

Western Australia

Government Railways (Access) Act 1998

(No. 49 of 1998)

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Western Australia

Government Railways (Access) Act 1998

No. 49 of 1998

An Act to promote competition in the operation of rail services by —

- **providing for the establishment of a Code governing the use of government railways for rail operations by persons other than the Western Australian Government Railways Commission;**
- **designating an official with monitoring, enforcement and administrative functions for the implementation of the Code; and**
- **specifying the kind of administrative arrangements that the Commission is to have in place for the purposes of that implementation,**

to amend —

- **the *Government Railways Act 1904* to make consequential amendments; and**
 - **the *National Rail Corporation Agreement Act 1992*,**
- and for related purposes.**

[Assented to 30 November 1998]

The Parliament of Western Australia enacts as follows:

Part 1 — Preliminary

1. Short title

This Act may be cited as the *Government Railways (Access) Act 1998*.

2. Commencement

- (1) Part 6 comes into operation on the day on which this Act receives the Royal Assent.
- (2) The other provisions of this Act come into operation on such day as is, or days as are respectively, fixed by proclamation.

3. Definitions

In this Act, unless the contrary intention appears —

“**access**” means the use of railway infrastructure;

“**access agreement**” means an agreement under the Code between the Commission and another person for access by that person;

“**Code**” means the Code for the time being in force under section 4;

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

“**Competition Principles Agreement**” means the Competition Principles Agreement made on 11 April 1995 by the Commonwealth, the States and the Territories as in force for the time being;

“**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;

“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);
- (b) tunnels and bridges;
- (c) stations and platforms;
- (d) train control systems, signalling systems and communication systems;
- (e) electric traction infrastructure;
- (f) buildings and workshops; and
- (g) associated plant machinery and equipment,

but not including —

- (h) private sidings and spur lines connected to premises not under the management or control of the Commission; and
- (i) rolling stock, rolling stock maintenance facilities, office buildings, housing, freight centres, or terminal yards and depots;

“Regulator” means the official provided for by Part 3.

Part 2 — Establishment of Code

4. Minister to establish Code

- (1) The Minister is to establish a Code in accordance with this Act to give effect to the Competition Principles Agreement in respect of railways.
- (2) Provision is to be made in the Code —
 - (a) for railway infrastructure to be available for use by persons other than the Commission to carry on rail operations in accordance with —
 - (i) agreements with the Commission; or
 - (ii) determinations made by way of arbitration;
 - (b) prescribing —
 - (i) which parts of the railways network; and
 - (ii) which railway infrastructure associated with those parts,
are to be so available; and
 - (c) setting out —
 - (i) provisions that are to govern the content of agreements and determinations referred to in paragraph (a); and
 - (ii) rights, powers and duties that are to apply to and in relation to the negotiation, making, and implementation of agreements.

5. Criteria to be considered in applying Code to particular routes

- (1) In deciding, for the purpose of establishing or amending the Code, which routes are to be prescribed under section 4(2)(b), the Minister is to consider the questions set out in subsection (3).

- (2) If in respect of a route the Minister is satisfied that each of those questions must be answered in the affirmative the route is to be prescribed under section 4(2)(b).
- (3) The questions are —
- (a) whether access to the route will promote competition in at least one market, other than the market for railway services;
 - (b) whether it would be uneconomical for anyone to establish another railway on the route;
 - (c) whether the route is of significance having regard to —
 - (i) its length;
 - (ii) its importance to trade or commerce; or
 - (iii) its importance to the economy;
 - (d) whether access to the route can be provided without undue risk to human health or safety;
 - (e) whether there is not already effective access to the route; and
 - (f) whether access or increased access to the route would not be contrary to the public interest.
- (4) A decision of the Minister of the kind referred to in subsection (1) is not liable to be challenged in, or reviewed or called in question by, a court.
- (5) In this section —
- “route”** means —
- (a) a particular part of the railways network; and
 - (b) the associated railway infrastructure.

6. Other matters for which Code may make provision

- (1) The Code may also make provision for or in relation to —
- (a) the registration of access agreements;
 - (b) the arbitration of disputes between the Commission and a person who has made a proposal for access under the Code;
 - (c) the establishment of panels of arbitrators, and the appointment of arbitrators, by the Regulator;
 - (d) the regulation of matters —
 - (i) of a savings, transitional or supplementary nature; or
 - (ii) that are otherwise necessary or convenient for the purposes of this Act.
- (2) Transitional provisions referred to in subsection (1)(d)(i) may authorize the Minister to determine by order published in the *Gazette* how any matter in progress immediately before the commencement of this Part is to be treated, after that commencement, for the purposes of the provisions of the Code.

7. Code does not affect existing agreements

The making of the Code —

- (a) does not affect the terms and conditions, or the operation, of an agreement for the use of railway infrastructure made with the Commission before the commencement of the Code whether under section 61 of the *Government Railways Act 1904* or otherwise; and
- (b) does not afford a party to such an agreement any ground or reason for not complying with the agreement according to its terms and conditions.

8. Code is subject to *Rail Safety Act 1998*

The Code is not to contain any provision that is contrary to or inconsistent with the *Rail Safety Act 1998*.

9. Code is subsidiary legislation

- (1) The Code is subsidiary legislation within the meaning of the *Interpretation Act 1984*.
- (2) The Code is to be laid before each House of Parliament within 6 sitting days of that House next following publication of the Code in the *Gazette*.
- (3) Notice of motion to disallow the Code or any part of the Code may be given in either House of Parliament within 10 sitting days of that House after the Code has been laid before it under subsection (2).
- (4) Within 10 sitting days of a House of Parliament after notice of motion has been given in that House under subsection (3), that House may pass a resolution disallowing the Code or any part of the Code.
- (5) If the Code is not laid before both Houses of Parliament under subsection (2), or is disallowed by either House under subsection (4), the Code ceases to have effect, but without affecting the validity or curing the invalidity of anything done or the omission of anything in the meantime.
- (6) If a resolution has been passed under subsection (4), notice to that effect is to be published in the *Gazette* within 21 days.
- (7) In this section —
“**the Code**” includes —
 - (a) an amendment of the Code; or
 - (b) a code repealing and replacing the Code.

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10. Public comment on amendment or replacement of Code

(1) Before the Minister exercises the power —

- (a) to amend the Code; or
- (b) to repeal and replace it,

he or she must make the proposed amendment or replacement available for public comment in accordance with subsection (2).

(2) The Minister must —

- (a) cause a notice giving a general description of the proposal to be published in one issue of —
 - (i) a daily newspaper circulating throughout the Commonwealth; and
 - (ii) a daily newspaper circulating throughout the State; and

- (b) include in the notice the following information —
 - (i) the places at which a copy of the proposal may be obtained;
 - (ii) a statement that written submissions on the proposal may be made to the Minister by any person within a specified period; and
 - (iii) the address to which the submissions may be delivered or posted.

(3) The period specified under subsection (2)(b)(ii) is not to be less than 30 days after both of the notices under subsection (2)(a) have been published.

(4) The Minister must have regard to any submission made in accordance with the notice.

11. Exception to section 10

- (1) Section 10(1) does not apply if the Minister is satisfied that a proposed amendment to the Code is —
 - (a) of a minor nature; or
 - (b) required to be made urgently.
- (2) If in reliance on subsection (1)(b) the Minister amends the Code without complying with section 10(1) —
 - (a) he or she must call for public comment on the amendment as soon as is practicable after it has come into force; and
 - (b) subsections (2) and (3) of section 10 apply with all necessary modifications.
- (3) Having regard to any submissions made on the amendment, the Minister must consider whether he or she should amend the Code —
 - (a) to reverse the effect of the amendment; or
 - (b) in some other manner.

12. Review of Code

- (1) The Regulator must carry out a review of the Code as soon as is practicable after —
 - (a) the third anniversary of its commencement; and
 - (b) the expiry of each 5 yearly interval after that anniversary.
- (2) The purpose of a review is to assess the suitability of the provisions of the Code to give effect to the Competition Principles Agreement in respect of railways.
- (3) Before carrying out a review of the Code, the Regulator must call for public comment in accordance with subsection (4).

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- (4) The Regulator must —
- (a) cause notice of the review to be published, in one issue of —
 - (i) a daily newspaper circulating throughout the Commonwealth; and
 - (ii) a daily newspaper circulating throughout the State;and
 - (b) include in the notice —
 - (i) a statement that written submissions on the Code may be made to the Regulator by any person within a specified period; and
 - (ii) the address to which the submissions may be delivered or posted.
- (5) The period specified under subsection (4)(b)(i) is not to be less than 30 days after both of the notices under subsection (3)(a) have been published.
- (6) The Regulator must prepare a report based on the review and give it to the Minister.

Part 3 — The Regulator

Division 1 — Office and functions

13. Definition

In this Part —

“**department**” means the department of the Public Service principally assisting the Minister responsible for the *Transport Co-ordination Act 1966* in the administration of that Act.

14. Who performs functions of Regulator

The functions of the Regulator under this Act and the Code are to be performed by the person who for the time being holds, or is acting in, the office of Director General of Transport under section 8 of the *Transport Co-ordination Act 1966*.

15. Functions of Regulator

The Regulator —

- (a) is responsible for monitoring and enforcing compliance by the Commission with the provisions of —
 - (i) this Act;
 - (ii) the obligations imposed by Part 4; and
 - (iii) the Code;and
- (b) also has the functions given to him or her by particular provisions of this Act and the Code.

16. Staff and resources

- (1) The Regulator may make use of —
 - (a) the services of any officer of the department; or
 - (b) the facilities of the department.
- (2) The employing authority under the *Public Sector Management Act 1994* in relation to the department may exercise the powers in section 100 of that Act to enable the Regulator to perform his or her functions.

17. Financial administration etc.

For the purposes of section 9 of the *Transport Co-ordination Act 1966*, the performance of the functions of the Regulator are to be treated as operations of the department.

18. Delegation

- (1) The Regulator may, by instrument in writing, delegate the performance of any of his or her functions, except this power of delegation, to —
 - (a) an officer of the department; and
 - (b) a person engaged under the powers referred to in section 16(2).
- (2) A function performed by a delegate is to be taken to be performed by the Regulator.
- (3) A delegate performing a function of the Regulator is to be taken to do so in accordance with the terms of the delegation unless the contrary is shown.

19. Regulator to act independently

The Regulator in performing his or her functions —

- (a) must act independently; and

- (b) is not subject to direction by the Minister or any other person.

Division 2 — Monitoring and enforcement powers

20. Purpose of powers

- (1) The Regulator may exercise the powers in this Division for the purpose of performing his or her functions under this Act or the Code.
- (2) Without limiting subsection (1), the powers in this Division extend to financial information relating to the Commission's own use of railway infrastructure to which the Code applies.

21. Powers to obtain information

- (1) The Regulator may by notice in writing require the Commission —
 - (a) to send to the Regulator before a day specified in the notice a statement setting out such information as is specified in the notice;
 - (b) to give information to the Regulator by way of periodical returns at times specified in the notice; and
 - (c) to send to the Regulator, before a day specified in the notice, any book, document, or record that is in the possession or under the control of the Commission.
- (2) The Commission must comply with a notice under subsection (1).

22. Powers in respect of documents etc.

The Regulator may inspect any book, document or record produced or sent to him or her and —

- (a) retain it for such reasonable period as he or she thinks fit; and
- (b) make copies of it or any of its contents.

23. Confidentiality

In relation to the exercise of his or her powers under this Division, the Regulator must ensure that confidential information to which section 31 applies is protected from use or disclosure except —

- (a) in the performance of the Regulator's functions;
- (b) as required or allowed by any law;
- (c) with the written consent of the person who supplied the information; or
- (d) in circumstances prescribed by regulations made by the Governor for the purposes of this section.

Part 4 — Administrative and accounting arrangements of the Commission

Division 1 — Preliminary

24. Definitions

In this Part —

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

“**officer of the Commission**” includes an officer of the Department as defined in the *Government Railways Act 1904*;

“**relevant officer**” means an officer of the Commission who is in any way concerned in the performance of access-related functions.

25. This Part prevails over the *Government Railways Act 1904*

This Part has effect, and is to be carried out by the Commission, despite the provisions of the *Government Railways Act 1904*.

Division 2 — Administrative arrangements

26. Commission to make administrative arrangements

The Commission is to make such administrative arrangements within its organization that it from time to time considers necessary or expedient for the carrying out of its access-related functions.

27. Delegation

- (1) The Commission may, by instrument in writing, delegate the performance of any of its access-related functions (including the

execution of access agreements) to an officer or officers of the Commission.

- (2) A function so performed is to be taken to be performed by the Commission.
- (3) An officer of the Commission when performing a function as a delegate of the Commission is to be taken to do so in accordance with the terms of the delegation, unless the contrary is shown.

Division 3 — Segregation of access-related functions

28. Duty to segregate

- (1) In making arrangements under section 26 the Commission must segregate its access-related functions from its other functions.
- (2) The Commission must have appropriate controls and procedures to ensure that the measures in place under subsection (1) —
 - (a) operate effectively; and
 - (b) are complied with.

29. Powers of Regulator in relation to segregation

- (1) Before the Commission puts in place or varies any arrangement for the purpose of carrying out its obligations under section 28 it must obtain the Regulator's approval to the arrangement or variation.
- (2) In addition to subsection (1), the Regulator may confer with the Commission on any matter which relates to the way in which the Commission's obligations under section 28 are to be carried out, with a view to the Regulator and the Commission reaching agreement on the matter.

- (3) The Regulator may give directions in writing to the Commission with respect to a matter to the extent that agreement is not reached under subsection (2), and the Commission is to comply with any such direction.

30. Matters to be covered under section 28

Without limiting section 28, in carrying out its obligations under that section the Commission must ensure that the provisions of sections 31, 32, 33 and 34 are satisfied.

31. Protection of confidential information

- (1) There must be an effective regime designed for the protection of confidential information relating to the affairs of persons seeking access or rail operators from —
- (a) improper use; and
 - (b) disclosure by relevant officers, or other persons, to other officers of the Commission or other persons, except for proper purposes.
- (2) In this section —
- “confidential information”** means information that has not been made public and that —
- (a) is by its nature confidential;
 - (b) was specified to be confidential by the person who supplied it; or
 - (c) is known by an officer using or disclosing it to be confidential.

32. Avoidance of conflict of interest

The arrangements under section 26 must be such as to ensure that a relevant officer does not have a conflict between his or her duties —

- (a) as an officer concerned in the performance of access-related functions, on the one hand; and
- (b) as an officer involved in other business of the Commission, on the other.

33. Duty of fairness

In performing their functions relevant officers must not have regard to the interests of the Commission in a way that is unfair to persons seeking access or to other rail operators.

34. Maintenance of separate accounts and records

The Commission must ensure that its accounts and records are in such form as to enable —

- (a) all income, expenditure, assets and liabilities relating to the carrying out of its access-related functions to be properly recorded and distinguished from the Commission's other income, expenditure, assets and liabilities; and
- (b) where necessary, any item of income, expenditure, assets or liabilities which relates only in part to the carrying out of its access-related functions to be apportioned in a fair and reasonable manner.

Part 5 — Enforcement

35. Contract enforcement not affected

Nothing in this Part affects the enforceability of an access agreement as a contract, or the availability of damages for a breach of the agreement.

36. Remedies

- (1) The obligations imposed on the Commission by the Code are enforceable —

- (a) by arbitration under the Code; or
- (b) under section 37,

as the case may require, but a breach of those obligations does not give rise to an action for damages.

- (2) Sections 177 and 178 of *The Criminal Code* do not apply to the obligations referred to in subsection (1).

37. Injunctions

- (1) The Supreme Court may grant an injunction in such terms as the Court thinks fit if it is satisfied that the Commission —

- (a) has engaged in conduct that amounts to a breach of the Code; or
- (b) is proposing to engage in conduct that would amount to such a breach,

other than conduct for which a remedy by way of arbitration is available under the Code.

- (2) An application for an injunction under subsection (1) may be made by —

- (a) the Regulator; or

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- (b) a person to whose proposal under the Code for access the conduct or proposed conduct relates.

Part 6 — Amendment of the *National Rail Corporation Agreement Act 1992*

Division 1 — Preliminary

38. Principal Act

In this Part the *National Rail Corporation Agreement Act 1992** is referred to as the principal Act.

[* *Act No. 56 of 1992.*]

Division 2 — Amendments about the NRC carrying on intra-State services

39. Section 5A inserted

After section 5 of the principal Act the following section is inserted in Part 2 —

“

5A. Intra-State rail services by Company

The Company is not to carry on intra-State rail services in the State unless the Minister has given the Company approval in writing to do so.

”

40. Section 5B inserted

Before section 6 of the principal Act the following section is inserted in Part 3 —

“

5B. Referral of power to the Parliament of the Commonwealth

- (1) The matter of the Commonwealth holding shares in the Company in accordance with the Agreement, to the

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Part 6 Amendment of the National Rail Corporation Agreement Act

Division 3 Minor amendments

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extent to which it is not otherwise included in the legislative powers of the Parliament of the Commonwealth, is referred to the Parliament of the Commonwealth.

- (2) The reference under subsection (1) only has effect for the period —
 - (a) beginning on the day on which section 40 of the *Government Railways (Access) Act 1998* commences; and
 - (b) ending on the day fixed under subsection (3) as the day on which the reference under subsection (1) terminates.
- (3) The Governor may, by proclamation, fix a day as the day on which the reference under subsection (1) terminates.
- (4) In this section, a reference to holding shares includes a reference to acquiring, disposing of or dealing with those shares.

”.

Division 3 — Minor amendments

41. Section 3 amended

Section 3 of the principal Act is amended in the definition of “the Agreement” by deleting “Schedule 1” and substituting the following —

“ the Schedule to this Act” .

42. Schedule 1 amended

Schedule 1 to the principal Act is amended —

- (a) in the heading to the Schedule, by deleting “1”; and

- (b) by inserting after the execution details that follow clause 10 of the Agreement, the following heading —
- “ **Schedule 1** ”.

Part 7 — Amendment of the Government Railways Act 1904

43. Consequential amendments to the *Government Railways Act 1904*

- (1) In this section the *Government Railways Act 1904** is referred to as the principal Act.

[* *Reprinted as approved 27 October 1982.*

For subsequent amendments see 1997 Index to Legislation of Western Australia, Table 1, pp. 98-9.]

- (2) Section 13 of the principal Act is amended by repealing subsection (1) and substituting the following subsections —

“

- (1) The Commission shall have the management, maintenance and control of every Government railway.

- (1a) Subsection (1) has effect subject to —

- (a) this Act;
- (b) section 18E of the *Transport Co-ordination Act 1966*;
- (c) the *Government Railways (Access) Act 1998*;
and
- (d) the *Rail Safety Act 1998*.

”

- (3) Section 22 of the principal Act is repealed.
- (4) Section 25 of the principal Act is repealed and the following section is substituted —

“

25. Conditions of carriage of goods

The Commission may determine the conditions of carriage of goods on any rail service operated by it,

including limits on its liability for loss of, damage to or
delay in the delivery of such goods.

”.

- (5) Section 26A of the principal Act is amended by deleting
“Notwithstanding the provisions of section twenty-two of this
Act, the” and substituting the following —

“ The ”.

- (6) Section 28A(3) of the principal Act is amended by deleting
“Notwithstanding sections twenty-two and twenty-five of this
Act, the” and substituting the following —

“ The ”.

- (7) Section 61(5) of the principal Act is amended by deleting “other
than the *Rail Safety Act 1998*” and inserting the following —

“

, including the *Government Railways (Access) Act*
1998, but is subject to the *Rail Safety Act 1998*

”.

- (8) Section 68 of the principal Act is amended by deleting from and
including “, subject, however, to the following conditions” to
the end of the section and substituting a full stop.
- (9) Section 69 of the principal Act is repealed.
- (10) The Second Schedule to the principal Act is repealed.
