulator a statement (an ***operating expenditure statement***) setting out, for each applicable route section, the operating expenditure incurred in relation to applicable railway infrastructure associated with the route section during the review period to which the regulatory asset base review statement relates.

[Section 47R inserted: SL 2023/207 s. 46.]

47S. Regulator may approve proposed capital expenditure

(1) A railway owner may apply to the Regulator to approve capital expenditure (the ***proposed capital expenditure***) proposed by the railway owner in relation to applicable railway infrastructure.

(2) On an application under subsection (1), the Regulator must —

(a) if the Regulator is satisfied that the proposed capital expenditure, if incurred as proposed, would meet the requirements of section 47V(3)(a) and (b) — approve the proposed capital expenditure; or

(b) otherwise — refuse the application.

(3) The Regulator must give the railway owner written notice of the Regulator's decision under subsection (2).

(4) If the proposed capital expenditure is approved by the Regulator under subsection (2)(a), and incurred as proposed, the incurred capital expenditure is approved capital expenditure for the purposes of section 47V(2).

(5) If the Regulator approves the proposed capital expenditure, the Regulator must publish notice of the approval on the Regulator's website.

[Section 47S inserted: SL 2023/207 s. 46.]

47T. Regulator may approve proposed operating expenditure

(1) A railway owner may apply to the Regulator to approve operating expenditure (the ***proposed operating expenditure***)

proposed by the railway owner in relation to applicable railway infrastructure.

(2) On an application under subsection (1), the Regulator must —

(a) if the Regulator is satisfied that the proposed operating expenditure, if incurred as proposed, would meet the requirements of section 47W(2)(b) — approve the proposed operating expenditure; or

(b) otherwise — refuse the application.

(3) The Regulator must give the railway owner written notice of the Regulator's decision under subsection (2).

(4) If the proposed operating expenditure is approved by the Regulator under subsection (2)(a), and incurred as proposed, the incurred operating expenditure is approved operating expenditure for the purposes of section 47W(2)(a).

(5) If the Regulator approves the proposed operating expenditure, the Regulator must publish notice of the approval on the Regulator's website.

[Section 47T inserted: SL 2023/207 s. 46.]

47U. Regulator to review updated regulatory asset base

(1) On receipt of a regulatory asset base review statement submitted under section 47P by a railway owner the Regulator must —

(a) assess whether each updated regulatory asset base determination under section 47N(1) set out in the regulatory asset base review statement (a ***relevant determination***) has been made in accordance with —

(i) section 47N(3); and

(ii) the costing principles for the time being approved or determined by the Regulator under section 47H;

and

(b) comply with section 47V in relation to each relevant determination.

(2) After complying with subsection (1) the Regulator must, for each relevant determination set out in the regulatory asset base review statement —

(a) approve the relevant determination; or

(b) if the Regulator is not willing to do so, direct the railway owner in writing to amend the relevant determination.

(3) A direction under subsection (2)(b) must specify the applicable railway infrastructure affected by the amendment to the relevant determination.

(4) A direction under subsection (2)(b) must not require the railway owner to amend a relevant determination to exclude the value of particular capital expenditure unless —

(a) the Regulator has determined under section 47V(4) that the capital expenditure is inefficient; and

(b) the capital expenditure and the relevant determination are specified in a notice under section 47V(5)(a).

(5) The railway owner must comply with a direction under subsection (2)(b).

(6) The Regulator must —

(a) if the Regulator approves a relevant determination under subsection (2)(a) — publish notice of the approval on the Regulator's website; or

(b) if the Regulator directs the railway owner under subsection (2)(b) to amend a relevant determination — give the railway owner written reasons why the Regulator is not willing to approve the determination.

[Section 47U inserted: SL 2023/207 s. 46.]

47V. Regulator to assess efficiency of capital expenditure

(1) Before the Regulator approves a relevant determination under section 47U(2)(a), or gives a direction in relation to a relevant determination under section 47U(2)(b), the Regulator must determine in accordance with this section whether the capital expenditure the value of which was added under section 47N(3)(c) for the purposes of making the relevant determination is efficient or inefficient.

(2) The Regulator must determine that capital expenditure referred to in subsection (1) is efficient if the capital expenditure is approved capital expenditure under section 47S(4).

(3) The Regulator must determine that capital expenditure referred to in subsection (1) is efficient if the Regulator is satisfied that the capital expenditure —

(a) would have been incurred by a prudent railway owner acting efficiently in accordance with good industry practice to achieve the lowest sustainable cost of providing access; and

(b) either —

(i) has an overall positive economic value, having regard only to the economic value that has accrued and is likely to accrue to the railway owner and access holders; or

(ii) is necessary capital expenditure.

(4) If capital expenditure referred to in subsection (1) does not meet the requirements of subsection (2) or (3) the Regulator must determine that the capital expenditure is inefficient.

(5) If the Regulator makes a determination under subsection (2), (3) or (4) the Regulator must —

(a) give the railway owner written notice of the determination; and

(b) in the case of a determination under subsection (2) or (3) — publish notice of the determination on the Regulator's website; and

(c) in the case of a determination under subsection (4) — give the railway owner written reasons why the capital expenditure that the Regulator has determined under subsection (4) to be inefficient does not meet the requirements of subsection (2) or (3).

(6) A notice under subsection (5)(a) of a determination under subsection (4) must specify —

(a) the capital expenditure that the Regulator has determined under subsection (4) to be inefficient; and

(b) each relevant determination set out in the regulatory asset base review statement to which the Regulator's determination under subsection (4) relates.

[Section 47V inserted: SL 2023/207 s. 46.]

47W. Regulator to assess efficiency of operating expenditure

(1) On receipt of an operating expenditure statement submitted under section 47R by a railway owner, the Regulator must determine in accordance with this section whether the operating expenditure set out in the operating expenditure statement is efficient or inefficient.

(2) The Regulator must determine that operating expenditure referred to in subsection (1) is efficient if —

(a) the operating expenditure is approved operating expenditure under section 47T(4); or

(b) the Regulator is satisfied that the operating expenditure would have been incurred by a prudent railway owner acting efficiently in accordance with good industry practice to achieve the lowest sustainable cost of providing access.

(3) If operating expenditure referred to in subsection (1) does not meet the requirements of subsection (2)(a) or (b) the Regulator must determine that the operating expenditure is inefficient.

(4) If the Regulator makes a determination under subsection (2) or (3) the Regulator must —

(a) give the railway owner written notice of the determination; and

(b) in the case of a determination under subsection (2) — publish notice of the determination on the Regulator's website; and

(c) in the case of a determination under subsection (3) — give the railway owner written reasons why the operating expenditure that the Regulator has determined under subsection (3) to be inefficient does not meet the requirements of subsection (2)(a) or (b).

(5) A notice under subsection (4)(a) of a determination under subsection (3) must specify —

(a) the operating expenditure that the Regulator has determined under subsection (3) to be inefficient; and

(b) the applicable railway infrastructure to which the operating expenditure relates.

[Section 47W inserted: SL 2023/207 s. 46.]

47X. Redetermination of costs following Regulator review

(1) If the Regulator gives a railway owner a direction under section 47U(2)(b), a notice under section 47V(5)(a) of a determination under section 47V(4), or a notice under section 47W(4)(a) of a determination under section 47W(3), the Regulator must —

(a) carry out a review of the costs approved or determined by the Regulator under Schedule 4 clause 9 or 10 in respect of any proposal (an ***affected proposal***) made to the railway owner on or after amendment day for access

to the applicable railway infrastructure specified in the direction or the notice; and

(b) make a fresh determination of those costs.

(2) The Regulator must —

(a) give the railway owner written notice of a fresh determination of costs under subsection (1)(b) and specify in the notice the day on which the determination was made; and

(b) publish notice of the determination on the Regulator's website.

(3) The costs determined under subsection (1)(b) in respect of an affected proposal are the costs that apply under Schedule 4 clauses 7 and 8 for the purposes of —

(a) the affected proposal; and

(b) any access agreement that relates to —

(i) the affected proposal; or

(ii) some modification of the affected proposal agreed to by the railway owner and the entity that made the affected proposal.

(4) For the purposes of Schedule 4 clauses 7 and 8, a fresh determination of costs under subsection (1)(b) has effect as if it had been made immediately after the Regulator first approved or determined costs under Schedule 4 clause 9 or 10 in respect of the affected proposal.

Note for this section:

Section 47(2)(c) requires the over-payment rules to give effect to the basic requirement that, if an excess referred to in Schedule 4 clause 8(4) in respect of an access holder or a group of access holders arises as a result of a determination by the Regulator under section 47X(1)(b), there must be no excess referred to in Schedule 4 clause 8(4) in respect of that access holder or group of access holders after the period of 60 business days beginning on the day on which the Regulator made the determination.

[Section 47X inserted: SL 2023/207 s. 46.]

Part 6 — General

48. Railway owner must supply certain information if requested

(1) If a railway owner has provided to an access seeker the information described in section 9(1)(b) in respect of a route section, another entity may request the railway owner to provide it with that information.

(2) If the railway owner receives a request for information under subsection (1), the railway owner must —

(a) comply with the request; and

(b) if the information does not remain current, indicate the time at which the information was correct.

[Section 48 inserted: SL 2023/207 s. 47.]

49. Inquiries and reports by Regulator

(1) It is a function of the Regulator to inquire into, and to report and make recommendations to the Minister on —

(a) matters relating to the operation of the Act or this Code; or

(b) the manner in which the Act or this Code might be amended.

(2) Subsection (1) applies to any matter that —

(a) is referred to the Regulator by the Minister for inquiry; or

(b) in the opinion of the Regulator should be brought to the notice of the Minister.

50. Dissemination of information by Regulator

(1) It is a function of the Regulator to disseminate information that relates to the carrying out of the Act, this Code or of matters provided for by them.

(2) Without limiting subsection (1), it applies to information that the Regulator considers would guide or assist persons who are involved in negotiations under Part 3 or may become so involved.

[(3) deleted]

[Section 50 amended: SL 2023/207 s. 48.]

50A. Disclosure of confidential information by Regulator

(1) In this section —

given includes notified, provided or submitted.

(2) The Regulator may, in the performance of the Regulator's functions under this Code, disclose confidential information given to the Regulator under this Code.

(3) The Regulator must not disclose confidential information under subsection (2) unless the Regulator is satisfied that it is in the public interest to do so.

(4) Before disclosing confidential information given to the Regulator under this Code, the Regulator must —

(a) give the person who gave the confidential information to the Regulator —

(i) written notice of the Regulator's intention to disclose the confidential information; and

(ii) a copy of the confidential information;

and

(b) give any other person who the Regulator considers to have a significant interest in the disclosure of the confidential information —

(i) written notice of the Regulator's intention to disclose the confidential information; and

(ii) a general description of the confidential information that does not disclose the confidential information;

and

(c) invite each person to make written submissions within the period of 10 business days after the day on which notice is given to the person under this subsection as to whether the confidential information should be disclosed.

(5) For the purpose of making a decision under subsection (3) the Regulator —

(a) may be informed in such manner as the Regulator thinks fit; but

(b) must have regard to any submission relevant to the decision made in accordance with a notice under subsection (4).

(6) The Regulator must, before disclosing confidential information under subsection (2), give the person who gave the confidential information to the Regulator written notice that the Regulator is satisfied that it is in the public interest to do so.

[Section 50A inserted: SL 2023/207 s. 49.]

51. Enforcement

Provision for the enforcement of the obligations imposed by this Code is made in Part 5 of the Act.

52. Requirements of notice extending time

A notice under section 26(2D), 47J(4), 47K(4) or Schedule 4 clause 10(6) must specify, for each period that the notice extends —

(a) why the extension is required; and

(b) the new period that applies as a result of the extension; and

(c) the last day of the new period.

[Section 52 inserted: SL 2023/207 s. 50.]

*[**53.** Deleted: SL 2023/207 s. 50.]*

*[**54** [1M]**.** A modification to insert s. 54, has effect under the Railway (Roy Hill Infrastructure Pty Ltd) Agreement Act 2010 s. 12. See note 1M.]*

Part 7 — Transitional provisions for *Railways (Access) Amendment Code 2023*

[Heading inserted: SL 2023/207 s. 51.]

56. Terms used

In this Part —

former Code means this Code as in force immediately before amendment day.

[Section 56 inserted: SL 2023/207 s. 51.]

57. Former Code continues to apply to proposals

On and from amendment day, the former Code continues to apply in relation to a proposal made before amendment day.

[Section 57 inserted: SL 2023/207 s. 51.]

58. Existing over-payment rules

(1) This section applies in relation to a railway owner if, immediately before amendment day, over-payment rules (***existing over-payment rules***) approved or determined under section 47 of the former Code were binding on the railway owner.

(2) On and from amendment day —

(a) the railway owner must comply with the provisions of the existing over-payment rules; and

(b) the reference in Schedule 4 clause 8(4) to the over-payment rules approved or determined under section 47 includes, in relation to the railway owner, a reference to the existing over-payment rules.

(3) On or after amendment day, the Regulator may in writing direct the railway owner to pay to an access holder any amount determined under a scheme referred to in section 47(2a) of the former Code.

(4) The railway owner must comply with a direction given to the railway owner by the Regulator under subsection (3).

(5) This section (other than subsection (4)) ceases to apply in relation to the railway owner on the day on which the Regulator approves or determines under section 47(3) over-payment rules in relation to the railway owner.

[Section 58 inserted: SL 2023/207 s. 51.]

59. Existing costing principles

(1) This section applies in relation to a railway owner if, immediately before amendment day, costing principles (***existing costing principles***) approved or determined under section 46 of the former Code were binding on the railway owner.

(2) On and from amendment day —

(a) the existing costing principles continue to be binding on the railway owner; and

(b) the reference in section 29(3)(d) to the costing principles under section 47H includes, in relation to the railway owner, a reference to the costing principles under section 46 of the former Code.

(3) This section ceases to apply in relation to the railway owner on the day on which the Regulator approves or determines under section 47H(3) costing principles in relation to the railway owner.

[Section 59 inserted: SL 2023/207 s. 51.]

60. Regulator must give effect to certain transitional depreciation arrangements when performing function under s. 47K(3)

(1) In this section —

amended Code means this Code as in force on and after amendment day;

transition period means the period beginning on amendment day and ending on the day that is 5 years after amendment day.

(2) This section applies in relation to a statement submitted by a railway owner to the Regulator under section 47K(1) if —

(a) the statement provides for depreciation of an asset or group of assets to be accelerated during the transition period; and

(b) the Regulator is satisfied that —

(i) during the period of 2 years immediately before amendment day the railway owner provided an entity (a ***relevant entity***) other than an associate of the railway owner, or a contractor engaged by the railway owner or an associate of the railway owner, with access to a route, or part of a route, and associated railway infrastructure under an access agreement or an agreement for access otherwise than under the former Code; and

(ii) the relevant entity paid for that access a sum that is greater than the sum equal to the costs referred to in Schedule 4 clause 8(1) that would be relevant to that access if that access had occurred under the amended Code and commenced on amendment day; and

(iii) accelerating depreciation of the asset or group of assets in the manner provided in the statement will not result in the capital costs determined in accordance with Schedule 4 clause 2 in relation to particular railway infrastructure exceeding the capital costs that would have been determined in accordance with Schedule 4 clause 2 of the former Code in relation to that railway infrastructure if Schedule 4 clause 2 of the former Code had continued to apply during the transition period.

(3) Despite section 47K(5)(d) and (f) and (6), the Regulator must perform its functions under section 47K(3) in a way that allows depreciation of the asset or group of assets to be accelerated during the transition period in the manner provided in the statement.

[Section 60 inserted: SL 2023/207 s. 51.]

Schedule 1 — Routes to which this Code applies

[s. 5]

Standard Gauge Routes

1. The track between Avon and Kalgoorlie, including the loop and the arrival road adjacent to that track at West Kalgoorlie.
2. The track between Forrestfield South and Kewdale.
3. The track between Kalgoorlie and Leonora.
4. The track between West Kalgoorlie West and West Kalgoorlie South.
5. The track between West Kalgoorlie and Esperance.
6. The track between Kambalda and Redmine.
7. The track between Cockburn North and Robb Jetty.
8. All tracks servicing the facilities of Co-operative Bulk Handling Limited on the standard gauge network except private sidings that are excluded by paragraph (h) of the definition of ***railway infrastructure*** in section 3.
9. All spur line tracks servicing customer facilities on the standard gauge network except private sidings that are excluded by paragraph (h) of the definition of ***railway infrastructure*** in section 3.

Narrow Gauge Routes

10. The track between Kwinana and Mundijong Junction.
11. The track between Mundijong Junction and Picton Junction.
12. The track between Cockburn North and Robb Jetty.
13. The track between Picton Junction and Lambert.
14. The track between Boyanup and Capel.
15. The track between Picton Junction and Picton East.
16. The track between Picton Junction and Inner Harbour Junction.
17 The track between Picton Junction and Bunbury Terminal.
18. The track between Pinjarra and Alumina Junction.
19. The track between Alumina Junction and Pinjarra South.

20. The track between Brunswick Junction and Premier.
21. The track between Brunswick North and Brunswick East.
22. The track between Worsley and Hamilton including Worsley East to Worsley North.
23. The track between Avon and Albany.
24. The track between York and Quairading.
25. The track between Narrogin and West Merredin.
26. The track between Yilliminning and Kulin.
27. The track between Wagin and Newdegate including Wagin East to Wagin South.
28. The track between Lake Grace and Hyden.
29. The track between Katanning and Nyabing.
30. The track between Katanning East and Katanning South.
31. The track between Tambellup and Gnowangerup.
32. The track between West Merredin and Kondinin.
33. The track between West Merredin and Trayning.
34. The track between Avon Yard and McLevie.
35. The track between Goomalling and Mukinbudin.
36. The track between Amery and Kalannie.
37. The track between Burakin and Beacon.
38. The track between Millendon Junction and Geraldton.
39. The track between Dongara and Eneabba South.
40. The track between Narngulu and Maya.
41. The track between Toodyay West and Miling.
42. All tracks servicing the facilities of Co-operative Bulk Handling Limited on the narrow gauge network except private sidings that are excluded by paragraph (h) of the definition of ***railway infrastructure*** in section 3.

43. All spur line tracks servicing customer facilities on the narrow gauge network except private sidings that are excluded by paragraph (h) of the definition of ***railway infrastructure*** in section 3.

Dual Gauge Routes

44. The track between Midland and Avon.

45. The track between Midland and Kwinana and the western leg of the Woodbridge Triangle from Signal 94 to Woodbridge South.

46. The track between Cockburn North and Cockburn East.

47. The track between Cockburn North and Cockburn South.

48. All spur line tracks servicing customer facilities on the dual gauge network except private sidings that are excluded by paragraph (h) of the definition of ***railway infrastructure*** in section 3.

Urban Network

49. The narrow gauge double tracks between Perth and —

(a) Clarkson; and

(b) Fremantle; and

(c) Armadale; and

(d) Midland; and

(e) Mandurah.

50A. The narrow gauge single track between Beckenham Junction and Thornlie.

50. The dual gauge track between Robb Jetty and Leighton and the spur line between Leighton and North Fremantle.

51. The narrow gauge mainline track between Armadale and Mundijong Junction.

TPI Railway and Port Agreement Route

52. All tracks that are part of the railway constructed pursuant to the TPI Railway and Port Agreement.

[Schedule 1 inserted: Gazette 23 Jul 2004 p. 2993-5; amended: Gazette 23 Jun 2009 p. 2416; Act No. 77 of 2004 s. 13.]

[Schedule 1, modifications have effect under the Railway (Roy Hill Infrastructure Pty Ltd) Agreement Act 2010 s. 13. See note 1M.]

Schedule 2 — Information to be made available

[s. 6]

[Heading inserted: Gazette 23 Jun 2009 p. 2417.]

Terms used

1. In this Schedule —

gross tonnage, of a train, means the total weight of the rolling stock of the train and the freight carried by the train;

gross tonne kilometres, of a train, means the gross tonnage of the train multiplied by the distance travelled by the train in kilometres.

Information

2. A map showing a geographical description of the railways network.

3. A map of the routes listed in Schedule 1 showing the configuration of the tracks on each route.

4. For each route section, details of the following —

(a) the track diagrams and type of track;

(b) the length;

(c) the curves and gradients;

(d) the operating gauge;

(e) the location and length of passing loops;

(f) the track and formation characteristics;

(g) the running times of existing trains;

(h) the maximum axle loads and maximum train speeds;

(i) the permanent speed restrictions;

(j) the rolling stock dimension limits;

(k) the indicative maximum train lengths;

(l) subject to any exemption under section 7B, the total gross tonne kilometres of all trains operated during a period provided for by section 7D;

[(m) deleted]

(n) the communication systems;

(o) the available capacity;

(p) the infrastructure capacity;

(q) the underlying assumptions used by the railway owner to calculate available capacity and infrastructure capacity.

5. The train control systems operating on the network.

6. A summary of improvements and capital works proposed to be carried out during a period provided for by section 7E.

7. For each route section, and for each month, details of the following —

(a) the minimum, maximum and average run time for each category of axle load;

(b) the number of trains delayed on entry to or exit from the network, the average length of delays, and the number of delays caused by each of the following —

(i) an access holder;

(ii) the railway owner;

(iii) a third party;

(c) the number of trains cancelled, and the number of cancellations caused by each of the following —

(i) an access holder;

(ii) the railway owner;

(iii) a third party;

(d) the number of days during which a temporary speed restriction applied;

(e) the criteria used by the railway owner to determine whether a temporary speed restriction applied;

(f) the average duration of all temporary speed restrictions;

(g) the average distance of track to which each temporary speed restriction applied.

[Schedule 2 inserted: Gazette 23 Jun 2009 p. 2417-18; amended: SL 2023/207 s. 66; SL 2026/148 s. 10.]

Schedule 2A — Matters to be set out in a proposal

[s. 8]

[Heading inserted: SL 2023/207 s. 52.]

Access seeker's details

1. The access seeker's name and contact details.

Details of the access sought

2. The route in respect of which access is sought, including each route section or part of a route section.

3. The railway infrastructure in respect of which access is sought, including any loading or unloading facilities.

4. The period for which access is sought.

5. Whether the access is sought for new or existing rail operations.

Details of the proposed rail operations

6. The commencement date of the proposed rail operations.

7. The origin and destination of the proposed rail operations.

8. The proposed method of transporting freight (for example, louvered wagons or bulk wagons).

9. If any product proposed to be transported will require separation from other trains, the separation requirements.

10. The forecast net tonnes of product to be transported per annum for each year of access.

11. The proposed travel speed.

12. The proposed sectional run times.

13. Any stabling requirements.

14. The points on the route that will be used for provisioning and, if required, stabling.

15. The proposed time for provisioning, loading, unloading and, if required, stabling.

Timetabling requirements

16. The timetabling requirements of the proposed rail operations, including —

(a) the required frequency, including weekly requirements, seasonal variations and any trends over the proposed term of access; and

(b) preferred days of operation and preferred departure and arrival times; and

(c) any requirements for shunting or dwell times.

Rolling stock details

17. Details of the rolling stock to be operated as part of the proposed rail operations, including —

(a) the number of locomotives and wagons per consist; and

(b) total train length.

Breach of existing or previous agreement

18. Whichever of the following applies —

(a) if the access seeker or a related body corporate of the access seeker has, at any time during the period of 2 years before the day on which the access seeker makes the proposal, been in breach of a fundamental term of an access agreement or an agreement for access made otherwise than under this Code (a ***relevant breach***) — details of each relevant breach; or

(b) if paragraph (a) does not apply — confirmation that paragraph (a) does not apply in respect of the proposal.

[Schedule 2A inserted: SL 2023/207 s. 52.]

Schedule 2B — Matters to be demonstrated in a proposal

[s. 8]

[Heading inserted: SL 2023/207 s. 52.]

Ability to use access rights

1. That the access seeker is actively seeking the following —

   (a) other supply chain rights (for example, port access) required to facilitate the proposed rail operations;

   (b) if required, a rail haulage agreement for the proposed rail operations during the proposed term of access;

   (c) access to facilities (including rolling stock, provisioning facilities, maintenance facilities and storage facilities) required to carry on the proposed rail operations.

Financial and managerial ability

2. That the access seeker is solvent (as defined in section 95A(1) of the *Corporations Act 2001* (Commonwealth)).

3. That, having regard to the access seeker's ownership structure, the access seeker has the ability to access the financial resources required to meet the access seeker's potential liabilities under an access agreement for the proposed access, including without limitation the payment of —

   (a) prices and charges for access; and

   (b) insurance premiums and deductibles under any required policies of insurance.

[Schedule 2B inserted: SL 2023/207 s. 52.]

Schedule 3 — Matters for which provision to be made in access agreement

[s. 17(1)(a)]

1. The period for which access is provided and arrangements for renewals.
2. The routes, including the railway infrastructure, to which access is provided.
3. The services to be provided by the access holder.
4. The allocation of train paths that have ceased to be used by the access holder.
5. Prices and charges.
6. Route control and management.
7. Train control, operations and consultation procedures.
8. Other services to be provided by the railway owner.
9. Certification of the access holder's staff and contractors —
   (a) as being competent to carry out functions in rail operations; and
   (b) to ensure compliance with the railway owner's safety standards under any written law.
10. The standards and other requirements to be met in respect of rolling stock.
11. Performance standards to be met by the railway owner and the access holder.
12. The powers of the railway owner in relation to —
   (a) the inspection of; and
   (b) the obtaining of information about; and
   (c) the testing of,

   the access holder's rolling stock and other equipment.
13. Emergencies and service interruptions.
14. Environmental standards.

15. Indemnities and insurances.

16. Variation and termination of the agreement.

17. Breaches and defaults arising from the agreement.

18. Determination of liability arising from incidents.

19. The resolution of disputes arising in the carrying out of the agreement.

20. Investigations and inquiries.

21. Confidentiality requirements or restrictions on the use or dissemination of information.

22. Assignment of rights and obligations.

23. Security for the payment of amounts becoming payable under the agreement.

[Schedule 3 amended: SL 2023/207 s. 53.]

Schedule 4 — Provisions relating to prices to be paid for access

[s. 17(1)(b)]

Division 1 — Preliminary

1. Terms used

In this Schedule —

incremental costs, in relation to an access holder or a group of access holders, means the following that the railway owner or an associate would be able to avoid if it were not to provide access to that access holder or group of access holders —

(a) the operating costs;

(b) where applicable —

(i) the capital costs; and

(ii) the overheads attributable to the performance of the railway owner's access-related functions whether by the railway owner or an associate;

total costs means the total of all —

(a) operating costs;

(b) capital costs; and

(c) the overheads attributable to the performance of the railway owner's access-related functions whether by the railway owner or an associate.

[Clause 1 amended: Gazette 23 Jul 2004 p. 2995-6; 20 Sep 2011 p. 3801; SL 2023/207 s. 54(1) and (2).]

2. Railway infrastructure

(1) In this Schedule —

capital costs means the costs comprising both the depreciation and risk-adjusted return on the relevant railway infrastructure.

(2) For the purposes of this clause, railway infrastructure includes a cutting or embankment made for any reason after the commencement of this Code.

(3) Capital costs must be determined as the annual cost of providing the railway infrastructure for each year of the relevant period calculated in accordance with subclause (4).

(4) The calculation must be made by —

(a) multiplying the current regulatory asset base of each relevant route section, which must be updated annually throughout the relevant period, by the weighted average cost of capital appropriate to the railway infrastructure; and

(b) adding depreciation in accordance with the applicable depreciation schedule for the time being approved or determined by the Regulator under section 47K(3).

(5) Capital costs include amounts for the amortisation of —

(a) the costs incurred by the railway owner or an associate of the railway owner to acquire any interest in land; and

(b) any other costs incurred by the railway owner or an associate of the railway owner in relation to the acquisition of any interest in land (for example, costs in connection with Aboriginal heritage or native title issues or other transaction costs),

but only to the extent that the Regulator determines that those amounts relate to the acquisition after the commencement of this Code of an interest in land used for constructing, maintaining or operating the relevant railway.

[Clause 2 amended: Gazette 23 Jul 2004 p. 2996; 20 Sep 2011 p. 3802; SL 2023/207 s. 54(3).]

3. Regulator to determine weighted average cost of capital

(1) For the purposes of clause 2(4)(a), the Regulator is to —

(a) determine, as at 30 June in each year, the weighted average cost of capital for each of —

(i) the railway infrastructure associated with the urban network described in items 49, 50A, 50 and 51 in Schedule 1;

(ia) the railway infrastructure associated with that part of the railways network described in item 52 in that Schedule; and

(ii) the railway infrastructure associated with the railways network described in the other items in that Schedule;

and

(b) publish notice of each such determination in the *Gazette* as soon as is practicable after it is made.

(2) Subclauses (3), (4) and (5) apply to the determinations under subclause (1) that are required to be made as at 30 June —

(a) in the year 2003; and

(b) in every 5th year after that year.

(3) Before the Regulator makes a determination mentioned in subclause (2) the Regulator must —

(a) publish a notice describing the requirements of subclause (1) on the Regulator's website; and

(b) include in the notice the following information —

(i) a statement that written submissions relating to the determination may be made to the Regulator by any person within a specified period;

(ii) the address (including an email address) to which the submissions may be delivered or sent.

(4) The period specified under subclause (3)(b)(i) must be not less than the period of 20 business days after the day on which the notice is published under subclause (3)(a).

(5) In making a determination under this clause the Regulator must have regard to any submission relating to the determination made in accordance with the notice.

[Clause 3 [1M, 1] amended: Gazette 23 Jul 2004 p. 2996; Act No. 77 of 2004 s. 14; SL 2023/207 s. 54(4).]

[Clause 3, modification have effect under the Railway (Roy Hill Infrastructure Pty Ltd) Agreement Act 2010 s. 14. See note 1M.]

4. Nature of costs

The costs referred to in this Schedule are intended to be those that would be incurred by a body managing the railways network and adopting efficient practices applicable to the provision of railway infrastructure, including the practice of operating a particular route in combination with other routes for the achievement of efficiencies.

Division 2 — Provisions relating to access price negotiation

5. Term used: other entities

In clauses 7(2) and 8(3) —

other entities means entities to which access is provided otherwise than under this Code.

6. Prices to be negotiated

(1) Subject to this Schedule, the prices to be paid to the railway owner for the provision of access to access holders are to be determined by negotiation under the provisions of this Code.

(2) If any extension or expansion of the route or the associated railway infrastructure is to be provided for by an access agreement, the parties must, in negotiating the price to be paid for the provision of access, take into account —

(a) the costs to be borne by the railway owner or the access seeker in respect of the extension or expansion; and

(b) any economic benefit to the railway owner or the access seeker resulting from the extension or expansion.

[Clause 6 amended: Gazette 23 Jul 2004 p. 2996; SL 2023/207 s. 54(5) and 55.]

7A. Apportionment of costs of extension or expansion

(1) This clause applies where —

(a) an extension or expansion of the route or the associated railway infrastructure is to be provided for by an access agreement; and

(b) it is necessary to determine the costs referred to in clause 6(2)(a).

(2) The costs are to be apportioned so that each entity that will use the route or the associated railway infrastructure as extended or expanded (the ***enhanced facilities***) is required to bear a share of the costs according to —

(a) the extent that the entity will use the enhanced facilities compared to all other users of those facilities; and

(b) the economic benefit that the entity is expected to derive from use of the enhanced facilities.

(3) Subclause (2) applies in respect of an entity only so far as —

(a) it is consistent with any agreement between the railway owner and the entity for the entity to be required to bear a share of the costs; or

(b) the railway owner is otherwise able to require the entity to bear a share of the costs.

(4) This clause does not apply to a proposal made under section 8 before the commencement of the *Railways (Access) Amendment Code 2009* section 14 [1].

[Clause 7A inserted: Gazette 23 Jun 2009 p. 2418-19.]

7. Floor price test

(1) An access holder that is provided with access to a route and associated railway infrastructure must pay for the access not less than the incremental costs resulting from its operations on that route and use of that infrastructure.

(1A) Subclause (1) does not apply in relation to access under an interim access agreement.

(2) The total of the following must not be a sum that is less than the relevant total —

(a) the payments to the railway owner by —

(i) all access holders that are provided with access to a route, or part of a route, and associated infrastructure (the ***route***); and

(ii) all other entities that are provided with access to the route;

(b) the revenue that the railway owner's accounts and financial statements show as being attributable to its own operations on the route.

(3) For the purposes of subclause (2), the ***relevant total*** is the total of the incremental costs resulting from the combined operations on the route of all access holders and other entities and the railway owner.

[Clause 7 amended: SL 2023/207 s. 54(6).]

8. Ceiling price test

(1) An access holder that is provided with access to a route, or part of a route, and associated railway infrastructure must pay for the access not more than the total costs attributable to that route, or that part of the route, and that infrastructure.

(2) For the avoidance of doubt it is declared that, regardless of the extent of the operations or use of the route, or the part of the route, and infrastructure by any particular access holder, the calculation of total costs under subclause (1) —

(a) is only for the route, or the part of the route, and associated railway infrastructure to which the access holder is provided access; and

(b) must be the same for all access holders that are provided with access to that route, or that part of the route, and that infrastructure.

(2A) Subclauses (1) and (2) do not apply in relation to access under an interim access agreement.

(3) The total of the following must not be a sum that is more than the total costs attributable to a route, or part of a route, and associated infrastructure (the ***route***) —

(a) the payments to the railway owner by —

(i) all access holders that are provided with access to the route; and

(ii) all other entities that are provided with access to the route;

(b) the revenue that the railway owner's accounts and financial statements show as being attributable to its own operations on the route.

(4) It is not a breach of this clause for —

(a) payments to the railway owner mentioned in subclause (1) to exceed the total costs referred to in that subclause; or

(b) the total sum mentioned in subclause (3) to exceed the total costs referred to in that subclause,

if the over-payment rules approved or determined under section 47 are complied with.

[Clause 8 amended: Gazette 23 Jul 2004 p. 2996-7; SL 2023/207 s. 54(7).]

9. Determination of costs by Regulator

(1) The Regulator may, if the Regulator considers that it is likely that a proposal (other than an interim access proposal) will be made to the railway owner in respect of a route, determine —

(a) the costs referred to in clause 7 in respect of the operations and use of infrastructure that the proposal would involve (including the costs for each year of the period for which the Regulator considers access would be sought under the proposal); and

(b) the costs referred to in clause 8 attributable to the route and associated infrastructure (including the costs for each year of the period for which the Regulator considers access would be sought under the proposal).

(2) The Regulator is to notify the railway owner whenever the Regulator proposes to exercise the power conferred by subclause (1), and the railway owner is to make an initial determination of the costs (including for each year of the period for which the Regulator considers access will be sought under the proposal) and provide details of that determination to the Regulator.

(3) Before the Regulator makes a determination under subclause (1) the Regulator must —

(a) publish a notice of the Regulator's intention to do so on the Regulator's website; and

(b) include in the notice the following information —

(i) a statement that written submissions relating to the determination may be made to the Regulator by any person within a specified period;

(ii) the address (including an email address) to which the submissions may be delivered or sent.

(4) The period specified under subclause (3)(b)(i) must be not less than the period of 20 business days after the day on which the notice is published under subclause (3)(a).

(5) In making a determination of costs under this clause the Regulator must have regard to —

(a) the initial determination made by the railway owner under subclause (2); and

(b) any submission relating to the determination made in accordance with the notice published under subclause (3).

(6) The Regulator must —

(a) give the railway owner written notice of the costs determined under subclause (1); and

(b) publish the determination on the Regulator's website.

[Clause 9 amended: SL 2023/207 s. 54(8).]

10. Determination of costs where clause 9 does not apply

(1) If a proposal (other than an interim access proposal) has been made and clause 9 does not apply, the railway owner must determine the costs referred to in clauses 7 and 8 that are relevant to the proposal (including the costs for each year of the period for which access is sought under the proposal).

(2) A determination under subclause (1) must be made in accordance with the costing principles for the time being approved or determined by the Regulator under section 47H.

(3) The railway owner must, on or before the day on which it provides the access seeker with the information described in section 9(1)(b), provide to the Regulator —

(a) the costs determined under subclause (1) (including the costs for each route section); and

(b) the current regulatory asset base of each route section; and

(c) supporting material demonstrating the basis of the costs referred to in paragraph (a) and the current regulatory asset bases referred to in paragraph (b); and

(d) the applicable depreciation schedule for the time being approved or determined by the Regulator under section 47K(3).

(4) The Regulator must, within 40 business days after the day on which the Regulator is provided with the information referred to in subclause (3)(a) to (d) by the railway owner —

(a) approve the costs determined by the railway owner under subclause (1); or

(b) if the Regulator is not willing to do so, determine the relevant costs (including the costs for each year of the period for which access is sought under the proposal).

(5) The Regulator must —

(a) give the railway owner and the access seeker written notice of the costs approved or determined under subclause (4); and

(b) publish the approved costs or the determination (as the case may be) on the Regulator's website.

(6) The Regulator may extend the period referred to in subclause (4), either before or after the period has ended, by written notice to the railway owner in accordance with section 52.

(7) If the Regulator extends the period referred to in subclause (4), the Regulator must give the access seeker a copy of the written notice given to the railway owner under subclause (6).

(8) The costs approved or determined by the Regulator under subclause (4) in respect of a proposal are the costs that are to apply under clauses 7 and 8 for the purposes of the proposal.

[Clause 10 inserted: SL 2023/207 s. 54(9).]

11. Public submissions must be sought

(1) Before the Regulator gives an approval or makes a determination under clause 10(4), the Regulator must —

(a) publish on the Regulator's website a notice setting out the information referred to in clause 10(3)(a) to (d) provided to the Regulator by the railway owner under that clause; and

(b) include in the notice the following information —

(i) that written submissions relating to those matters may be made to the Regulator by any person within a specified period;

(ii) the address (including an email address) to which the submissions may be delivered or sent.

(2) The period specified under subclause (1)(b)(i) must be not less than the period of 20 business days after the day on which the notice is published under subclause (1)(a).

[Clause 11 inserted: SL 2023/207 s. 54(9).]

12. Review and redetermination of costs

(1) This clause applies if the Regulator considers that there has been, or may have been, a material change in any of the circumstances that existed at the time when the Regulator approved or determined costs under clause 9 or 10 in respect of a proposal.

(2) Where this clause applies the Regulator may —

(a) carry out a review of the costs in question; and

(b) if the Regulator considers that there is justification for doing so, make a fresh determination of those costs.

(3) Before the Regulator carries out a review under subclause (2)(a), the Regulator must —

(a) publish on the Regulator's website a notice setting out details of the proposed review; and

(b) include in the notice the following information —

(i) that written submissions relating to the determination of the costs in question may be made to the Regulator by any person within a specified period;

(ii) the address (including an email address) to which the submissions may be delivered or sent.

(4) The period specified under subclause (3)(b)(i) must be not less than the period of 20 business days after the day on which the notice is published under subclause (3)(a).

[Clause 12 amended: SL 2023/207 s. 54(10).]

12A. Prices for access under interim access agreement

(1) Except as provided in subclause (2), an access holder that is provided with access to a route and associated railway infrastructure under an interim access agreement must pay for the access the same prices as the prices required to be paid by the access holder to the railway owner for access to the route and associated railway infrastructure under the relevant existing access agreement.

(2) The prices that the access holder must pay for access under the interim access agreement —

(a) must be proportionate to any difference in the period for which access is to be provided under the interim access agreement compared to the period for which access is provided under the relevant existing access agreement; and

(b) may be adjusted to take into account asset indexation over the period during which the relevant existing access agreement is in force.

(3) For the purposes of subclauses (1) and (2), the ***relevant existing access agreement*** is the existing access agreement —

(a) to which the access holder and the railway owner were party when the access holder made the interim access proposal to which the interim access agreement relates; and

(b) the impending expiry of which gave rise to that interim access proposal.

[Clause 12A inserted: SL 2023/207 s. 54(11).]

13. Guidelines to be applied

In the negotiation of prices for the provision of access, the railway owner is to implement the following guidelines —

(a) there should be consistency in the application of pricing principles to rail operations carried on or proposed to be carried on in respect of a route whether by the railway owner or an associate or by another entity;

(b) the consistency referred to in paragraph (a) requires that if the access of different entities relates to the same market, any difference between the respective prices to be paid by them for access must only reflect a difference between them in the costs or risks associated with the provision of the access;

(c) prices should reflect as far as is reasonably practicable —

(i) the standard of the infrastructure concerned and the operations proposed to be carried on by the access seeker; and

(ii) the relevant market conditions; and

(iii) any other identified preference of the access seeker;

(d) any apportionment of costs for the purposes of this Schedule should be fair and reasonable;

(e) prices should be structured in a way that will encourage the optimum use of facilities;

(f) prices should allow a railway owner to recover over the economic life of the railway infrastructure concerned the costs of the owner in respect of any extension or expansion to accommodate the requirements of an access holder.

[Clause 13 amended: Gazette 23 Jul 2004 p. 2997; SL 2023/207 s. 54(12) and 55.]

Schedule 5 — Relevant provisions of Competition Principles Agreement

[s. 29(2)]

Clause 6(4)(i)

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

(i) the owner's legitimate business interests and investment in the facility;

(ii) the costs to the owner of providing access, including any costs of extending the facility but not costs associated with losses arising from increased competition in upstream or downstream markets;

(iii) the economic value to the owner of any additional investment that the person seeking access or the owner has agreed to undertake;

(iv) the interests of all persons holding contracts for use of the facility;

(v) firm and binding contractual obligations of the owner or other persons (or both) already using the facility;

(vi) the operational and technical requirements necessary for the safe and reliable operation of the facility;

(vii) the economically efficient operation of the facility; and

(viii) the benefit to the public from having competitive markets.

Clause 6(4)(j)

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

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

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

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

Clause 6(4)(l)

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

Notes

This is a compilation of the *Railways (Access) Code 2000* and includes amendments made by other written laws. For provisions that have come into operation, and for information about any reprints, see the compilation table.

Compilation table

Citation	Published	Commencement
Railways (Access) Code 2000	8 Sep 2000 p. 5123-81	1 Sep 2001 (see s. 2 and *Gazette* 28 Aug 2001 p. 4795)
Railways (Access) Amendment Code 2004 [1]	23 Jul 2004 p. 2988-97	23 Jul 2004 (see s. 2)
Railway and Port (The Pilbara Infrastructure Pty Ltd) Agreement Act 2004 Pt. 3 Div. 2 assented to 8 Dec 2004	1 Jul 2008 (see s. 2(2) and *Gazette* 17 Jun 2008 p. 2543)	
Railways (Access) Amendment Code 2009	23 Jun 2009 p. 2407-19	s. 1 and 2: 23 Jun 2009 (see s. 2(a)); Code other than s. 1 and 2: 24 Jun 2009 (see s. 2(b))
Reprint 1: The *Railways (Access) Code 2000* as at 5 Feb 2010 (includes amendments listed above)		
Railways (Access) Amendment Code 2011	20 Sep 2011 p. 3801-2	s. 1 and 2: 20 Sep 2011 (see s. 2(a)); Code other than s. 1 and 2: 21 Sep 2011 (see s. 2(b))
Railways (Access) Amendment Code 2013	19 Jul 2013 p. 3269-71	s. 1 and 2: 19 Jul 2013 (see s. 2(a)); Code other than s. 1 and 2: 7 Aug 2013 (see s. 2(b) and *Gazette* 6 Aug 2013 p. 3677)
Railways (Access) Amendment Code 2015	4 Dec 2015 p. 4846-7	s. 1 and 2: 4 Dec 2015 (see s. 2(a)); Code other than s. 1 and 2: 5 Dec 2015 (see s. 2(b))
Railways (Access) Amendment Code 2023	SL 2023/207 18 Dec 2023	Pt. 1: 18 Dec 2023 (see s. 2(a)); Code other than Pt. 1 and 3: 19 Dec 2023 (see s. 2(c)); Pt. 3: 18 Mar 2024 (see s. 2(b))

Citation	Published	Commencement
Railways (Access) Amendment Code 2026	SL 2026/148 16 Jul 2026	s. 1 and 2: 16 Jul 2026 (see s. 2(a)); Code other than s. 1 and 2: 17 Jul 2026 (see s. 2(b))

Other notes

[1M] Under the *Railway (Roy Hill Infrastructure Pty Ltd) Agreement Act 2010* Pt. 3, this Code must be applied with the modifications set out in that Part. Those modifications have effect on and from 15 Aug 2015 until that Part expires in accordance with s. 15 of that Act.

[1] The *Railways (Access) Amendment Code 2004* s. 3(2) reads as follows:

> (2) Sections 9, 14 and 15 and Schedule 4 clause 10(2) and (3) of the principal Code apply in relation to a proposal under that Code received by the railway owner before the commencement of this Code as if sections 7, 8, 9 and 15(7) of this Code had not been made.

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[This is a list of terms defined and the provisions where they are defined. The list is not part of the law.]

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